VOLUME LIX, NO. 2 MAY 2009

THE KULLMAN FIRM

A PROFESSIONAL LAW CORPORATION

CLIENT NEWSLETTER

Published as a service to clients and friends of The Kullman Firm, this newsletter discusses recent labor relations laws, regulations, policies, practices, and employment cases particularly applicable to the labor and employment arena.

New Developments

Swine Flu Precautions in the Workplace

Is your business or organization prepared to deal effectively with the swine flu if the outbreak gets worse or if it returns in the traditional flu season, which is being predicted? "No" is the correct answer, if you're in the majority of businesses and organizations.

For now, with the outbreak causing relatively little business disruption at the time of this Newsletter's publication, you should be "stabilizing" your workplace in order to comply with requirements under the Occupational Safety and Health Act (OSH Act). Consider, for example, doing at least these four things: (1) distribute liberally bottles of hand sanitizer in your facilities as well as to workers, like outside salespersons, who work away from your facilities; (2) encourage workers to wash their hands frequently, especially after lunch or meetings when they may have had hand contact with other individuals; (3) encourage employees to wipe down, with an appropriate disinfectant (which you should consider providing) various work surfaces, telephones, computer equipment and the like; and (4) place tissues in areas of frequent foot traffic, and encourage employees to grab tissues and sneeze into them (as opposed to in their hands or in the air generally). Obviously, a different or even more aggressive approach may be mandated, depending on your industry, work environment and geographic location.

For workers who "get" the flu, requiring them to remain out of the workplace (on sick leave or a similar absence) is not only wise from an "overall workforce health standpoint" but also perhaps required (depending on the severity of the flu) by the OSH Act, which contains a General Duty clause that puts the burden on employers to provide a workplace free from recognized hazards that are likely to result in death or serious physical harm. In addition to the OSH Act, be sure to comply with any Family and Medical Leave Act (FMLA) requirements in connection with worker absences; do not discriminate against Mexican job applicants (lest you invite a national origin discrimination claim) just because the swine flu originated there; do not violate employee privacy rights in the event that any worker has a medical diagnosis that should remain confidential (and not be "broadcast" to co-workers); etc. In short, labor- and employment-related laws continue to apply to the workplace, and the swine flu outbreak likely will not provide a valid excuse for any violation of laws.

Continued on page 2

A Trusted Resource in Labor and Employment Law.

IN THIS ISSUE:

Swine Flu

Immigration

ERISA Preemption

Continued from page 1

For additional information, visit www.pandemicflu.gov, www.cdc.gov/Partners/Business, and www.osha.gov/Publications/influenza_pandemic.html. Also, do whatever business planning is necessary in the event that this flu outbreak gets worse, and consider using this outbreak as a "test" to see if you have an appropriate plan in place in the event of a pandemic—a much worse one—some time in the years ahead.

Department of Homeland Security: Workforce Enforcement Strategy

On April 30, 2009, the Department of Homeland Security (DHS) issued new guidelines to Immigration and Customs Enforcement (ICE) regarding the focus of efforts to reduce employment of illegal workers. In the guidelines, DHS states that it has a critical responsibility to reduce the demand for illegal employment and the new guidelines demonstrate a renewed focus on illegal workers and employers who "cultivate illegal workplaces by breaking the country's laws and knowingly hire illegal workers." The new guidelines mark a significant shift in worksite enforcement strategy by changing the primary focus of worksite enforcement actions undertaken over the past few years. ICE will now prioritize criminal and civil prosecution of employers as opposed to focusing primarily on large-scale arrests of illegal workers.

Although the guidance issued by DHS reflects a continued commitment to targeting criminal aliens, it dramatically shifts the focus more towards criminal and civil prosecution of employers found to have knowingly hired illegal workers. DHS suggests this change in priority will better target the "root cause" of illegal immigration; i.e., employers who provide jobs for illegal workers. DHS notes that of the approximately 6,000 arrests made in 2008 as part of worksite enforcement efforts, only 135 were employers. ICE will continue to arrest and process for removal any illegal workers who are located during worksite enforcement activities, however, under the new guidelines, they will only do so after they have obtained indictments, criminal arrest or search warrants, or a commitment from a U.S. Attorney's Office to prosecute the targeted employer.

In addition, during worksite enforcement actions, ICE will look for evidence of criminal conduct including trafficking, smuggling, harboring, visa fraud, ID fraud, and money laundering. To penalize employers further for violations and to deter illegal employment, ICE will also reemphasize the use of civil fines and debarment from federal contracts. In this regard, the guidelines indicate ICE "will use all available civil and administrative tools" in order to combat illegal employment and new administrative civil penalty assessments will be developed.

