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Foster Swift Employment, Labor & Benefits Group

What's Inside:

Health Care Reform/Cafeteria Plan Amendments Required by December 31, 2010

by: Sherry A. Stein

The Patient Protection and Affordability Care Act as amended made several changes to cafeteria plans. In most cases, these changes will require the adoption of an amendment to the cafeteria plan by December 31, 2010. These changes are summarized below.

Health Care Reform/Summary of Cafeteria Plan Changes		
Title	**Summary**	**Effective Date**
Exclusion from gross income of employer-provided health coverage for employee's child	An employee's gross income does not include the value of health coverage for the employee's child who has not reached age 27 at any time during the taxable year. The child is not required to be a "dependent" for the exclusion to apply, and therefore does not have to meet the residency, support and other tests for a "dependent".	March 30, 2010
Mid-year change in status election	Employees may amend a salary reduction election to make pretax contributions for health benefits (including health insurance premiums and health FSA benefits) for children under age 27 if the cafeteria plan is amended by December 31, 2010.	March 30, 2010
Dependent health coverage until child reaches age 26	Group health plans that offer dependent coverage must provide coverage for a dependent child until age 26, regardless of student or marital status.	Plan years beginning after September 23, 2010 (January 1, 2011 for calendar year plans)
Over-the-counter drugs are not eligible medical expenses	Over-the-counter drugs are not eligible for reimbursement through a health FSA or HRA, unless prescribed by a physician.	Tax years beginning after December 31, 2010 (January 1, 2011 for calendar year taxpayers)

Please contact your Foster Swift employee benefits counsel if you want an amendment prepared for your cafeteria plan.

New Green Cards Issued By USCIS

by: Samuel J. Frederick

Effective May 11, 2010, the U.S. Citizenship and Immigration Services (USCIS) began issuing a new, redesigned Permanent Resident Card, commonly known as the "Green Card." The new Green Card incorporates several new security features to catch and deter immigration fraud. The new card utilizes state-of-the-art technology to prevent counterfeiting, obstruct tampering, and facilitate a quick and accurate authentication of the card.

The new features on the redesigned Green Card include optical variable ink, embedded radio frequency identification device, a laser engraved fingerprint and a unique background design. The new card features will store biometrics for quick and reliable identification of the card holder. The radio frequency identifier will also allow Customs and Border Protection officers at ports of entry to read the card from a distance and compare it immediately to file data. The enhanced features will better serve employers, law enforcement and immigrants, all of whom look to the Green Card as definitive proof of authorization to live and work in the United States.

The redesigned Green Card, contrary to its past, will now actually be colored green. Some previous editions were pink – despite the card's nickname. The new cards will be issued by USCIS to new applicants and individuals applying for Green Card renewals.

If you have any questions regarding the new Green Card or its impact on workplace employment verification, please visit the USCIS website at www.uscis.gov or contact your primary Foster Swift attorney.

GINA Law - Practical Tips For Employers

by: Sheralee S. Hurwitz

Do you need a written Handbook policy about GINA? How does GINA affect your wellness program?

GINA applies to employers with 15 or more employees, and interim regulations are now in effect for employers and health insurers. GINA prohibits discrimination by health insurers and employers based on any individual's "genetic information." The scope of the term "genetic information" includes the results of genetic tests to determine whether someone is at increased risk of acquiring a condition in the future, as well as an individual's family medical history. So, genetic information protected by GINA includes information about an applicant, employee or family member, family medical history in general and requests for or receipt of genetic services by applicants, employees or their family members.

The employment-related provisions of GINA are similar to other anti-discrimination laws. Genetic information cannot be a factor in employer decisions about hiring, termination or referral or in other decisions regarding compensation, terms, conditions, or privileges of employment. Also, retaliation for opposing an act or practice made unlawful by GINA is prohibited. Further, employers may not:

- request, require or purchase genetic information about an employee or an employee's family member; or

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- except as allowed by GINA, use such information to:
  - satisfy certification requirements of the Family Medical Leave laws,
  - monitor the biological effects of toxic substances in the work place,
  - or under certain other conditions specifically allowed by GINA.

In those circumstances where genetic information is maintained, the information must be kept on separate forms and separate medical files. The information must be treated as confidential medical records and not disclosed, except in certain limited situations.

Written Policy. GINA does not require that employers provide a written GINA policy statement to their employees. Many employers may opt only to include "genetic information" in the list of protected classifications in their Equal Employment Opportunity statement. Certain other types of employers may wish to implement a brief written GINA policy. A manufacturing or laboratory employer, for example, may deal with GINA-type information frequently because of the need to monitor potential safety hazards. A written policy statement will make clear what is required and permitted with regard to obtaining and maintaining that information. For example, inquiries regarding fitness-for-duty testing or reasonable accommodations should not include questions about family history. But, employees still must provide the minimal information necessary to confirm the need for FMLA leave for caregiver purposes. Additionally, all employees should be sensitive to the scope of day-to-day discussions and avoid discussion of an employee's individual or family history.

