LEGISLATIVE AND REGULATORY UPDATE

PREPARED BY

PATRICK S. McELHONE, JD
PRINCIPAL
MERCER (US) INC.
700 AEGON CENTER
LOUISVILLE, KENTUCKY 40202

LOUISVILLE EMPLOYEE BENEFITS COUNCIL
LOUISVILLE, KENTUCKY
February 12, 2013

Court says that employee handbook creates enforceable agreement under state law: Policies in an employee handbook may support state wage claims, a federal court in Illinois has ruled. Employees had sued for overtime pay under Illinois' wage law, which permits claims to enforce employment contracts or agreements. However, the handbook expressly stated that it did not create "an express or implied contract of employment" or "other legally enforceable promise." Nonetheless, the court found the handbook was a binding "agreement," which -- unlike a contract -- merely requires "mutual assent" from each party. The case is ***Wharton v. Comcast Corp., No. 12 C 1157 (N.D. Ill. Dec. 6, 2012).***

SEC approves listing standards on comp committee and adviser independence: The SEC has approved NYSE and Nasdaq Stock Market changes to their listing standards implementing Dodd-Frank mandates for compensation committee member independence and adviser selection. Shortly before the standards were approved, the exchanges clarified a few items.

Effective dates. The effective dates for the new mandates are as follows:

Provision	NYSE	Nasdaq
Standing independent compensation committee with written charter	Required under current standards	First annual meeting after Jan. 15, 2014 (or Oct. 31, 2014, if earlier)
New compensation committee independence factors	First annual meeting after Jan. 15, 2014 (or Oct. 31, 2014, if earlier)	First annual meeting after Jan. 15, 2014 (or Oct. 31, 2014, if earlier)
Compensation committee (i) authority to retain and fund compensation advisers and (ii) responsibility to consider independence factors before selecting such advisers	July 1, 2013 Current standards already give the committee authority to retain compensation consultants.	July 1, 2013

Clarifications. To align with certain exceptions to current SEC disclosure rules regarding compensation consultants, the compensation adviser selection standards will not apply to advisers whose role is limited to (i) consulting on broad-based nondiscriminatory plans that apply generally to all salaried employees, such as 401(k) plans, or (ii) providing survey information not customized for the company or customized information based on parameters not developed by the compensation adviser and not accompanied by advice.

The NYSE also added language already in the Nasdaq standards to clarify that while a compensation committee is required to consider the independence of compensation advisers, it may select or receive advice from advisers that are not independent. Finally, the NYSE tweaked the transition period for companies that cease to qualify as smaller reporting companies.

Employers await more guidance on health plans' minimum value: Recently proposed HHS rules on essential health benefits (EHBs) leave open key questions about how employers can determine whether their health plans provide the minimum value needed to avoid shared-responsibility penalties under the Affordable Care Act. The proposal adopts three IRS-proposed approaches for making the minimum value determination but provides little new information about the role, if any, EHB will play in determining minimum value. IRS and HHS are expected to release a minimum value calculator and additional guidance soon. **Full text of proposed HHS rules on EHBs, actuarial value, accreditation standard (Federal Register, 26 Nov 2012); Fact sheet on proposed rule (HHS, 14 Dec 2012) »**

HHS issues final HIPAA rules on privacy, security and breach notices: Several final regulations from the U.S. Department of Health and Human Services address requirements for health plan privacy and security and related agency enforcement mechanisms under the Health Insurance Portability and Accountability Act (HIPAA). The compliance date for the rules – published as an omnibus package on Jan. 25 – is generally Sept. 23, 2013.

Four final rules. The package includes final versions of four rules related to HIPAA privacy and security.

Business associates mandate. Many changes were made to HIPAA privacy and security requirements by the Health Information Technology for Economic and Clinical Health (HITECH) Act, enacted in 2009. Among key changes covered by this final rule is the mandate for health plans' so-called business associates – and their subcontractors – to independently comply with certain privacy and security standards. Health plans generally have a year to update their business associate contracts.

