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Employment & The Law

Labor & Employment Practice Group

2013 Summer Newsletter

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Health Care Reform: With the Employer Mandate and Insurer Reporting Requirements Delayed – What's Left for 2014?

By Jonathan A. Kenter, Evelyn Small Traub and Jeanne E. Floyd

On July 3, the Obama administration announced a delay in the employer mandate to provide health insurance and the insurer reporting requirements under the Patient Protection and Affordable Care Act ("ACA"). See our prior alert on the delay available here. The employer mandate and insurer reporting requirements – which were scheduled to become effective on January 1, 2014 – will now be delayed until 2015. Formal guidance describing the delay was issued on July 9, 2013. However, the delay does not affect a number of provisions of ACA that are applicable to employer sponsored group health plans which are scheduled to take effect in 2014. This alert describes the plan design changes that employers must implement for the 2014 plan year.

The formal guidance makes it clear that the delay affects only the penalties applicable to employers that fail to offer minimum value affordable coverage and the information reporting associated with such penalties. Employers are encouraged, however, to voluntarily comply with information reporting (once rules have been issued) and to maintain or expand health coverage in 2014.

The delay does not affect the following provisions of ACA that are applicable to employer sponsored group health plans which are scheduled to take effect in 2014:

- Pre-existing condition exclusions – Group health plans will no longer be able to avoid paying benefits because participants have a pre-existing condition prior to joining the plan. This prohibition took effect earlier – as of plan years beginning on or after September 23, 2010 with respect to individuals who are under 19 years of age. Please see our prior alert available here for additional details.

- Exclusion of adult children – Grandfathered plans will no longer be permitted to exclude adult children who have health care coverage under the child's employer's plan. Please see our prior alert available here for additional details.

- Waiting periods limited – Waiting periods greater than 90 days will no longer be permitted. Please see our prior alert available here for additional details.

- Annual dollar limits – Annual limits on the dollar amount of "essential health benefits" for any individual are prohibited. Essential health benefits include ambulatory care; emergency care; hospitalization; maternity/newborn; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; lab; preventive/wellness and chronic disease management; and pediatric services including dental

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and vision care. Please see our prior alert available here for additional details.

- Annual limit rule – The temporary waiver on the annual limit rule expires. This means that "limited benefit" or "mini-med" plans often offered to lower wage, part-time or temporary workers or volunteers and stand alone health reimbursement accounts (HRAs) cannot be maintained after the 2013 plan year. Retiree-only HRAs are still permitted. The annual limit rule needs explanation.

- Coverage for certain clinical trials – Non-grandfathered plans must provide coverage for certain clinical trials and cannot deny or limit coverage of routine patient costs for items and services furnished in connection with the trial, or discriminate against an individual based on participation in the trial.

- Essential health benefits – Non-grandfathered, fully-insured, small group plans must provide essential health benefits.

- Cost sharing – Cost sharing provisions in non-grandfathered plans may not exceed high deductible health plan (or "HDHP") maximum out-of-pocket limits (for 2014 these maximums are $6,350 for self-only coverage and $12,700 for family coverage). If a plan uses multiple providers such as separate pharmacy benefit manager or behavioral health management organization, a one year safe harbor extension applies if certain conditions are met.

- Maximum annual deductible – Fully insured small group health plans may not apply an annual deductible that exceeds $2,000/$4,000 (as adjusted). Health savings account, flexible spending account and HRA contributions may be taken into account as regulations permit.

- Reinsurance fees – Transitional reinsurance fees will be imposed. Please see our prior alert available here for additional details on the reinsurance fees.

Compliance with automatic enrollment requirements that will be applicable to employers with more than 200 full-time employees and the non-discrimination provisions applicable to fully insured plans continue to be on hold until guidance is issued.

At present, individuals will still be obligated to procure health insurance or pay a penalty starting in 2014, although the Administration will be hard pressed to maintain this requirement while delaying the employer mandate for large employers. In addition, starting in 2014, individuals also will have access to the premium tax credits available under the ACA without having to prove their eligibility.

