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June 2010

What's New!

COBRA Subsidy Program Extended and DOL Model Notices Updated AGAIN!

On April 15, President Obama signed into law the Continuing Extension Act of 2010 (the "Act"), thereby extending for a third time the program that subsidizes continued health care coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and similar state continuation coverage laws for involuntarily terminated employees.

That program provides that certain employees whose employment is involuntarily terminated can continue health coverage under COBRA by paying only 35% of the ordinary COBRA premiums for up to fifteen months. The insurer, the employer or the health plan pays the remaining 65%, which is recovered from the federal government through a credit against payroll tax liabilities or through direct reimbursement.

"DOL has updated the model COBRA notices . . ."

Extension Of The Cobra Subsidy Eligibility Period

As originally enacted, the COBRA subsidy was available to an employee and family members if the employee was involuntarily terminated between September 1, 2008 and December 31, 2009. Two subsequent pieces of legislation extended eligibility for the subsidy, the first for employees who were involuntarily terminated on or before February 28, 2010 and the second for employees who were involuntarily terminated on or before March 31, 2010.

The Act now extends eligibility to cover an employee and family members if the employee is involuntarily terminated on or before May 31, 2010 and is eligible for COBRA continuation coverage as a result. In addition, the Act extends eligibility to cover an employee and family members if the employee is involuntarily terminated between March 2, 1010 and May 31, 2010 following a reduction in hours that occurs between September 1, 2008 and May 31, 2010, if such reduction in hours resulted in a loss of health coverage for the employee.

Provision Of Cobra Notices And Election Forms

To reflect the Act, the Department of Labor (DOL) has updated the model COBRA notices on its COBRA subsidy webpage.

The new model notice is now on our Forms Page and the What's New Page of our website.

The rules of the Act for determing who is qualified are very complicated. As such, we recommend that you just provide it to employees who have been involuntarily terminated since September 1, 2008.

The new rules may even require that you establish a procedure to credit or refund COBRA premium amounts paid by individuals eligible for the subsidy in April 2010 and/or May 2010 who may have paid more than 35% of the COBRA premium for those months. [PE]

Child Labor Law Flyer Enclosed!

President's Report
~Dave Miller~

'Tween A Rock and a Hard Spot!
Compare these Cases -

Justice Department Files Discrimination Complaint

The Justice Department filed a lawsuit alleging that John Jay College engaged in a pattern and practice of discrimination by requiring all non-U.S. citizens to present certain work authorization documents, to the exclusion of other acceptable documents, thereby imposing unnecessary and discriminatory hurdles to employment for work authorized non-U.S. citizens. John Jay College is a New York City public college in the City University of New York (CUNY) system.

The Immigration and Nationality Act (INA) prohibits employers, both private and public, from imposing different or greater employment eligibility verification (I-9) standards on non-citizens as compared to U.S. citizens. Nevertheless, John Jay College imposed different and greater requirements on non-U.S. citizens as compared to applicants and employees who were U.S. citizens.

"Every individual who is authorized to work in this country has the right to know they will be free from discrimination as they look for a job, and that they will be on the same playing field as every other applicant or worker," said Thomas E. Perez, Assistant Attorney General for the Justice Department's Civil Rights Division. [PE]

Owner And Manager Indicted For Hiring Undocumented Workers

A San Diego-area French bakery, along with its owner and a manager, are charged in a 16-count indictment unsealed Wednesday resulting from an investigation by U.S. Immigration and Customs Enforcement (ICE) into allegations the business knowingly hired undocumented workers.

The French Gourmet, Inc, of San Diego, Calif., together with its president and one of the company's managers, are accused in the indictment handed down by a federal grand jury April 15. The indictment alleges the defendants conspired to engage in a pattern or practice of hiring and continuing to employ unauthorized workers, a misdemeanor, in addition to 14 felony counts, including making false statements and shielding undocumented alien employees from detection.

Also named in the indictment are the bakery's owner, Michel Malecot, 52, and a company manager, Richard Kauffman, 51, both of San Diego. The men are charged with 12 felony counts for making false statements and shielding undocumented alien employees working at the bakery from detection. They were arraigned Wednesday. If convicted, Malecot and Kauffman face a maximum of five years in prison and a $250,000 fine on each count.

The indictment also seeks criminal forfeiture of proceeds gained from the corporation's unlawful activities. "Employers have a responsibility for maintaining the integrity of their workforce," said Mike Carney, acting special agent in charge for ICE Office of Investigations in San Diego." [PE]

A civilized society is one which tolerates eccentricity to the point of doubtful sanity.
-Robert Frost, poet (1874-1963)

Recent Developments

Arizona Governor Signs Controversial Immigration Bill into Law.

Less than two years after the enactment of the Legal Arizona Workers Act ("LAWA"), Arizona Governor Jan Brewer has signed into law the Support Our Law Enforcement and Safe Neighborhoods Act.

The Act requires law enforcement officials to attempt to determine the immigration status of any person that they believe to be an alien unlawfully present in the United States. The Governor's decision has thrust Arizona into the spotlight of immigration reform debate.

