A Publication of The Cavanaugh Law Firm, LLC

THE JOB DESCRIPTION

Are You Subject to Health Care Reform's Employer Mandate?

ISSUE 9, SPRING 2013

In This Issue:

Are You Subject to Health Care Reform's Employer Mandate? 1

New I-9 and FMLA Forms 2

Unpaid Intern Lawsuits on the Rise 3

Legislative Update 3

Are You Ready to Accommodate Nursing Mothers? 4

Although not effective until January 1, 2014, now is the time to begin evaluating compliance with the Affordable Care Act's employer mandate. Beginning in 2014, if you employed 50 or more full-time employees during 2013 and you do not offer your full-time employees affordable, minimum essential health coverage, you will be penalized if even one of your full-time employees receives subsidized health coverage through an exchange. There are two primary issues in determining your need to comply with the employer mandate: First, how do you determine whether you employ 50 or more full-time employees?; and second, what is affordable, minimum essential health coverage?

Do You Employ 50 or More Full-Time Employees?

An employee working an average of at least 30 hours each week is counted as one full-time employee, and all other employees are counted on a pro rata basis using 120 hours per month to determine the number of your full-time equivalent employees. The first necessary step to answer this question includes determining who is the "employer." Next, the employer should separate its full-time employees from its part-time employees for the preceding calendar year (note that, for 2014, an employer may take advantage of a transition rule and use the prior 6-months instead of the 2013 calendar year). Full-time employees are those

Continued on page 2

The Cavanaugh Law Firm, LLC is committed to your company's success. We are available to provide you knowledgeable advice on the full range of labor and employment law issues and to defend your company and its managers in lawsuits and agency proceedings. If you have any questions about the contents of this newsletter or about any issue affecting your company, please contact us.

Bryan P. Cavanaugh
The Cavanaugh Law Firm, LLC
512 Sunnyside Avenue
St. Louis, Missouri 63119
(t)314.308.2451; (f)314.754.7054
bcavanaugh@cavanaugh-law.net
www.cavanaugh-law.net

The Cavanaugh Law Firm, LLC

(Continued)

working 30 hours or more per week. Next, the employer must identify all other employees, combine their work hours for a month, and divide by 120 hours for the month. The quotient equals the full-time equivalents for the non full-time employees. Adding the full-time employees and full-time equivalents together will determine whether the seasonal worker exception applies. The seasonal worker exception applies if the employer both exceeds the 50 full-time employee threshold for 120 days or less during the calendar year and the employees in excess of 50 employed during those 120 days were seasonal workers.

If your total is more than 50 and the seasonal exception does not apply, you are subject to the employer mandate.

What is affordable, minimum essential health coverage?

Most employer-provided group health coverage meets the very broad definition of minimum essential coverage. The definition includes any coverage under an "eligible employer-sponsored plan," which includes a group health plan or group health insurance coverage offered by an employer to an employee that is a governmental plan, or any other plan or coverage offered in a state's small or large group market. Proposed IRS regulations clarify that self-insured employer coverage, retiree coverage, and COBRA coverage can qualify as an eligible employer-sponsored plan for this purpose. Minimum essential coverage does not include certain excepted benefits, such as health FSAs that do not accept employer contributions, disability coverage, AD&D coverage, and dental-only and vision-only coverage.

In addition, to avoid the penalties fully, the health coverage must offer a minimum value and be affordable. To offer a minimum value, a plan's share of the total allowed costs of benefits provided under the plan must be less than 60% of those costs. To be affordable, the employee portion of the premium for coverage may not exceed 9.5% of the employee's household income.

The first step to complying with the employer mandate is to determine whether or not it applies. There are several additional steps, including evaluating coverage, understanding how the complicated penalties apply, and determining whether you will comply or choose to pay any applicable penalties.

New I-9 and FMLA Forms

Employers must soon begin using a revised Form I-9, which is the form that must be completed by all employers to verify the employment eligibility of every new hire. The new edition of the Form I-9 is now effective. Employers do not need to complete the new Form I-9 for current employees for whom there is already a properly-completed Form I-9 on file, unless re-verification applies.

The U.S. Department of Labor recently marked the 20th anniversary of the signing of the Family and Medical Leave Act (FMLA) by issuing a final rule implementing important expansions of FMLA protections. As a result, employers should begin using new FMLA forms that reflect these expansions. The expansions provides families of eligible veterans with the same job-protected FMLA leave currently available to families of military service members, and it also enables more military families to take leave for activities that arise when a service member is deployed. The new rule also extends FMLA military caregiver leave to family members of certain veterans with serious injuries or illnesses.

