

CHANGES ARE OCCURRING
 IN NEW HEALTHCARE LAW IMPLEMENTATION



Catherine Shuck

"A number of regulatory changes to PPACA that ease some rules applicable to employers and employer-sponsored plans have been in the news recently."

Although the future of the Patient Protection and Affordable Care Act (PPACA) is uncertain, employers must forge ahead and comply with PPACA's numerous statutory and regulatory provisions at least for now. A number of regulatory changes to PPACA that ease some rules applicable to employers and employer-sponsored plans have been in the news recently and are discussed below.

Waivers available from PPACA's annual limit requirement.

The Department of Health and Human Services (HHS) has put into place a procedure whereby plans can apply for a waiver of PPACA's annual limit requirement. Although this waiver process was initially targeted to provide relief to mini-med plans, as explained below it may provide relief to any plan that would be burdened by complying with PPACA's annual limit requirements.

PPACA provides that for plan or policy years beginning on or after September 23, 2010, a plan may not have an annual limit that is less than \$750,000. The rule applies regardless of whether or not the plan is a grandfathered health plan. For plan or policy years beginning on or after September 23, 2011, the annual limit minimum goes up to \$1.25 million, and for plan or policy years beginning on or after September 23, 2012, the minimum jumps to \$2 million. (After 2014, annual limits are prohibited.)

McDonald's made the news not long after PPACA was passed by announcing that if it were forced to comply with the annual limit requirement, it would drop the health insurance it currently offers its workers. McDonald's, like many employers, offers so-called mini-med plans, which provide low premiums but which cap annual benefits at a low level, typically only \$2,000 to \$3,000 per year. McDonald's essentially argued that it would be prohibitively expensive to comply with the annual limit requirement.

When the implementing agencies (HHS, Treasury, and the Department of Labor) issued interim final rules on June 28, 2010 addressing PPACA's annual limit requirement, the agencies noted in the preamble that HHS would subsequently create a process by which mini-med plans could apply for waivers from the annual limit. That process was announced, rather quietly, on September 3, 2010.

To obtain a waiver, the plan must submit a statement to HHS meeting a few requirements, the main one being a description of why compliance with the annual limit requirement would result in a significant decrease in access to benefits or a significant increase in premiums. There is no requirement that the applicant be a mini-med plan. The plan must apply at least 30 days before the beginning of the plan year. If the waiver is granted, it is good for the single plan or policy year only. Participants must be provided detailed notice of the waiver.

As of December 3, HHS announced that it had issued waivers of the annual limit requirement to over 200 employers, unions and insurers, affecting 1.5 million enrollees. The waiver process has enabled plans with annual limits much higher than those of a mini-med plan but still below the \$750,000 threshold to maintain their limits. For example, if a plan's current annual limit is \$300,000, a waiver could allow the annual limit to remain in place for the next plan year, rather than increase to \$750,000. If

Continued on page 4 ►►

ICE ENFORCEMENT TARGETING EMPLOYERS TO CONTINUE UNTIL IMMIGRATION REFORM IS REACHED



Jerry Pinn

"The strategy focusing on I-9 audits rather than raids allows a much broader enforcement against employers."
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During the Fall, Department of Homeland Security Secretary Janet Napolitano emphasized that, while the Obama Administration remains committed to immigration reform legislation, until the laws are changed, DHS will engage in targeted work site enforcement. Rather than going after undocumented workers, the Administration is directing its efforts towards targeting employers that knowingly hire undocumented aliens or mistreat workers. The strategy focusing on I-9 audits rather than raids allows a much broader enforcement against employers, according to Secretary Napolitano. However, she does acknowledge that it is hard to prove a case against employers under the current law, and the fines are really too low. Currently, fines for uncorrected technical violations on I-9 forms range from \$110.00 to \$1,100.00 per form. Higher fines of up to \$16,000.00 per person can apply for knowingly employing unauthorized workers.