The controversial statute has attracted both national and international attention since the April 23 signing and has led to daily protests at the Arizona State Capitol in downtown Phoenix. Public figures ranging from Los Angeles Catholic Cardinal Roger Mahony to the Reverend Al Sharpton and Mexican President Felipe Calderon have spoken in opposition. Despite this, polls suggest that 70 percent of Arizona voters favor the law.

Widespread Concerns Regarding Racial Profiling

The most controversial provision of Senate Bill 1070 requires law enforcement officials to make a reasonable attempt to determine the immigration status of any person that they come into contact with if they believe the person may be an alien unlawfully present in the country. Specifically, the statute provides, "where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determinate the immigration status of the person…."

Other controversial provisions in the statute include:

* Prohibiting state, city or county officials from limiting or restricting "the enforcement of federal immigration laws to less than the full extent permitted by federal law." Under the statute, any Arizona resident may sue a public official or agency that adopts or implements a policy that so limits such laws' enforcement. The provision is intended to prevent "sanctuary cities" that adopt policies viewed as protecting undocumented aliens.
* Making it a crime to be an illegal immigrant present in Arizona by creating a state charge for "willful failure to complete or carry an alien-registration document."
* Making it a crime for a person to "conceal, harbor or shield or attempt to conceal, harbor or shield an alien from detection in any place in this state ... if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of the law."
* Allowing a peace officer, without a warrant, to arrest a person if the officer has probable cause to believe the person "to be arrested has committed any public offense that makes the person removable from the United States."
* Requiring a peace officer to remove and either immobilize or impound a vehicle if the officer determines that a person is "transporting or moving or attempting to transport or move" an alien in the furtherance of the illegal presence of an alien in the United States. [PE]

Supreme Court Rules Against Inference of Class Arbitration in "Silent" Contracts.

In the recent Supreme Court case, *Stolt-Nielsen v. AnimalFeeds*, the court held that the Federal Arbitration Act prohibits arbitrators from imposing class arbitration on parties who have not agreed to authorize class arbitration. Justice Alito authored the majority opinion, which was joined by the Chief Justice and Justices Thomas, Kennedy, and Scalia. Justice Ginsburg filed a dissenting opinion that was joined by Justices Stevens and Breyer. Justice Sotomayor did not participate in the case.

> …"MANIFEST DISREGARD" OF THE LAW.

The parties in this case are parties to an international maritime contract that contains an arbitration clause. The contracts are silent as to whether arbitration is permissible on behalf of a class, and the parties submitted that issue to arbitration. A panel of arbitrators decided that the arbitration clause allowed for class arbitration. The District Court vacated the award on the ground that it was made in "manifest disregard" of the law. The 2nd Circuit reversed.

The US Supreme Court held (5-3) that imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act (FAA).

(1) The arbitrators exceeded their powers by imposing their own policy choice instead of identifying and applying a rule of decision derived from the FAA or from maritime or New York law. (2) Imposing class arbitration in this case is inconsistent with the FAA. The Court restated the principles that arbitration "is a matter of consent, not coercion," that "private agreements to arbitrate are enforced according to their terms," and that parties are "generally free to structure their arbitration agreements as they see fit." Based on these principles, "parties may specify **WITH WHOM** they chose to arbitrate." [Emphasis in original] Because the parties stipulated that there was no agreement on class arbitration, the parties cannot be compelled to submit to class arbitration. [PE]

Immigration Law Prompts Union Push

Labor unions are using Arizona's new immigrant trespassing law to bolster their organizing efforts among Hispanic workers. Union representatives say they are seeing a surge in inquiries from Hispanic workers in Arizona worried about the new law and the potential for more police raids and inquiries into their workplaces.

> "THEY WANT SOME PROTECTION TO BE ABLE TO COUNTERACT SOME OF THIS STUFF."

"We are getting more calls," said Scott Washburn, state director of the Service Employees International Union. SEIU has about 4,000 members in Arizona, mostly in the public sector.

Washburn wouldn't provide specific details on any organizing efforts or which sectors SEIU is getting calls from in the wake of Gov. Jan Brewer signing Senate Bill 1070 into law. The measure gives police broad powers to question and arrest illegal immigrants on misdemeanor trespassing charges. Washburn acknowledged that the new law and the anti-immigrant mood in Arizona is increasing workers' interest in unions.

"They want some protection to be able to counteract some of this stuff," he said. Arizona AFL-CIO Director Rebekah Friend said the immigration debate and the law are encouraging Hispanic workers to look at organizing and becoming more involved politically. {PE]

Child Labor Law Flyer Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Out of Country FMLA

Q: ***"Can an employee use FMLA leave for care of a parent out of the country and do we have to include them in bonuses?"***

A: An employee may use family and medical leave to care for a parent outside of the country, assuming that the employee is eligible for FMLA leave (has worked 12 months and 1,250 hours) and the employee is "needed to care" for a parent who has a "serious health condition," as these terms are defined by the FMLA.

