



# Employment Law Changes— Working Today for a Better Tomorrow

Presented By:

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# Major Employment Law Changes

- Patient Protection and Affordable Healthcare Act as amended by the Health Care and Education Reconciliation Act of 2010
- Florida Unemployment Tax Bill signed March 2, 2010
- EEOC and Jury Verdict Trends
- Fair Credit Reporting Act Civil Penalties
- FLSA Retaliation
- National Guard Re-Employment after Service



# Patient Protection and Affordable Health Care Act

- Key Question: Is your plan a grandfathered plan (in effect with individuals enrolled prior to March 23, 2010) or is coverage maintained through one or more collective bargaining agreements that was ratified before March 23, 2010?
- If so, certain provisions will not apply to your plan.
- Maintaining grandfathered status will be beneficial and guidance is expected to be issued by the DOL, HHS and the Treasury



# Patient Protection and Affordable Health Care Act

- The Act states that grandfathered status will NOT change when:
  - Participants renew their coverage after March 23, 2010 (such as during open enrollment)
  - Participants can enroll dependents, including those who were not covered prior to March 23, 2010
  - New employees and dependents may be enrolled
  - Coverage amendments made to conform to collectively bargained plan to the new requirements (probably same treatment for non-bargained plans)
- Status might change if you do anything other than above (such as changing service providers, etc.)



# Grandfathered Plan Requirements

- First plan year starting on or after September 23, 2010:
- Must provide coverage for non-dependent children up to age 26 if child is not eligible for coverage under another employer-sponsored plan.
- Prohibits preexisting condition exclusions for all under age of 19
- Cannot rescind coverage for a participant except for fraud or intentional misrepresentation
- Prohibits lifetime limits and restricts annual limits on the value of “essential benefits” for any participant in the plan



# Non-Grandfathered Plans

- First plan year starting on or after September 23, 2010:
- Prohibits determining eligibility for plan based on total wages of the employee if it has effect of discriminating in favor of higher-wage employees
- Essential Benefits and Cost Sharing



# Grandfathered Plan Requirements

- For plan years starting on or after January 1, 2014:
- Must provide coverage for non-dependent children up to age 26 regardless of whether child is eligible for coverage under another employer-sponsored plan.
- Prohibits preexisting condition exclusions for all enrollees



# Non-Grandfathered Plans

- For plan years starting on or after January 1, 2014:
- Cost Sharing Limits
  - The cost sharing for self-only coverage or other levels of coverage for all plans cannot exceed amount set by IRS related to HSA's
  - Currently the max is \$5,950 for self-only coverage and \$11,900 for family coverage.
  - After 2014, the maximum will be the amount from 2014 plus a premium adjustment percentage calculated by the Secretary.
- Capped Deductibles
  - \$2,000 for individuals; \$4,000 for families
  - Exception allows higher deductible policies for people under age 30



# All Plans beginning on or after 1/1/2014

- No waiting period that exceeds 90 days
- No pre-existing condition exclusions can be used to deny coverage
- Prohibits annual Limits



# Other Changes Approaching

- Beginning 2011, additional reporting on W-2 Forms
- Employers required to report the value of employees' health benefits on W-2 Forms



# Flexible Spending Account Limits

- Beginning in 2011, Excludes over-the-counter medication without a doctor's prescription from reimbursement under FSA's and health savings accounts (HSA).
- Penalties on non-medical HSA distributions increased to 20%.
- Beginning in 2013, caps contributions at \$2,500



# Automatic Enrollment

- Employers with more than 200 FT employees must enroll employees into health plans automatically, allowing for an opt-out.
- Law does not provide a specific effective date.





# Health Care Exchanges

- States to create Small Business Health Options Program (SHOP) exchanges no later than January 1, 2014 where providers compete for customers on equal terms.
- Exchanges designed to assist small employers in enrolling employees in qualified health plans.
- Beginning 2017, states may allow large employers to use exchanges to offer coverage.
- Small = average of at least 1 employee but not more than 100 on the business days during preceding calendar year that employees at least 1 employee on first day of plan year
- Large = average of at least 101 employees
- States can opt to make 50 employees the cut-off for plan years beginning before January 1, 2016.