The delay in the employer mandate and insurer reporting requirements does not impact the establishment of the government-sponsored insurance "exchanges," which are scheduled to begin open enrollment in October 2013.

Stay tuned *– we suspect this is not the last you will be hearing on the implementation of the ACA. In the meantime, for assistance in evaluating how these changes may affect your company, please contact a member of Troutman Sanders LLP's Employee Benefits and Executive Compensation Team.*

United States v. Windsor: The Impact of the Supreme Court's DOMA Ruling

By Jonathan A. Kenter, Evelyn Small Traub and Jeanne E. Floyd

On June 26, the U.S. Supreme Court struck down Section Three of the federal Defense of Marriage Act of 1996 (DOMA). Section Three of DOMA provides that for purposes of federal law, the word "marriage" means only "a union of a man and a woman" and the definition of "spouse" is limited to "a person of the opposite sex who is a husband or a wife."

DOMA's limitations on the definitions of "marriage" and "spouse" affected a myriad of federal laws, including the Internal Revenue Code, ERISA, COBRA and HIPAA, and thus deprived same-sex couples legally married under the laws of certain states of various legal protections and preferred tax treatment that were available to opposite-sex spouses under retirement and health care benefit plans and federal law. The Supreme Court's ruling means that this differential treatment of same-sex married couples is not permissible in the thirteen states and the District of Columbia that allow or recognize same-sex marriages. States that currently allow or recognize same-sex marriage are California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington.

Less clear is how to treat same-sex spouses who were lawfully married in a state where same-sex marriage is recognized but who reside in a state, like Virginia or Georgia, that does not recognize same-sex marriage. For now, the Supreme Court left for another day DOMA Section Two, which allows states to refuse to recognize a same-sex marriage lawfully performed in another state.

Employers offering retirement and health and welfare benefits will have to review and update their plan documents, payroll systems, and administrative procedures to comply with the Supreme Court's ruling. Due to the complexities of the ruling, and the issues that remain (for example, state law questions and the extent to which the ruling is retroactive), benefits must be examined and possibly modified based on the facts and circumstances of each employer. Regulatory authorities are expected to issue guidance to help employers navigate these issues. Employers may wish to wait until regulatory guidance is issued before making any significant changes.

Following is a summary of some of the issues raised by the Supreme Court's ruling related to employer-sponsored health and retirement benefits for employees and their same-sex spouses that will need to be addressed by companies with employees who have same-sex spouses.

Health Plan Benefits

- Health Care Coverage, FSAs, HRAs, HSAs – Employees may contribute to their health care on a pre-tax basis for themselves and their spouses and dependents. Additionally, employers generally may provide coverage to employees and their spouses and dependents on a tax-free basis.

- COBRA Continuation Coverage – COBRA-mandated health care continuation coverage is available in the event of a qualifying event that results in a loss of coverage for a spouse (including through divorce).

- HIPAA Special Enrollment Rights – Under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), employees covered by their employer's group health plan must be given a special enrollment right to add a spouse if they marry during the coverage period.

- FMLA – Under the Family and Medical Leave Act (FMLA), employees can take up to 12 weeks (or 26 weeks, in specific circumstances) of unpaid leave of absence without the loss of their job to take care of certain family members, including spouses.

- Dependent Care Assistance – Employer-provided dependent care assistance enjoys pre-tax treatment if used to pay for qualifying dependent care assistance expenses of dependants and spouses.

Historically, the favorable tax treatment, coverage, special enrollment rights and other protections described above were only available to opposite-sex spouses. Under the Supreme Court's ruling, these protections will be available to same-sex spouses.

Retirement Plans

- Qualified Joint and Survivor Annuities and Qualified Preretirement Survivor Annuities – Certain types of retirement plans must provide death benefit coverage to a participant's spouse in the form of a survivor annuity.

- Payment of Defined Contribution Account Balances at Death – Certain types of defined contribution retirement plans must provide that, absent spousal consent, the account balance of a married participant will be paid to the surviving spouse at death.

