HR Newsletter

HOSPITAL COUNCIL of WESTERN PENNSYLVANIA

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In This Issue

DC Circuit Court Invalidates NLRB "Recess" Appointments

The U.S. Court of Appeals for the District of Columbia Circuit has vacated a National Labor Relations Board (NLRB) decision, ruling that the board did not have a quorum at the time because three of its members were not validly appointed. At issue was whether President Obama correctly used his recess appointment authority to appoint three members to the labor board in January 2012, without Senate approval. In making the appointments, the administration took the position that the Senate was in recess-thereby making it proper for the President to exercise his right to make recess appointments not subject to Senate confirmation. However, the Appeals Court agreed with the argument put forth by a Washington state company seeking to invalidate an NLRB ruling that went against it. The company argued that the Senate was not technically in recess at the time of the appointments and that a quorum did not therefore exist, making any decision by the board invalid. In a unanimous decision, the court held that the President can only make recess appointments for vacancies that arise during an official recess, which it defined as the break between sessions of Congress. If the ruling stands, it could invalidate over 200 NLRB decisions made since the appointees joined the board. The NLRB issued the following statement in response to the court's decision: "The Board respectfully disagrees with today's decision and believes that the President's position in the matter will ultimately be upheld. It should be noted that this order applies to only one specific case, Noel Canning, and that similar questions have been raised in more than a dozen cases pending in other courts of appeals. In the meantime, the Board has important work to do. The parties who come to us seek and expect careful consideration and resolution of their cases, and for that reason, we will continue to perform our statutory duties and issue decisions."

DOL Clarifies Definition of Son or Daughter with Disability under FMLA

The U.S. Department of Labor (DOL) has issued Administrator's Interpretation Letter FMLA 2013-1 which clarifies the definition of "son or daughter" under the Family and Medical Leave Act as it applies to an individual 18 years of age or older and incapable of self-care because of a mental or physical disability. The DOL determined that additional guidance was needed regarding the definition of "son or daughter" as it applies to an employee seeking to take leave under the Family and Medical Leave Act (FMLA) to care for a son or daughter with a disability who is 18 years of age or older. The FMLA regulations define a "son or daughter" 18 years of age or older as one who is "'incapable of self-care because of a mental or physical disability' at the time that FMLA leave is to commence." Those regulations, however, do not address whether it is relevant if the disability occurs before or after the son or daughter turns 18 years of age. In its determination letter, DOL has concluded that the age at the onset of the disability is irrelevant in determining whether an individual is considered a "son or daughter" under the FMLA.

IRS Proposes Guidance on Health Coverage "Affordability" Under PPACA

The Internal Revenue Service has published a "Notice of Proposed Rulemaking and Notice of Public Hearing" concerning the "Shared Responsibility for Employers Regarding Health Coverage". The proposed regulations provide guidance under section 4980(H) of the Internal Revenue Code with respect to the shared responsibility requirements for employers regarding employee health coverage under the Patient Protection and Affordable Care Act (PPACA). PPACA requires employers with 50 or more full-time equivalent employees to offer "affordable coverage." Coverage is defined as affordable if the employee's required contribution for coverage does not exceed 9.5 percent of the employee's household income for the taxable year. The proposed rules outline safe harbors upon which employers could rely in meeting their legal obligations for determining the affordability of coverage under an eligible employer sponsored plan.

Compliance Programs No Longer Voluntary by PPACA

Since 1997, the Office of Inspector General (OIG) has encouraged Medicare and Medicaid providers to adopt voluntary compliance programs. In 1998, the OIG began issuing compliance guidance to healthcare organizations including hospitals, nursing facilities, home health providers, hospices, DME providers, and third party medical billers. Now, under the Patient Protection and Affordable Care Act (PPACA), compliance programs will no longer be voluntary for Medicare and Medicaid providers. They will be mandatory for those providers who participate in any federal healthcare program. Section 6401 of PPACA requires healthcare providers to establish compliance and ethics programs that contain certain "core elements" as a condition of their participation in the federal healthcare programs. So far, the Department of Health and Human Services (HHS) has not defined the "core elements." Furthermore, nursing facilities and skilled nursing facilities are subject to Section 6102, which identifies eight required elements for nursing facility compliance programs. Nursing facilities must have their mandatory compliance and ethics programs in place by March 23, 2013. Even though HHS hasn't defined the "core elements" or issued its overdue guidance for nursing facilities, the requirements for nursing facilities are consistent with the OIG's earlier compliance guidance to providers. Generally, the core and required elements follow the seven steps of the federal Sentencing Guidelines. (See the January 23rd Podcast, "Tips for Implementing an Effective Compliance Program.")

EEOC Clarifies Employers' Obligation to Accommodate Religious Objection to Mandatory Flu Vaccination Policy

The EEOC has published an Informal Discussion Letter in response to an employee's requests for the agency's position on the employee's right to be exempt from mandatory flu vaccination as a religious accommodation. In the letter, the EEOC's Legal Counsel explained that employers are permitted to seek supporting information to verify the employee's sincerely held religious belief or practice when an exemption is requested. The letter goes on to state that where the employer makes reasonable inquiries for such supporting information, the employee must cooperate or they may not be entitled to an accommodation. Even if the employee provides the requested information, the employer may deny the accommodation request if it would pose an undue hardship, or it may impose other infection control measures such as a mask requirement, if not done for retaliatory or discriminatory reasons. If no undue hardship would result, an employer may be required to excuse a person from a mandatory vaccination policy as a requested religious accommodation under Title VII, or as a disability accommodation under the ADA. (See "Title VII: Vaccination Polices and Reasonable Accommodation.")

DOL Issues Final Rules on FMLA Amendments

The US Department of Labor has issued final regulations implementing two amendments to the Family and Medical Leave Act (FMLA) enacted by the National Defense Authorization Act for Fiscal Year 2010 (FY 2010 NDAA); and the Airline Flight Crew Technical Corrections Act. The first set of rules provides families of eligible veterans with the same job-protected FMLA leave currently available to families of military service members and enables more military families to take leave for activities that arise when a service member is deployed. The second set of rules modifies existing rules so that airline personnel and flight crews are better able to make use of the FMLA's protections. Military caregiver leave entitles an eligible employee who is the spouse, parent, son, daughter, or next of kin of a covered service member with a serious illness or injury to take up to a total of 26 work weeks of unpaid, job-protected leave during any single 12-month period to care for the service member. Before the FY 2010 NDAA was enacted, military caregiver leave was limited to eligible employees who were the family members of current service members with a serious injury or illness incurred in the line of duty on active duty. The new rule expands military caregiver leave to eligible employees who are the family members of certain veterans with a serious injury or illness incurred or aggravated in the line of duty on active duty and that manifested before or after the veteran left active duty. It expands the definition of serious injury or illness to include injuries or illnesses that existed prior to the service member's active duty, but were aggravated in the line of duty on active duty.