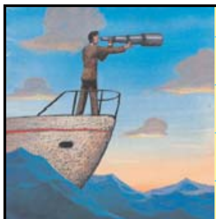

Legal Advisory

IDEAS AND STRATEGIES FOR YOU AND YOUR BUSINESS / THIRD QUARTER 2010

inside

Health Care Reform Debuts

The monumental new health care legislation features sweeping changes for businesses and individuals. Here is a summary of several key provisions.

Employer responsibilities: Beginning in 2014, if an employer with 50 or more employees does not provide minimal essential coverage to an eligible employee, it may be assessed a penalty of $2,000 per full-time employee per year (excluding the first 30 employees). But a qualified "small business" may use a special tax credit to offset employer-provided coverage. Contact your adviser to see if you qualify.

Employers offering coverage must provide certain low-income employees with a "free choice voucher" to enroll in an exchange. The voucher amount is equal to the amount the employer would pay for coverage to the employee under its plan. Employers providing free choice vouchers are not subject to penalties for employees that receive premium credits in a state-run exchange.

An employer with more than 200 employees must automatically enroll employees in its health plan, but employees may opt out of this coverage.

Individual responsibilities: Beginning in 2014, individuals are generally required to obtain health insurance coverage. Otherwise, they must pay a tax penalty equal to the greater of $695 per year up to a maximum of three times that amount per family or 2.5% of household income (phased in over three years). Certain low-income individuals are exempt.

Health insurance exchanges: Beginning in 2014, state-based American Health Benefit Exchanges and the Small Business Health Options Program (SHOP) will offer coverage to individuals and small businesses with up to 100 employees. After 2016, states may permit businesses with more than 100 employees to purchase coverage in the SHOP exchange.

*(see **Health care reform** on page 3)*

Is Your Company Liable for Tired Workers?

One of your employees is burning the midnight oil, working for 24 straight hours. At long last, the employee closes up shop and heads home. Unfortunately, the employee causes a major traffic accident due to the employee's drowsiness. As a result, another driver suffers a disabling injury.

Potential problem: The other driver's family may sue your company, alleging that you should not have allowed the employee to drive home after working such long hours. The legal theory used to extend liability to the employer is similar to the principle that holds party hosts liable for injuries caused when they allow guests who have been drinking to drive home.

This could place an added burden on employers to investigate the condition of its employees when they leave work. For example, employers might implement a testing procedure for fatigue.

Details: In recent years, employer liability has been extended for injuries caused by employees, or to the employees themselves, relating to their employment. The lawsuits often involve workers forced to work long shifts—usually at night—to accommodate the employer. A common thread in these cases is that the employer's conduct was excessive in demanding the employee to work long hours. By pushing its workers to the limits of fatigue, the employer was risking an accident when the employee had to drive home. In addition, the employer may represent an easy target because of its financial situation and insurance coverage.

Four Pillars of the HIRE Act

Here are four important tax benefits in the new Hiring Incentives to Restore Employment (HIRE) Act:

1. Payroll tax forgiveness: The new law "forgives" the 6.2% Social Security tax that employers must pay on wages of certain workers. To qualify, the employee cannot have worked more than 40 hours during the previous 60 days.

2. Retained worker credit: An employer may also claim a tax credit for continuing to employ qualified workers for at least 52 consecutive weeks. The credit equals the lesser of $1,000 or 6.2% of the employee's wages.

3. Section 179 deduction: An employer could currently deduct up to $250,000 of qualified business assets placed in service in 2009. The new law preserves this maximum Section 179 deduction for 2010 (it was scheduled to drop to $134,000).

4. Tax credit bonds: The new law enhances the "Build America Bonds" program by allowing issuers of qualified tax credit bonds to receive direct payment from the federal government.

Of course, legal trends shift back and forth. For instance, some courts have limited claims by employees (or their estates) against employers. Reason: The injuries suffered by the employees are considered to be work-related and subject to workers' compensation award limits. Also, state law may regulate litigation arising out of employment.

Despite these longstanding issues, employers must be cognizant of the risks. In addition, be aware that testing of employees may raise concerns over the rights of privacy.

Conclusion: If your company requires employees to work unusually long hours, it makes sense to play it safe. One possibility is to provide transportation to employees or take other steps such as accommodations for an overnight stay. ✍

Health Care Reform Debuts

(continued from front page)

Premium assistance credits: Beginning in 2014, premium credits will be available to certain low-income individuals and families. Eligibility will be based on household income in the tax year ending two years before the enrollment period. The credit is generally available to taxpayers with a household income between 100% and 400% of the federal poverty level.

Tax on health insurance plans: Effective in 2018, an excise tax is imposed on insurers of employer-sponsored health plans with aggregate values exceeding $10,200 for individual coverage and $27,500 for family coverage. Higher costs under these "Cadillac plans" may be passed on to consumers.

Benefit designs: Effective in 2014, an essential health benefits package is established that provides a comprehensive set of services, covers at least 60% of the actuarial value of the covered benefits, limits annual cost-sharing and is not more extensive than the typical employer plan. All qualified health benefits plans, including those offered through the exchanges and private plans (except grandfathered plans), are required to offer at least essential health benefits.