- Spousal Rollover Rights – Under current law, a participant's surviving spouse may roll over distributions from the participant's qualified plan to an IRA or another qualified employer plan.

- Qualified Domestic Relations Orders (QDROs) – A participant's retirement plan benefits may be required to be paid to a former spouse incident to a court ordered QDRO.

- Age 70½ Required Minimum Distributions – Under current law, in some cases, a surviving spouse may defer required minimum distributions from a qualified retirement plan for a longer period, following the death of the participant, than a non-spouse beneficiary.

- 415(b) Limits – Under current law, the value of a subsidized qualified joint and survivor annuity is not taken into account in determining the maximum benefit that may be accrued under Internal Revenue Code Section 415(b) if the survivor benefit is paid to the participant's spouse.

- Hardship Withdrawals – Under current law, certain 401(k) plans condition the availability of a hardship withdrawal on the consent of a spouse.

Under the Supreme Court's ruling, the protections discussed above will apply to same-sex spouses.

This ruling represents a sea change to the administration of retirement and health and welfare plans and will change the way in which many employers administer FMLA leave. There are many other aspects of employee benefits that will likely need to be addressed based on the Supreme Court's ruling.

Contact the Troutman Sanders LLP Employee Benefits and Executive Compensation Team or Labor & Employment Team for additional information on how to comply with this new legal landscape.

A more detailed version of this article, available here, was previously published on July 1, 2013.

Strategies for Handling Real Life FMLA Abuse

By Kristina N. Klein and Summer Associate Jenifer Curtis

The Family and Medical Leave Act ("FMLA") provides a means for employees to balance their work and family responsibilities by taking leave for certain reasons, like the birth of a child or to care for an immediate family member who suffers from a serious health condition. Like many well-intentioned laws, however, some employees abuse the rights granted under the FMLA and have used FMLA leave to vacation on the beach or to extend a long weekend. This article will provide scenarios which illustrate common suspicious FMLA leave situations, and then will outline strategies to help prevent potential FMLA abuse.

Scenario #1: Caught Red-Handed: Facebook Pictures During FMLA Leave

Sara began taking intermittent FMLA leave related to worsening knee pain from a leg injury she sustained ten years before. During one of Sara's FMLA absences, several of her coworkers saw pictures of Sara drinking at a local festival posted on Facebook and showed the pictures to Sara's supervisor. You check her certification, which indicates that her physician certified the need for leave based on her inability to engage in physical activities.

What should you do?

Don't Jump to Conclusions or Rush to Terminate.
Even if it appears that an employee has been caught red-handed, you should still conduct a complete and exhaustive investigation of the facts. When employers don't afford an employee with some level of due process, the risk of litigation and an adverse ruling increases significantly. In *Jaszczyszyn v. Advantage Health Physician Network*, an employer was faced with a similar scenario and provided a good example of how an employer should respond. In *Jaszczyszyn*, the employee was out on FMLA leave for back pain but was posting pictures on Facebook at a local Polish festival. After learning about the pictures, the employer did not rush to terminate her on the spot. Instead, it invited her back to work to discuss her leave of absence. During the meeting, the employer confirmed the scope of Jaszczyszyn's need for FMLA leave, asked her to explain what her limitations were, had her acknowledge the company's policies regarding fraud, and then showed her the Facebook pictures. Jaszczyszyn's response was that she "was in pain at the festival and was just not showing it." Ultimately, the Sixth Circuit Court of Appeals upheld a lower court's decision that the employee's response was not enough to prevail in the face of the employer's honest belief defense.

