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CONTACTS

Lisa R. Nelson, Esq.
Director
Compliance & Regulatory Affairs
lisan@barneyandbarney.com 858.875.3017

Christopher K. Bao, Esq.
Compliance Manager, Orange County
Compliance & Regulatory Affairs
chris.bao@barneyandbarney.com 949.540.6924

CA Insurance LIC: 0C03950
www.barneyandbarney.com

SAN FRANCISCO TO IMPLEMENT FAMILY FRIENDLY WORKPLACE ORDINANCE

On October 14, 2013, San Francisco's mayor signed into law the San Francisco Family Friendly Workplace Ordinance. Some highlights of the Ordinance are located below.

SUMMARY

Effective Date

The ordinance will be effective January 1, 2014.

Definition of Flexible Working Arrangement

The ordinance requires that an employer offer a "Flexible Working Arrangement" to all eligible employees.

A Flexible Working Arrangement provides flexibility to employees with caregiving responsibilities. These work arrangements may include, but are not limited to:

- A modified work schedule
- Changes in start and/or end times for work
- Part-time employment
- Job sharing arrangements
- Working from home
- Telecommuting
- Reduction or change in work duties
- Part-year employment

Covered Employers

The ordinance applies to all employers with twenty (20) or more employees. This includes:

- Full-time employees
- Part-time employees
- Leased employees; and
- Any employees whom the employer exercises control over their wages, hours, or working conditions

San Francisco to Implement Family Friendly Workplace Ordinance (Continued)

Employees Entitled to Flexible Schedules

The following criteria must be met by an employee in order to be entitled to a flexible schedule under the Ordinance:

- Works within San Francisco city limits
- Worked six months or more; and
- Works at least eight (8) hours per week

Reasons for Employees to Use Flexible Schedules

Employees have the right to request Flexible Working Arrangements when needing to:

- Care for a child, for whom the employee has a parental responsibility
- Care for a family member with a serious health condition; or
- Care for a parent age 65 or older

Employer Responsibilities for Flexible Schedule Requests

Employer requirements:

- Employers must meet with an employee within 21 days of the employee's request for a Flexible Working Arrangement; and
- Employers must respond, in writing, within 21 days of the meeting with the employee

Employer denials of Flexible Working Arrangements must be due to a bona fide business reason, which may include:

- Identifiable cost issues;
- The inability to meet customer demands; and
- Insufficiency of work to give to an employee during the requested period of work hours

Any denial of the request for a Flexible Working Arrangement should:

- Be done in writing;
- Detail the business reasons for denial; and
- Inform the employee of their right to request reconsideration

Other Employer Information

Employers may not retaliate against employees requesting Flexible Working Arrangements.

Employers must inform employees of their rights under the ordinance by posting a notice to be published by the Office of Labor Standards Enforcement (OLSE). Notice must be available in English, Spanish, Chinese, and any other language spoken by 5% or more of the workforce.

Action Required

Employers should be on the lookout for the Flexible Working Arrangements Notice developed by OLSE, to be posted on or before January 1, 2014. Employers should also begin thinking about how to offer flexible schedules to employees, and how this Flexible Working Arrangement may impact their business.

For more information regarding this Ordinance, go to:

http://sfgsa.org/modules/showdocument.aspx?documentid=10583

NEW YORK CITY IMPLEMENTS ORDINANCE FOR PREGNANT EMPLOYEES

On October 2, 2013, the mayor of New York City signed into law an amendment to the New York City Human Rights Law. Previously, in New York City, although pregnancy was considered a "disability," the treatment of it as a disability was not uniform.

Highlights of the expansion of the law to pregnant individuals are included below.

Effective Date

The ordinance will be effective January 30, 2014.

