BARNEY&BARNEY™
Legislative Compliance

Employee Benefits Legislative Compliance
Monthly Newsletter, MMA Western Edition
September 2014 | Issue 9

IN THIS ISSUE

- Massachusetts to mandate unpaid leave for domestic violence situations
- Sick in New York City? A new leave law clarifies your rights to leave
- Organizations with religious objections to contraceptive mandate have accommodations options
- The *NEW, new* ACA reporting instructions now released
- Reminder: Bay Area Commuter Benefit Program must be established this month!

CONTACTS

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

Christopher K. Bao, Esq.
Manager, Employee Benefits Compliance & Regulatory Affairs, MMA West
chris.bao@barneyandbarney.com 949.540.6924

CA Insurance LIC: 0H18131
www.barneyandbarney.com

Barney & Barney is a Marsh & McLennan Agency LLC Company

MASSACHUSETTS MANDATES DOMESTIC VIOLENCE LEAVE ACT

On August 8, 2014, Massachusetts Governor Deval Patrick signed into law M.G.L c. 260 "An Act Relative to Domestic Violence." The law is effective upon signing and applies to all public and private Massachusetts employers with four or more employees. Highlights are below.

Leave Entitlements

- Unpaid leave of up to 15 days in any 12-month period
- Eligible employees are individuals who have personally been a victim or have a family member who has been a victim of domestic violence
- Employers must provide notice of rights and responsibilities
- Proposed rules in relation to the reporting provisions are expected to be released this summer
- Employee leave must be directly related to the abusive behavior, such as seeking or obtaining medical attention, counseling, victim services, or legal assistance; obtaining a protective order from a court; meeting with a district attorney or other law enforcement official; or attending a child custody proceeding
- Employees who take domestic violence leave must exhaust all personal, sick, annual, and vacation leave before receiving unpaid leave unless the employer determines otherwise
- Employees must provide employers with advance notice of the decision to use the leave unless there is a threat of imminent danger to the health or safety of the employee or a member of the employee's family. An employee who does not give notice must notify the employer within three workdays from the commencement of leave that leave is/was being taken under the Act's leave provisions. The notice may be provided by certain specified individuals other than the employee
- Employees who take leave under the new law cannot lose any employment benefit accrued prior to the date on which the leave was taken
- Employees who take leave under the new law are entitled to the restoration of their original jobs or an equivalent position
- Employers cannot take negative actions against employees for unauthorized absences if, within 30 days of the last day of absence, the employee provides documentation that the absence was due to domestic violence. The forms of acceptable documentation are listed in the new law (e.g., police reports documenting the abusive behavior)

This is informational only, and is not intended to serve as legal, tax or financial advice. You should consult with our qualified legal, tax, or financial advisor before making any changes to your plan.

Massachusetts Mandates Domestic Violence Leave Act (Continued)

- An employer may require an employee to provide documentation evidencing that the employee, or the employee's family member, has been a victim of abusive behavior even if the employee provides advance notice of the leave
- With limited exceptions, information related to the employee's leave must be kept confidential by the employer
- Employers are prohibited from retaliating against or discriminating against in any manner an employee who exercises his or her rights under the new law

Action Required

Employers with employees in the state of Massachusetts should ensure their leave policies are updated to include this new leave law. Employers already offering a leave or Paid-Time-Off (PTO) policy that allows for leave related to dealing with any domestic violence issues (e.g., legal, medical, or personal) need not create a new policy.

There are numerous unanswered questions in the new law, including (1) whether intermittent leave is required; (2) the exact scope of activities that qualify for leave under the new law; and (3) what happens in the event an employee who has been disciplined or even terminated for absences provides documentation that the absences were due to abusive behavior. Nonetheless, employers are required to notify employees of their rights and responsibilities under the law. This means that employers must develop and circulate leave policies that include the domestic violence leave provisions. Employers are encouraged to update their handbooks and/or develop a policy surrounding this new type of leave of absence.

For complete details, see M.G.L. c. 260, at: https://malegislature.gov/Bills/188/Senate/S2334

FINAL RULES CLARIFY NEW YORK CITY EMPLOYER OBLIGATIONS FOR EARNED SICK TIME

Recently, New York City released guidance clarifying employer obligations under the New York City Earned Sick Time Act. Pursuant to this Act, as of July 30, 2014, employees who work in the City more than 80 hours a year can earn up to 40 hours of sick leave each year in order to care for themselves or a sick family member. Highlights of the additional guidance are below.

