



THE PATIENT PROTECTION AND AFFORDABLE CARE ACT IS WITH US - NOW WHAT?



Cathy Shuck

“Among the key questions yet to be answered for employers are: (1) how the automatic enrollment provision will be administered; and (2) precisely how an employer’s full-time equivalent workers will be determined for purposes of the ‘play or pay’ provision.”

Now that the Supreme Court has ruled that the Patient Protection and Affordable Care Act’s (the “ACA”) individual mandate is constitutional, the focus shifts to the regulatory agencies that will issue the regulations and guidance necessary to implement the law’s core provisions by January 1, 2014. Among the key questions yet to be answered for employers are: (1) how the automatic enrollment provision will be administered; and (2) precisely how an employer’s full-time equivalent workers will be determined for purposes of the “play or pay” provision. That provision requires that employers with fifty or more full-time equivalent employees offer health insurance to employees and their dependents or pay a penalty. The implementing agencies (Health and Human Services (“HHS”); the Treasury and IRS; and the Department of Labor (“DOL”) issued a “Frequently Asked Questions” document (“FAQ”) earlier this year giving a preliminary indication as to how the agencies will craft those rules, but the specifics are yet to be addressed.

First, the automatic enrollment provision requires employers with more than 200 full-time employees to automatically enroll new hires in the employer’s health insurance plan, subject to any waiting period authorized by law. It also requires covered employers to automatically continue coverage of currently-enrolled employees. The automatic-enrollment provision was written without an effective date, but the agencies had previously stated that it would not take effect until DOL completes rulemaking, and that DOL “intended” to complete that rulemaking by 2014. The FAQ now pushes the effective date back even further, noting that DOL has concluded that it will not be ready to take effect by 2014. The agencies cited the need for “coordinated guidance and a smooth implementation process, including an applicability date that gives employer sufficient time to comply” in noting that the provision would likely not be implemented by 2014. Although that could change, it appears that employers now have one less thing to worry about with respect to the ACA in 2014.

Regulations or other guidance implementing the automatic enrollment provision will have to, among other things: define how the 200-employee threshold is calculated; explain how an employer with multiple plans should determine which plan the employee should be enrolled in; clarify whether the coverage should be employee-only; clarify how other coverage choices should be made; explain how an employee may opt out of the coverage; and explain what sort of notice is required to employees, including notice informing an employee of the opt-out option.

With respect to the play-or-pay mandate and the determination of full-time status, the FAQ notes that upcoming rules are “expected” to provide that employers will have as much as six months to determine whether a newly-hired employee is full time for purposes of compliance with the mandate. Recall that the ACA defines “full time” as 30 or more hours per week. Employers will not be subject to a penalty for noncompliance during that determination period.

Whether the employee is full time will be based on whether “(a) the employee is reasonably expected as of the time of hire to work an average of 30 or more hours per week on an annual basis and (b) the employee’s first three months of employment are reasonably viewed, as of the end of that period, as representative of the average hours the employee is expected to work on an annual basis.”

Specifically, the rules are expected to provide that if a new employee is “reasonably expected” to work full time, and does work full time during the first three months of employment, then the employee must be offered health coverage as of the end of that period. However, if it cannot be reasonably determined whether the new employee is expected to work full time, the employer must make an evaluation after three months of employment. If the employee actually works full time

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Amanda Lowe.....

“Currently, 16 states and approximately 150 counties and municipalities include gender identity or expression in their discrimination protection statutes.”

EEOC RULES DISCRIMINATION LAWS PROTECT TRANSGENDER STATUS

In April, 2012 the EEOC overturned the Department of Justice’s refusal to fully consider the EEO claim of a transgender federal employee, holding that discrimination based on gender identity, change of sex and/or transgender status is discrimination on the basis of sex, and is therefore actionable under Title VII. The case of *Macy v. Holder* involved the Bureau of Alcohol, Tobacco and Firearm’s decision not to hire a highly qualified transgender applicant. After being told on several occasions that she had the job pending the background check, Macy was informed the position was no longer available *after* she advised the Agency that she was in the process of transitioning from male to female. Upon later inquiry, she was informed the position had been filled. Macy filed an EEO complaint, suspecting the initial reason provided by the Agency was pretextual. The EEOC decided to accept jurisdiction over Macy’s entire claim.