Implement a Policy Prohibiting Misrepresentations and Dishonesty.
Courts are reluctant to accept employees' FMLA claims in cases where the employee lied to or misled an employer. In another similar case, *Lineberry v. Richards*, a nurse was out on FMLA leave for an injury, and was fired after Facebook posts showed her vacationing in Mexico. Her doctor certified the need for leave due to substantial lifting and mobility restrictions, and later certified her vacation to Mexico and stated that the trip was not physically demanding and would not conflict with her recovery. However, several photos posted to Facebook showed her riding in a boat and lying on her side on a bed holding up two bottles of beer in one hand. After coworkers told the nurse's supervisor about the photos, the supervisor emailed the nurse saying that, since she was well enough to travel on a 4+ hour flight and wait in customs, she should be well enough to come back to work. In response, to the nurse claimed that she rode in a wheelchair in the airports and through customs and was unable stand for any length of time. However, when the nurse finally returned to work, the employer showed her the Facebook photos and the nurse admitted that she had lied about using a wheelchair. The employer then terminated her for violating the company's policy on dishonesty and for misuse of FMLA leave. The nurse filed suit claiming FMLA interference and retaliation, but a Michigan

federal court ruled that the employer had the right to fire her for dishonesty. The court also explained that, even if the nurse had not admitted to lying about the wheelchair, the employer's honest belief that the nurse was lying and misusing her FMLA leave would have supported the termination decision.

Scenario #2: Monday/Friday Migraines

John is a receptionist who is absent at least 3-4 days a month due to what he claims are bad migraines. He has provided certification from his physician that confirms that he suffers from a medical condition that will cause him to be out 3-4 days a month due to migraine episodes; however, you are noticing that nearly all of his absences are on Mondays and Fridays. Due to lack of staff to fill in for John at the last minute, it is difficult for the office to run in his absence.

What should you do?

Request Recertification.
Recertification is one of the best tools available here. As a general rule, employers may request recertification no more than every 30 days and only in cases where the employee has actually been absent from work for the FMLA-covered medical condition. However, employers may request recertification in less than 30 days if:

- The employee requests an extension of leave;
- Circumstances described by the previous certification have changed significantly; or
- Information is received that casts doubt on the employee's stated reason for the absence or the continuing validity of the certification.

In addition, where there is a specific pattern of leave, as described in this case, employers can provide a copy of the employee's recent attendance record to the certifying physician to inquire whether the pattern of leave is consistent with the employee's actual need for medical leave.

Establish a Call-In Policy.
To help reduce the effects of last minute no-shows, employers may enforce company call-in procedures, even when leave is unforeseeable. The regulations specifically provide that an employer may require, as part of its policies, that an employee provide written notice of the need for leave and call in all absences. Where an employee does not comply with its employer's requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. For example, in *Ritenour v. Tennessee Department of Human Services*, an employer properly applied its call-in policy to discipline and ultimately terminate an employee that took FMLA leave to care for her child, but, while taking several days off to do so, did not call in her absences as required under the employer's call-in policy. The Sixth Circuit Court of Appeals upheld the lower court's decision, which concluded that, because the employee was well aware of the obligation to call in, failed to follow the policy, and failed to establish that an "unusual circumstance" prohibited her from complying, she was in violation of her employer's policy and subject to discipline. This was particularly true because the employer's policy required adequate notice for any form of absence, not just absences covered by FMLA.

Transfer the Employee to an Alternative Position.
Depending on the employee's position, habitual Monday and Friday absences may significantly affect the operations of the business, especially if the employee is the only one fulfilling that job function or is difficult to replace. As a result, it may be in the employer's best interest to assign the employee to an alternative position that causes less disruption in the normal operations. While transfers are permitted, employers must make sure pay and benefits remain the same and that the transfer is not punitive in nature.

Scenario #3: FMLA Leave or Extended Vacation?

Denise, a secretary at your company, requests FMLA leave for surgery pursuant to the company's policy. You approve the request. A few weeks after the surgery, you find out that Denise, while out on leave, has traveled to the Bahamas to "help her recuperate" for a week.

What can you do?