Data breach notice and reporting. When protected health information is improperly disclosed, an affirmative duty to notify affected individuals may apply. The final rule replaces the current notice obligation – triggered only if there is a risk of significant harm to affected individuals – with a duty to notify unless it's determined that the probability is "low" that the breached data was compromised.

Changes for GINA. The Genetic Nondiscrimination Act (GINA) extends various protections to genetic information, including a ban on using the data for underwriting purposes. The final rule applies this restriction to all plans that are subject to the HIPAA privacy rule except long-term care plans.

Modifications to the enforcement provisions. HHS has an array of civil and criminal penalties at its disposal to enforce the privacy and security standards. A key provision of the final rule allows the agency to move directly to a civil money penalty without exhausting informal resolution efforts, particularly in cases involving willful neglect violations.

Employers sponsoring group health plans will need to review the final regulations to determine how their HIPAA privacy and security documents, forms, and processes should be changed to meet the rules' provisions.

Marital communications on work computer are not confidential, appeals court says: Confidentiality protections for spousal communications do not apply to emails stored on a work computer, the 4th US Circuit Court of Appeals has ruled in a criminal case with employment implications. The employee had argued "marital privilege" prohibited disclosure of emails exchanged with his wife using his work computer. However, the court found the employee waived this privilege by failing to preserve the confidentiality of his spousal communications, even after his employer adopted a policy stating users have "no expectation of privacy." The case is ***United States v. Hamilton, No. 11-4847 (4th Cir. Dec. 13, 2012)***.

New FAQs delay March exchange notice and address status of HRAs: New frequently asked questions (FAQs) on health care reform clarify key issues for employers. The FAQs delay the March 1 deadline to give employees notices about health insurance exchanges until this summer or later. The guidance also states that stand-alone health reimbursement arrangements (HRAs) -- such as HRAs to help employees buy their own insurance policies -- violate the ban on annual dollar limits for essential benefits. Other FAQs address which fixed-indemnity insurance designs are "excepted benefits" and what rules apply to self-insured, supplemental Medicare Part D coverage.**Full text of Affordable Care Act FAQs, set 11 (DOL/IRS/HHS, 24 Jan 2013) »**

New procedures for correcting retirement plan errors take effect April 1: Recent updates to the IRS's Employee Plans Compliance Resolution System (EPCRS) affect all retirement plan sponsors trying to fix compliance problems, with or without IRS approval. Revenue Procedure 2013-12 retains the structure of the program but revamps the process for obtaining IRS approval of voluntary corrections. The EPCRS updates generally take effect April 1, but sponsors may follow the revised procedures immediately.

Agencies' reports shine spotlight on multiemployer pension plan problems: Three new reports on multiemployer pension plans highlight funding and PBGC insurance problems. In a joint report on the Pension Protection Act's impact, the Labor Department, IRS and PBGC note that multiemployer plans' average funding levels fell sharply from 105% in 2000 to 48% in 2010. The report also points out that these plans face declining active membership, increasing "orphaned participants" and more employer bankruptcies. Two PBGC reports caution that without changes, the insurance program for multiemployer plans is almost certain to run out of money in 10 to 20 years.

FMLA rule implements protections for military families and airline flight crews: A final Family and Medical Leave Act (FMLA) rule implements the expanded benefits for military families and airline flight crews enacted since 2009. Revisions contained in the new rule:

- Extend qualifying exigency leave to families of servicemembers deployed in the regular armed forces
- Permit eligible employees to take qualifying exigency leave for parental care
- Allow up to 15 days of qualifying exigency leave for rest and recuperation
- Broaden military caregiver leave to cover more types of duty-related injuries or illnesses and veterans
- Explain how to determine eligibility and calculate leave for flight crew employees

The revised rule takes effect March 8. The Labor Department has updated its FMLA poster, forms, notices and other resources for the changes. **Full text of final FMLA rule (Federal Register, 6 Feb 2013); DOL website with updated FMLA forms, poster, fact sheets, FAQs, charts and other resources »**