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EMPLOYMENT, LABOR & BENEFITS QUARTERLY

Foster Swift Employment, Labor & Benefits Group

WHAT'S INSIDE:

Equitable Relief May Be Available to Employees to Reform Misstatements Made in SPDs

by: Sherry A. Stein

The U.S. Supreme Court has held that equitable relief may be available to employees under ERISA Sec. 502(a)(3) to reform the terms of a pension plan in the event of a fiduciary breach. In the case of Cigna Corp. v. Amara, 131 S. Ct. 1 866, 50 ECB 2569 (2011), the Summary Plan Description ("SPD") prepared for a pension plan stated that the changes made in the amended plan would be an improvement that "significantly enhanced" retirement benefits for plan participants. A lower court held that the description of the amended benefit in the SPD was inaccurate and did not disclose that many participants would receive less favorable benefits under the amended plan. The Supreme Court then held that while the terms of an SPD cannot be enforced as if the SPD was the plan, "misrepresentations in the SPD can form the basis of equitable relief" such as estoppel and reformation. Citing ERISA Sec. 502(a)(3), the Supreme Court ordered the lower court to determine the appropriate remedy, including the equitable remedy of plan reformation, to provide the "enhanced" benefits described in the SPD. The decision of the Supreme Court sends a message to all plan administrators to confirm that the Company's SPDs reflect the benefits that the Company intends to offer its eligible employees.

Please contact your Foster Swift employee benefits professional for further information.

New Interim DOL Rule Regarding Electronic Disclosure Under Participant Fee Disclosure Regulations

by: Stephen I. Jurmu

The U.S. Department of Labor (the "DOL") recently issued an interim policy regarding how an employer can electronically disclose to plan participants information that must be provided pursuant to the DOL's Final Participant Level Fee Disclosure Regulation. The Participant Fee Disclosure Regulation requires disclosures relating to plan costs and investment costs that are incurred by employees who direct their own investments in 401(k) and other individual account retirement plans. The new interim disclosure policy allows a plan administrator to furnish such required fee disclosures electronically if certain conditions and safeguards are met. These conditions and safeguards are similar to those contained in the electronic disclosure rules that apply to the distribution of other information such as

continued on page 2 | **Electronic Disclosure**

Electronic Disclosure | continued from page 1

the summary plan description (SPD) and any summary of material modifications (SMM). An employer whose 401(k) or other individual account retirement plan allows participant directed investments must comply (by use of the electronic disclosure rules or otherwise) with the new Participant Fee Disclosure Rules not later than May 31, 2012, or at a later date that is permitted by the new rules.

Please contact your Foster Swift employee benefits counsel if you have questions about the interim policy.

I-9 Compliance is a "Hot" Area - How to Avoid Getting Burned

by: Ryan E. Lamb & Melissa J. Jackson

Since 1986, the U.S. has placed upon employers the burden of acting as gate-keepers in the enforcement of the immigration laws. At the same time, employers must be very careful not to discriminate against authorized employees or candidates for employment based on citizenship or national origin. The result is a very fine line that employers are required to walk, with steep pitfalls (business disruption, steep fines, negative publicity, discrimination lawsuits, and criminal penalties) awaiting any missteps.

In the last few years, immigration reforms and increased enforcement have been the topics of extensive debate. While our politicians have not been able to agree upon any major new policies, one proposition which seems to meet little objection is the idea that employers should be subjected to greater scrutiny and enforcement, increasing the burden of their role as front-line evaluators of workforce authorization. Indeed, the last few years have seen significant increases in workforce audits and raids by U.S. Immigration and Customs Enforcement ("ICE") at all levels. In fact, the Obama Administration has made employers the center of its enforcement strategy in addressing undocumented workers and illegal immigration. You may have read reports of a few of the more prominent raids or enforcement actions that have made national news.

An I-9 audit can be triggered for a number of reasons, including random samples and reporting by disgruntled employees (or ex-employees). Certain business sectors, for example food production, are especially susceptible to I-9 audits, and "silent raids" by ICE. In the event of an audit, your company will need to establish its I-9 compliance with ICE. Without a proactive approach, such responses are likely to be reactive and defensive. This typically leads to an internal emergency in responding expeditiously, resulting in a harried response, lost productivity, increased attorney's fees, worker replacement difficulties and possibly fines or criminal charges.

Therefore, while proper I-9 compliance has always been important, it has never been more essential. It is not enough for employers to simply fill out the I-9 form to the best of their ability according to the basic form instructions and throw them in a file. The risks are simply too high to maintain a lackadaisical approach to I-9 compliance, if that is your current posture. Proper I-9 compliance requires due care and proactive planning.