Employer Obligations

- Employers with five or more employees who work in NYC must provide **paid** sick leave
- Employers with fewer than five employees who work in NYC must provide **unpaid** sick leave
- Employees accumulate an hour of sick leave (whether paid or unpaid) at the rate of one hour for every thirty hours worked, up to a maximum of 40 hours of sick leave per calendar year
- Employers must provide to domestic workers who have been employed for at least one year up to two days of paid sick leave, in addition to the three days of paid rest to which domestic workers are entitled to under New York State Labor Law
- Up to 40 hours of unused sick time may carry over to the following year for a total of 40 hours per year of total sick time
- All employees (exempt, non-exempt, full-time, part-time and temporary) are entitled to sick leave, regardless of immigration status

This is informational only, and is not intended to serve as legal, tax or financial advice. You should consult with our qualified legal, tax, or financial advisor before making any changes to your plan.

Final Rules Clarify New York City Employer Obligations for Earned Sick Time (Continued)

- Must disseminate Notice of Employee Rights to all new hires upon commencement of employment
- Employees employed as of April 1, 2014 were entitled to begin using sick time as of July 30, 2014. All other employees may begin using sick time after 120 calendar days following the employee's first day of employment
- Employers may only seek documentation for use of sick leave when the employee is absent for more than three consecutive work days and the employee must be provided seven days to procure verifying documentation once returning to work
- Work days include partial days
- Tipped employees are not entitled to lost gratuities, but still must receive at least a minimum wage (currently $8 per hour) equivalent for sick time
- Employees paid on commission must receive either their base wage or minimum wage, whichever is greater, for paid sick leave
- Sick time must be paid no later than the payday for the next regular payroll period after the sick time was used unless a document was requested and additional time is needed to secure the documentation
- If an employer sells its business, an employee will retain and may use all accrued sick time if the employee continues to work within the City for the successor employer
- Employers must distribute or post their written sick time policies (i.e. in an employee handbook, on a company intranet, or displayed in a conspicuous location)

Action Required

Employers with employees working within the New York City limits should be aware of these rules. Employers should review their leave policies and revise where necessary. Employers with policies that accrue sick leave at the same rate or greater need not implement a new policy, but should still ensure that they post or distribute the required notices (links to notices can be found at the below link). Additionally, any records of accruals, administration, and use should be retained for six years.

For the complete details, see: http://www.nyc.gov/html/dca/html/law/PaidSickLeave.shtml

This is informational only, and is not intended to serve as legal, tax or financial advice. You should consult with our qualified legal, tax, or financial advisor before making any changes to your plan.

PROPOSED RULES RELEASED ON ACCOMMODATIONS FOR RELIGIOUS OBJECTIONS TO CONTRACEPTIVE COVERAGE

On August 22, 2014, the Departments of Health and Human Services (HHS), Labor (DOL), and Treasury released interim final and proposed regulations providing accommodations parameters for certain employers with religious objections to the Affordable Care Act's (ACA) contraception coverage mandate. As background, the ACA mandates that employers provide contraceptive coverage at no cost to employees when offering a non-grandfathered group health plan. Exemptions exist for non-profit religious organizations but require such organizations with insured plans to submit a self-certification form (ERISA form 700) to their insurer, who then provides coverage for contraceptives to employees at no cost. Self-funded plans would submit forms to their Third Party Administrator (TPA) who would then pay the contraceptive claims and then recover such monies at a later date. However, closely held for-profit organizations with strongly-held religious objections may now be eligible for an accommodation following the *Burwell v. Hobby Lobby* United States Supreme Court decision this past summer. Additionally, the *Wheaton College v. Burwell* case provided that a school that is a religious organization is not required to provide their TPA with the ERISA form 700 in order to obtain the accommodation or exemption from the mandate. The Court found that a religious school is merely required to notify the government of its beliefs. Highlights of the interim final and proposed regulations are below.