As a result of the change in policy away from raids towards I-9 audits, the numbers of employees arrested have declined. Criminal arrests of employees have fallen to 245 this fiscal year, compared to 296 and 968 in the previous two fiscal years. A recent example of the emphasis on I-9 audits and fines occurred at clothing retailer Abercrombie & Fitch, which has agreed to pay over \$1 million in fines as a result of a Form I-9 audit at the company's Michigan retail stores. The audit of Abercrombie's Michigan retail stores has uncovered numerous technology-related deficiencies in the company's electronic I-9 verification system, according to ICE. ICE stated that employers are responsible not only for the people they hire, but also for the internal systems they choose to utilize to manage their employment process. In spite of the large assessed fines, ICE found no instances of the company knowingly hiring unauthorized workers.

ICE states that its I-9 audit targets result in part from specific leads and whistleblower allegations of employer non-compliance, hiring unauthorized workers, and paying unfair wages. Compounding the problem for employers is the fact that federal regulatory agencies are now engaging in more coordinated efforts involving all workplace regulations. For example, an immigration audit can become a wage-hour or workplace safety audit, as DHS inspectors share their findings with Labor Department investigators. Similarly, an employer under investigation for wage and hour violations may find Labor Department inspectors asking to see forms I-9 and other immigration-related documents and, under current practice, DOL inspectors finding questions of I-9 compliance are required to pass on their concerns to ICE. Also, DOL inspectors conducting other types of investigations - under OSHA, or EEOC - must alert ICE to any immigration concerns they uncover, just as ICE inspectors must alert them to workplace safety or discrimination issues they discover.

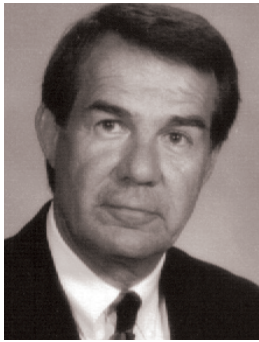
ICE sometimes takes many months to report on the results of its audits. Further, there reportedly has been some confusion as to the subject of technical or procedural I-9 violations. In 1996, Congress passed an amendment to the immigration law to provide employers with the opportunity to correct technical or procedural I-9 violations if the deficiencies occurred in the context of a good faith effort to comply with employment verification requirements. Under the amendment, employers that have found they have committed certain omissions or failures in the I-9 procedures will not be subject to a fine, but will be given notice of the technical violations, and will be granted 10 days to cure the deficiencies. Subsequently, in 1997, then INS General Counsel Paul Virtue issued a memorandum that outlined the agency's position regarding which violations were substantive and which were technical or procedural. The following year, INS published a proposed regulation which defined substantive versus technical violations, largely following the Virtue memorandum.

Some employers are reporting that ICE has issued a number of Notices of Intent to Fine (NIF) improperly interpreting the provisions in the INA regarding substantive versus procedural and technical violations. During 2010, ICE confirmed the agency's official policy that it is following the standards set forth by the 1997 Virtue memorandum, and the 1998

Continued on page 4 ►►

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NEW POSTING RULE FOR PRIVATE EMPLOYERS



Ronald Daves.....

"The proposed rules require all employers who are covered by the NLRA ... to make prominent postings in the workplace to inform employees of their rights under the NLRA, including the right to form, join and assist union organizing."

While many of us were preparing for holidays and celebrations, the Obama NLRB was quietly publishing proposed new rules to advance the Administration's pro-labor-organizing agenda. The proposed rules require all employers who are covered by the NLRA (most private employers) to make prominent postings in the workplace to inform employees of their rights under the NLRA, including the right to form, join and assist union organizing. The postings also are required to advise employees of NLRB contact information and NLRB enforcement procedures.

The Obama NLRB believes that many employees are unaware of their legal rights. It stated that informing employees of their rights regarding union organizing is central to advancing the NLRA's promise of "full freedom of association, self-organization, and designation of representatives of their own choosing." The rule contains a description of employee rights that are derived from NLRB and federal court decisions. It includes examples of employer conduct that may be violative of employee rights.