Establish a Policy Requiring Employee to Remain in Vicinity of Home.
In *Pellegrino v. Communications Workers of America*, the Third Circuit Court of Appeals upheld an employer's policy requiring an employee to remain in the immediate vicinity of their home as a condition of receiving paid sick leave, including during periods when the employee is on FMLA leave. The policy allowed an employee to travel outside of the immediate vicinity of their home only for medical treatment, family needs, and with the prior consent of the employer. While on leave, the employee traveled to Mexico and stayed for a week. There was no medical or family reason for the trip, nor had she secured her employer's consent to travel outside the immediate vicinity of her home during leave. The employer terminated her for violation of the policy. The court determined that the termination was legitimate based on the policy violation and reasoned that, even if an employer did

not have a formal policy restricting travel during FMLA leave, "no reasonable jury could find that an employer acts illegitimately or interferes with FMLA entitlements when that employer terminates an employee for taking a week-long vacation to Mexico without at least notifying the employer that her doctor had approved the travel or that she would be out of the country."

Maintain Communication.
Most employers have a greater success of preventing FMLA abuse when they maintain regular contact with an employee on FMLA leave. What is considered an appropriate form of "contact" is unique to each situation, but can consist of periodic phone calls by the employer or a requirement that employees periodically report on their status and intent to return to work. "Periodically" is not clearly defined, so employers must be cautious when requiring updates or calls too frequently. In addition, employers should be careful not to take an aggressive approach. For example, in *Terwilliger v. Howard Memorial Hospital*, a federal district court in Arkansas explained that, while FMLA regulations specifically authorize employers to require employees on FMLA leave to report periodically on their status and intent to return to work, weekly calls to an employee may constitute FMLA "interference" if the employee feels "discouraged" from taking FMLA leave. To reduce the risk of an FMLA interference claim like Terwilliger's, employers should make sure all employees receive the company's FMLA policy and are advised of their rights, ensure that the company's policy specifically states when employees will be contacted or required to provide status updates, adjust the frequency of contact based on each individual situation, and train management personnel who will be communicating with the employee to make sure they do not give employees the idea that they are discouraged from taking FMLA leave and being forced to return to work.

Interested in Learning More About Strategies for Dealing with FMLA Abuse?

Troutman Sanders Partners **Evan Pontz** and **Rebecca Shanlever** will be leading a Live Audio Conference on August 28, 2013 from 12:00-1:30 pm EST and will be answering questions about what employers should do when they suspect an employee is "working the system" and taking part in FMLA Abuse. Evan and Rebecca will cover the following topics:

- How you can use job descriptions to curb FMLA abuse
- What paperwork is required … and allowed
- Special concerns related to intermittent (reduced-schedule) FMLA leave
- What disciplinary actions you can and should use
- How to establish effective policies for employees on leave
- When it is time to consider termination
- Proper techniques for investigating FMLA leave abuse

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OVERTIME UPDATE: National Retailers Hit With Meal Break Litigation and the "Black Swan" Internship Saga Continues

By Jana L. Korhonen

This edition of Overtime Update features a refresher on employee meal breaks in light of some recent potential class action lawsuits against national retailers and discusses the latest developments in the case of Glatt v. Fox Searchlight Pictures, Inc. (Glatt, being a former intern for the company that produced the 2010 Oscar-nominated film "Black Swan"). Each topic is discussed separately below.

National Retailers Hit With Meal Break Litigation

Retail and service establishments live by the mantra: the customer is always right. A belief that holds a close second: the customer is probably in a hurry, too. So, when the customer is ready to check out at a cash register or needs help finding a dressing room or has questions about this week's sales or promotional items, most employees will quickly try to meet those customers' needs. And, of course, that's not a legal violation. But what if the employee was on his or her meal break at the time?

The federal Fair Labor Standards Act (the "FLSA") does not require employees to receive meal breaks. It does, however, require that all covered, non-exempt employees be paid for all hours worked. The U.S. Department of Labor, which enforces the FLSA, takes the position that bona fide meal periods (typically lasting at least 30 minutes) are generally not compensable, provided the employee is "completely relieved from duty" for the purpose of eating regular meals. Conversely, the employee is not relieved from duty if he or she is required to perform any duties, whether active or inactive, while eating. Some states also impose their own requirements and restrictions on meal breaks (including, California, Illinois, and New York), which the DOL summarizes here: http://www.dol.gov/whd/state/meal.htm.