Health Assessment Information. Employers also should be aware of the GINA provisions that prohibit collection of genetic information by health insurers and health plans, including as part of an employer's wellness program or insurance enrollment requirements. GINA prohibits group health plans from restricting enrollment, imposing pre-existing condition exclusions, and adjusting premiums based on genetic information or genetic services. GINA also prevents group health plans and insurance companies from requesting or requiring that an individual take a genetic test. Further, under GINA, no rewards or penalties may be offered in conjunction with a health risk assessment (HRA) that requests genetic information, including family medical history, even if the request is made after the enrollment. Accordingly, employers should review all wellness and disease management plans to determine how HRAs are used and what information is requested to eliminate any questions or programs that might violate GINA.

Please contact your Foster Swift ELB group attorney to discuss any GINA questions you may have.

Look Who's Talking at Foster Swift

On June 10, 2010, Johanna Novak spoke to hospital representatives at the Upper Peninsula HR Health Focus regarding health care reform. Please contact Johanna if you are looking for a speaker on this topic for your upcoming event.

Federal Health Care Reform Includes New Whistle Blower Protections

by: Cole M. Young

It is not surprising that many people have not read the Patient Protection and Affordable Care Act ("PPACA") in its entirety. Instead, the media and special interest groups have focused on only a handful of hot-button issues. Unfortunately, some very expansive legislation that is contained in the Act is receiving very little attention. One provision in particular, could have devastating consequences on employers.

Section 1558 of PPACA amends the Fair Labor Standards Act by prohibiting discrimination against an employee who provided, caused to be provided, or is about to provide to the employer, federal government or state attorney general, information relating to any violation of Title I of the Act. PPACA further prohibits discrimination against employees who object to or refuse to participate in a violation of Title I. Title I is exceptionally broad and contains, among other things, prohibitions on lifetime or annual limits, protections against discrimination based on preexisting conditions and several reporting requirements. Thus, PPACA Section 1558 essentially protects employees who attempt to report such violations, or who refuse to be involved in such violations.

The procedures, notifications, burdens of proof, remedies and statutes of limitation are all governed by the Consumer Product Safety Improvement Act. Under those standards, a complainant employee can prevail by merely proving a preponderance of the evidence that his or her protected activity was a contributing factor in an unfavorable employment action. Once that burden is met, the employer must show, by clear and convincing evidence, that it would have taken the same action in the absence of the employee's protected activity. Like cases brought under the Consumer Product Safety Improvement Act, this threshold for employers tends to be a massive hurdle to overcome.

Bad Facts Make Bad Law for Employers/ Alternative Resolution Process Not Upheld

by: Melissa J. Jackson

On April 26, 2010, our Sixth Circuit issued a decision in the case of Alonso v Huron Valley Ambulance, Incorporated. The only good news about this opinion for employers is that it was not recommended for publication. So, although it can be used in arguments to courts, the courts are not bound by the decision.

In this case, the Court reviewed an alternative dispute resolution process that was used by Huron Valley Ambulance. The process allowed employees to appeal employment-related claims through a four-step grievance system. The claims had to be brought within six months of the incident precipitating the

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claim, and the final step was a hearing before an internal Grievance Review Board. All employment-related appeals were required to be brought through this internal process. The plaintiffs in this case, however, went to court instead and claimed that the internal appeals process was not final and binding on them because the process was not fair. The Court agreed, finding that they did not "knowingly and intelligently" waive their right to sue in court or agree to a six month limitation period on their claims.

The plaintiffs in this case had signed a job application in which they agreed to be bound by the internal process and the six month limitations period. The Court stated, however, that "[a]t the time the Alonsos signed waivers of their rights to a judicial forum, they had no idea what the Grievance Review Board process entailed." The Court objected to the fact that the plaintiffs were not given any documentation regarding the process until almost a month after they began their employment, which is when they received the employee handbook that described the process. Also, when they applied and signed the application form, they were in a small room with a number of other applicants, told that this was their only opportunity to apply and there was no one present to answer questions. The Court summarily dismissed the defendant's argument that the claim was not brought within the six month limitations period, holding that, since the waiver of the right to sue was not knowing, the agreement to the six month limitations period was likewise flawed.

Although plaintiffs' attorneys are hailing this decision as a harbinger of things to come, this is the first time that a court has struck down a waiver and, as we noted, this Court did so in an unpublished decision. The decision also disregards a strong trend of courts to favor arbitration and quick resolution. So, we are not advising employers to abandon their alternative resolution processes and the shortened limitation periods. Nevertheless, the decision does signal that certain steps should be taken to react to the Court's concerns. First, provide a pamphlet to applicants, along with the application form, explaining the alternative dispute resolution system; this can be a copy of the policy in the handbook. Second, add a statement to the waiver indicating that the applicant can request additional information regarding the process and speak to Human Resources if he or she has questions about it. Third, allow the applicant to pause the application process to provide time for consideration of the waiver and then, when and if the applicant agrees to be bound by it, resume the process at the point that it was paused.

