Claremont Management Group Presents
Employer Update
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By

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I. TWC – Full response to initial unemployment claim required.

(d) If a reimbursing employer pays a reimbursement to the commission for benefits paid to a claimant that are not in accordance with the final determination or decision under this subtitle, the employer is not entitled to a refund of, or credit for, the amount paid by the employer to the commission unless the employer has complied with the requirements of Section 208.004 with respect to the claimant.

Sec. 208.004. Notification of Adverse Facts Affecting Claim; Waiver

a) A person to whom notice is mailed under Section 208.002 shall notify the commission promptly of any facts known to the person that may:
   1. adversely affect the claimant's right to benefits; or
   2. affect a charge to the person's account.

II. NLRB – Employers Must be Aware of Concerted Action

Employees do not need to belong to a union, or attempt to unionize, to be protected by the NLRB. Any “concerted action” is protected under the law.

The NLRB has been hard on employers regarding employees using social media and public statements over the last few years.

a) Owner of 10 Jimmy Johns sub shops was hammered under these circumstances:*

   Industrial Workers of the World, a union, filed charges claiming that employer engaged in unfair labor practices when it fired 6 of its employees and reprimanded 3 others who were involved in a poster campaign to get the franchisee to provide workers paid sick leave.

An administrative law judge for the NLRB agreed with the union that employer's actions against the employees were unfair. As a result, the ALJ ordered the employer to reinstate the 6 terminated employees with back pay, and rescind all punishments and written warnings issued to the other workers. Ruled: Employees were simply trying to improve the terms and conditions of their employment — which are protected activities.

Employer was also forced to display a posted notice at all of its locations explaining workers rights to:

- form, join or assist a union
- choose representatives to bargain on their behalf
- act together with other employees for their benefit and protection, and
- choose not to engage in any of these protected activities.

It also had to explain its actions to make all the employees responsible for the sick leave posters whole.

***Case:** *MikLin Enterprises, Inc. and Industrial Workers of the World*

b) Protest and Free Lunch to Boot:

Gates & Sons Barbeque of Missouri, a BBQ chain in the Kansas City, MO area, provides the following benefits to its employees:*

- a free lunch valued at between $6 and $10 on the day of an employee's shift
- the ability to make purchases on a "tab" that would be deducted from employees' paychecks, and
- monthly performance bonuses if bonus standards were achieved.

The situation:

- One day last summer, a number of employees at the Main Street location participated in a campaign by Kansas City food workers, which was spurred by local labor organizations like the Workers' Organizing Committee of Kansas City (WOC).
- Between seven and nine employees of Gates & Sons' Main Street location engaged in a one-day strike to protest their wages. Starting wages at the BBQ shop were just above

minimum wage, and the WOC was trying to push food workers' wages to $15 per hour.

- Upon returning to work the day after the strike, Gates & Sons' employees found that their free meal had been taken off the benefits menu.
- When the WOC brought the situation to the NLRB's attention, an administrative law judge for the board found that denying the free meal, along with the manager's comments, were proof that Gates & Sons' employees had been retaliated against for their "concerted activity," which was protected under the National Labor Relations Act.
- The punishment for the employer: The ALJ ruled it had to reinstate the free employee meal benefit and make employees whole for the period during which they were denied the benefit.

See: http://mynlrb.nlrb.gov/link/document.aspx/09031d458178b7e2

III. EEOC – 5th Circuit Case and Wellness Program incentives

a) Employer's Prompt Remedial Action Bars Racial-Harassment Claim*

Reversing a race-based hostile-work-environment jury verdict, the 5th U.S. Circuit Court of Appeals found that an employer's prompt remedial actions were sufficient to defeat the claim because they effectively halted the offending conduct.

The following constituted prompt remedial actions:

- The supervisor's prompt report of Williams-Boldware's complaint to human resources.
- The employer's meeting with Williams-Boldware to discuss her complaint.
- The employer's acquiescence to her request to personally confront her colleague.
- The employer's request for Williams-Boldware's input on an appropriate response.
- The employer's verbal reprimand of the offender.
- The employer's requirement that the co-worker attend diversity training.
- The employer's transfer of Williams-Boldware so she could avoid any contact with her colleague.

