

Employment Law: New employment laws you need to know, and comply with.

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Ripping on a supervisor on your Facebook page, which led to the firing of a Connecticut woman and her subsequent complaint before the National Labor Relations Board, might well be next year's point of employment law. But there is plenty of new employment law created in 2010, and local attorneys Cynthia Van Bogaert of the Boardman Law Firm and Meg Vergeront of Stafford Rosenbaum, both well versed in employee benefit law, stepped up to offer their compliance advice.

1. Employers must make quick adjustments to respond to changes brought about by the Patient Protection and Affordable Care Act. According to Van Bogaert, employers are scrambling to identify the employee benefit plans that are subject to the new law, and that's not always straightforward. "Say you have a wellness benefit and you find that it is subject to health care reform, and you really didn't think of it as a benefit plan before," she explained. "There are other laws like ERISA and COBRA that you need to think about with respect to these plans."

In addition, there are employee notices and employer reporting requirements, including special enrollments and a new requirement to report the aggregate cost of employer-sponsored coverage on the W-2 form, among other record-keeping requirements.

Compliance: It's a good time to look at all health-related compliance issues, not just those linked to your major medical plan. Employers should properly identify the plans that are subject to various provisions and requirements in the new law. "It's really a provision-by-provision analysis," Van Bogaert said.

2. Also related to "Obama Care" requirements, there are certain notices that need to be sent out regarding things like the removal of caps on lifetime benefits, non-grandfathered health plans, and the like. Employers with fully insured plans need to work with their insurers to find out who is sending which notice. There are a couple of cases in which certain employees and their dependents are given the right to enroll, have a 30-day window to enroll, and the employer needs to figure out who is sending out that notice. "Are the insurers going to be sending out the notice?" Vergeront asked. "Are they going to be putting the notices in the plan document, itself?"

Compliance: Typically, the insurers make the notifications, but Vergeront said it doesn't matter which party fulfills the obligation, as long as someone fulfills it. "Typically, an employer is going to be responsible for doing what its plan is obligated to do," Vergeront noted, "so that is where the notice obligation comes from and that's why you want to coordinate, if you are fully insured, with the insurance company to see what notices they are going to do and what notices they are not going to do."

3. As part of the health care law, employers are required to provide a reasonable break time for nursing mothers who need to express their breast milk, and provide a private area for the break other than a restroom. They can take as many breaks as they deem necessary, but the law does not define what a reasonable break time is. Employers have to use their judgment.

There is an exception for employers for 50 or fewer employees if they can show the requirement would impose an undue hardship. Under Department of Labor guidance, an undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer, but official regulations are still pending. "This 'guidance' does not do much to clarify the issue," Vergeront stated. "The bottom line is that there is no bright line test as to whether providing a break would cause an undue hardship."

Compliance: Employers who don't fall under the hardship exception simply need to designate a break area, amend their handbooks accordingly, and train managers and supervisors on the new policy. "The supervisors and managers, the people who deal with break time issues and enforcing policies, have to make sure they know that if somebody says, 'I need to take some time in a place where I can go to express some milk,' they don't say 'forget it.'"

4. Effective July 16, 2011, there will be new 401(k) plan disclosure requirements on fees and conflicts of interest for service providers. The law requires mandatory reporting from the service provider to the employer group health plan, and it's designed to make sure employers have adequate information to assess whether fees are reasonable and whether they have a conflict of interest working with the service provider, Van Bogaert said.

Compliance: This is going to be a large undertaking for the 401(k) industry, but employers also have a role to play. Before July 16, fiduciaries should review existing service providers and determine, based on regulations, which are subject to mandatory reporting rules, and then engage in some due diligence on what the market offers in terms of fees, and services. "This is not a new obligation, but the reporting is new," Van Bogaert explained. "It's pretty well accepted that if you hire someone to undertake something that involves your pension plan, you should be doing a periodic evaluation where you compare them to competitors."

"You can't enter into an agreement under the law if the fees are not reasonable."