Employers must notify employees of these changes in the FMLA. Covered employers are required to provide such notices even if they have no eligible employees. Failure to provide such notice could be considered interference, restraint, or denial of FMLA rights.

Unpaid Intern Lawsuits on the Rise

Your for-profit business hires an unpaid intern in a seemingly win-win situation: the intern gets "real-life" experience while learning the ropes, with a chance to impress for regular employment, and the business gets support from an enthusiastic helper. But a trend is increasing in wage and hour litigation: unpaid interns suing for pay under the federal Fair Labor Standards Act (FLSA).

The U.S. Department of Labor (DOL) suggests the following six criteria to assist in determining whether participants in a for-profit entity's internship program are exempt from the FLSA's minimum wage and overtime requirements. A for-profit employer that answers "yes" to these questions would have strong arguments that its program is exempt:

- Is the experience primarily for the benefit of the intern and not the employer?
- Is the internship comparable to training offered by an educational environment?
- Is there no displacement of a regular employee by the intern, and does s/he work under close supervision of existing staff?
- Is the intern not necessarily entitled to a job at the conclusion of the internship?
- Does the employer derive no immediate advantage from the activities of the intern?
- Does the employer make clear to the intern, from the outset, that the internship is unpaid?

In addition, payment of a stipend to an intern could complicate defending the unpaid nature of the internship. That could spawn an argument that the pay leads the intern to believe that he or she was to receive pay for the internship. At a minimum, pre-planning and careful drafting of program language or the intern offer-letter would be crucial. Labeling any such payment as a simple "thank you," for instance, might prove helpful.

The bottom line: Employers need to make certain that, on paper and in action, an unpaid internship program complies with all the DOL criteria, and that any housing/food stipend or other "pay" is clearly unrelated to wages, or, if it is wages, it meets at least the minimum wage requirements under the FLSA and applicable state laws.

Legislative Update

If signed into law, the Fair Minimum Wage Act of 2013 (H.R. 1010 and S. 460) would amend the Fair Labor Standards Act of 1938 (FLSA) to increase the federal minimum wage for employees to: (1) $8.20 an hour on the first day of the third month after the enactment of this Act; (2) $9.15 an hour after one year; (3) $10.10 an hour after two years; and (4) the amount determined by the Secretary of Labor (based on increases in the Consumer Price Index) after three years, and annually thereafter.

Are You Ready to Accommodate Nursing Mothers?

As the result of an amendment in 2010's Patient Protection and Affordable Care Act, the Fair Labor Standards Act's Section 7(r) now requires covered employers to give unpaid break time to a nursing mother to express milk. For a year after the child's birth, the employer must:

- Provide a suitable location for the break (other than a bathroom) that is shielded from view and is free from intrusion by co-workers or the public
- Allow a break of "reasonable" length under the circumstances
- Permit a break each time the employee "has need" to express milk

To some extent, meeting these requirements calls for individualized evaluation. For instance, a "reasonable" break's duration will depend on factors such as how much time it takes the employee to express the milk (the U.S. Department of Labor (DOL) anticipates 15 to 20 minutes), how long it takes her to walk to and from the break location, the amount of time needed to set up for and express the milk, and the time needed to clean up and to store the milk.

Under this law, an employer is not required to compensate the employee for the reasonable break time taken. However, the DOL has said that an employer must pay the employee in the same way it does others for any similar break time. The DOL also says that the break time might be compensable in some other situations such as if the employee is not "completely relieved from duty" during the break. The break time requirement does not apply to employees who are excluded from the FLSA's overtime provisions, such as those who meet each criterion for that law's executive, administrative, professional, or outside salesperson exemption. Nor does it apply to an employer of fewer than 50 workers in total if allowing the breaks would cause "undue hardship."

Employee complaints could provoke an investigation by the DOL, to a DOL lawsuit for court-ordered compliance, and to penalties of up to $1,100 for each willful or repeated violation.

And the DOL has been active. Earlier this year, officials disclosed that there have been at least 54 Section 7(r) investigations, and that the government found one or more violations in 36 of them. The DOL said that 29 of the violations involved a failure to provide space, while several others arose from not providing break time. In all cases in which there were violations, the DOL required the employers to agree to future compliance and to provide appropriate remedies for any employee losses resulting from unlawful conduct.

Many states, including Illinois, also require these kinds of breaks. Section 7(r) does not override those laws to the extent that they are more favorable to the employee. Any nursing-mother policy must take the applicable requirements of these other jurisdictions into account.

Bryan P. Cavanaugh
The Cavanaugh Law Firm, LLC
512 Sunnyside Avenue
St. Louis, Missouri 63119
Phone: 314.308.2451
Fax: 314.754.7054
bcavanaugh@cavanaugh-law.net
www.cavanaugh-law.net