Wimberly Lawson
Wright Daves & Jones, PLLC
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Briefly

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ARE YOU READY TO COMPLY WITH THE NEW ACA HEALTHCARE REPORTING REQUIREMENTS?

Catherine E. Shuck

"Employers must prepare quickly to determine whether they have sufficient information to timely file the health coverage reports."

Once again, the New Year brings with it a new requirement for employers under the Patient Protection and Affordable Care Act (ACA). Pursuant to Section 6056 of the ACA, each employer with 50 or more full-time employees (30 hours or more per week) must file an informational return with the IRS providing employee-specific information about the health coverage offered during 2015, whether healthcare benefits are offered or not. Additionally, employers must provide the same information to employees.

First, employers must send a Form 1094-C to the IRS, which gives a company level overview of the benefits offered and hours worked. Second, the employer must provide each employee who was benefit eligible during 2015 with a Form 1095-C. The information will be used to enforce the ACA's individual mandate and determine the eligibility of individuals for subsidies on the healthcare exchanges. Individuals offered coverage at work aren't eligible for subsidies if the offered plan meets the ACA's standards for affordability and value.

The information on these returns will include total employee headcount per month; health coverage for all full-time employees; name, Social Security number, date of birth, and address for employees and covered dependents; employees' share of the lowest monthly health insurance premium; and other data. The IRS will use this information to determine which employers and employees are complying with the ACA's coverage requirements.

The returns were initially due in early 2016, but on December 28, 2015, the IRS issued Notice 2016-04, bumping the due dates back. First, the IRS moved the deadline for the Form 1095-C, which employers must furnish to employees, from February 1, 2016 to March 31, 2016. Second, the IRS moved the deadline for furnishing the form and the corresponding transmittal to the IRS from February 29, 2016 to May 31, 2016 if not filing electronically and from March 31, 2016 to June 30, 2016 if filing electronically. Notice 2016-4 also delayed the corresponding due dates under Section 6055, which applies to insurers and self-insured employers.

In summary: employers have until March 31, 2016 to get the forms to employees. Employers have until June 30, 2016 to get the forms to the IRS if they file electronically and until May 31, 2016 if they file paper. Employers filing 250 or more forms must file electronically; smaller employers *may* file electronically if they choose.

Most individuals will not need their form 1095-C to file their taxes, but Notice 2016-4 provides relief to taxpayers who file their taxes before receiving a form 1095-C, as long as the taxpayer relies on other information provided by the employer and/or the coverage provider.

The Section 6056 employer reporting requirement is difficult. The forms are long and the codes are confusing. To avoid penalties, however, covered employers must make a good faith effort to comply. Fines for incorrect employer reports can range from $50 per return if a mistake is corrected within 30 days of filing to $500 or more per return for intentional errors. The IRS has stated that it will grant relief to those employers who make a good-faith effort to comply but nevertheless file incorrect or incomplete information. However, the IRS has been clear that a "good faith effort" must include actually filing the forms on time. Thus, employers must be diligent in working to collect the necessary information and prepare and file the forms.

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Howard B. Jackson

"A further concern is that Weingarten rights will be extended by the current NLRB to the non-union sector, so that non-union employees may demand the assistance of a co-worker during an interview that could lead to discipline."

EMPLOYEES' RIGHTS TO REPRESENTATION
UNDER THE NLRB

A couple of recent cases from the National Labor Relations Board (NLRB) illustrate how a union employee's right to representation during an investigation that could lead to discipline apply in the substance abuse test setting. Some 40 years ago the U.S. Supreme Court ruled in a case involving a unionized employer that when an employee is questioned by the employer during an investigatory interview about a matter the employee reasonably believes could lead to discipline, the employee has the right to request and be provided with union representation during such interview. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). This right to representation is commonly referred to as the employee's *Weingarten* rights.

This right to representation during an investigatory process that could lead to discipline is rooted in the National Labor Relations Act's ("Act") provision for the protection of employee's rights in addressing matters that relate to their wages, hours and working conditions. At one point, the NLRB extended *Weingarten* rights to a non-union employee who requested the assistance of a co-worker during a disciplinary interview. That decision has been reversed, however, and the most recent NLRB precedent indicates that *Weingarten* rights do not apply in the non-union setting. *IBM Corp.*, 341 NLRB 1288 (2004).

It is clearly established that the right to representation during disciplinary interviews applies to drug testing. For example, in late 2014, the NLRB held that an employer violated the Act by requiring an employee to submit to a drug and alcohol test, notwithstanding his request for representation, and by discharging him for his refusal to take the test without representation. *Ralphs Grocery Co.*, 361 NLRB No. 9 (2014). The employer demanded that the employee submit to a reasonable suspicion drug screen. The employee demanded representation and refused to take the drug screen without the representative. The employer discharged the employee specifically because of his refusal to take the test.