# “Large” Employer Penalty for Not Offering Coverage

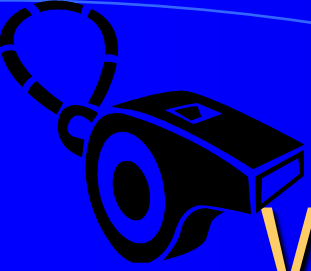
- Beginning in 2014:
  - Employers with more than 50 Full-Time employees during preceding calendar year that do not offer coverage must pay penalty of 1/12 of \$2,000 per FT equivalent employee per month for all those FT employees in excess of 30 if at least 1 receives a federal government subsidy and purchases coverage in an exchange.
  - FT employee = 30 hours
  - 1/12 of \$2,000 is about \$166.67 per month per employee



# “Large” Employer Penalty for Unaffordable Coverage

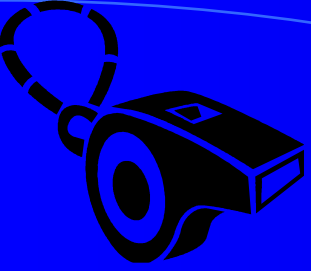
- If employee opts out of employer-provided coverage because the coverage is unaffordable, employer must pay a penalty of 1/12 of \$3,000 for each FT employee per month who receives a government subsidy and purchases coverage through an exchange
- “Large” employer = 50 or more
- 1/12 of \$3,000 is \$250 per month for each employee receiving a subsidy





# Whistle-Blower Protections

- Section 1558 amends the FLSA to prohibit employers from retaliating against employees who apply for health benefit subsidies or receive tax credits under the PPACA.
- Also protects employees who provide information or testimony about possible employer violations of Title I of PPACA (which establishes new requirements for businesses and individuals when purchasing health insurance) and to those who object or refuse to participate in practices or policies they believe violate the statute.



# Whistle-Blower Protections

- Provides explicit right to jury trial.
- Employees file complaint with OSHA within 180 days of becoming aware of retaliatory actions. If OSHA does not resolve it within 210 days or the DOL fails to act within 90 days of receiving written determination from OSHA about possible violations, worker can go to federal court and request jury trial.
- Remedies for employee: reinstatement, back pay with interest, special damages, attorney's fees, litigation costs and expert witness fees. Special damages can include compensation for pain, suffering mental anguish and career damage.

# Tax Credits for Small Employers

Small employers (business or tax-exempt) that provide health insurance coverage, may qualify for **Small Business Health Care Tax Credit**. A governmental employer is not a qualified employer unless it is an organization described in Code section 501(c) that is exempt from tax under Code section 501(a).

1. Determine the total number of employees (not counting owners or family members):

a. Calculate Full-time employees:

\_\_\_\_(enter # of employees who work at least 40 hrs/wk)

+ \_\_\_\_ Full-time equivalent of part-time employees:

(Calculate FTE by dividing total annual hours of PT employees by 2080)

= \_\_\_\_ total employees

b. If total # employees is  $\leq 25$  GO TO STEP 2

# Tax Credits—3 Simple Steps

2. Calculate the average annual wages of employees (not counting owners or family members):
  - a. \_\_\_\_\_ total annual wages paid to employees
  - b.  $\div$  \_\_\_\_\_ (divide it by # employees from STEP 1)
  - c. = \_\_\_\_\_ average wages
  
3. If the result is  $< \$50,000$ , AND you pay at least  $\frac{1}{2}$  the insurance premiums for employees at the single (employee-only) coverage rate, then you may be able to claim the Small Business Health Care Tax Credit.

Tax credits for tax years 2010-2013 are capped at 35% of premiums paid (or 25% for tax-exempt organizations)

# Notices to Employees

- Act amended FLSA to require written notice to current employees no later than 3/1/2013 and to all new hires after that date.
- Must describe the Exchange and how to contact
- Must advise that if total allowed cost of benefit under employer plan is less than 60%, employee may be eligible for tax credit and cost sharing reduction if they purchase plan through Exchange
- Must advise that if employee purchases through Exchange, he/she will lose employer contribution

# Wellness Program Incentives

- Beginning 2014, employers can offer premium discounts and/or financial incentives for up to 30% of the cost of employee-only coverage to individuals who satisfy a health standard
  - Participants must have opportunity to qualify for reward at least 1 time per year
  - Must disclose terms of program and possibility of waiver of the health standard for those who cannot meet or attempt to meet it because it would be medically inadvisable to do so
  - Program must be reasonably designed to promote health or prevent disease and cannot be overly burdensome
- HHS/DOL/Treasury Secretaries have authority to allow incentives up to 50%.
- Grants available for up to 5 years to “small” employers (<100 employees who more more than 25 hrs/wk) that establish wellness programs not in place before passage of Act.

