TCOR® Insurance Management Risk Control Update

July 2010

As we approach the mid-term elections, the Obama Administration appears to be continuing its agenda of increased employment legislation, regulation, audits and enforcement...changes from the Department of Labor have been made and more are in the works. But the impact on businesses (especially in Texas) could prove to be more hassle than help...

Family Medical Leave Act (FMLA) - Expanded

On June 22nd the Department of Labor (DOL) issued an Administrator's Interpretation expanding the scope of "Parents" eligible to take FMLA leave by broadening the definition of who constitutes a son or daughter under the Act. This latest interpretation broadens the meaning of "son or daughter" as it applies to an employee who stands in *loco parentis* to a child. In *loco parentis* commonly refers to an individual who has assumed the position and the obligations of a parent without going through formal legal channels.

Key Actions:

- Domestic partners and other individuals who may not have previously been considered a qualifying parent of a child will now be deemed to meet this revised definition and be entitled to FMLA leave. These may include grandparents when the parents are incapable of providing care for the children, or even an unrelated adult, such as a parent's boyfriend or girlfriend, who has day-to-day childcare responsibility.

For potential Business Impact or more Key Actions please visit our web-site at www.tcormanagement.com/hrx

Supreme Court rules on - Employer Searches (and the importance of electronic communications policies)

The United States Supreme Court issued a unanimous decision that provides guidance that employers can use to reduce an employee's privacy expectations and emphasizes the importance of having a clear, well-defined privacy policy. The Supreme Court decided *City of Ontario v. Quon* on June 17, 2010, holding that the City of Ontario did not violate an employee's Fourth Amendment privacy rights when it reviewed personal text messages that the employee sent and received on his employer-owned and issued pager.

Key Notes:

- The City of Ontario issued pagers to Jeffery Quon and other SWAT Team members to help respond to emergency situations.
- The City had a written electronics communication policy that warned employees of the City's right to monitor electronic communication.
- The City decided to review the officers' text messages to determine whether the existing character limit was too low, namely, whether officers were paying overage fees for work-related messages or if the overages were for personal messages.
- The review revealed that the vast majority of Quon's messages were personal and some were sexually explicit. After Quon was disciplined for violating department rules, he filed a lawsuit, alleging that the City violated his privacy rights.
- The Supreme Court reversed the Ninth Circuit, holding that the City's review of the text messages did not violate Quon's Fourth Amendment privacy rights.
- The Court agreed that the City had a legitimate interest in ensuring that it was not forcing employees to pay for work-related expenses or, alternatively, that it was not paying for employees' personal communications.
- A key factor The Court considered was that Quon should have known his communications were not immune from scrutiny based on the fact that the City told him that his messages were subject to auditing.

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Hiring Incentives to Restore Employment Act (HIRE)

While covered in the 1st quarter update we continue to visit with employers that are not utilizing the potential tax savings of the Act. So a brief recap:

• An individual hired by the qualified employer is required to certify that he or she had not been employed for more than 40 hours during the 60 days prior to being employed by the qualified employer. The IRS has provided a model affidavit (W-11) for new hires to sign, as well as a revised Form 941 (Employers Federal Quarterly Tax Return) for employers. To access a W-11 form, please visit www.tcormanagement.com/w11 To access a 941 IRS form, please visit www.tcormanagement.com/941

• Payroll tax reduction can be taken starting in Q2 of 2010.

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COBRA Continuation Coverage Assistance Under ARRA

Looks like the COBRA premium reduction for eligible individuals will finally come to an end. Due to the statutory sunset, the COBRA premium reduction under ARRA is not available for individuals who experience involuntary terminations after May 31, 2010.

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So What's Next in 2010?

New Regulatory & Enforcement Agenda from the DOL?

The DOL announced a new "department wide regulatory and enforcement strategy," which it named "Plan/Prevent/Protect." If fully implemented by the DOL, the "Plan/Prevent/Protect" program may have a significant impact by requiring employers to prepare, implement, and share with employees comprehensive compliance programs in the workplace.

"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" - Identify and remediate the risks of legal violations and other workplace risks to their employees. Employees must be included in the creation of the plan and the completed plan must be circulated to those employees who will be able to monitor the plan's 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 its plan to address the violations, as well as update the plan regularly).
- " PROTECT" - Ensure that the plan's objectives are met on a regular basis and that the plan will result in protecting employees 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 (expected Notice of Proposed Rulemaking in August 2010) 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.

Employee Misclassification Prevention Act (EMPA)

Introduced on April 22, 2010, if passed this Act would amend the FLSA and permit penalties for improperly labeling workers as contractors. After the Act was introduced, Secretary of Labor Hilda Solis issued this statement, "I look forward to working with the Congress to address the important issue of misclassification of workers. The Department of Labor is working with the Vice President's Middle Class Task Force and the Department of Treasury on a multi-agency initiative to develop strategies to address this issue. The administration's budget request for fiscal year 2011 includes $25 million for the Department of Labor as part of this initiative, including $12 million for increased enforcement of wage and overtime laws in cases where employees have been misclassified."