Interim Final Rule

- Instead of filing ERISA form 700 with the insurer or TPA, an eligible not-for-profit religious organization may simply inform HHS in writing of its religious objection using the provided model notice
- HHS will notify the insurer (or, for self-funded plans, notify the DOL who will notify the TPA) whether it is obligated to cover contraceptives for any employee or student covered under the employer's or school's plan

Proposed Rule

- Allows closely held for-profit organizations with religious objections to qualify as an eligible organization and thus claim accommodations similar to non-profit religious organizations
- To claim an accommodation, the for-profit organization must take action with the state Department of Insurance stating its religious objections
- The proposed rule seeks comments on how to further define closely held organizations and the likely number of such companies that may seek an exemption from the contraceptive mandate

No Action Required

Employers seeking an accommodation or exemption from the ACA contraceptive coverage mandate should become familiar with the notice requirements as well as the rules. Additionally, employers are encouraged to submit comments on the proposed rules in order to help shape future regulations on this provision. Instructions on how to submit comments can be found on the first few pages of the rules below.

For complete details, go to: http://www.ofr.gov/OFRUpload/OFRData/2014-20252_PI.pdf; http://www.ofr.gov/OFRUpload/OFRData/2014-20253_PI.pdf**; and,** http://www.ofr.gov/OFRUpload/OFRData/2014-20254_PI.pdf

For the Women's Preventive Services Coverage and Non-Profit Religious Organizations Fact Sheet, go to: http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html

This is informational only, and is not intended to serve as legal, tax or financial advice. You should consult with our qualified legal, tax, or financial advisor before making any changes to your plan.

INTERNAL REVENUE SERVICE RELEASES DRAFT ACA REPORTING REQUIREMENT INSTRUCTIONS

On August 28, 2014, the Internal Revenue Service (IRS) released draft instructions to supplement the previously released draft Section 6055 (issuer reporting) and Section 6056 (employer reporting) forms. As background, employers and health insurance issuers are required to report information in relation to the health coverage they offer. Beginning in 2016, employers who have more than 50 Full-Time (FT) and/or Full-Time Equivalent (FTE) employees will be responsible for reporting the health coverage offered to their employees in the previous calendar year. Information in connection with the form instructions is listed below.

Forms for Filing

- Employers who are subject to the reporting requirement will file Form 1094-C as a transmittal to the IRS and will report information regarding an employee's health coverage to the employee on Form 1095-C
- Health insurance issuers (e.g., plan sponsors of self-funded plans, carriers of fully-insured plans, government sponsored plans, etc.) will file Form 1094-B when reporting insurance coverage information to the IRS. Covered individuals will receive Form 1095-B notifying them of their coverage via their employer

Content of the Draft Instructions

- An overview of the reasons for filing the forms
- Who must file the forms
- Line by line instructions
- Definitions of terms used in the forms
- How to file the forms
- Multi-employer plan filing instructions; and
- Non-calendar year plan transition relief information

Action Required

For 2016 reporting, employers should review these form instructions in addition to reviewing the forms and developing a process to begin collecting the data for health benefit offerings to employees in 2015.

For the form instructions, go to: http://www.irs.gov/pub/irs-dft/i109495c--dft.pdf**; and,** http://www.irs.gov/pub/irs-dft/i109495b--dft.pdf

For Frequently Asked Questions (FAQ) related to the form instructions, go to: http://www.irs.gov/uac/Questions-and-Answers-on-Reporting-of-Offers-of-Health-Insurance-Coverage-by-Employers-Section-6056**; and,** http://www.irs.gov/uac/Questions-and-Answers-on-Information-Reporting-by-Health-Coverage-Providers-Section-6055

This is informational only, and is not intended to serve as legal, tax or financial advice. You should consult with our qualified legal, tax, or financial advisor before making any changes to your plan.

COMPLIANCE REMINDERS...

Bay Area Commuter Benefit Mandate

Deadline to Establish Program is September 30, 2014

San Francisco Bay Area employers with 50 or more full-time employees (working at least 30 hours or more per week) within the Bay Area Air Quality Management District's (Air District) geographic boundaries (i.e., Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo and Santa Clara, Solano and Sonoma) **are now required** to register and offer commuter benefits to their employees by September 30, 2014 in order to comply with the Bay Area Commuter Benefits Program.