Other aspects of ICE's shifted focus will include looking for evidence of mistreatment of workers. Additionally, the existing humanitarian guidelines will be extended to worksite enforcement actions that involve as few as 25 illegal workers. Previously, the humanitarian guidelines only applied when at least 150 illegal workers were involved. This extension is likely in response to numerous human rights groups' concerns that ICE's enforcement procedures at smaller-scale worksite enforcement actions often ignored, among other things, the fact some detainees were the sole caregivers for small children.

Because the guidelines signal a shift in enforcement focus, employers should take all possible precautions to verify the status of their workers and should be aware that worksite enforcement actions can be instigated based on information from a variety of sources, including reports from current or former employees, unions, the public, and even other law enforcement agencies. Although investigations may be initiated for these variety of reasons, the DHS website indicates that cases involving national security considerations or which implicate public safety will take top priority, as will concerns over alleged worker exploitation that places employee welfare at risk.

If the guidelines themselves are not indication enough that ICE will address illegal immigration through a more focused attempt to crackdown on employers who knowingly hire illegal workers, the Fact Sheet posted on DHS's website regarding the new worksite enforcement strategy touts the

Continued on page 3

Continued from page 2

fact that Secretary Napolitano signed into law one of the most stringent employer sanctions laws in the country when she served as Governor of Arizona. In addition, the DHS website notes that in 2008, worksite enforcement efforts had resulted in several convictions of company executives and human resource managers who are now serving prison sentences ranging from several months to several years. Thus, whereas prior enforcement actions focused on the arrest of illegal workers, employers should take seriously the fact that ICE will now treat those arrests as part of a more significant effort to build criminal and civil cases against employers.

If you have any questions regarding the new DHS guidelines and ICE's new worksite enforcement strategy, please contact the Kullman attorney with whom you regularly work.

Benefits

"CHIPRA" Provides New State Insurance Subsidy and Special Enrollment Rights for Low-Income Families

On February 4, 2009, President Obama signed the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), which extends and expands the State Children's Health Insurance Program (SCHIP). Effective April 1, 2009, this law allows states to subsidize medical insurance premiums for certain low-income children. The Act also places significant new obligations on group health plan sponsors, including the administration of new HIPAA special enrollment rights, new notice and disclosure requirements, and civil penalties for non-compliance with the Act.

State Premium Subsidy.

Beginning April 1, 2009, CHIPRA allows states to begin subsidizing group health plan premiums for eligible employees who want to switch from individual-only coverage to coverage for SCHIP or Medicaid-eligible dependents. To qualify for the subsidy, dependents must qualify for coverage under the employer's group plan and either SCHIP or Medicaid. However, states may only subsidize qualified employer-sponsored coverage. This includes group health plans for which the employer contributes at least 40% of the cost of coverage but excludes health flexible spending accounts and high deductible health plans.

Generally, the amount of the subsidy will be the difference between the employee's contribution for employee-only coverage and the employee's contribution for coverage for the employee and the child. Although the Act allows states to provide the subsidy either as a reimbursement to the employee or a direct payment to the employer, the Act also allows an employer to opt-out of receiving the subsidy payment from the state. In that event, the state will pay the subsidy to the employee directly, and the employee's premium may be paid through a salary reduction arrangement.

Special Enrollment Rights.

Also beginning April 1, 2009, group health plans must permit an employee (or dependent) who is eligible, but not yet enrolled for coverage, to enroll in an employer plan without waiting for an open enrollment period if: (1) the employee or dependent loses Medicaid or SCHIP coverage due to loss of eligibility; or (2) becomes eligible for a Medicaid or SCHIP premium subsidy. In either case, the employee must notify the group health plan within 60 days of the event. Importantly, this 60-day special enrollment window differs from the 30-day window to request coverage because of a special enrollment event under HIPAA (loss of other coverage or new dependent). Therefore, employers should review health and cafeteria plan documents to determine if they must be amended to permit this special enrollment right.

Future Requirements.

Although CHIPRA's state premium subsidy and special enrollment rights are effective April 1, 2009, the Act also imposes disclosure and notice requirements which will become effective at a later date. These future requirements are explained below.

Continued on page 4

Continued from page 3

Disclosures To States.

Upon request, plans will have to disclose plan information relating to plan eligibility, benefits, premiums, and costs sharing to states providing premium assistance. This information will help these states determine the cost-effectiveness of providing premium assistance to eligible beneficiaries. However, the Departments of Labor (DOL) and Health and Human Services (HHS) have not yet provided plan administrators with model disclosure forms, and states cannot request plan information until the first plan year after the date on which these model forms are issued.