# Wellness Program Incentives

- Employers can continue any current program that began prior to enactment of law OR
- If the reward/premium discount for participation in program is not based on employee satisfying a health standard, the wellness program does not violate the law if program does any of the following:
  - reimbursement to fitness centers;
  - diagnostic testing that rewards participation and not outcome
  - Encourages preventive care by waiver of co-pay or deductible for services related to the care
  - Reimburses for smoking cessation programs without regard to outcome
  - Rewards attendance at periodic health education seminars

# Tax on High Value Plans

- Beginning in 2018
- 40% excise tax on insurance companies and plan administrators for group health coverage that exceeds a threshold of \$10,200 for single coverage and \$27,500 for families, not counting stand-alone dental/vision.
- Thresholds for retirees over 55 and plans that cover employees in high-risk professions: \$11,850 single and \$30,950 family.
- Tax applies to amount of the premium that is in excess of the threshold.
- Beginning 2019, the thresholds will be indexed to the rate of general inflation, plus 1 percentage point.

# Long-Term Care Enrollment Procedures

- Law creates national social insurance program by providing limited community living assistance coverage for active employees
- All premium costs can be charged to employees
- Beginning 1/1/2011, employers must have in place automatic enrollment procedures that allow workers to opt out or procedures that allow workers to initiate enrollment.

# FLSA—Nursing Mothers

- Must furnish “reasonable break time for an employee to express breast milk for her nursing child” for 1 year after child’s birth.
- Employer must provide place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public
- Do not need to pay employees who take this break, which is different from other breaks of less than 20 minutes that must be paid under the FLSA
- Employers with less than 50 employees are exempt IF it would “impose an undue hardship causing the employer significant difficulty or expense when considered in relation to the size financial resources, nature or structure of the employer’s business.

# Act Challenged

- Florida, South Carolina, Nebraska, Texas, Utah, Louisiana, Alabama, Michigan, Colorado, Pennsylvania, Washington, Idaho, and South Dakota sued HHS, DOL, and Dept. of Treasury
- Encroachment of liberty interests and state sovereignty, constitutional violations.
- Asks for declaratory judgment and injunctive relief.

# Unemployment Tax Bill

- Governor Crist signed on March 2, 2010
- Suspended scheduled rate hikes in unemployment compensation taxes
- Reduces taxable wage base from \$8,500 to \$7,000 for 2010 and 2011
- In 2012, wage base returns to \$8,500
- In 2015, wage base sunsets back to \$7,000, unless State has outstanding loan balances with Federal Government.



# EEOC Trends

- Total Charges filed decreased by 2.2% from 2008 to 2009.
- First decrease in total charges since 2005 (5% decrease).
- Most common filed charges as of 2008:
  - Race/Retaliation tied at 36% each of all charges
  - Sex (30%)
  - Disability increased by 10% since 2008



# Jury Verdict Trends

- Median verdict for all employment claims rose 60% in 2008 from \$204,000 to \$326,640
- Verdicts based on discrimination claims rose 16% from \$208,000 to \$241,119
- Reported Medians:
  - Retaliation \$225,000
  - Wrongful Termination \$201,500
  - Whistleblower \$200,550
  - Discrimination \$200,000
- Sex/Race most common
- Age/disability highest verdicts
- Government Entities were most often the Defendant from 2002-2008 (43% of cases), then service/retail (41%)



Source: Jury Verdict Research, “Employment Practice Liability: Jury Award Trends & Statistics 2009 Ed.”

# Fair Credit Reporting Act

- When Consumer Reporting Agency handles your background screening must comply with FCRA notice provisions.
- FTC settled to claims recently when employer rejected job applicants without providing proper notices under FCRA.
- \$53,000 in civil penalties for one employer; \$24,000 for the other



# FLSA Retaliation



- Does complaint have to be in writing to be “protected activity”?

# FLSA Retaliation



- Does complaint have to be in writing to be “protected activity”?
- US Supreme Court will review.
- 3/22/2010 they accepted review of case from 7<sup>th</sup> Circuit holding verbal complaint is not “filing a complaint” under the FLSA.
- Important because 11<sup>th</sup> Circuit has ruled verbal complaints are protected

# National Guard Re- Employment



- Fla. Stat. 250.482 became effective 7/1/2009
- Prohibits discharge, reprimand or penalty b/c of absence by reason of state active duty.
- Prohibits discharge within 1 year, except for cause



# Thank you!

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