Through this program, employers must offer their employees one of four commuter benefit options in order to comply with Air District Regulation 14, Rule 1. Commuter benefits encourage employees to take transit, vanpool, carpool, bicycle or walk rather than drive alone to work. Reporting is also required and may be submitted at the link below. Details of the options follow.

- Option 1 – Pretax Option: The employer allows employees to exclude their transit or vanpool costs from taxable income to the maximum amount allowed by federal law
- Option 2 – Employer-Provided Subsidy: The employer provides a transit or vanpool subsidy to reduce or cover the employee's monthly transit or vanpool costs
- Option 3 – Employer-Provided Transit: The employer provides a free or low-cost bus, shuttle, or vanpool service for employees (operated by or for the employer); or
- Option 4 – Alternative Commuter Benefit: The employer proposes an alternative commuter benefit method that would be as effective as the other options in reducing single-occupant vehicle trips (and/or vehicle emissions)

Note: Employers with fewer than 50 Bay Area employees may be subject to a local commuter benefits ordinance.

For more information see: https://commuterbenefits.511.org/

For the Air District Regulation 14, Rule 1, go to:
http://www.baaqmd.gov/~/media/Files/Planning%20and%20Research/Commuter%20Benefits%20Program/Proposed%20Rule%20Packet/Proposed%20Rule%20Reg%20141.ashx

QUESTION OF THE MONTH

Q: Our group health plan has a gatekeeper feature that requires participants to designate and coordinate covered health care through a primary care physician. Do we have any special notice requirements associated with this plan requirement?

A: Yes, group health plans that require designation of a primary care physician (PCP) must provide a notice describing the requirement and certain related rights. Health care reform established new patient protections (which took effect starting with plan years beginning on or after September 23, 2010) that apply when group health plans (or health insurers) require a PCP to function as a gatekeeper to covered care. Group health plans that require designation of a PCP must permit each participant or beneficiary to designate any available participating PCP. For a child enrolled in these plans, they must permit designation of any available physician (allopathic or osteopathic) who specializes in pediatrics as the child's PCP. Furthermore, a group health plan may not require preauthorization or referral (by the plan or any person, including a PCP) for a female participant or beneficiary seeking obstetrical or gynecological care from a participating provider who specializes in obstetrics or gynecology.

A notice must be provided to each plan participant describing the plan's PCP requirement and participants' and beneficiaries' rights to—

- Designate any participating PCP who is available to accept the participant or beneficiary
- Designate, for any participant or beneficiary that is a child, a PCP that is a pediatrician; and
- Receive obstetrical or gynecological care without preauthorization or referral

This is informational only, and is not intended to serve as legal, tax or financial advice. You should consult with our qualified legal, tax, or financial advisor before making any changes to your plan.

Question of the Month (Continued)

The notice is required to be provided whenever a summary plan description or other similar description of plan benefits is provided to a participant or beneficiary. It is unclear what the phrase "similar description of plan benefits" means for this purpose. Cautious employers will want to assume an expansive meaning until this is clarified.

The agencies have provided model language (in their regulations) that can be used to meet this notice requirement. It includes a mention of any automatic designation that may occur if one is not made by the participant, as well as an explanation of how to obtain a list of participating PCPs and further information about the plan's requirements. A stand-alone model notice is also available. It contains the model language and some additional background information. This is because a participant or beneficiary will always reach one of the separate out-of-pocket maximums (and the plan will begin paying that category of benefits at 100%) before the individual would have reached a single, combined out-of-pocket maximum.

(But if your plan's current out-of-pocket maximum is significantly lower than the annual limit, you may be able to divide the annual limit between major-medical and prescription drug benefits without experiencing this impact.) Any expected increase in annual claims costs (as estimated by the plan's actuary) should be evaluated against the administrative cost of implementing a system to reconcile claims data across multiple service providers. Additionally, if you decide to establish separate out-of-pocket maximums, the allocation between major medical and prescription drug benefits should be determined in coordination with the other cost-sharing features (e.g., deductibles, co-pays, and percentage cost-sharing) applicable to each benefit category.

Source: EBIA Thomson Reuters

This is informational only, and is not intended to serve as legal, tax or financial advice. You should consult with our qualified legal, tax, or financial advisor before making any changes to your plan.