EMPA would attempt to reduce the number of misclassification violations by:

• Ensuring that employers keep records that reflect the accurate status of each worker as an employee or non-employee and clarifying that employers violate the Fair Labor Standards Act when they misclassify workers;
• Increasing penalties on employers who misclassify their employees and are found to have violated employees' overtime or minimum wage rights;
• Requiring employers to notify workers of their classification as an employee or non-employee
• Creating an "employee rights web site" to inform workers about their federal and state wage and hour rights;
• Providing protections to workers who are discriminated against because they have sought to be accurately classified.

EMPA would improve federal and state efforts to detect and stop misclassification by:

• Mandating that states conduct audits to identify employers who misclassify workers and by requiring that DOL monitor states' efforts to identify misclassification;
• Directing states to strengthen their own penalties for worker misclassification;
• Permitting DOL and IRS to refer incidents of misclassification to one another;
• Directing DOL to perform targeted audits focusing on employers in industries that frequently misclassify employees.

Many of the proposed Bills that we discussed in previous updates are still pending, but we may start to see new consideration and discussion on these.

Employee Free Choice Act (EFCA) Update:

While the unions haven't given up on it, the EFCA seems to have lost most all of its momentum – at least for now. At this point the strategy may turn to trying to attach it to another piece of legislation or surface it again after the November elections – either with a stronger Democratic majority or in the Lame Duck session before a new congress is seated in January of 2011. Stay tuned – this one is not quite over yet.

Employment Non-Discrimination Act (ENDA)

• The bill prohibits employment discrimination based on sexual orientation and gender identity (defined as the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth).

Protecting America's Workers Act (PAWA)

Would expand the Osh Act – the legislation would:

• Increase penalties for OSHA citations – the minimum penalty for a willful violation will increase from $5,000 to $8,000 and the maximum penalty will increase to $120,000. A willful violation resulting in a death will increase to $250,000;

• Set Criminal Penalties – provide for possible felony prosecution as a result of repeated and willful violations which result in fatality or serious bodily injury. The penalties could be up to 10 years for a first offense and up to 20 years for repeat offenses;

• Increase "Whistleblower" protection;

• Expand coverage to federal, state and local public employees;

• Expand the definition of "employer" to include "any responsible corporate officer."

Safety –

Secretary of Labor Hilda Solis announced that the Occupational Safety and Health Administration (OSHA) would create a new program, the Severe Violator Enforcement Program (SVEP). The SVEP would identify employers with repeated, serious citations, and, among other things, subject them to increased, multi-worksite inspections and higher penalties.

According to the draft Directive, SVEP will "focus increased enforcement attention on significant hazards and violations" by concentrating on employers that have demonstrated "indifference" to workplace safety obligations through willful, repeated, or failure-to abate-violations in four areas: (1) fatality or catastrophe situations; (2) industries that expose employee to the most severe hazards, including those identified in the draft Directive as "High-Emphasis Hazards"; (3) industries that expose employees to the potential release of highly hazardous chemicals; and (4) egregious enforcement actions. Once an employer is selected for the SVEP, OSHA will undertake a number of enforcement steps including enhanced follow-up inspections as well as inspections at other worksites of that same employer, potentially on a nationwide basis.

An important point for employers is that this is another step in OSHA's recent efforts to increase its enforcement against employers. This new program includes new features that will allow OSHA to conduct more aggressive multi-worksite inspections against those employers that fall within the program. As OSHA stated in the Directive, the "purpose of the SVEP is to focus increased enforcement attention on significant hazards and violations by concentrating on employers who have demonstrated indifference to their occupational safety and health obligations."

OSHA will consider any inspection that meets one or more of the following criteria as a candidate for the SVEP:

- Fatality/Catastrophic Criteria. A fatality/catastrophe inspection in which OSHA finds one or more willful or repeated citations or failure-to-abate notices based on a serious violation related to the death of an employee or three or more employee hospitalizations. Violations under this section do not need to be classified as "High-Emphasis Hazards."
- Nonfatality/Noncatastrophic High-Emphasis Hazards. An inspection that finds two or more willful or repeated violations or failure-to-abate notices based on high-gravity, serious violations due to a High-Emphasis Hazard.
- Nonfatality/Noncatastrophic Hazards Due to the Potential Release of a Highly Hazardous Chemical—Process Safety Management (PSM). An inspection that finds three or more willful or repeated violations or failure-to-abate notices based on high-gravity, serious violations related to petroleum refinery hazards, i.e., hazards covered by the petroleum refinery PSM NEP and hazards associated with the potential release of highly hazardous chemicals, as defined by the PSM Covered Chemical Facilities NEP.
- Egregious Violations. All "egregious" enforcement actions—cases where OSHA has alleged instance-by-instance violations of a particular standard—will be considered SVEP cases.

Selection into the SVEP will have significant impact on employers moving forward. Accordingly, while OSHA has not announced an implementation date for the SVEP, employers should take the time now, before its implementation, to audit their safety programs.

"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.

Until our next visit,

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