Every employer should have a formal internal I-9 Compliance Policy detailing the employer's exact policies and procedures for properly completing, verifying and retaining I-9 and employment authorization documentation, for assigning supervisory responsibility within the company for these duties, and for self-audits or other periodic internal monitoring efforts to ensure compliance. In addition, the employer's Employee Handbook should contain a section explaining to the employee the employer's and the employee's respective obligations with respect to Form I-9.

With all of the enforcement activity, publicity and risks, it is time to get proactive on this issue - please contact one of the experienced immigration or employment attorneys at Foster Swift to discuss a comprehensive approach.

DOL Extends Applicability Dates for the Service Provider Fee Disclosure and Participant-Level Fee Disclosure Regulations

by: Lauren B. Dunn & Erica E.L. Huddas

The Department of Labor ("DOL") recently issued a final regulation that extends the applicability dates for the Service Provider Fee Disclosure and the Participant-Level Fee Disclosure Regulations (the "Applicability Date Extension Regulation"). The Applicability Date Extension Regulation extends the effective date for the Service Provider Fee Disclosure Regulation from July 16, 2011 to April 1, 2012. This extension differs from and takes into account the public comments received in response to the Notice of Proposed Extension of Applicability Dates published by the DOL on June 1, 2011.

The Participant-Level Fee Disclosure Regulation is effective for plan years beginning on or after November 1, 2011 (the "Effective Date"). Originally, plan administrators were required to furnish initial disclosures to participants and beneficiaries within 60 days of the Effective Date. The Applicability Date Extension Regulation, however, provides that initial disclosures must be furnished to participants and beneficiaries no later than the later of (1) 60 days after the first day of the first plan year beginning on or after November 1, 2011, or (2) 60 days after the April 1, 2012 effective date of the Service Provider Fee Disclosure Regulation. This means that although the Participant-Level Fee Disclosure Regulation still applies to a calendar year plan on January 1, 2012, a calendar year plan has until May 31, 2012 (60 days after the effective date of the Service Provider Fee Disclosure Regulation) to furnish initial disclosures to participants and beneficiaries. Certain quarterly statements must be furnished no later than 45 days after the end of the quarter in which the initial disclosures are required to be furnished (no later than August 14, 2011 for a calendar year plan).

Please contact your Foster Swift employee benefits professional if you have any questions.

Guidelines Adopted on Required Coverage of Preventive Health Services for Women by Non-Grandfathered Group Health Plans

by: Lauren B. Dunn

The Department of Health and Human Services ("HHS") has announced that the Health Resources Services Administration ("HRSA") has adopted guidelines on the required coverage of preventive health services for women by non-grandfathered group health plans. These guidelines were developed by the Institute of Medicine.

Effective for the first plan year that begins on or after August 1, 2012 (January 1, 2013 for a calendar year plan), a non-grandfathered group health plan is required to provide certain preventive health services for women. Coverage without cost-sharing (i.e., no deductible, co-payments or co-insurance) for these services is required when the services are delivered by an in-network provider. Most notably, this requirement includes providing coverage for FDA-approved contraception and counseling. Other preventive services that must be covered with no cost sharing include screening for gestational diabetes, HPV testing as part of screening for cervical cancer for women age 30 and older, annual counseling on sexually transmitted infections,

continued on page 4 | **Preventive Health Services**

Preventive Health Services | continued from page 3

annual counseling and screening for HIV infection, lactation counseling and breastfeeding equipment rental, screening and counseling for interpersonal and domestic violence and annual well-woman preventive care visits to obtain recommended preventive services.

In addition to adopting the foregoing guidelines, the Department of Labor, HHS, and the Treasury released an amendment to the interim final regulations that implement the Patient Protection and Affordable Care Act. Effective August 1, 2011, the amendment allows the HRSA discretion to exempt certain religious employers that offer health insurance to their employees from the requirement to cover contraceptive services. A "religious employer" is an employer that (1) has the teaching of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code.

Please contact your Foster Swift employee benefits professional if you have any questions regarding this recent development.

Can I Take FMLA Leave to Care for My Significant Other's Sick Child?

by: Sheralee S. Hurwitz

What do you do when an employee says he needs leave to care for his "significant other's kids?"

If the employer is a covered employer (has 50 or more employees) and the employee is otherwise eligible for FMLA leave, then the first issue is whether the requested time off is for a qualifying FMLA reason. (Is the leave request due to birth of a child, placement of the child for adoption or foster care, or to care for a child with a "serious health condition"?) A request for leave to provide generic "childcare" is insufficient to be entitled to FMLA leave.

