



## Labor and Employment News Alert

April 5, 2010

# The Patient Protection and Affordable Care Act: *What Do Employers Need To Know Today?*

As you have no doubt seen, heard and read in many places, President Obama recently signed the final (at least for now!) version of the sweeping healthcare legislation known as the ***Patient Protection and Affordable Care Act*** or “PPACA.” The legislation is almost 3,000 pages long and contains more than 400,000 words, and will undoubtedly lead to tens of thousands more pages of regulations in the coming months and years.

Although PPACA’s longer term impact will be significant, the ***immediate*** compliance requirements for most employers are modest, as most of PPACA’s changes are scheduled to take effect no earlier than next year. Nonetheless, employers--particularly their tax and employee benefits groups--must start to develop an understanding of PPACA as soon as possible; and the process of learning will need to accelerate as employers start working with their insurance brokers or third-party administrators to renew those plans for next year. Employers that currently sponsor group health plans will be relieved to learn that PPACA “grandfathers” such plans in order to moderate (but certainly not eliminate) the near term impact of PPACA on these currently existing plans. Also, although media reports have described a handful of PPACA provisions that will start impacting employer-sponsored health plans as early as September, the language of PPACA actually says these provisions (which are discussed further below) generally do not apply until ***the first plan year that starts after September 23***. Because most employers sponsor group health plans that operate on a calendar year basis, no such requirement will take effect in 2010 for most employers.

### **One PPACA Change Has Already Taken Effect: Employers Must Provide Breaks and Facilities For Nursing Mothers**

The only immediate PPACA compliance requirement for employers has nothing to do with health insurance. Rather, it involves PPACA amendments to the Fair Labor Standards Act or FLSA. The laws of Washington and many other states require employers to provide non-exempt employees with two paid 10-minute paid rest breaks and a 30-minute unpaid meal break during a full 8-hour shift. Before PPACA, the federal FLSA did not require that employers provide any rest or meal breaks, but required that if an employer provided rest breaks of less than 20 minutes, those breaks needed to be paid. PPACA now amends the FLSA to require that ***all employers***, regardless of size, must provide rest breaks for nursing mothers who wish to express breast milk, except that small employers with less than 50 employees are exempt from the requirement if they can demonstrate an undue hardship. Here are the key aspects of this new requirement:

- Nursing mothers are entitled to breaks for expressing milk for up to one year after giving birth.

- Nursing mothers are entitled to “a reasonable break time” for the purpose of expressing milk, and they are entitled to such a break “each time the employee has need to express the milk.” Thus, ***there is no specific limit on the number of daily breaks that must be provided to nursing mothers for the purpose of expressing milk.*** We hope to see additional definitional guidance regarding these terms from the U.S. Department of Labor (“DOL”) but, according to one report we saw last week, the DOL was only recently made aware that PPACA had amended the FLSA even though it is specifically responsible for enforcing all FLSA provisions.
- Although the FLSA currently requires that employees must be paid for short rest breaks (other than meal breaks), employers do not need to pay nursing mothers for any additional break time that they take for the purpose of expressing milk. This ***no-pay*** requirement might provide employers with some relief from concerns that some small percentage of nursing mothers might unfairly exploit the new break requirement, although distinguishing Washington state paid rest breaks from unpaid breaks for expressing milk could prove to be a recordkeeping challenge.
- Employers must also provide nursing mothers with “a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by an employee to express breast milk.” For some employers with available office space this will not be a challenge, but it may prove to be much more difficult for many employers with limited facility options.
- Finally, this new revision to the FLSA specifically states (in a manner that is consistent with all other FLSA provisions) that it does not preempt or interfere with any state requirement that provides more favorable break requirements for nursing mothers. Roughly one third of the states already have such requirements. Here in the Pacific Northwest, the only such requirement is in Oregon, where a nursing mother is entitled to 30 minutes in each four-hour work period for the purpose of expressing milk.

As noted above, these new requirements apply to all employers. However, if an employer has less than 50 employees, the employer is relieved from these requirements “if such 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.” For those of you who are familiar with the “undue hardship” standard under the Americans With Disabilities Act, the use of substantially similar language in this new PPACA provision suggests it might be difficult for employers to prove the existence of an undue hardship; however, since this undue hardship provision is directed solely at smaller employers, perhaps the courts and the DOL will act to protect small employers that truly do not have the resources to provide the breaks and private facilities that are described in the statute. We look forward to additional guidance on these issues from the DOL.

Perhaps the most troublesome aspect of this new break requirement is the absence of any exception for larger employers who operate in small retail spaces or who have a multitude of other locations with limited facilities and small employee populations in each such location. Unless the DOL offers some sort of regulatory or enforcement relief (and, frankly, it is far from clear that the DOL has the authority to offer such relief), it may prove to be quite difficult for such employers to comply with this new set of break and facility requirements.

Please contact us to discuss any challenges with which you may need assistance.

## **Near-Term Health Plan Changes**

Many new health plan requirements—including the requirement that most employers must either provide medical plans for their employees or must pay a tax penalty for failure to do so—do not take effect until 2014 or later. Existing plans are also “grandfathered” or protected from certain PPACA requirements. Here are key changes for all plans, including existing plans, that take effect for most employers on January 1, 2011 (or on the first date of any plan year that starts on or after September 23, 2010):

- Lifetime dollar limits on “essential health benefits” (as that term will eventually be defined by the federal Department of Health and Human Services (“HHS”)) will no longer be permitted.
- Annual dollar limits will no longer be permitted except as provided for in regulations to be published by HHS.

- Preexisting condition exclusions will no longer be permitted for children under age 19.
- Employers will no longer be entitled to rescind or cancel coverage except in limited circumstances.
- Dependent adult children will remain eligible for coverage until they are age 26, even if they are married; however, prior to 2014, such coverage need not be provided if the dependent child is covered under the plan of that dependent's employer.
- Employers must use and distribute coverage and benefits summaries to be published by HHS.
- The value of employer-sponsored health benefits will need to be reported each year on the employee's Form W-2.
- Reimbursements for medicines or drugs under a FSA, HSA, HRA or Archer MSA will be permitted only for prescription drugs.
- The penalty tax for HSA distributions not used for qualified medical expenses will increase from 10% to 20%.

There are innumerable other changes that will be applicable to new employer-sponsored health plans, and many others that will apply in the years to come. We will, of course, provide you with additional information as the DOL and HHS issue new regulatory or other guidance, and will also keep you informed of other PPACA developments. In the meantime, please call on us with questions or if we can assist you in any way with your PPACA compliance questions or activities.

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While this provides a brief summary of the new law, there are, of course, additional details. Please contact us if you have any questions.

The [Riddell Williams Labor and Employment Group](#) helps businesses comply with labor and employment laws and resolve disputes with employees. Our practice consists of four primary areas: counseling, litigation, training, and traditional labor law.

### **Two opportunities to attend:**

## **Breakfast Briefing -- *Bob Howie's Annual Employment Law Update***

Due to the popularity of this briefing, the identical presentation will be given on two dates. Choose the date convenient for you:

**June 9, 2010** or **June 15, 2010**

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