A couple of recent lawsuits suggest that the scenario described above, in which employees (either through their own volition or by being asked to handle discrete tasks) worked at least *during* if not *through* their meal breaks, is not entirely uncommon. Just ask clothing giant Brooks Brothers. In June 2013, Brooks Brothers Group, Inc. was hit with a putative class action alleging that the company, among other things, deprived employees of proper meal breaks in violation of state law. The named plaintiff in that case, a non-exempt sales associate and manager, alleged that Brooks Brothers knew or should have known that the plaintiff and the other class members should have been entitled to additional pay required under state law when they did not receive a timely uninterrupted meal period. They also allege that Brooks Brothers did not staff sufficient employees to meet customer service demands and did not properly coordinate employee schedules to permit compliant meal periods.

Another company hit with a lawsuit in June 2013 alleging that it failed to provide employees with proper meal breaks: Pottery Barn. In that case, the named plaintiff alleged that he and his putative class members were denied meal breaks required by state law and/or required to work during those breaks without compensation. These cases serve as a reminder that low staffing levels or other business conditions that require non-exempt employees to forfeit all or part of a required meal break, or the failure to compensate employees properly for work performed during such breaks, could potentially spawn litigation.

***Glatt v. Fox Searchlight Pictures, Inc.*: The Black Swan Internship Saga Continues**

In the last edition of Overtime Update (available here: http://www.troutmansanders.com/overtime-update-what-the-supreme-courts-genesis-healthcare-ruling-means-for-you-and-assessing-whether-an-unpaid-summer-internship-is-legal-06-10-2013/), we reported that several employers have recently been sued for wages owed by their former unpaid interns. In June 2013, a federal judge handed down a noteworthy ruling in the case of production interns Eric Glatt and Alexander Footman, who sued Fox Searchlight Pictures, Inc., a division of Twentieth Century Fox, for alleged unpaid wages owed to them and others for production work performed on the set of the film "Black Swan." In case you missed it, here's the back story:

Glatt and Footman sued Fox Searchlight, in September 2011 in a federal court in New York alleging that they did basic tasks

(e.g., preparing coffee and expense reports) and that, through the use of a tightly-controlled budget, the film was produced for approximately $13 million and grossed more than $300 million. The lawsuit alleged that Fox Searchlight violated the minimum wage and overtime provisions of the FLSA and state law. On June 11, 2013, Judge William H. Pauley III ruled that the plaintiffs were "employees," not "trainees" or "interns," and should have been paid. Judge Pauley discussed the six factors cited by the U.S. Department of Labor for evaluating whether an employee is properly classified as an unpaid intern (*see* our last edition of Overtime Update, linked above). In discussing one of those factors (whether the internship was for the benefit of the interns), the court reached this important conclusion:

> Undoubtedly, Glatt and Footman received some benefits from their internships, such as resume listings, job references, and an understanding of how a production office works. But those benefits were incidental to working in the office like any other employee and were not the result of internships intentionally structured to benefit them. Resume listings and job references result from any work relationship, paid or unpaid, and are not the academic or vocational training benefits envisioned by this factor.

The court also noted that other factors favored the finding of an employment relationship, including that Fox Searchlight did not contest having derived an immediate advantage from Glatt and Footman's work. While an appellate court may view the case differently, the case is nonetheless a reminder that unpaid internships, particularly with for-profit employers, present legal risks. For assistance in evaluating potential wage-and-hour risks for your company, please contact a member of Troutman Sanders LLP's Labor & Employment Team.

