

I would be remiss in not acknowledging passage of the Patient Protection and Affordable Care Act and it would be folly to think I can discuss it in the bi-monthly newsletter. People are just beginning the task of sorting through this massive law. We will be conducting seminars and preparing in-depth analysis of various parts of the new rules. However, as I said before, this is not the proper format to talk about the Patient Protection and Affordable Care Act.

Attorney Fees

“Fair” is such a subjective term. In an effort to take some of the heat off of Congress and the President, I thought I would reference an article that talks about an attorney that was awarded \$ 45,000 in legal fees for handling a case where the retirement plan won \$ 650. That is, the attorney won \$ 650 for the retirement plan and the Court awarded the lawyer \$ 45,000 in fees.

<http://hr.cch.com/news/pension/031410a.asp>

Again “fair” is subjective and I am sure the attorney thought the Court’s decision was “fair.”

Fringe Benefit Audits

Everyone will admit the “big bucks” is in providing health benefits and, to a lesser degree, retirement benefits. Therefore, it is easy to see that some HR professionals may

overlook other types of less expensive benefits like discount programs or gift cards. The following article talks about increased IRS audits for fringe benefits.

<http://www.thompson.com/public/newsbrief.jsp?cat=BENEFITS&id=2702>

As a practical matter, with the passage of health care reform I am not sure how much attention is going to be focused on fringe benefits and how much extra time HR professionals are going to have to worry about these types of benefits. However, I wanted to break up the monotony of health care reform. The article is worthwhile to remind you that you should at least pay attention to the rules governing fringe benefits.

HIRE

In another attempt by the government to spur hiring and reduce the unemployment numbers, the President signed the Hiring Incentives to Restore Employment Act (HIRE) into law on March 18th. The new law provides incentives for businesses to hire the unemployed. The following articles talk about the new statute.

<http://www.mcguirewoods.com/news-resources/item.asp?item=4628>

<http://www.ifebp.org/Resources/News/Regulatory+Updates/IRS+Releases+Information+on+Payroll+Tax+Incentive+Under+HIRE+Act.htm>

Now that Congress and the President have worked their way through health care reform, it is a safe bet that they will turn their attention to reducing the number of unemployed.

Paid Leave Costs

There are hundreds of surveys on thousands of topics. However, I thought I would include a survey by the Bureau of Labor Statistics (a government agency) discussing the cost associated with paid time off.

http://www.bls.gov/opub/ted/2010/ted_20100316.htm

Many may find this link useful because the Bureau does provide some helpful benchmarks employers can use to help gauge if their benefits and wages are within the norm.

Government Updates COBRA Materials

We reported in the last update that the premiums subsidy had been extended until March 31, 2010. The government has updated its materials to reflect the changes. The following link is to the government's main COBRA webpage.

<http://www.dol.gov/ebsa/cobra.html>

The following is a link to the government's webpage with 31 Q&A's regarding the premium subsidy extension.

<http://www.dol.gov/ebsa/faqs/faq-cobra-premiumreductionEE.html>

It is very likely that the premium subsidy will be extended again. However, as you know, the focus has been on health care reform. Chances are the premium subsidy will be included in some sort of jobs bill that will be passed soon.

ADEA

The Age Discrimination in Employment Act ("ADEA") precludes employers from discriminating against employees based on their age. Earlier this month we talked about the President's attempt to pass legislation to try and bring some clarity when it comes to classifying individuals as independent contractors vs. employees. One Court recently ruled that independent contractors are not protected under ADEA.

<http://www.hr.cch.com/news/benefits/031910.asp>

On one hand you have the government trying to protect individuals by developing new rules that preclude employers from arbitrarily classifying them as independent contractors. On the other hand, it generally is more expensive for the employer to hire and classify the person as an employee because of the cost to provide benefits to employees. In short, there is a tension between protecting individuals from being

misclassified as independent contractors with a generally lower cost to the employer vs. the government trying to combat the current high unemployment numbers.

FICA Tax on Severance Payments

Staying with the employment theme, one Court recently brought into question whether severance pay is subject to FICA withholdings. This article talks about a severance plan under which severance payments were not connected to the receipt of state unemployment compensation and were not attributable to the rendering of any particular employment service. The Court held the payments were not wages and, therefore, not subject to FICA. Instead, the payments were “supplemental unemployment compensation benefits” exempt from FICA withholdings.

<http://www.mcguirewoods.com/news-resources/item.asp?item=4625>

As always, it is important to remember that court decisions are very fact sensitive. In other words, just because one court ruled a certain way does not necessarily mean that your particular situation will be afforded the same treatment.

General Catchall Article

The following article is a good general article highlighting several different timely topics. It is worth the five minute reading time.

<http://www.reinhartlaw.com/Publications/Documents/ea%20201003%20EB.pdf>

Again, this is just a good general article providing an overview of several topics.

Smoke Free Policy

More employers are adopting policies regarding smoking. Some employers prohibit smoking at the employer's facilities and other employers take an even more aggressive stance and prohibit employees from smoking at all. That is, some employers will not hire individuals who smoke at work or at home. The attached article discusses this topic and contains a link to a webpage listing the various state laws governing smoking.

<http://www.thompson.com/public/newsbrief.jsp?cat=BENEFITS&id=2713>

As a general rule, smokers are not a protected class which means most employers have substantial freedom when it comes to developing a smoker policy.

TPA Subject to State Law Claim

For those of you with self funded health plans, you are used to working with third party administrators ("TPAs"). You should have an administration agreement with your TPA. Most TPAs will put into the agreement that they are not a fiduciary as defined under ERISA. They do this in attempt to limit their exposure if they are ever sued. One Court held the TPA can not have it both ways. If the TPA is not a fiduciary under ERISA, then

ERISA preemption does not apply. This, in turn, means the TPA can be sued under state law. The following is interesting reading for those with self funded health plans.

<http://www.passionforsubro.com/erisa/tpa-did-not-function-as-an-erisa-fiduciary-leaving-it-open-to-state-law-breach-of-contract-claims/>

As medical costs continue to rise it is not surprising that litigation also continues to increase. Therefore, it is a good idea to take out your administration agreement and review the terms. At a minimum the TPA should be liable for negligence as opposed to gross negligence.

As I said in the beginning, we will be getting “knee deep” into health care reform in the coming issues. Also, we plan on holding seminars to talk about the more important aspects of the new rules.

As always, if you have any questions or comments, please direct your questions back to your McGohan Brabender Account Team.