In *Macy*, the EEOC observed that sex stereotyping is but “one means of demonstrating disparate treatment based on sex.” Thus, the EEOC concluded that “intentional discrimination against a transgender individual because that person is transgender, is, by definition, discrimination ‘based on sex,’ in violation of Title VII.” The EEOC pointed out that the discrimination is “based on sex” in violation of Title VII whether the employee is discriminated against for expressing gender in a non-stereotypical fashion, the employer is uncomfortable with the employee’s transition (completed or in process), or because the employer simply does not like the fact that the employee identifies as a transgender person.

Although the EEOC decision is significant, to a degree the EEOC was playing “catch-up” with some federal courts, states and local governments. The EEOC cited to several recent cases that relied upon the 1989 *Price Waterhouse v. Hopkins* decision to find in favor of transgender individuals, holding that they were discriminated against based on sex stereotyping. Currently, 16 states and approximately 150 counties and municipalities include gender identity or expression in their discrimination protection statutes.

The EEOC has demonstrated that enforcement is likely to spread into the private sector by way of their *amicus* brief in *Pacheco v. Freedom Buick GMC Truck*, wherein the EEOC argued in favor of the plaintiff’s gender identity claim under Title VII. Employers should be prepared for claims of discrimination relating to transgender status, and consider training, education and policies similar to those that address, prevent and prohibit sexual harassment and other forms of discrimination based upon sex.



Anita Patel.....

“It is expected that as many as 1.4 million youth will benefit from the passage of this legislation and be able to enter the workforce legally.”

DREAMERS TO BE GRANTED WORK AUTHORIZATION

On June 15, Secretary of Homeland Security Janet Napolitano announced that certain young people who came to the United States as children and meet other key guidelines (“DREAMers”) may be eligible, on a case-by-case basis, to receive, in two year increments, deferred action, the right to remain in the United States and to be considered for an Employment Authorization Document (“EAD”).

Those eligible at this time for consideration are those who:

1. Came to the U.S while under the age of 16;
2. Were under the age of 31 on June 15, 2012;
3. Have continuously resided in the United States since June 15, 2007 and who were physically present in the U.S. on June 15, 2012;
4. Are currently in school, have graduated, obtained a GED, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
5. Have not been convicted of a serious crime or multiple minor crimes.

Individuals may begin to request consideration of deferred action for childhood arrivals on August 15, 2012.

It is expected that as many as 1.4 million youth will benefit from the passage of this legislation and be able to enter the workforce legally.

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OSHA'S VIEWS ON DISCIPLINE OF EMPLOYEES WHO REPORT INJURIES



Mary Helms

"The premise for the report is that the reporting of an injury by an employee is a protected activity under OSHA which cannot be subject to retaliation."

..... rules should not penalize workers who do not realize immediately that they are injured or that their injuries are serious enough to report.

Another fact pattern occurs when an employee reports an injury, and the employer disciplines the employee because the injury resulted from the violation of a safety rule by the employee. For such discipline to be legitimate, a key factor is whether an employer is simply attempting to invoke a work rule as a pretext for discrimination against the worker who reports an injury. This may depend on whether the employer monitors and imposes similar discipline on employees who violate the work rule even in the absence of an injury.

In March of 2012, OSHA published its views on certain fact patterns involving employees who are disciplined following their reports of injury. The premise for the report is that the reporting of an injury by an employee is a protected activity under OSHA which cannot be subject to retaliation. Therefore, OSHA views discipline of an employee simply for reporting an injury to be a violation of the OSHA law. However, an employee can be disciplined for violation of company rules or for fault.

For example, suppose that an employer disciplines an employee for violating a rule about the time or manner for reporting injuries. While recognizing the legitimacy of such a rule or policy, OSHA expresses reservations. That is, such policies or procedures must be reasonable and may not unduly burden the employee's right and ability to report. Thus,

KNOW YOUR ATTORNEY FREDRICK R. BAKER

FREDRICK R. BAKER is a Member in the Cookeville, Tennessee office of the firm, which he joined in 2001. His law practice includes an emphasis in workers' compensation and employment discrimination, as well as ADA and FMLA compliance. Fred is the Editor of the Tennessee Workers' Compensation Handbook,



4th Edition, published by M. Lee Smith Publishers. He is also on the Advisory Board for the Tennessee Workers' Comp Reporter. Fred was named Co-Chair of the Legislative Committee of the Upper Cumberland Society of Human Resource

Management for 2012 and is a member of the Tennessee Bar Association. Fred received his Bachelor of Arts degree in Philosophy, summa cum laude, from Transylvania University and his law degree, magna cum laude, from the University of Tennessee.