5. Related to this, a final rule issued on Oct. 20, 2010 for plan use beginning on or after Nov. 1 2011 (essentially for plan year 2012) requires 401(k) plans to disclose to participants specific details about the plan, its operation, and investments. This and the above rule are part labor regulations that have been in the works for some time and, coincidentally, issued within the past six months.

Compliance: Fortunately, there is a fairly long lead period, and the tip here is to start working with providers to ensure that disclosure obligations are met in time. "It falls under the same category as the fee disclosure for service providers in that the participants' information really reflects the fees that the plan fiduciary has negotiated," Van Bogaert said. "The participant needs to be informed of these, and the fiduciary should really be looking at this as an exercise in reviewing their previous assessment."

They also should decide whether it's time to conduct a review or have some kind of a request for proposal to make sure they document that they have considered the issues on a routine basis, and that they have satisfied themselves that their arrangement meets the requirement that fees are reasonable for the services provided.

6. Another 401(k) compliance opportunity is something that has not been on a lot of people's radars. A 401(k) compliance questionnaire was sent out by the IRS to 1,200 employers in May of 2010. The IRS, which has reported on its findings, wanted to assess how people were complying and what the issues were. One of the key findings was that too many organizations do not have a proper 401(k) plan document, and they fail to follow the terms of the plan.

Compliance: Employers should use this survey even if they are not one of the 1,200 employers who were contacted. Employers can go to the [IRS website](#) and use the survey as a self-audit tool. "You can look at the issues they are asking about, and see if you can answer them satisfactorily for your plan," Van Bogaert said. "So it's a great way to see if you have issues with compliance."

7. Many employers are confused about the difference between regular employees and independent contractors, and some will just slap the label of independent contractor on a worker without analyzing whether the worker qualifies as an independent contractor. Regular workers are subject to worker's compensation and unemployment insurance taxes; independent contractors are not.

Vergeront said a new law raises the stakes for misclassification by giving the state Department of Workforce Development the power to receive and investigate complaints, and refer complaints to other state and local agencies that administer laws related to classification. DWD can require an employer to provide proof they have maintained proper employee records; if an employer fails to provide that information, DWD has the right to order the business to stop work and impose forfeitures of \$250 a day.

Compliance: Since exposure to the consequences of misclassifying workers as independent contractors has been extended under this law, Vergeront said this is a situation where an employer should consult with an attorney. "There is one definition under the unemployment insurance law, another definition under the worker's compensation law, and another test the IRS applies," Vergeront said. "They are similar, but not identical."

"I hate to say that because it makes it sound like I'm looking for business, but given that there are three different tests, I think it's difficult for lay people to work through the tests and find the tests."

8. The HITECH Act and health care law have increased penalties and enforcement for HIPAA privacy violations. One penalty calls for up to \$1.5 million per identical violation in a calendar year, and state attorney generals are allowed to file lawsuits. "That's \$ 1.5 million for identical violations in a calendar year, so if you have several different violations, you could have millions of dollars in penalties," Van Bogaert noted.

Compliance: Make sure HIPAA policies reflect changes in the law and operation of the health plan. "Things as innocuous as handling your trash need careful attention under HIPAA privacy rules," Van Bogaert said. "Rite Aid and other pharmacies have entered into settlement agreements with governments because of poor handling of trash. HIPAA privacy is something that requires overall review of the details of how you are operating from A to Z."

9. Under health Flexible Spending Accounts (FSAs), employees can authorize employers to deduct from their paycheck, pre-tax, and from those deductions they can get reimbursed for medical expenses. As Vergeront notes, employees used to be reimbursed for over-the-counter drugs, but as of the first of the year, they can no longer use their FSA to cover over-the-counter drug expenses without a prescription, other than insulin.

Compliance: If they haven't already, employers will want to educate their employees about this change before or during open enrollment. "This is not going to be in place until 2013, but in 2013 there is going to be a cap of \$2,500 on the account," Vergeront noted. "An employee can't contribute more than that or draw out more than that."