Fourth, add a statement to the waiver in which the applicant acknowledges that he or she is waiving certain legal rights and understands that waiver. Finally, ensure that the alternative dispute resolution system itself is fair. In this case, the Court found that the process was weighted in favor of the employer since the final step of the appeal was heard by a Board consisting of two managers chosen by management and three employees chosen by the appealing employee, one of whom had to be a manager; thus, the majority of the Board was comprised of managers.

Wary employers should take steps to minimize the impact of this decision. Please contact your employment attorney if you would like us to review your current documents.

FLSA Amendment Requires Breaks for Mothers to Express Breast Milk

by: Amanda Garcia-Williams

The recently enacted healthcare reform act signed into law by President Obama on March 23 amends the Fair Labor Standards Act (FLSA) to require employers to provide "reasonable" breaks for nursing mothers to express milk for their infants for one year from the child's birth. Additionally, the employer must provide a private location, other than a bathroom, where affected employees may express milk. The location must be shielded from view and free from intrusion from coworkers and the public.

Employers of fewer than 50 employees are exempt from the new law if the breastfeeding requirements would "impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." Additionally, in recognition that many states require breastfeeding breaks, the amendment makes clear that an employer must comply with either the FLSA or the applicable state law provisions that are most favorable for the employees.

It is not yet known whether DOL will issue regulations or guidance on how these provisions are to be implemented, and what the penalties are for noncompliance.

At this point, there are a number of unanswered questions, including:

- whether and when the breaks must be compensated as hours worked remains unclear. Short breaks running from 5 to 20 minutes generally are counted as hours worked under the FLSA regulations and subject to compensation for non-exempt employees. The recent amendment states that the employer will not be required to compensate an employee receiving "reasonable" break times. It remains unclear if "reasonable" refers to breaks of 20 minutes or less, or if the amendment applies a different standard.
- the definition of "undue hardship" that would qualify an employer with fewer than 50 employees for the exemption is unknown. Note that the exemption is not automatic, but is available only if employers with fewer than 50 employees can meet the "undue hardship" requirement.

Though these questions should be addressed in future regulations issued by the DOL, at this time, employers receiving requests for breaks of this nature should contact an employment attorney.

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Among The Best

The Employment, Labor & Benefits Practice Group is pleased to announce that **Steve Jurmu**, **Sherry Stein** and **Steve Lowney** have been listed in the special Corporate Counsel Edition of *Super Lawyers*. *Super Lawyers* names top lawyers in each state as chosen by their peers through the independent research of Law & Politics.

Steve Jurmu is a shareholder with Foster Swift. He has been practicing in Michigan for more than three decades. A graduate of the University of Michigan Law School, he joined Foster Swift in 1976. Steve's practice is focused in the areas of employee benefits, family owned businesses and taxation and tax planning.

Steve Lowney is a shareholder with Foster Swift and has been practicing in Michigan for more than two decades. A graduate of Thomas M. Cooley Law School, he joined Foster Swift in 1985. Steve's practice is focused primarily in the areas of employee stock ownership plans (ESOPs), employee benefits, business succession planning, corporate transactions, family owned businesses, mergers and acquisitions and business entity selection, organization and planning.

Sherry Stein is also a shareholder with Foster Swift. She has been practicing in Michigan for more than two decades. She joined Foster Swift in 1983 after her graduation from Thomas M. Cooley Law School. Sherry's practice is focused in the areas of employee benefits and COBRA compliance.

Foster Swift Expands West Michigan Presence

Effective June 1, 2010, Foster Swift has added six attorneys and one office location (Holland) to its letterhead. Jack Siebers, Paul Yared, Jennifer Van Regenmorter, Thomas TerMaat, Ryan Lamb and Mindi Johnson, formerly of the West Michigan law firm Siebers Mohney PLC join the firm.

With the addition of these individuals, Foster Swift counts 21 attorneys in West Michigan and a total of 105 attorneys in its six offices. (Lansing, Grand Rapids, Farmington Hills, Detroit, Marquette and Holland)

"Expanding our presence in West Michigan is part of our strategic plan" states Gary McRay, Foster Swift President. "Foster Swift opened its first office in Grand Rapids in 2005 with seven attorneys. Just five years

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later, we have 21 lawyers and have added an office in Holland."

Everyone involved is excited at the opportunities this new relationship brings. "We are looking forward to being able to provide broader legal resources to our clients with the same high level of personal service" commented Jack Siebers, formerly the managing partner at Siebers Mohney. McRay follows, "The practice areas of the attorneys joining us match up nicely and enhance our capabilities to meet the varying legal needs of West Michigan businesses, local governments and individuals."

Jack Siebers, Paul Yared and Ryan Lamb join Foster Swift's Business and Corporate Group. Jack and Paul practice in the Grand Rapids office and Ryan is based in Holland. Jennifer Van Regenmorter and Mindi Johnson join the firm's Healthcare Practice Group and work in the Holland office while Thomas TerMaat joins the General Litigation Group and is based in Grand Rapids office.

For more information about labor and employment or employee benefits law related issues, please contact any member of the Foster Swift Employment, Labor & Benefits Group.

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