FMLA regulations address the issue of medical certifications executed by doctors in countries outside the United States. According to the regulations, in circumstances in which the employee or a family member is visiting in another country or a family member resides in another country, and a serious health condition develops, the employer must accept a medical certification as well as second and third opinions from a healthcare provider who practices in that country. Where a certification by a foreign healthcare provider is in a language other than English, the employee must provide the employer with a written translation of the certification upon request.

The FMLA regulations state that employees on FMLA leave are not entitled to any bonus or incentive payment, whether it is discretionary or nondiscretionary, when the bonus or other payment is based on the achievement of a specified goal, such as hours worked, products sold, or perfect attendance (assuming that the employee has not met the goal due to FMLA leave).

Employers may deny such payment only if employees on an equivalent leave status (non-FMLA leave) are also denied bonus and incentive payments.

However, bonuses that are not premised on the achievement of a goal, such as a holiday bonus given to all employees, may not be denied to an employee because he or she took FMLA leave. [PE]

Dinner for 2 at the *Vintage Press*?
That's right! When a business that you recommend joins Pacific Employers, we treat you to dinner for two at the *Vintage Press*.
Call 733-4256 or 1-800-331-2592.

Sexual Harassment Prevention Training

Visalia Chamber of Commerce and Pacific Employers, will jointly host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on July 28th, registration at 7:30am — Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876 – $25
Certificate – Forms – Guides – Full Breakfast

No-Cost Employment Seminars

The Tulare-Kings Builders Exchange, along with the Small Business Development Center and Pacific Employers host this Free Seminar Series at the Tulare-Kings Builders Exchange on the corner of Lover's Lane and Tulare Avenue in Visalia, CA. RSVP to Pacific Employers at 733-4256 or the SBDC, at 625-3051 or fax your confirmation to 625-3053.

The mid-morning seminars include refreshments and handouts.

2010 Topic Schedule

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 17th, 2010, 10 - 11:30am

♦ **Hiring & Maintaining "At-Will" -** Planning to hire? Putting to work? We discuss maintaining "At-Will" to protect you from the "For-Cause" Trap!
Thursday, July 15th, 2010, 10 - 11:30am

There is No Seminar in August

♦ **Forms & Posters -** as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 16th, 2010, 10 - 11:30am

♦ **Workplace Security will be the topic for our Guest Speaker Seminar -** Annually we bring you a speaker for a timely discussion of labor relations, HR and safety issues of interest to the employer.
Thursday, October 21st, 2010, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 18th, 2010, 10 - 11:30am

There is No Seminar in December

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Child Labor Law Flyer Enclosed!

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ADA Claims - Side Effects of Medication

In Sulima v. Tobyhanna Army Depot et al., the Third Circuit addressed when an employee may bring suit under the Americans with Disabilities Act (ADA) based on conditions caused by medication.

Employee Ed Sulima needed more time than most employees for restroom breaks. How much time you ask? Well, on one day in 2008 he spent approximately two hours in the restroom in one shift! While Mr. Sulima was morbidly obese and suffered from sleep apnea, these conditions did not create his bathroom issues. Instead, the culprit was Mr. Sulima's weight loss medication.

So, are Mr. Sulima's medication-induced gastrointestinal problems a disability under the ADA? It turns out they are not. But more importantly, the side effects from treatment and medication can constitute a disability under the three-prong test utilized by the Court in Sulima:

(1) the treatment is required "in the prudent judgment of the medical profession,"

(2) the treatment is not just an "attractive option," and

(3) that the treatment is not required solely in anticipation of an impairment resulting from the plaintiff's voluntary choices.

In Mr. Sulima's case, his medication was not "required in the prudent judgment of the medical profession" as evidenced by the fact that his doctor took him off the medication when learning of the side effects. [PE]

Federal Drug Testing Guidelines Delayed to Oct 1

The U.S. Department of Health and Human Services ("DHHS") has announced that it will delay implementation of the revisions to the Mandatory Guidelines for Federal Workplace Drug Testing Programs from May 1, 2010, to October 1, 2010.

DOT announced on April 29th that it is still reviewing the comments and that it intends to issue its own rule to coincide with DHHS's new effective date of October 1, 2010.

Proposed Changes

The revisions are numerous. Following are highlights of the proposed changes:

1. Requiring testing for Ecstasy (MDMA). The initial screening cut-off concentration for MDMA will be 500 ng/ml and the confirmatory cut-off concentration will be 250 ng/ml for MDMA, as well as MDA and MDEA (drugs that are chemically similar to Ecstasy);

2. Requiring testing for 6-acetylmorphine (a unique metabolite of heroin, considered to be definitive proof of heroin use);

3. Lowering the initial test cutoff concentration for amphetamines from 1,000 ng/ml to 500 ng/ml, and lower the confirmatory test cutoff concentration from 500 ng/ml to 250 ng/ml; and

4. Lowering the initial test cutoff concentration for cocaine from 300 ng/ml to 150 ng/ml, and lower the confirmatory test cutoff concentration from 150 ng/ml to 100 ng/ml. [PE]

UNLIMITED CONSULTATION?

A benefit of Pacific Employers' Membership is unlimited, direct, phone consultation on labor, safety or personnel questions on the Pacific Employers' Helpline at
(559) 733-4256 or Toll Free (800) 331-2592