TCOR Insurance Management

Risk Control Update

April 2011

With the mid-term elections behind us, and with the change of power in The House of Representatives, may employers may think the Obama Administration's agenda of increased employment regulation, audits and enforcement will be stalled or challenged. The political change in Congress may halt or dim the prospects for any new employment legislation, but his has not stalled a large number of new proposed regulations, informal directives and increased enforcement of government agencies. The National Labor Relations Board (NLRB), the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC) and others are diligently committed to redefining the way employment laws are interpreted and enforced.

EEOC Issues Final ADAAA Regulations

On March 25, the Equal Employment Opportunity Commission (EEOC) published in the Federal Register its long-awaited final regulations and accompanying Interpretive Guidance under the Americans with Disabilities Act Amendments Act (ADAAA) of 2008.

On September 25, 2008, President George W. Bush signed into law the ADAAA, which went into effect on January 1, 2009. The ADAAA amended the Americans with Disabilities Act (ADA). The ADAAA specifically overturned several Supreme Court decisions that had limited the ability of an individual to establish a "disability" under the ADA, and made clear that the intent of the amendment was to "reinstate a broad scope of protection" for individuals with disabilities.

Key points of the Final Rule:

Expanded the Meaning of "Substantially Limits"

- Should be construed "broadly in favor of expansive coverage." "Not meant to be a demanding standard"
- Impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people. This determination should not require extensive analysis.
- The determination shall be made without regard to the ameliorative effects of mitigating measures (except for ordinary eyeglasses or contacts).
- Impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- Impairment that substantially limits one major life activity need not substantially limit other major life activities.
- The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting - Therefore even conditions of short duration can meet this definition.

Expanded the list of "Major Life Activities"

- To include major bodily functions (hemic, lymphatic, musculoskeletal, sense organs and skin, genitourinary, and cardiovascular functions)
- Need not be one that is "of central importance to daily life"

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NLRB Publishes New Proposed Rule

On December 22, 2010, the National Labor Relations Board published a proposed rule that would require all private sector employees covered by the National Labor Relations Act (NLRA) to post a notice informing employees of their NLRA rights, whether there is a union or no union in place. The notice is likely to be similar to the notice the DOL recently approved for use by federal contractors, and includes an extensive listing of employee rights arising under Section 7 of the NLRA:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union, bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your terms and conditions of employment or union organizing with your co-workers or a union, take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.

Many of these, employees may not generally be familiar with, particularly in non-union environments.

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Ninth Circuit Court of Appeals Decision

(*Boswell v. Federal Express Corp.* 2010)
In *Boswell*, Federal Express had asked the trial court for a jury instruction that it would not be liable for punitive damages if the jury found it engaged in good faith efforts to implement policies prohibiting and addressing discrimination, harassment, and retaliation. As the Supreme Court explained in 1999, "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer's good faith efforts to comply with Title VII." This is so, the Ninth Circuit panel noted, even when the punitive damages stem from actions taken by managers, unless the manager is "sufficiently senior" to be treated as "the corporation's proxy." Because the trial court failed to instruct the jury on the good faith defense to a punitive damages claim, the *Boswell* court overturned the punitive damage award.

The decision provides a valuable reminder that the defense of a claim for discrimination, harassment, and retaliation begins with policies, practices, and training implemented long before any complaint is filed.

Will Congress Repeal Health Care Reform?

Controversy has surrounded the health care form legislation since it was signed into law on March 23, 2010. This debate entered Congress once again when Republicans took control of the House of Representatives in November 2010.

As promised, House Republicans attempted to repeal the law. Thus far, these efforts have not been successful, due to a Democrat-controlled Senate and the promise of a veto by President Obama.

However, because full repeal of the law would be difficult, Republicans have indicated that they will try to replace or repeal parts of the law instead. Provisions that may be revised or repealed include:

- The requirement for businesses to report payments in excess of $600 on a Form 1099. (On April 5, 2011, the Senate voted to repeal the Form 1099 tax reporting requirement that was included in last year's health car reform law. The repeal measure was supported by the White House and is expected to be signed by President Obama.)
- The provisions in which employers can face penalties for not providing health coverage to employees
- The individual responsibility requirement, which imposes penalties on individuals who do not obtain coverage
- The Cadillac Plan tax on high-cost, employer-sponsored health plans
- The tax on manufacturers of medical devices
- Cuts to Medicare

At this point, it is uncertain what will happen with the health care reform law. Though there may be changes, it may also remain intact. Therefore, employers should make sure they are implementing the requirements as they become effective, until more is known about potential changes.