Expansion of the Disability Law

Under the newly expanded law, any person who is pregnant or has given birth is entitled to:

- A "reasonable accommodation" related to pregnancy, childbirth, or a related medical condition, that would enable her to perform the "essential requisites" of employment

However, employers may object to such "reasonable accommodation," based upon it creating an "unreasonable hardship" on the employer. The factors that will be taken into account, as to whether the accommodation would create an unreasonable hardship on the employer include:

- The nature and cost of the accommodation
- The overall financial resources of the employer
- The number of employees
- The effect on expenses and resources; and
- The impact the accommodation would have on the employer's operations

Notice to Employees

The New York City's Human Rights Commission will create a written Notice of Employee Rights under the pregnancy accommodation law.

The Notice must be provided:

- To new employees upon hire; and
- To current employees within 120 days of enactment

The Notice must also be conspicuously posted at the employer's place of business, in an area that is accessible by employees.

Action Required

Employers should be on the lookout for the Notice that is to be released by the NYC Human Rights Commission. Employers should be aware that accommodations should be made (subject to unreasonable hardship to the employer) for pregnant employees on or before January 30, 2014.

For more information regarding this Amendment, go to:

http://open.nysenate.gov/legislation/bill/S6273-2011

NEW JERSEY STATE SAME-SEX MARRIAGE BEGINS

SUMMARY

Recently, the New Jersey Supreme Court ordered New Jersey officials to begin performing same-sex marriages. This makes New Jersey the 14th state [1] to institute same-sex marriage. The court order took effect on October 21, 2013, following Governor Chris Christie's decision to drop his appeal on the Court's decision. New Jersey is now the fifth state where same-sex marriage is legal as a result of a court decision.

Background

Previously the State Supreme Court found that the New Jersey Constitution guarantees same-sex couples in committed relationships the same rights and benefits as married couples of the opposite sex (*Lewis v. Harris*). In response, the Legislature passed the Civil Union Act. While civil unions are meant to guarantee the same rights and benefits of marriage, they do not allow same-sex partners to marry; as a result, civil union status has been challenged in the state of New Jersey as a failure to provide equal treatment to same-sex couples.

In light of the U.S. Supreme Court ruling in *United States v. Windsor*, lower court Judge Mary C. Jacobson found that civil union partners are being denied equal access to federal benefits due to the label placed on their relationship. As a result, it was determined that the state must extend the right to civil marriage to same-sex partners. Jacobson's decision was followed by an order to state officials to allow eligible same-sex partners to marry in New Jersey effective October 21, 2013.

State Governor Chris Christie, appealed the decision and asked for the start date to be put on hold while the state appeals. Though this request for hold has been denied, the state's Supreme Court has agreed to hear the appeal with oral arguments scheduled for early January. However, when the court unanimously denied the Christie administration's request for a hold on marriages until the appeal was settled, it also indicated that the justices did not think the appeal had a "reasonable" likelihood of success. While Governor Christie firmly believes that this determination should be made by all the people of the State of New Jersey and does not agree with the court ordered allowance for same-sex marriage, he will comply with the ruling. For now he has instructed the Department of Health to cooperate with all municipalities in effectuating the order of the Superior Court under the applicable law.

Effects of Court Ruling

- Civil union partner status remains unchanged; meaning, current status does not afford civil union partners the same right to benefits as legally married spouses under Federal Family and Medical Leave Act (FMLA), Medicare, tax and immigration matters, military and veterans' affairs, etc.
- Same-sex marriage may take place in the state of New Jersey beginning October 21, 2013
- State officials must permit eligible same-sex partners (including civil union partners) to enter into civil marriage

Action Required

Employers in New Jersey should modify their policies, procedures, and their plan documents to provide benefits to same-sex spouses.

For details, go to:

http://www.judiciary.state.nj.us/samesex/index.htm; and,

http://www.judiciary.state.nj.us/samesex/Supreme%20Court%20Opinion%20on%20Stay%20Motion.pdf

[1] States permitting same-sex marriages to be performed in their state include: California, Connecticut, Delaware, New Hampshire, New York, Vermont, New Jersey, Iowa, Maine, Maryland, Massachusetts, Minnesota, Rhode Island, Washington, and the District of Columbia

FINAL RULES ON THE PROGRAM INTEGRITY OF THE INSURANCE EXCHANGES & REINSURANCE PROGRAM

On October 30, 2013, the final rules addressing the financial integrity and oversight standards of the Insurance Exchanges, and the Risk Adjustment and Reinsurance Programs, were released. Highlights of the final rule are below.