Health Care Reform Delayed, Immigration Bill Quickly Passes the Senate, and Partisan Bills Abound

By James M. McCabe and Seth T. Ford

With the administration pressing pause on major components of healthcare reform until 2015, many employers are breathing a sigh of relief, or catching their breath. While employers have welcomed the delay to healthcare reform, the administration is pressing forth on other fronts, particularly immigration. The mammoth immigration bill, reported in our last legislative update here, passed the Senate on June 27, 2013. Once a bill that seemed too big to succeed, some polls now give it almost a 50% chance of passing the House. It may be time that employers give this bill a closer look, both for its potential benefits and increased oversight.

Although there have been relatively few other noteworthy legislative developments since our last update, two highly partisan bills merit some consideration and are reviewed below. The first threatens to introduce the legal process into every employer's scheduling decision, while the second would provide greater protection against the threat of unionization in the workforce.

FLEXIBILITY FOR WORKING FAMILIES ACT (S. 1248; H.R. 2559)

CURRENT STATUS OF LAW: Federal laws protect time off from work due to (1) certain medical conditions of oneself or family members (the Family and Medical Leave Act) or (2) requests for an adjusted work schedule to accommodate a disability where the adjustment does not create an undue hardship for the employer (the Americans with Disabilities Act). However, apart from these protected reasons, employees do not generally have the right under federal law to request changes to their place or time of work or to file lawsuits associated with that request.

WHAT WOULD CHANGE: On June 27, 2013, Democratic representatives of the House and Senate introduced identical versions of the Flexibility for Working Families Act. This Act would permit employees of covered employers (15 or more employees) to apply to their employer for a temporary or permanent change in the employee's terms or conditions of employment if the change relates to:

1. The number of hours the employee is required to work;
2. The times when the employee is required to work or be on call for work;

3. Where the employee is required to work; or

4. The amount of notification the employee receives of work schedule assignments.

Employees would only be permitted to apply for such a change once per year. In response to an application, an employer would be required to hold a meeting with the employee to discuss the application and issue a written decision to the employee regarding whether the application is granted, including documenting the reasons for any rejection with specific reference to one of a number of reasons identified in the statute. In addition, if the employer rejects the application, the employee is permitted the right to appeal that decision to another supervisor, who would then be required to provide written documentation to the employee of his or her acceptance or rejection of the appeal. Finally, at any meeting regarding the employee's application, the employee would be permitted to have a representative present.

The Act would make it unlawful for an employer to interfere with, restrain, or deny the exercise of any of these rights, or to retaliate against an employee for exercising these rights. The Secretary of Labor would be authorized to enforce and investigate any such claims.

WHY YOU CARE: Such overreaching employment legislation hasn't been introduced in quite some time. Certainly, this bill would create controversy in the workplace. An employee can appeal their supervisor's decision to another supervisor. That appears destined to cause problems. Moreover, each decision must be issued by the supervisor in writing to the employee, who is permitted to have counsel present, with specific reference to the reasons identified by the regulations. Basically, this Act seeks to introduce the American legal process into day-to-day business decisions regarding the scheduling of employees. Last but not least, employers can be sued if they violate the requirements of the Act (or if an employee simply complains about your decision under the Act before you terminate them).

LIKELIHOOD OF BECOMING LAW: Not likely, thank goodness.

A BILL TO AMEND THE NATIONAL LABOR RELATIONS ACT TO PROVIDE FOR APPROPRIATE DESIGNATION OF COLLECTIVE BARGAINING UNITS (S. 1166)

CURRENT STATUS OF LAW: Under a new test set forth in the NLRB's *Specialty Healthcare* decision, issued on April 30, 2011, it is now much easier for smaller units of workers to be considered appropriate bargaining units. In particular, under this test, in order to demonstrate that a bargaining unit is inappropriate, an employer will be required to prove that the excluded employees share "an overwhelming community of interest."

One year after the *Specialty Healthcare* decision, on April 30, 2012, the NLRB published amendments to election rules that permit what some have termed "quickie elections" by permitting an election to occur in less than 25 days. Prior to these amendments, an election could not occur sooner than 25 days after the petition for representation was filed, which gave employers valuable time to present their position on union representation and to challenge the appropriateness of the bargaining unit.