Sharp Rise in Audits for Illegal Alien Hiring Practices

Among the many employment laws that companies must follow is the Immigration Reform and Control Act (IRCA), which prohibits employers from hiring illegal aliens and imposes strict penalties on those who do. One of the primary responsibilities associated with this law is verifying employee citizenship status through the filing of the I-9 Form.

The federal government can audit any company and require it to provide I-9 documents for examination. Failure to do so or a finding of noncompliance with the law can result in penalties ranging from $110 to several thousand dollars. Recently, U. S. Immigration and Customs Enforcement has greatly increased the number of these audits across the country, as many lawmakers push for tougher immigration enforcement.

It is important that you understand the rules of this law, maintain all necessary forms and conduct internal audits to make sure you are prepared in case of an audit. For more information, visit www.wscis.gov.

Updated in 2011

New Regulatory & Enforcement Agenda from the DOL?

As mentioned previously, The DOL announced a new "department wide regulatory and enforcement strategy," which it named "Plan/Prevent/Protect" in Spring of 2010. The DOL has not yet published a proposed regulation requiring employers to create compliance plans, but confirmed its commitment to the Plan/Prevent/Protect strategy in its 2010 Fall Regulatory Agenda.

"Plan/Prevent/Protect" initiative is intended to be a fundamental, department wide shift in thinking away from what the DOL calls "catch me if you can" compliance to placing the onus on employers to "assemble plans, create processes, and designate people charged with achieving compliance."
Five agencies (Wage and Hour, OSHA, the Office of Federal Contract Compliance Programs, Mine Safety and Health Administration, and Employee Benefits Security Administration) are expected to

propose regulations and/or take other actions requiring employers to adopt a compliance plan that includes the following elements:

"PLAN" - The DOL will "propose a requirement that employers and other regulated entities create a plan for identifying and remediating risks of legal violations." The DOL would require employers to "provide their employees with opportunities to participate in the creation of the plans," and "the plans would be made available to workers so they can fully understand them and help to monitor their implementation."

- "PREVENT" - Implement the plan "thoroughly and completely" and in a manner that prevents legal violations (in other words, the plan cannot be drafted and then left on a shelf; an employer must fully carry out the plan to address the violations, as well as update the plan regularly).
- "PROTECT" - The DOL will "propose a requirement that the employer or other regulated entity ensures that the plan's objectives are met on a regular basis. Just any plan will not do. The plan must actually protect workers from violations of their workplace rights."

The two main pieces of this initiative appear to be the WHD's Public Classification Analysis and OSHA's Injury and Illness Prevention Program.
The DOL has suggested that the WHD proposal will include, for example:

- A requirement that employers provide workers with information about their employment, including how their pay is calculated.
- A requirement that employers that seek to exclude workers from the FLSA's coverage perform a classification analysis, disclose that analysis to the employees, and retain that analysis for WHD enforcement personnel who might request it.

Haven't been too worried about those unemployment notices and/or hearings?

With many states' unemployment trust funds running on empty (and being supplemented with federal funds to keep UI benefits flowing), the Obama administration proposes to replenish them by more than doubling the limit on employers' FUTA contribution. The 6.2% surtax is now capped at the 1st $7000 earned by each employee. The proposed change would up the cap to the 1st $15,000 earned per worker, starting in 2014.

"As a business owner or manager, Human Resource management and compliance can be an overwhelming challenge and a miss-step in this area can be very costly for your business and in some cases you personally. Given all of this it's not surprising that the analysis firm Gartner Group has found that HR ranks number one among outsourced business processes. At TCOR we understand the challenge and continue to seek to serve and support our clients at the highest level. If you need additional information, support or service on the topics of this newsletter or any other HR issue please contact us. Additionally, you can visit our website for more information on TCOR's HR support and services."

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Until our next visit,