

Health Care Reform Legislation Amends the Fair Labor Standards Act to Give the U.S. Department of Labor Increased Enforcement Authority over Health Care

RESOURCE LINKS

Senate Reform Bill

http://docs.house.gov/rules/hr4872/111_hr3590_engrossed.pdf

Reconciliation Bill

http://docs.house.gov/rules/hr4872/111_hr4872_amndsub.pdf

Amendment to the Reconciliation Bill

http://docs.house.gov/rules/hr4872/111_manage_rs_hr4872.pdf

Summary of the Reconciliation Bill

http://www.rules.house.gov/111_hr4872_secby_sec.html

Summary of the Amendment to the Reconciliation Bill

http://www.rules.house.gov/amendment_details.aspx?NewsID=4611

EBG Client Alert: Consumer Product Safety Improvement Act

<http://www.ebglaw.com/showclientalert.aspx?Show=8910>

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The Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 (the "Act"), significantly impacting the delivery of health care, also amends the Fair Labor Standards Act ("FLSA"). The FLSA amendments impose certain employer responsibilities in providing health care benefits, confer whistleblower protections and authorize the U.S. Department of Labor ("DOL") to undertake increased enforcement related to health care. Employers have new requirements to learn, and to implement, under the FLSA, irrespective of their size or the number of employees in their workforce.

The most significant features of these amendments to the FLSA are summarized below.

Automatic Enrollment in Health Plans for Employers with at Least 200 Employees

- Under the Act, a new Section 18A is added to the FLSA that requires employers with 200 or more full-time employees to automatically enroll new full-time employees in one of the health plans offered by the employer and to continue the enrollment of current employees in the health plans offered. Under the automatic enrollment requirements, automatically enrolled employees must be given adequate notice and an opportunity to opt-out of the health plan. Any applicable state laws regarding payroll, such as permissible deductions of wages, will continue to be in effect except to the extent the state laws prohibit employers from implementing automatic enrollment.
- This provision is effective upon the promulgation of regulations by the DOL. It is unclear when the DOL will issue regulations implementing this requirement, and officials at the DOL have confirmed that they have yet to issue official guidance on any of the amendments to the FLSA.

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Required Health Care Notice to Employees

- The Act adds a new Section 18B to the FLSA that requires employers to provide a detailed notice to employees of significant provisions of the Act regarding the American Health Insurance Exchange (“Exchange”). The Act requires each state to establish an Exchange by January 1, 2014, through which individuals (and small businesses) may purchase insurance coverage under qualified health plans that provide certain standards of health benefit coverage. For more information regarding the Exchange and its impact on employers, please see our Client Alert of April 8, 2010, entitled “Health Care Reform: What Employers Need to Know.” The notice must inform each employee at the time of hire of the existence of the Exchange, that the employee may be eligible for a premium tax credit if the employer’s share of the total cost of benefits is less than 60 percent of such costs and that, if the employee purchases a policy through the Exchange, the employee may lose the employer contribution to any health benefits offered by the employer (except as otherwise required by a “free choice voucher”).
- This provision is effective for employers beginning March 1, 2013, and the notice must be provided to current employees no later than March 1, 2013.

Non-Discrimination and Whistleblower Protections

- A new Section 18C, “Protections For Employees,” is added to the FLSA, prohibiting employers from taking adverse action against any employee because the employee:
 - received a premium tax credit or subsidy for a health plan;
 - provided information to the employer or the federal or state government concerning a violation, act or omission the employee reasonably believes to be a violation relating to Title I of the Act. (Title I of the Act, among other things, provides rules for the establishment and operation of the Exchange and imposes certain mandates on employers, including the provision of certain standards of benefits for health coverage, the automatic enrollment requirements described above and the elimination of certain restrictions in health coverage, such as pre-existing condition exclusions and lifetime and annual dollar limitations in coverage);
 - testified or is about to testify in a proceeding concerning such violation;
 - assisted or participated, or is about to assist or participate, in such a proceeding; or
 - objected to, or refused to perform, any activity or assigned task the employee reasonably believes to be such a violation.
- The new employee protections under the Act are significant in that they provide employees with the authority to challenge actions of employers in implementing the requirements of Title I of the Act.
- Enforcement of these protections incorporates the procedures, notifications, burdens of proof, remedies and statute of limitations set forth in the Consumer Product Safety Improvement Act of 2008 (“CPSIA”), 15 U.S.C. 2087(b). The DOL is likely to assign complaints under this section to

the whistleblower investigations unit within OSHA, as are 17 other statutes, including CPSIA. Finally, these protections do not diminish any other rights under federal or state law or under a collective bargaining agreement and are not waivable.

- This provision is effective immediately.

Nursing Mothers

- A new paragraph (r) is added to Section 7 of the FLSA that requires employers to provide unpaid, reasonable break time for nursing mothers to express breast milk, as such employee has need to express the milk, for one year after the child's birth and a place to express the milk "other than a bathroom, that is shielded from view and free from intrusion." An employer with less than 50 employees will not be required to implement this provision if doing so would cause the employer an "undue hardship."
- This provision is effective immediately.

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