If the leave is for a qualifying reason, the next question is -- does the lack of a legal or biological relationship make a difference? It depends. An employer cannot immediately deny the FMLA leave because there is no "legal" or "biological" son or daughter relationship. The FMLA defines "son" or "daughter" to include "a child of a person standing in loco parentis." According to DOL Administrator Interpretive guidance, whether an employee stands *in loco parentis* to a child is a fact-dependent issue. FMLA regulations define *in loco parentis* as including day-to-day responsibilities to care for and financially support a child. An employee who has no biological or legal relationship to a child may nevertheless stand *in loco parentis*, and be entitled to FMLA leave, if he or she provides *either* day-to-day care *or* financial support to the child. The *in loco parentis* standard also may apply "for the birth of a child and to bond with a child within the first 12 months following birth or placement."

continued on page 5 | **FMLA**

FMLA | continued from page 4

If the employer is unsure whether there is a sufficient parental relationship to require it to grant the leave, before making a decision, the employer may ask for confirmation of the family relationship. "[T]he employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose." 29 CFR 825.122(j).

The Administrator's Interpretation also notes that "the fact that a child has a biological parent in the home, or has both a mother and a father, does not prevent a finding that the child is the 'son or daughter' of an employee who lacks a biological or legal relationship with the child for purposes of taking FMLA leave." The DOL's position is that nothing in FMLA or its implementing regulations restrict the number of parents a child may have under FMLA.

Ultimately, the determination of whether the person requesting the leave stands in *loco parentis* to the child will depend on the particular facts. The DOL has granted this status, for example, to grandparents assuming on-going care for a grandchild where the parents cannot meet the standard. However, an employee taking care of a child while his parents are on vacation, will not meet the standard.

When faced with a questionable request for FMLA leave, employers should make sure they understand the facts, ask appropriate and permitted questions, and if in doubt, consult with your Foster Swift employment counsel regarding how to proceed.

Employers May be Required to Post a Notice Advising Employees of the Right to Unionize

by: Michael R. Blum

On August 26, 2011, the National Labor Relations Board (the "Board") published a controversial final rule requiring that all employers covered by the National Labor Relations Act (the "Act") post a notice detailing employees' rights under the Act. The original November 14, 2011 deadline has been extended, and the Final Rule is now scheduled to go into effect on January 31, 2012. The National Association of Manufacturers (NAM) has filed a lawsuit in the U.S. District Court for the District of Columbia to stop the Board from implementing the posting requirement.

Unless blocked by the Court, most private sector employers covered by the Act will be required to post a notice on January 31, 2012, containing, among other things:

- Notification that employees have the right to form, join or assist a union.
- Notification that employees have the right to discuss their wages, benefits and other working conditions with co-workers or a union.
- A summary of other employee rights under the Act, with examples of violations of those rights by employers or unions, and an affirmation that unlawful conduct will not be permitted.
- Information about the Board, the Board's contact information, and details on how to file a charge with the Board.
- Notice of the 6-month statute of limitations for filing charges with the Board.

The text for the actual notice can be downloaded from the NLRB's website (www.nlrb.gov).

continued on page 6 | **Right to Unionize**

Right to Unionize | continued from page 5

Employers will be required to physically post the notice in their facilities; and employers who customarily post notices to employees regarding personnel rules or policies on an internet or intranet site will be required to post the Board's notice on those sites as well. In addition, employers will be required to post the notice in foreign languages where 20 percent or more of an employer's workforce is not proficient in English.

Failure to post the required notice may be found to be an unfair labor practice and may also, in appropriate circumstances, be grounds for tolling the statute of limitations. Although the Board does not have the authority to fine employers for failing to post, it can find the failure to post to be an independent unfair labor practice charge and also be used to support any other charge.

Please contact your Foster Swift employment law professional if you have any questions.

The Publicly Funded Health Insurance Contribution Act

by: Johanna M. Novak

On September 24, 2011, Governor Snyder signed into law the Publicly Funded Health Insurance Contribution Act. Beginning January 1, 2012, the Act places certain limits on the amount that public employers can pay toward employee medical benefit plans.

Pursuant to the "hard cap" provision in the Act, a public employer that contributes to a medical benefit plan for its employees or elected public officials may pay no more toward the annual cost of coverage (including reimbursement of co-pays, deductibles, or payments into health savings accounts, health flexible spending accounts, or similar accounts used for health care costs) than a total amount equal to $5,500 times the number of employees with single person coverage, $11,000 times the number of employees with individual and spouse coverage, and $15,000 times the number of employees with family coverage. These maximum payment figures will be adjusted each year based on the change in the medical care component of the United States Consumer Price Index. The public employer may allocate its payment for medical benefit plan costs among its employees and elected officials as it sees fit.