Small Employer Defined

Under the Patient Protection and Affordable Care Act (PPACA), small employer is defined as:

- Any employer with at least one (1), but not more than one-hundred (100) employees on any business day during the preceding calendar year
- Prior to 2016, states may define a small employer as an employer with at least (1), but not more than fifty (50) employees

Guaranteed Availability Clarified

Under PPACA, all insurance carriers offering benefits within a State must accept every applicant (e.g., employer and individual) within the State, also known as "guaranteed availability." However, the Final Rules only require a group carrier "guarantee availability" in the market (i.e., small group market or large group market) for which they are selling the coverage. Therefore, if a carrier stops offering certain health plans in the small group market, they would not be required to remove those same health plans in the large group market.

Guaranteed Renewability & Transition to Different Group Size

Under the guaranteed renewability rules, employers will be guaranteed renewal of coverage, even if they no longer belong in the previous group market. For example, an employer who offered a small group plan to employees in the previous year, who is now a large group employer, cannot be denied the ability to renew the small group plan, and vice versa.

However, PPACA group specific rules (such as premium rating or single risk pool requirements) would not apply to the previous group product.

Non-Grandfathered Individual or Merged Market Plans Offered Only on a Calendar Year

To seek consistency with the Exchange and non-Exchange coverage, and to avoid adverse selection, individual market open enrollment periods (and some merged market plans) will all occur on a calendar year basis.

To facilitate this transition to these policies going onto a calendar year basis, individuals with non-calendar year plans will have the opportunity to enroll in a calendar year plan upon renewal in 2014 that will include a pro-rated policy year ending on December 31 of that year.

Reinsurance Program Collection Change & Certain Self-Insured Plans Exempt

Previously, reinsurance program contributions would be collected one time each year. However, the rules propose, in future rulemaking, that there will now be two collection dates:

- The first collection date for the reinsurance contributions and administrative expenses would occur at the beginning of the calendar year, following the applicable benefit year; and
- The second collection date, for contributions to the U.S. Treasury, would be collected at the end of the calendar year following the applicable benefit year

Final Rules on the Program Integrity of the Insurance Exchanges & Reinsurance Program (Continued)

Also, in future rulemaking, certain self-insured, self-administered plans will be exempt from making contributions for the 2015 and 2016 benefit years.

No Action Required

Employers preparing for payment of the reinsurance fee at the end of 2014 should be aware that future guidance will require two payments of the reinsurance fee. In addition, employers with self-funded plans that are self-administered, should be on the lookout for future guidance on exemptions.

For more information regarding these final rules, go to:

https://www.federalregister.gov/articles/2013/10/30/2013-25326/patient-protection-and-affordable-care-act-program-integrity-exchange-premium-stabilization-programs

ADDITIONAL EXEMPTION ALLOWED FOR INDIVIDUAL MANDATE PENALTY

On October 28, 2013, the Centers for Medicare & Medicaid Services (CMS) issued guidance in a question and answer format, adding another exemption to penalties for individuals who fail to have Minimum Essential Coverage (MEC). Highlights of the guidance are below.

Background

Individuals who enroll in Exchange coverage do not have same day effective dates. Therefore, from the time a person enrolls in coverage on the Exchange, there may be a delay in the purchaser actually being able to utilize the coverage purchased.

For instance, in the Exchange, a person who selects a plan between the 1st and 15th of the month, the plan would have an effective date on the first day of the following month. For a person selecting a plan between the 16th and end of a given month, the plan would have an effective date of the first day of the second month following the selection of the plan.

In addition, individuals failing to have health coverage during any given month would be subject to a penalty, pursuant to the Individual Mandate. However, certain persons may be entitled to a hardship exemption, which would allow them to avoid the penalty.