***Case:** Williams-Boldware v. Denton Cnty, 5th Cir., No. 13-40044 (Jan. 31, 2014)*

b) Employer sued over wellness program*

The EEOC recently sued a Wisconsin employer, claiming the penalty the employer imposed for non-participation in its program was too significant. The EEOC also determined the wellness requirements were involuntary under the Americans with Disabilities Act.

Watch for collision of ACA, ADA and HIPAA in design of wellness plans. It is important to provide alternatives for participants.

* ***Case:** EEOC v. Orion Energy Systems. See:* *http://www.eeoc.gov/eeoc/newsroom/release/8-20-14.cfm*

In the EEOC case, the employer paid 100% of the health insurance premiums for employees who participated in its "voluntary" wellness program. If the employee chose not to participate, the employee paid 100% of the premiums.
This wellness program only offered one option for participation: the in-office motion machines.

IV. ACA requirements

Under the ACA, health contingent programs can come in two forms: "outcomes based" and "activity-only."

Employers have more latitude in offering incentives for wellness participation and improvement under the health care reform law. The new regulations raise the maximum permissible reward offered in connection with a health-contingent wellness program to 30%. This amount is raised to 50% for programs that seek to reduce tobacco use.

V. Substance Abuse Policy Suggestion

Special Note: Some states have decriminalized or even legalized marijuana. Please note that it is still illegal in Texas and under Federal law. Further, even if it is legalized, like alcoholic beverages, the use of

this drug is still prohibited when it could be present in your system during work hours.

VI. FLSA

Normally not an issue, but spike in compliance audits. Watch for internship ruling. If interns do real work, must be paid.

See: http://www.dol.gov/whd/regs/compliance/whdfs71.htm

VII. Reducing exposure under "Play or Pay"

a) Coverage

- Employers with less than 50 employees, including a calculation of full-time-equivalents ("FTEs") for part time employees, are not subject to the penalty provisions at this time. Each 120 hours a month of part-time work equals one FTE

See:
http://www.nfib.com/Portals/0/PDF/AllUsers/Free%20Rider%20Provision.pdf

- The pundits have criticized this penalty, as providing a disincentive for businesses to exceed 50 employees. This may lead to an increased incentive to outsource jobs outside of the United States.
- A possible plus for small employers is that the Act does provide a small business tax credit to encourage businesses with up to 25 FTE employees to provide health insurance. Average wages must be less than $50,000 for the business to participate.

b) How employers can limit exposure to ACA's "Pay-or-Play" penalties*

1. **Code § 4980H(a) Liability**

The employer fails to offer to all its "full-time employees" (and their dependents) the opportunity to enroll in "minimum essential

coverage" under an "eligible employer-sponsored plan." Under this prong, if an employer fails to make an offer of coverage to its full-time employees, an assessable payment is imposed monthly in an amount equal to $166.67 multiplied by the number of the employer's full-time employees, excluding the first 30.

- or -

2. Code § 4980H(b) Liability

The employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan that, with respect to a full-time employee who qualifies for a premium tax credit or cost-sharing reduction, either is (i) "unaffordable" or (ii) does not provide "minimum value." The amount of the Code § 4980H(b) Liability is capped at the Code § 4980H(a) Liability amount. As a result, an employer that offers group health plan coverage can never be subject to a larger assessable payment than that imposed on a similarly situated employer that does not offer group health plan coverage.

"Employer-provided health insurance coverage is deemed "unaffordable" if the premium required to be paid by the employee for self-only coverage exceeds 9.5% of the employee's household income. Final regulations issued under Code § 4980H offer three safe harbors:

- W-2
- Rate-of-pay
- Federal Poverty Limit

Coverage is deemed to provide "minimum value" if it pays for at least 60% of all plan benefits, without regard to co-pays, deductibles, co-insurance, and employee premium contributions. Final regulations establish rules for determining minimum value which include the use of an on-line calculator.

In order to eliminate exposure to both the Code § 4980H(a) and Code § 4980H(b) penalties, the employer must offer coverage that is both affordable and provides minimum value.

These strategies include the following:

- Reference pricing models
- Major medical plans without inpatient hospital coverage
- Limited network arrangements

*__See:__ http://ebn.benefitnews.com/news/ebn_plan_design_admin/how-employers-can-limit-exposure-to-acas-pay-or-play-penalties-2743497-1.html