Alternatively, public employers can instead elect pursuant to the 80/20 provision of the Act to pay not more than 80% of the total annual costs of all of the medical benefit plans it offers or contributes to for its employees and elected public officials. Under this alternative, each elected public official participating in the employer's medical benefit plans would be required to pay 20% or more of the total annual costs of the plan. The public employer is permitted to allocate the employees' share of the total annual costs of the medical benefit plans among its employees as the employer sees fit.

A local unit of government may exempt itself from the Act annually by a two-thirds vote of its governing body. Certain cities and counties must also obtain mayoral or county executive approval of any such exemption.

Failure to comply with the Act's provisions can lead to a reduction in state aid to the public employer.

Please contact your Foster Swift employee benefits professional if you have any questions.

This Shouldn't be News, but…Accessing Porn on Company Computers is Misconduct

by: Sheralee S. Hurwitz & Melissa J. Jackson

The Michigan Court of Appeals (CA) recently came through for employers, confirming that accessing inappropriate websites is misconduct that makes a former employee ineligible for unemployment insurance benefits. In the case of *Berglund v Industrial Technology Institute*, 211 WL 2936772 Mich App 20ll, the CA actually had to overrule the trial court's decision. At the administrative level, the Administrative Law Judge (ALJ) and the Board of Review had denied the employee unemployment benefits, but the trial court noted that the employer had not entered documentary evidence of the inappropriate conduct and thus found that there was insufficient evidence to warrant the denial of benefits. This finding was despite the employer's production of testimony that the ALJ and Board of Review deemed superior in weight, quality, and credibility.

The discharge of the employee, Berglund, was based on two types of misuse of the employer's resources and equipment. First, despite a warning not to use the company's equipment to help him with his outside employment (teaching a college course), the employee printed a student's paper. Second, IT personnel and Berglund's manager confirmed that Berglund used company equipment to access a number of websites that contained nudity and scantily clad teenage girls, including some websites that were considered pornographic. The employer's evidence was deemed superior by the Board of Review in weight, quality, and credibility. The trial court, however, overturned that decision, finding that there was insufficient evidence to (1) warrant denial of benefits, and (2) prove the misconduct standard necessary to do so.

Berglund argued that his activities, regardless of their nature, did not affect his work performance. He claimed, essentially, that his conduct did not meet the standard necessary to deny him unemployment insurance benefits. According to Berglund, his actions did not demonstrate a "willful or wanton disregard of an employer's interest" of the kind that is "found in deliberate violations or disregard of standards of behavior which an employer has the right to expect of his employee."

Fortunately, the CA found that there was more than sufficient evidence to confirm misconduct. Berglund admitted that he printed a paper from one of his students at a second job, when he previously had been told to no longer use the company's resources or equipment to further his outside employment. He also admitted receiving and keeping e-mails that the court noted that Berglund had acknowledged were inappropriate. The information technology manager of the company testified that two company employees had examined the website visited by Berglund's computer and found that several contained nudity and were considered pornographic. Finally, Berglund also acknowledged that he recalled an incident where other employees had been accessing websites of this nature that lead to spam, pop-ups, and cookies and that his employer had to make changes to filter its computers to prevent those types of sites from being attached. The CA ultimately found Berglund's arguments to be unimpressive. Berglund compared his accessing the inappropriate websites to "keeping a magazine in a desk drawer." This argument failed to convince the Court that Berglund's actions were not willfully disregarding his employer's interests.

Workplace computer use is increasingly difficult to monitor and control. This case is a welcome confirmation that inappropriate access is misconduct that will deny an employee his right to receive unemployment insurance benefits.

Please contact your Foster Swift employment law professional if you have any questions.

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BEST LAWYERS IN AMERICA

36 Foster Swift attorneys were recognized in the 2012 edition.

Employment, Labor & Benefits attorneys recognized:

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- Administrative/Regulatory Law
- Employment Law - Management

Stephen I. Jurmu
- Corporate Governance
- Corporate Law
- Employee Benefits (ERISA) Law

Stephen J. Lowney
- Employee Benefits (ERISA) Law

Frank T. Mamat
- Employment Law - Management
- Labor Law - Management

Sherry A. Stein
- Employee Benefits (ERISA) Law

MICHIGAN SUPER LAWYERS

21 Foster Swift attorneys were recognized in the 2011 edition. In addition, four attorneys were named *Michigan Rising Stars*.

Employment, Labor & Benefits attorneys recognized:

Michael R. Blum
- Employment & Labor

Stephen I. Jurmu
- Employee Benefits/ERISA

Stephen J. Lowney
- Employee Benefits/ERISA

Frank T. Mamat
- Employment & Labor

Sherry A. Stein
- Employee Benefits/ERISA