Preexisting conditions: Effective within 90 days of enactment and extending through 2013, a temporary national high-risk pool is established to provide health coverage to individuals with preexisting medical conditions. Individuals who have a preexisting medical condition and who have been uninsured for at least six months will be eligible to enroll in the high-risk pool and receive subsidized premiums.

Private insurance: Effective in 2010, health insurance plans are required to report the proportion of premium dollars spent on clinical services, quality and other costs. Beginning in 2011, insurers must provide rebates to consumers for the amount of the premium spent on clinical services and quality that is less than 85% for plans in the large-group market and 80% for plans in the individual and small-group markets.

Effective six months after enactment, all individual and group policies must provide dependent coverage for children through age 26. Individual and group health plans are prohibited from placing lifetime limits on the dollar value of coverage, and insurers cannot rescind coverage (except for fraud).

Beginning in 2014, individual and group health plans are prohibited from placing annual limits on the dollar value of coverage. Prior to 2014, plans may only impose annual limits on coverage as determined by the U.S. Treasury Department.

Six months after enactment, grandfathered plans are required to extend dependent coverage to age 26, prohibit rescissions of coverage, eliminate waiting periods for coverage of greater than 90 days and eliminate preexisting condition exclusions for children. Beginning in 2014, grandfathered group plans must eliminate lifetime limits on coverage and eliminate annual limits on coverage.

New Medicare Taxes on the Way

Effective in 2013, the new health care law imposes two new taxes on high-income individuals:

- An additional 0.9% Medicare tax on earned income above $250,000 for joint filers ($200,000 for single filers).
- A 3.8% Medicare tax on "net investment income" for taxpayers with a modified adjusted gross income (MAGI) above $250,000 for joint filers ($200,000 for single filers).

Net investment income includes interest, dividends, royalties, rents, gains from dispositions of property and passive activity income.

Effective in 2014, waiting periods for coverage are limited to 90 days, and states have the option of merging the individual and small-group markets.

Medical deductions: Currently, unreimbursed medical expenses are deductible only to the extent the annual total exceeds 7.5% of adjusted gross income (AGI). Beginning in 2013, the threshold increases to 10% of AGI. Exception: An individual (and spouse) who is age 65 or older is temporarily exempt from this increase for 2013 through 2016.

Prescription drugs: Changes in Medicare Part D will effectively close the "doughnut hole" for prescription drug coverage.

This is only a general overview. Seek assistance from your professional advisers. ✍

Spotlight on Mold Lawsuits

Toxic mold within a home may be grounds for a lawsuit. The courts are seeing a growing number of such claims throughout the country. And juries have awarded substantial damages in some cases.

Background: Molds can be found indoors or outdoors. They can cause problems ranging from headaches to respiratory conditions to lung disease and memory loss or brain damage.

If you become aware of a contamination, promptly notify your insurance company (or your landlord's insurance company if you are a tenant). Depending on the findings, you might be compensated for damages due to the mold condition. Alternatively, you may decide to pursue a legal action. Note: Some insurance policies have a "no action" clause requiring you to file a lawsuit within a year of discovering the mold. In any event, the lawsuit must be initiated within the timeframe allowed under the prevailing statute of limitations.

Property owners have a legal duty to mitigate their damages by removing the mold. Typically, you will incur repair expenses, which may be included in the damages you seek in a lawsuit (see below).

Who is the defendant? A negligence claim may be filed against the prior homeowners if they knew about the mold condition and didn't disclose it, the contractors who built the home, suppliers or manufacturers of defective building materials or a landlord (if you are a tenant). Plaintiffs in a successful lawsuit may be able to recover costs of—

- inspections
- repairs
- replacement of damaged household items
- relocation expenses while repairs are made
- medical expenses (present and future)
- emotional distress

To facilitate matters with the insurance company, take photographs at every step of the process. Keep receipts for inspections, repairs, medical expenses, household items you had to replace, relocation expenses and any other related expenses. Also, maintain medical reports and records of physician visits.

An experienced attorney can provide the necessary legal guidance in this area. ✍

BRIEFS

Hidden Bias—Perpetrators of racial harassment are not always obvious. Still, employers should take the necessary steps to investigate matters. New case: A college professor in Maryland was left threatening notes. The administration asked the police to investigate and issued a campus-wide e-mail asking anyone with information to come forward. When the professor subsequently sued the college, the Fourth Circuit Court absolved the school of "hostile environment" liability.

Powers of Attorney—If you are taking a long vacation this year, you may establish a "limited" power of attorney. For instance, you may give another person the ability to sign checks, pay your bills and make bank deposits while you are away. Conversely, you might grant broader powers that will permit the person to handle any financial matters that might arise. Discuss the alternatives with your legal adviser.

Severance Packages—In a surprising new case, a District Court in Michigan ruled that severance payments should not be treated as "wages" for employment tax purposes. Instead, the court characterized the payments as wage-replacement social benefits. As a result, a business that has downsized may choose to file a protective refund claim for past years. Note: The IRS is expected to appeal this decision.

Employment Complaints—Are job discrimination claims on the wane? Not exactly. In fiscal year 2009, workers filed 93,277 charges with the Equal Employment Opportunity Commission (EEOC). That's slightly below the number of 95,402 charges in 2008, but still the second highest figure ever. In comparison, for the prior 10 years, the EEOC received an average of about 79,000 complaints, substantially lower than the current amount.