Employee Notice Requirements.

An employer maintaining a group health plan in a state providing premium assistance will also need to provide written notice to employees of their potential eligibility for the new subsidy. These notices will be required when an employee becomes eligible for enrollment under the plan, but may be provided with open enrollment materials or in the summary plan description. However, like the state disclosure requirement, plans need not distribute these notices until the first plan year after the date on which the DOL and HHS issue the model employee notices (which the Act requires by February 4, 2010).

Civil Penalties For Non-Compliance.

Each failure to comply with the notice and disclosure requirements of the Act subjects employers to a penalty of up to $100.00 per day, which applies to each violation per participant or beneficiary.

Supreme Court Rules That Plan Documents Control Distributions to Ex-Spouses

In *Kennedy v. Dupont Savings and Investment Plan*, the U.S. Supreme Court recently clarified how plan sponsors should decide to distribute benefits to divorced employees and their estates. The case resolved conflicts in the lower courts over spousal rights by holding that even if an ex-spouse waives his or her rights to plan benefits in a state divorce decree, the plan administrator may rely on plan documents, such as beneficiary designation forms, when deciding whether the ex-spouse is entitled to benefits. Since the state divorce decree was not a qualified domestic relations order (QDRO), the plan administrator need only "look at the plan documents and records conforming to them" when distributing funds.

In this case, William Kennedy, a Dupont employee, designated his wife Liv as his plan benefit death beneficiary without naming any contingent beneficiaries. When the couple divorced, their divorce decree unambiguously divested Liv of any rights to William's benefits, but William never removed his ex-spouse as the designated plan beneficiary. After William's death, his daughter and executrix, Kari Kennedy, demanded that the plan turn over the funds to the estate, but upon reviewing the plan documents, the plan administrator determined that Liv remained the designated beneficiary and paid her approximately $400,000.

William's estate sued, claiming that because Liv had waived her right to the funds in the divorce decree, the plan had violated ERISA by paying Liv. The estate eventually lost in the U.S. Fifth Circuit, which ruled that Liv never waived her right to William's funds because the divorce decree was not a QDRO, and ERISA otherwise prohibited a diversion (or "alienation") of benefits due. This ruling conflicted with other circuits, however, which held that an ex-spouse could waive ERISA benefits in a divorce decree, even though such waivers were not QDROs.

The Supreme Court agreed that Liv was the proper beneficiary, holding that the plan had not violated ERISA by relying on William's beneficiary designation instead of the divorce decree. The Court clarified that an ex-spouse could waive his or her entitlement to ERISA benefits in a divorce decree since such a waiver was not an illegal alienation or assignment but also ruled that the plan administrator was not obligated to honor Liv's waiver because the plan documents clearly stated that Liv, not the estate, was William's beneficiary. According to the Court, "the plan administrator did its statutory ERISA duty by paying the benefits to Liv in conformity with the plan documents."

Continued on page 5

Continued from page 4

This ruling should give solace to plan administrators who, according to the Kennedy Court, need only apply "the directives of the plan documents" when paying out benefits. That may not be the end of the story for all beneficiaries, however, as the Court left open for another day the issue of whether the estate could have sued to recover the benefits after Liv received them. Since under prior rulings, a contractual agreement to forfeit funds (like a divorce decree) may be enforceable after the funds are distributed--ex-spouses who receive plan distributions may not always get to keep them.

REMINDER: The Firm is hosting a one-day labor and employment law conference in New Orleans (May 28). Information about registration may be accessed at: http://www.kullmanlaw.com/seminars.asp

---

A Trusted Resource in Labor and Employment Law.

1600 Energy Centre, 1100 Poydras Street / New Orleans, LA 70163 / 504.524.4162
Suite A, 4605 Bluebonnet Boulevard / Baton Rouge, LA 70809 / 225.906.4250
Suite 340, 600 University Park Place / Birmingham, AL 35209 / 205.871.5858
1100 Riverview Plaza, 63 S. Royal Street / Mobile, AL 36602 / 251.432.1811
Suite 704, Court Square Towers, 200 6th Street North / Columbus, MS 39701 / 662.244.8824
Suite 120, 1640 Lelia Drive / Jackson, MS 39216 / 601.366.2990

Visit us online at www.kullmanlaw.com

This publication is provided by The Kullman Firm as a service to clients and friends of the Firm.
The information contained in this publication should not be construed as legal advice.