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Andrew Hebar

"In spite of a strong union-led phone call and door knocking campaign to muster supporters, the governor won by 7 percentage points."

..... the number of union dues-paying members has dropped in half as the law gives them the right to choose whether union dues will be deducted from their paychecks. Republican Governor Mitch Daniels in Indiana adopted similar measures, resulting in losses of a majority of dues-paying public sector union membership in Indiana.

WISCONSIN GOVERNOR RETAINED AFTER STATE RIGHT TO WORK MEASURES

On June 5, 2012, Wisconsin Governor Scott Walker survived a recall election, making him the first governor in history to survive such an election. Public sector unions and their supporters in the State were outraged by the governor's efforts to balance the budget in Wisconsin by curtailing collective bargaining rights for public employee unions, trimming rich benefit programs, and eliminating mandatory union membership. The governor's efforts ultimately closed the budget deficit without raising taxes. In spite of a strong union-led phone call and door knocking campaign to muster supporters, the governor won by 7 percentage points. Democratic leaders attributed the victory to the governor's advantage in fund raising. Many believe that public employee benefits have gotten out of hand, particularly since they are often under-funded, therefore placing the burden of satisfying those liabilities on the shoulders of future taxpayers. There seems to be an increased emphasis on the part of both Democratic and Republican local government leaders across the country to reduce such costs. Significantly, other elections held the same day in San Jose and San Diego, California, reduced retiree benefits for government employees.

Governor Walker's initiatives have been devastating to public-sector unions in Wisconsin. As a result of the "right to work" concept now written into Wisconsin's public sector collective bargaining laws, the number of union dues-paying members has dropped in half as the law gives them the right to choose whether union dues will be deducted from their paychecks. Republican Governor Mitch Daniels in Indiana adopted similar measures, resulting in losses of a majority of dues-paying public sector union membership in Indiana.

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during the first three months of employment, and the employee's hours during that period are reasonably viewed, as of the end of those three months, as representative of the hours the employee is expected to work going forward, then the employee is full-time and must be offered health coverage. If the employee works part time (i.e., less than 30 hours per week), then there is no liability for the employer penalty for that period.

On the other hand, if the employee works full-time during the first three months of employment, but the employee's hours during that period are reasonably viewed as not representative of the average hours the employee is expected to work on an annual basis, then the employer may take another three months to determine the employee's status. Again, in this situation, no penalty would be due as to either the first three months or the second three months. If the employee still is reasonably viewed as part time at the end of the second three months, then health coverage need not be offered.

The FAQ notes that any guidance or regulations are also expected to coordinate the rules for newly-hired employees with the rules applicable to other employees, such as those transferred from one employment classification or status to another.

Finally, the FAQ also notes that upcoming rules are “expected” to provide that an employer will not be subject to the penalty if the employer fails to offer health coverage during the first three months of employment (i.e., during a waiting period).

Regulations or other guidance on the employer mandate will also have to address numerous other questions, including how an employing entity is defined for purposes of the mandate. The statute appears to require that all businesses controlled by a single owner be lumped together, but some advocates have argued that the agencies have flexibility to read that provision leniently, perhaps even permitting employers to count employees by physical location. Another question is how employees in different states or even outside the United States will be counted.

The FAQ included the statement that the agencies “are mindful of employers’ requests for safe harbors and simplicity and will seek to accommodate those requests to the extent feasible and consistent with the terms of the statute.” It is not yet clear whether the agencies will be able to deliver on that promise, given the complexity of the law.

The ACA is still likely to face challenges in the months and years ahead. On the legislative front, a Republican sweep of the November elections could result in Congressional action repealing or modifying some portions of the ACA. It is unlikely that proponents of repeal will pick up enough Senate votes to pass a measure repealing key provisions, such as the individual or employer mandates, but some less contentious provisions could be targeted.

On the regulatory front, the National Federation of Independent Businesses (NFIB), which was on the losing side of the Supreme Court challenge to the ACA, has turned its attention to the rule-making process. The NFIB and other employer advocates are urging HHS to write the rules determining how full-time employees are determined, how employing entities are defined, what benefits employers must offer, and other such provisions in an employer-friendly way. If Mitt Romney is elected in November, he will be in a position to appoint new Cabinet Secretaries to head the agencies with rule-making authority, which could have a significant impact on the final regulations.

Although employers should move forward with plans to comply with the applicable ACA provisions, employers should also continue to closely monitor the rule-making process.

