

LABOR & EMPLOYMENT ALERT

HEALTH CARE BILL HIGHLIGHTS***Health Flexible Spending***

Health Flexible Spending arrangement contributions will be capped at \$2,500 effective January 1, 2013.

Health Insurance Penalties

Employer with at least 50 full-time employees that do not provide coverage must pay an annual penalty (imposed on a monthly basis) equal to \$2,000 multiplied by the total number of its full-time employees in excess of 30 if at least one of its employees qualifies for, and obtains, government-subsidized coverage. The 50 employee threshold includes part-time employee whose hours have been aggregated into full-time equivalents, but excludes seasonal workers. For the purposes of calculating the penalty, a full-time employee is anyone who averages more than 30 work hours per week. [Note: A business with 25 full-time employees and 200 part-time employees each working 20 hours per week would qualify as having more than 50 full-time employees by aggregating the part-time hours, but there would not be a penalty because there are less than 30 full-time employees.] In addition, an employer with at least 50 employees that provides coverage that does not offer certain levels of cost-sharing or reimbursement benefits must pay an annual \$3,000 penalty (imposed on a monthly basis) for each of its employees that qualifies for, and obtains, government-subsidized coverage. The provision is effective January 1, 2014.

Non Discrimination

Individuals may not be excluded from participation in, denied the benefits of, or subjected to discrimination under any health program or activity that receives Federal financial assistance or is administered by an executive agency or an entity established by the law because of their race, color, national origin, sex, age or disability. This prohibition will be enforced through the existing mechanisms of the federal antidiscrimination laws. This provision is immediately effective.

Nursing Mothers

The Fair Labor Standards Act is amended to allow nursing mothers to take a break every time they need to express breast milk and requires employers to provide a private location, other than a bathroom, where such employees may express milk. Employees must be allowed such breaks for up to one year after their child's birth. Employers of fewer than 50 employees are exempt if the breastfeeding requirements would "impose an undue hardship by causing the employer significant difficulty or expense."

Small Business Tax Credit

A Small Business Tax Credit of up to 35% of the health insurance costs of small businesses is in effect from 2010 through 2013, by which time the health insurance exchanges should be established. Applies to businesses that pay at least half of the employees' premium cost and have fewer than 25 employees with average wages below \$50,000, although the full credit applies to businesses with 10 or fewer employees averaging less than \$25,000 in wages.

Tax Reporting

Effective for tax years after December 31, 2010, employers are required to disclose the value of the benefit provided by the employer for each employee's health insurance coverage on the employee's annual Form W-2.

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Waiting Periods

Effective January 1, 2014, employers may have waiting periods for provision of coverage of new employees only up to 90 days.

Whistleblower Provision

The Act provides that, effective immediately, employees may not be discharged or in any way discriminated against with respect to the terms and conditions of their employment because they (i) receive an individual subsidy under the Act, (ii) provide information to their employer, the Federal government or a state attorney general about acts or omissions that they reasonably believe to be a violation of Title I of the Act,¹ (iii) provide testimony concerning such violation, (iv) assist or participate in a proceeding regarding such violation, or (v) object to, or refuse to participate in, any activity, policy, practice, or assigned task that they reasonably believe to be in violation of Title I of the Act. An aggrieved employee must file a complaint with the U.S. Department of Labor (“DOL”) within 180 days of the date of the alleged violation. DOL will invite a position statement from the employer, investigate the complaint, and determine whether there is reasonable cause to believe that a violation has occurred, or whether the employee has failed to establish a *prima facie* case that his or her protected activity was a contributing factor in the unfavorable personnel action. Even if a *prima facie* case is established, the employer can demonstrate, under the heightened standard of “clear and convincing evidence,” that it would have taken the same employment action regardless of the employee’s protected conduct. If the DOL finds reasonable cause, it will issue a preliminary finding of relief (which can include reinstatement and/or compensatory damages), after which either party has 30 days to request a hearing. The DOL has 120 days after the hearing to issue a final order providing relief or denying the complaint. If the DOL takes no action on the complaint for 210 days, or within 90 days after receiving a written determination, an employee may file suit in an appropriate United States district court for *de novo* review. Further, any person adversely affected by the DOL’s final order can within 60 days file petition for review in the appropriate U.S. court of appeals. In addition, if an employer fails to comply with the Secretary of Labor’s final order, either the employee or the Secretary may file a civil enforcement action in an appropriate United States district court (or, if the Secretary wishes, in the district court for the District of Columbia).

The Labor & Employment Alert is intended to keep readers current on matters affecting labor & employment, and is not intended to be legal advice. If you have any questions, please call Jeffrey W. Larroca at 202.659.6646 or any other attorney with whom you have been working.

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