One of these exemptions is for a gap in coverage that lasts less than 3 months.

Expansion of the Penalty Exemptions

Because an individual may purchase coverage in the Exchange, and their effective date may create a longer than 3 month coverage gap, an individual may claim a hardship exemption in the 2015 year, for the months prior to the effective date of coverage, without the need to request an exemption from the Marketplace.

No Action Required

Employers should be aware of this additional exemption and inform employees of their ability to benefit from this exemption under the Individual Mandate.

For more information regarding this Guidance, go to:

http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/enrollment-period-faq-10-28-2013.pdf

CLARIFICATION ON TRANSITION RELIEF FOR EMPLOYEE ELECTIONS IN 2013

Background

Section 125 cafeteria plan elections must be made before the start of the plan year, and are irrevocable during the plan year. Limited exceptions to the rule of irrevocability exist, including certain qualified changes in status. Under existing regulations, the Department of Treasury and the Internal Revenue Service (IRS) do not include health coverage inside of an Exchange as a qualifying status change.

Therefore, for an employer with a 2013 non-calendar plan year, the Treasury Department and the IRS have allowed employers to amend their plan documents beginning December 28, 2012, to allow employees to make either and/or both of the below elections, without the employee experiencing a change in status:

- An employee who elected a salary reduction for a non-calendar year Section 125 cafeteria plan for accident or health coverage, may prospectively revoke or change his or her election once during the 2013 plan year
- An employee who failed to elect a salary reduction for a non-calendar year Section 125 cafeteria plan for accident or health coverage, is allowed to make a prospective salary reduction election for accident and health coverage on or after the first day of the 2013 plan year

Clarifications to the Previous Guidance

The following are clarifications to the above transition relief. The clarifications were released in IRS Notice 2013-71 on October 31, 2013:

- Despite previous regulations stating that only applicable large employer members may amend their documents in conjunction with the transition relief, IRS Notice 2013-71 clarifies that all employers with non-calendar year Section 125 Cafeteria Plans may utilize the transition relief
- Employers may be more restrictive in amending their plan documents, but not less restrictive:
  - Example: An employer may be more restrictive than the rule by only allowing employees one prospective change, during a limited period of time in the first month of 2014, rather than the entire year

Action Required

Employers wishing to allow employees the ability to revoke their benefits election, or join a current plan, should amend their 2013 plan documents by December 31, 2014.

For more information regarding this Notice, go to:

http://www.irs.gov/pub/irs-drop/n-13-71.pdf; and,

http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/enrollment-period-faq-10-28-2013.pdf

CHANGES TO QUALIFIED TRANSPORTATION FRINGE BENEFITS

Under IRS Revenue Procedure 2013-35, the monthly fringe tax benefits (under Section 132(f) of the IRS Code), for tax years beginning in 2014, are below:

- The total fringe benefit exclusion for transportation in a commuter highway vehicle, or any transit pass, is reduced, from $245 a month in 2013 to $**130** a month in 2014. The total fringe benefit exclusion for qualified parking **increased**, from $245 a month in 2013, to $**250** a month in 2014

Action Required

Employers should notify employees prior to January 1, 2014, to allow employees to modify their salary contributions.

For more information regarding this Revenue Procedure, go to:

http://www.irs.gov/pub/irs-drop/rp-13-35.pdf

QUESTION OF THE MONTH

Q: We are changing our company's major medical plan from fully insured to self-insured next year. Will our plan have to comply with nondiscrimination rules under Code § 105(h) and, if so, what do these rules require?

A: Your company's self-insured major medical plan will have to pass two nondiscrimination tests under Code § 105(h)—the Eligibility Test and the Benefits Test. These tests are designed to prevent a self-insured health plan from unduly favoring employees who are Highly Compensated Individuals (HCIs). An HCI for this purpose is an individual who is (1) one of the five highest-paid officers; (2) a shareholder who owns (under certain ownership attribution rules) more than 10% of the value of the employer's stock; or (3) among the highest-paid 25% of all employees (with certain exclusions). If your company is part of a group of related businesses, you will need to determine whether testing must be performed on the group as a whole. If the plan fails one or both tests, employees who are HCIs will be taxed on a portion of their plan benefits. Here is an overview of the two tests.