Still another fact pattern deals with an employer who establishes incentive programs that may discourage employees from reporting injuries. According to an even more recent report of the Government Accountability Office issued in May, OSHA's enforcement authority to address incentive programs that discourage reporting is limited. That is, as an agency, OSHA can cite employers for injuries that go unreported as a result of incentive programs, but cannot cite them for the disincentives themselves. According to the report, approximately 25% of U.S. manufacturers implement some type of safety incentive program, usually either based upon injury and illness rates at a work site or the behavior of workers. Rate-based programs may reward workers for reporting no or few injuries during a time period, while behavior-based programs may reward workers for reporting near-miss incidents. For the manufacturers surveyed who do implement such systems, 69% used demerit systems, 56% require post-accident drug and alcohol testing, 22% have some type of rate-based program, and 14% have some type of behavior-based program. Furthermore, 14% of employers surveyed encouraged the reporting of workplace injuries and illnesses through safety management programs, such as creating incentives to identify hazards.

Based on the OSHA publication, prudent employers should review existing safety incentive programs and policies to ensure compliance.



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We invite you to attend our 33rd Annual Labor and Employment Law Update

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THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott Downtown
500 Hill Avenue, Knoxville, Tennessee
November 15 & 16, 2012



BACK BY POPULAR DEMAND OUR KEYNOTE SPEAKER

Dr. Farris Jordan

Licensed Psychologist
and author of
"Stress! Are You in Control?"

SPECIAL GUESTS EEOC OFFICIALS

Opportunities to participate in panel discussions entitled *"New Developments and Strategies for Working with the EEOC"* with guest speakers Sarah L. Smith, Director, and Sylvia Hall, Enforcement Supervisory Federal Investigator, with the Nashville, Tennessee office of the EEOC.

A FEW COMMENTS FROM LAST YEAR

Hard to choose – so many great choices for breakout

Very informative!

Great information that's affordable for small employers

A great refresher – keeps me up to date!

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TARGET OUT OF RANGE



Dear Clients and Friends:

Our Annual Fall Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. **PLEASE PLAN NOW TO JOIN US.**

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. A few of the thirty-five or more topics are:

- Boasts, Hosts, and Posts – Developments in Social Media for Employers
- Drug Testing Policies, Procedures and Issues
- Workers' Compensation in Depth Legislative and Case Law Update
- Supervisor/Manager Training and Tips on First Level of Prevention
- New Developments and Strategies for Working With the EEOC
- Employer Liability? Tort Reform, Negligence, and Premises Liability
- Affirmative Action, EEO-1 Reports and Service Contract Act Compliance
- Workplace Harassment – More Than You Want to Know
- Employment Policies – Handbooks, Handguns, Intra-Net, Tobacco, Electronic Communications Devices and More
- Internal Dispute Resolution Systems
- USERRA and Veteran's Issues
- HR Audit – Get Ahead of the Game

Join us in Knoxville on November 15th and 16th! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves
Managing Member



AGENDA

(Note: These are Pre-Conference Topics, Titles and Times.
They may change – Please Check Final Conference Program on Day of Conference.)

Thursday, November 15, 2012 (9:00 a.m. - 5:15 p.m.)

8:00 a.m. – 9:00 a.m. Registration and Continental Breakfast

9:00 a.m. - 10:45 a.m. - General Session

The Year in Review and Impact of Recent Election Results
Healthcare Reform - What's An Employer to Do?
Workers' Compensation - Current Trends and Emerging Issues
Wage & Hour Enforcement Activity Update

11:00 a.m. - 12:00 p.m. - Breakout Sessions

Employer Liability? Tort Reform, Negligence, and Premises Liability
FMLA Basic Course on Application of Law, Regs and Compliance
Drug Testing Policies, Procedures and Issues
Workers' Compensation In Depth Legislative and Case Law Update
ADAAA Basic Review and Developments of Law, Regs and Enforcement
Supervisor/Manager Training and Tips on First Level of Prevention
Wage and Hour – D.O.L. Initiatives, How to Comply and Avoid Liability

12:00 p.m. - 1:15 p.m. - Lunch (*As Guests of Wimberly Lawson*)

1:30 p.m. - 2:30 p.m. - General Session

Keynote Speaker, Dr. Farris Jordan

2:45 p.m. - 3:45 p.m. - Breakout Sessions

New Developments and Strategies for Working With the EEOC
Boasts, Hosts, and Posts - Developments in Social Media for Employers
Affirmative Action, EEO-1 Reports and Service Contract Act Compliance
Workplace Harassment - More Than You Want to Know
Employment Policies - Handbooks, Handguns, Intra-Net, Tobacco,
Electronic Communications Devices and More
ADAAA Advanced Course and Application of Law, Regs and Enforcement
Immigration – The Executive Order, E-Verify and Tennessee Lawful Employment Act

4:00 p.m. - 5:15 p.m. - General Session

GINA Update
Internal Dispute Resolution Systems
Religion - The Bible in the Workplace
USERRA and Veteran's Issues
What Keeps Corporate Counsel Awake at Night?

