Claremont Management Group Presents
Spring Employer Update
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By

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A. OBAMACARE UPDATE:

- Over 2013 and 2014, watch for the following to be implemented under the Act:
    1. Elimination of 28 percent subsidy on the costs for Medicare Part D that employers have received.
    2. Group health plans and insurance carriers may not impose any annual limit. Lifetime limit already in place.
    3. Plans cannot have any pre-existing condition exclusions.
    4. Out-of-pocket (OOP) expenses and deductibles cannot exceed those applicable with the HSA-eligible high-deductible health plans.
    5. Maximum coverage waiting period is 90 days or less.
    6. Individuals who do not enroll in qualifying coverage are subject to an excise tax. They generally pay the greater of a flat dollar amount (2014: $95, 2015: $325, 2016 and beyond: $695) or a percentage of income (2014: one percent, 2015: two percent, 2016 and beyond: 2.5 percent). There is a hardship exemption for those with incomes below a certain level.
    7. Employers with 200 or more full-time employees must automatically enroll all new hires.
- Undetermined: creation of state “health exchanges” to provide health insurance for those who are not covered by an employer or cannot afford their employer’s plan. The hitch here is that while some states already have such exchanges, states may opt not to participate in such exchanges. As part of the Act, covered employers will be required to provide an exchange-related notice to new hires.
- 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 – So this is actually less than the 30 hours

a month we have been hearing in the press. Failure to provide health coverage results in a monthly penalty equal to 1/12 of $2,000 after disregarding the first 30 employees. Premium credit penalty is $3,000 or $2,000 per employee, depending on certain factors. For a detailed discussion of this provision from the NFIB, 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. RECESS APPOINTMENTS TO THE NLRB RULED UNCONSTITUTIONAL:

January 25, 2013 – US Circuit Court for DC ruled that Obama's three "recess appointments" to the NLRB are unconstitutional. While this will certainly be appealed to the US Supreme Court, this is a significant ruling for employers.

- The National Labor Relations Board ("NLRB") is an independent Federal agency that regulates the relationship between workers and employers with regard to union activities.
- If this decision is not reversed by the US Supreme Court, it could lead to the vacating of approximately 100 decisions made by the NLRB over the last year.
- Many small businesses do not regard the NLRB as a key concern. Unionization is at its lowest level in about 50 years in the United States.
- Unions often target large businesses since they obtain more members and dues from organizing a 500 employee plant than they would from organizing a 25 employee plant.
- The reason the Court decision is so significant to small business is that these Board members appointed in January 2012 are decidedly pro-union.

- I note below some special concerns for small business:

  - While unions have lost many members:
    - Energized by the recent national elections
    - Rulings of the NLRB over the last year.

  - Small businesses are not immune from unionization. An example:
    - Wholesale distribution company - 50 total employees
    - Dozen truck drivers
    - Dozen warehouse workers,
    - Two possible bargaining units
    - Employer lost one unit election and won the other.
    - Union involved filed 10 Unfair Labor Practice ("ULP") charges with NLRF against the employer.
    - NLRB ruled in favor of the union on most of the ULPs
    - Employer was facing another election in the unit which it had won. However, no union at the company today.
    - Cost was about two years of disruption and about $50,000 in legal fees and settlement costs.

- 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. Example:
  - An employee posts on their Facebook page that they feel their employer is unfair and pays poorly? This employee is acting alone and can generally be disciplined for making inappropriate public comments about their employer.
  - Suppose now that two or three fellow employees respond to the posts and agree with the first employee? This employee is now acting "in concert" with other employees regarding pay and other conditions of employment and may file a complaint with the NLRB if they are disciplined.

- Employment at Will Disclaimers in Employee Handbooks:

  - Incredible as it may seem, the NLRB has attacked two employers for using fairly standard Employment at Will disclaimers in their employee handbooks.

  - The NLRB alleged that such language might chill employees' NLRA Section 7 rights to unionize.

- Issue seems to be a statement that only a writing signed by the President of the employer could counter the “at-will” status of the employer. This seems to make sense and a union contract would have to be signed by the President.
- This type of statement may pass the current NLRB approach, however, if the current NLRB is changed due to the UC Circuit Court ruling, this could be off the table in any event:

This is not a contract of employment. Although we hope that your employment relationship with us will be long-term, either you or we may terminate this relationship at any time, for any reason, with or without cause or notice, as we are an at-will employer. Please understand that no supervisor, manager, or representative of the company other than the President has the authority to enter into any employment contracts or to make any promises or commitments contrary to this Handbook. Further, any employment contract or modification of this handbook entered into by us shall not be enforceable unless it is in writing and signed by the President.