- Eligibility Test. Eligibility testing answers this basic question: Are enough non-HCIs benefiting from the plan? Code § 105(h) provides three alternative ways to pass the Eligibility Test. The "70% Test" generally is passed if at least 70% of all non-excludable employees (the rules permit certain categories of employees to be excluded) are covered by the plan. The "70%/80% Test" is generally passed if at least 70% of all non-excludable employees are eligible for the plan, and the plan benefits at least 80% of those who are eligible. Finally, the "Nondiscriminatory Classification Test" is more complicated and includes both "facts and circumstances" and mathematical components: In general, there must be (1) a bona fide business classification (in other words, a legitimate business reason) for any exclusion of non-HCIs; and (2) a sufficient ratio of benefiting non-HCIs to benefiting HCIs
- Benefits Test. Benefits testing asks whether all participants are eligible for the same benefits. It ensures that HCIs are not getting better benefits or making lower contributions for the same benefits. The Benefits Test looks at both the plan document (by requiring no discrimination in the plan's terms as written) and plan operation (by considering, on a "facts and circumstances" basis, whether, for example, the timing of a plan amendment that adds or eliminates a particular benefit operates to favor one or more HCIs)

Although these tests may seem complicated, their complexity in practice will depend on your plan design and the structure and demographics of your workforce. Keep the rules in mind as you design and prepare to implement your new plan. You may also wish to discuss testing services while selecting a TPA for the plan. Questions to ask include what services are available, when testing will be performed, and whether additional fees apply. Note that if your company also maintains a cafeteria plan (to enable employees to make pre-tax contributions for medical plan coverage or other benefits); the cafeteria plan is subject to additional nondiscrimination rules under the Code. Health care reform also established nondiscrimination requirements for certain insured health plans, although compliance is not required until the government issues regulations or other guidance on the new requirements.

Contributing Editors: EBIA Staff.

IMPORTANT DATES

PLAN YEARS ENDING ON / AFTER 10/01/2013

- **Comparative Effectiveness Fee**. Fully-insured carriers and self-funded plan sponsors will be subject to a fee in the amount of $2 per covered life. The Fee is due 07/31 of each year using Form 720 “Quarterly Federal Excise Tax Return”

PLAN YEARS ON / AFTER 01/01/2013

- **Flexible Spending Accounts** limited to $2,500 for employee contributions

60 DAYS AFTER THE BEGINNING OF THE PLAN YEAR

- **Employer Creditable Coverage Reporting to CMS** due (e.g., if a plan effective date is 01/01, reporting must be completed by 03/01)

NOVEMBER 2013

- **11/14/2013 – Barney & Barney’s Legislative Compliance 2014 Outlook Seminar** in San Diego, CA
- **11/15/2013 – Reinsurance Fee** reporting due for carriers and self-funded plans (including plan sponsors who have not integrated their HRA with their self-funded plan)

DECEMBER 2013

- **12/04/2013 – Barney & Barney’s Legislative Compliance 2014 Outlook Seminar** in San Francisco, CA
- **12/05/2013 – Barney & Barney’s Legislative Compliance 2014 Outlook Seminar** in Orange County, CA

JANUARY 2014

- **01/01/2014 –** Federal **90-Day Waiting Period** effective for calendar year plans; California state **60-Day Waiting Period** effective for calendar year plans. For non-calendar year plans, the Waiting Period effective date should be implemented on the first day of the plan year in 2014
- **01/01/2014 – Individual Mandate Penalty**. Individuals will be penalized for failing to have Minimum Essential Coverage. Transition relief provides that individuals (employee, employee’s spouse, employee’s dependents) who were eligible for non-calendar year, employer sponsored coverage in 2013, will not be subject to penalties until the end of the plan year in 2014