Employers will be required to post a hard copy of the notice in conspicuous places in the workplace, including all places where notices are normally posted. Employers who customarily communicate with their employees electronically must also provide the notice electronically, either by email or by posting on the employer's intranet site and/or by other electronic means.

The Notice of Proposed Regulations was published in the Federal Register on December 22, 2010. Public comment on the rule may be submitted within sixty days (02/20/11) of the publication date. Comments may be submitted electronically at www.regulations.gov or by mail to the NLRB, 1099 14th Street, NW, Washington, DC 20570. The full text of the proposed rule and other information may be viewed on the NLRB's website at www.nlr.gov.

Employers may be sure that this initiative by the pro-labor Obama Board is a clear affirmation of the President's determination to reverse a long-term decline in union membership and to reward big labor for its support of his campaigns past and future. The Administration has been unsuccessful in its efforts to pass the so-called Employee Free Choice Act, which would eliminate employee's right to have a secret ballot vote regarding unionization and, thereby, make union organizing much easier. The Obama Administration has engaged in other more subtle measures to achieve its pro-labor goals by making several recess appointments to the NLRB in order to give the Board its first Democrat majority in ten years. This proposed rulemaking regarding the mandatory postings may be viewed as a continuing effort to accomplish, by Executive Order, objectives that the Administration cannot achieve through the legislative process.

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Continued on page 4 ►►

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“CHANGES ARE OCCURRING” continued from page 1

your plan year has not yet started, or if you are planning ahead for your next plan year, our firm can provide more information and help with the process of obtaining a waiver.

Medical loss ratio regulations provide flexibility for some plans.

In a similar vein, on November 22, the government announced new regulations applicable to insurance companies that define the highly technical concept of medical loss ratio. In layman’s language, PPACA and the regulations require that 80 to 85 percent of premium dollars be used to pay medical costs of the insureds, instead of the administrative expenses of the insurers. If the insurers do not comply with the requirement each year, the insurers must rebate a portion of the premium to the insureds each year.

The regulations granted insurers some relief for mini-med policies, which usually cannot satisfy the medical loss ratio requirements because of high administrative costs due to turnover and relatively low spending on claims. The announced goal of the relief for mini-med plans, as with the annual limit relief, was to discourage employers from dropping their plans because of the new law. The regulations also grant relief to insurers with fewer than 75,000 enrollees in a state, and to new insurers.

Group health plans may switch insurers without losing grandfathered status.

Finally, the government has also made it possible for employers to switch insurance carriers while retaining grandfathered status. Interim final regulations initially stated that an insured plan would lose grandfathered status upon changing to a new insurer. The government changed its position and announced that an insured group plan will not lose grandfathered status merely by changing to a new insurer. The group plan with the new insurer must have essentially the same terms as the plan with the prior insurer in order to keep grandfathered status. Minor differences between the old and new plan will not result in loss of grandfathered status.

“ICE ENFORCEMENT TARGETING EMPLOYERS” continued from page 2

proposed regulations. Further, ICE has announced that it generally recognizes a 5-year statute of limitations. Employers are advised that if they have difficulty with investigators refusing to follow the Virtue memorandum or honoring the 5-year statute, they may consider contacting the District Counsel that oversaw the issuance of the NIF to raise the issue.

“NEW POSTING RULE” continued from page 3

Opponents of the rule and the rule-making, argue that the NLRB lacks the statutory authority to impose the requirement. That opinion has been expressed by Labor Board Member Hayes. The U.S. Chamber of Commerce and its attorneys are taking the position that the regulation is tantamount to “government sanctioning” of unions.

Certainly, the imposition of the mandatory postings, and the language of the postings, will have an impact on employers’ efforts to remain union free. Another yet unforeseen and un-established effect is the possibility of severe sanctions to employers whose postings do not meet the requirements. Labor unions and the NLRB could prosecute employers during unionization attempts and create negative results for employers.

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