The NLRB found that his demand for representation before submitting to the test – something that could obviously lead to disciplinary action – was an exercise of his *Weingarten* rights for which he could not be lawfully discharged. The NLRB rejected the employer's contention that the discharge was based on insubordination and a presumption of a positive test based on the refusal, because those grounds were inextricably intertwined with the employee's assertion of his protected rights. The employer could not successfully argue that it would have discharged the employee even if he had not refused to take the test, because it gave no such other reasons for the action. The employer's documentation also showed that refusal to submit to the test was the reason for discharge.

A year later, the NLRB went a step further finding that *Weingarten* rights extend to allowing an employee to insist on having a union steward present during the drug or alcohol test itself. *Manhattan Beer Distributors*, LLC, 362 NLRB No. 192 (2015). The concept is that having the representative present could assist the employee in making sure proper screening protocols are followed. The case also discusses the principle that under some circumstances an employer must delay a test if necessary for a worker to obtain union representation.

A further concern is that *Weingarten* rights will be extended by the current NLRB to the non-union sector, so that non-union employees may demand the assistance of a co-worker during an interview that could lead to discipline. It

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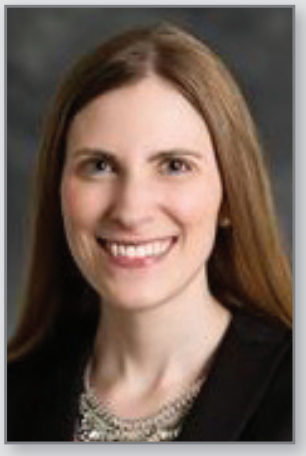

PLEASE JOIN US IN WELCOMING COLLEEN HORN!

COLLEEN K. HORN is an Associate in the Nashville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in September 2015. Colleen's practice includes an emphasis in insurance defense, workers' compensation, employment law, and general civil defense litigation. Colleen received a Bachelor of Business Administration and a Bachelor of Arts in History from Belmont University, graduating magna cum laude in 2006. She then attended Southwestern Law School in Los Angeles, California, where was a member of the Moot Court Honors Program and Southwestern Law Review. During law school, Colleen served as an extern to the Honorable Terry J. Hatter, Jr., United States District Court Judge for the Central District of California. Prior to joining the Firm, Colleen spent over three years with a general civil defense firm in Knoxville, Tennessee, and Brentwood, Tennessee. Colleen is a member of the Tennessee Bar Association, the Nashville Bar Association, Lawyers' Association for Women – Marion Griffin Chapter, and Belmont University College of Law American Inn of Court.

Jerome D. Pinn

PROSPECTIVE DATES FOR IMPLEMENTING NEW OVERTIME RULES LIMITING WHITE COLLAR EXEMPTIONS

During late November, at a conference at the *American Bar Association's Labor and Employment Law Section*, Solicitor of Labor Patricia Smith stated it was likely that the new white collar eligibility rules will not be issued until late 2016. One of the reasons for that time frame is that the U.S. Department of Labor (DOL) received approximately 270,000 comments about the proposed rules in the comment period that ended in early September.

The time frame for issuing the final rules suggests that the new requirements may not go into effect until the beginning of calendar year 2017. The current minimum salary to meet the white collar exemption requirements is now approximately $24,000, and the proposed rules are expected to result in an increase to around $50,000, more than double the current level.

"NEW ACA HEALTHCARE REPORTING REQUIREMENTS" continued from page 1

Also, effective January 1, 2016, small employers with 50-99 employees must provide healthcare coverage, while those with fewer employees remain exempt. The choice of such employers is to either pay a penalty that applies if at least one worker gets a subsidy to buy healthcare coverage through an exchange, which could total $2,160 for each full-time employee, not counting the first 30 employees.

Employers must prepare quickly to determine whether they have sufficient information to timely file the health coverage reports. The solution: if you have not done so already, start now!

"EMPLOYEES' RIGHTS TO REPRESENTATION" continued from page 2

is quite possible that the current NLRB is looking for an appropriate case to address this issue, as the Board has taken an increasingly expansive view of employee rights in the non-union setting.

At the moment, *Weingarten* rights apply to employees who are members of a bargaining unit. When the employer is engaging in an investigation, or otherwise engaging in a process that may lead to disciplinary action, and an employee requests representation, the employer has three choices: (1) grant the request, with or without a reasonable period of delay to allow the representative to arrive; (2) give the employee the option of proceeding without representation; or (3) discontinue the interview (or other process) and make a disciplinary decision based on information obtained or available from other sources. As illustrated by the *Ralph's Grocery*, and *Manhattan Beer Distributors* cases, the employer must not cite the employee's refusal to proceed without representation as a basis for any disciplinary action.

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The Tennessee workers' compensation lawyers of Wimberly Lawson understand the challenges an employer faces in a workers' compensation claim. Our attorneys provide aggressive representation, and our reputation for integrity, coupled with our concern for your bottom line, ensures your best interests will be protected.

Respectfully,

Fredrick R. Baker

Fredrick R. Baker
Member