WHAT WOULD CHANGE: This bill is another attempt by Republicans to "undo" the effects of the NLRB's *Specialty Healthcare* decision and quickie election rules. (Last year Republicans in the House attempted a similar maneuver, as reported in our prior article here.) This bill would require the NLRB, "prior to an election," to determine the appropriate bargaining unit and, through consideration of a number of factors, is designed to prevent the smaller bargaining units permitted by the *Specialty Healthcare* decision. Practically speaking, such a requirement would likely slow or halt the election process.

WHY YOU CARE: When a union targets your business, employers want to slow down or stop the election process. This bill would help to do that.

LIKELIHOOD OF BECOMING LAW: There is little chance this bill will make it out of the Democrat-controlled Senate.

Who Is GINA and Why Is She Now Questioning Our Medical Forms?

By Tashwanda Pinchback and Rebecca Shanlever

Your company asks certain new hires to complete medical questionnaires before they start work. The questionnaire is required only after you make a job offer (but before the new hire starts), and only for certain jobs, so it's permissible under the Americans with Disabilities Act. But a new hire complains about the questionnaire, saying she shouldn't have to provide the requested family medical history. Is she right? Are there any *other* laws that might apply?

The Genetic Information Nondiscrimination Act (GINA) became law four years ago, but many employers are still in the dark about how GINA applies to them and what is required to comply with GINA. By its terms, GINA prohibits employers from making employment decisions based on genetic information, but it also prohibits employers from *requesting, requiring,* or *purchasing* genetic information of employees, even if that information is never used or considered by the employer. (Note: for exceptions to GINA's prohibition against requesting, requiring, or purchasing genetic information, see *A Brave New World: EEOC GINA Regulations With Tips for Employer Compliance*, published in Troutman Sanders' Spring 2011 Employment & the Law Newsletter.) Recent actions by the Equal Employment Opportunity Commission (EEOC), which enforces GINA, reveal that the agency is making GINA a priority and focusing on this second part of the statute – employer requests for genetic information.

GINA defines "genetic information" broadly. Many employers understand that certain information, such as genetic test results and genetic counseling, constitutes genetic information. But what about the fact that heart disease runs in an employee's family? That kind of family medical history is also covered by GINA. The statute defines "genetic information" as: (i) an individual's family medical history; (ii) the results of an individual's or family member's genetic tests; (iii) the fact that an individual or an individual's family member sought or received genetic services; or (iv) genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Recent EEOC Actions

In May, the EEOC settled its first-ever lawsuit involving a GINA claim. In that case, the EEOC alleged that the employer violated GINA when it requested a family medical history in its post-offer medical examination of a temporary employee who had been offered a permanent position. When the employee reported for her medical examination, she was required to fill out a questionnaire and disclose the existence of numerous separately listed disorders in her family medical history. The questionnaire asked about the existence of heart disease, hypertension, cancer, tuberculosis, diabetes, arthritis and "mental disorders" in the employee's family. In a statement following the settlement, EEOC Regional Attorney Barbara Seely announced: "Although GINA has been law since 2009, many employers still do not understand that requesting family medical history, even through a contract medical examiner, violates this law."

A week after settling the first GINA lawsuit, the EEOC filed its first class action under GINA, challenging an employer's policy of requiring medical examinations of all applicants. According to the EEOC's suit, the employer conducted post-offer, pre-employment medical exams of all applicants, and these were repeated annually if the person was hired. As part of this exam, the employer requested family medical history – which, as the lawsuit notes, is a form of protected genetic information. "GINA applies whenever an employer conducts a medical exam," said Elizabeth Grossman, another Regional Attorney with the EEOC.

These GINA lawsuits should not come as a surprise. One of the six national priorities identified by the EEOC's Strategic Enforcement Plan is to address emerging and developing issues in employment law, which includes genetic discrimination. The lawsuits also demonstrate that the mere request for genetic information violates GINA, even if the employer never uses the information. Employers should take a close look at any medical and personnel questionnaires to make sure that they do not request family medical history or other protected genetic information.