5:15 p.m. - 7:00 p.m. Reception (*please join us for scrumptious hors d'oeuvres*)

Friday, November 16, 2012 (8:30 a.m. - 1:00 p.m.)

8:00 a.m. - 8:30 a.m. - Continental Breakfast

8:30 a.m. - 9:30 a.m. - General Session

OSHA Crackdown - Recordability Requirements
Guidance on Internal Investigations/Privileged Information
Tips for Implementing Litigation Hold Requirements
Protected Concerted Activity - What's That?

9:45 a.m. - 10:45 a.m. - Breakout Sessions

FMLA Advanced Examination of Recent Case Law and Difficult Issues
Wage and Hour - Ask the Experts/Open Forum Re Compliance
Getting Thicker Skin - The Law on Retaliation
New Developments and Strategies for Working with the EEOC
Labor Law - Update on NLRB Rulemaking and Union Activity
Unemployment Claims and Hearings - Tactics for Employers
Making Performance Reviews More Meaningful and Effective

11:15 a.m. - 1:00 p.m. - General Session

HR Audit - Get Ahead of the Game
Independent Contractor Classification - The Continuing Saga
Class Action Waivers - Post *DR Horton Case*
EEOC's Guidance and Court Cases on Arrests and Convictions
Out and About - Issues Related to the Legal Protection of LGBT Persons

1:00 p.m. Conclusion



The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

This program has been approved for 9.50 recertification credit hours toward PHR, SPHR and GPHA recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI home page at www.hrci.org.

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Thirty-Third Annual Labor & Employment Law Update Conference

Knoxville Marriott - Knoxville, Tennessee
November 15-16, 2012

COST:

Early Bird (registration AND payment received by Oct. 15)
\$319 per person
\$309 for each additional person from same company
\$279 for eight or more from same company

Registration and payment received AFTER October 15
\$359 per person
\$349 for each additional person from same company
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REGISTRATION INCLUDES:

Seminar (1 1/2 days), materials, two continental breakfasts, lunch and evening reception on Thursday, November 15, 2012

CANCELLATION CHARGE:

50% cancellation fee will be incurred for cancellations after October 15. Cancellations made after October 31, 2012 will forfeit registration fee (registrants will receive the conference materials post-seminar). Substitutions of attendees within the same company will be permitted at any time.

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KEYNOTE SPEAKER

Dr. Farris Jordan

Licensed Psychologist
and author of

"Stress! Are You in Control?"

No one is immune from stress, but Dr. Farris C. Jordan can teach anyone how to make it productive instead of damaging. And he is a master at having fun and laughing while he does it.

Dr. Jordan is a licensed psychologist who knows what it means to take control of stress. After receiving four degrees from the University of Tennessee, he has been extensively involved in stress research.

Dr. Jordan is the author of four books and numerous articles on the prevention of mental and physical illness. He has received national recognition for his "hands on" research on the effects of stress by becoming personally involved in highly stressful events such as Brahma Bull riding, NASCAR race driving, sky diving, Giant Canadian Bear wrestling, alligator wrestling, 13 consecutive Boston Marathons, completion of the 2,150 mile Appalachian Trail from Georgia to Maine in 139 days, and the 2,552 mile Mississippi River in a small canoe in 57 days. These experiences have enabled him to teach others how to control stress and stay motivated without fear or hesitancy.

FIVE WAYS TO REGISTER

1. Mail to: Bernice Houle
Wimberly Lawson Wright
Daves & Jones, PLLC
P.O. Box 2231
Knoxville, TN 37901
2. Fax to: 865-546-1001
3. Email to: [bhoul@wimberlylawson.com](mailto:bhoule@wimberlylawson.com)
4. Via website: www.wimberlylawson.com
5. Phone: 865-546-1000

Special Needs? If you should have any special needs, such as wheelchair access or special dietary requirements, please contact Bernice Houle at 865-546-1000 no later than 10 days before the event.

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