Port Administration and
Legal Issues Seminar
April 9-11, 2013
Boston, MA

Employment

and

Human Resource Issues

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Employment and Human Resource Issues

Discussion Leader:

Thomas G. Schroeter - ***Introduction; Affordable Care Act Mandates***
Associate General Counsel
Port of Houston Authority

Speakers:

Christopher B. Kaczmarek - ***Employment Law Update***
Shareholder
Littler, Mendelson P.C.
Boston, MA

William V. Hoch - ***Just Another Day at the Office***
Associate Chief Legal Counsel
Ethics and Employment
Massachusetts Port Authority

Catherine Boutch - ***Current Issues Facing HR Managers***
Human Resources Director
Port of Houston Authority

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Christopher B. Kaczmarek

Christopher B. Kaczmarek represents employers of all sizes in matters involving a wide range of state and federal laws. Chris regularly defends employers in litigation, including class actions, involving claims of alleged wage and hour violations, wrongful discharge, breach of contract, unlawful discrimination, and harassment.

He also defends and prosecutes cases involving claims of misappropriation of trade secrets and violations of non-competition and non-solicitation agreements. Additionally, Chris counsels employers on the steps necessary to minimize the chance of litigation. He provides advice to employers regarding individual employment decisions, the creation and successful implementation of effective personnel policies, compensation practices, and employment agreements.

Chris has written for a variety of publications and regularly gives lectures, presentations, and training sessions regarding a variety of employment law topics, including the identification and prevention of discrimination and harassment in the workplace. His clients include financial services companies, retailers, hospitals and health care providers.

Before joining Littler Mendelson in November 2005, Chris practiced labor and employment law at Goodwin Procter LLP. He also previously clerked for the Honorable Paul J. Barbadoro, United States District Court for the District of New Hampshire. He is admitted to practice in Massachusetts and New Hampshire.

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Bill Hoch

William V. Hoch (Bill) is Associate Chief Legal Counsel at the Massachusetts Port Authority (“Massport”). His practice focuses on ethics and employment law. In this role, Bill advises the Human Resources Department and senior management on a wide range of matters involving ethics laws, compliance investigations, employee misconduct, employee benefits, background investigations, leaves of absence, and policy drafting.

Bill is also a litigator and has defended Massport in employment cases brought before administrative agencies and in state and federal court.

Prior to joining Massport in 2004, Bill worked as a litigator for the Boston Police Department focusing on employment law and employee discipline. In addition, he was an associate with the law firm of Peabody & Arnold and clerked with the judges of the New Hampshire Superior Court.

Bill is a graduate of Boston College Law School and Williams College.

Catherine (Cat) Boutch

Catherine (Cat) Boutch is the Director of Human Resources for the Port of Houston Authority. She is an experienced senior leader with extensive experience and HR body of knowledge. She is a results driven leader with a consistent record of success. With over 25 years of experience, she has worked with large, small, complex and highly regulated companies.

Her track record as a strategic Human Resources business partner has allowed her to successfully impact organizational results and build positive organizational cultures and business processes.

Cat has provided coast to coast HR leadership and her experience includes labor negotiations, organizational planning and development recruitment, compensation/ benefits administration, employee training and development programs, employee engagement, succession planning and, talent / performance management.

Cat began her Human Resources career with Beringer Vineyards in St. Helena, California following active military service with the U.S. Navy

As the 7th child out of 11 children, Cat has often said her childhood prepared her to effectively assess situations and to recommend solution with a win/win outcome.

Thomas G. Schroeter

Thomas G. Schroeter, a member of the State Bar of Texas since 1983, has been Associate General Counsel of the Port of Houston Authority since 2001.

He is Vice Chairman of the Law Review Committee of the American Association of Port Authorities (AAPA).

Mr. Schroeter provides legal counsel to the Human Resources Department at the Port of Houston Authority. He has spoken on Human Resources and Employment Law issues at AAPA and other conferences and has given preventative training on discrimination law for the Port of Houston Authority.

He is also involved extensively in other port legal matters, including security compliance matters. He is a director of the Houston Ship Channel Security District, a member of the Houston-Galveston Area Maritime Security Committee's (AMSC's) Grant and TWIC Subcommittees and a member of the Port of Houston Authority's Senior Management Review Committee for the Authority's ISO 28000-certified Security Management System (SMS). He has also spoken frequently on security law matters.

Mr. Schroeter is a graduate of the Georgetown University Law Center in Washington, D.C. where he was an Editor of the Georgetown Law Journal.

AAPA American Association of Port Authorities

Alliance of the Ports of Canada, the Caribbean, Latin America and the United States

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Employment and Human Resource Issues

Introduction

Today, many tough issues face HR Managers across the country:

- Discrimination Law - EEOC cases continue to mount
- FLSA – standards for determining exempt/non-exempt status; overtime pay issues
- FMLA – good faith; computing the time, confidentiality; ADA rights remain after FMLA
- ADA - disability definition; reasonable accommodation vs. substantial burden
- Whistleblower/Retaliation Issues
- Termination Issues
- Employee Background Checks – new EEOC guidelines; can you do them?
- Investigations – use of attorneys; outside forensic specialists; keeping confidentiality
- Violence in the Workplace
- Social Media – privacy, protection of proprietary information, libel concerns
- First Amendment rights of public employees, NLRA protection of concerted activities
- Employee Benefits, including pension plans and Affordable Health Care Act (Obamacare); how do we administer; how do we pay for this; penalties for non-compliance

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Employment and Human Resource Issues

THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

(ACA)

What Your Port Should Know

Affordable Care Act (ACA)
Executive Summary

March 2010 – President Obama signs the Patient Protection and Affordable Care Act into law

- 2,572 pages
- House Speaker Pelosi: "**We Have To Pass The Health Care Bill So You Can Find Out What's In It**"
- January 2014 – **Individual Mandate**: Substantially all Americans are required to have insurance or pay a penalty
- January 2014 **-** **Employer Mandate**: Employers with 50 or more full-time employees are required to provide "affordable" qualified insurance with "essential benefits" or pay a penalty

Affordable Care Act (ACA):
Executive Summary

June, 2012: U.S. Supreme Court rules most of ACA, including the individual mandate, is constitutional (penalties are a valid type of "tax"): *National Federation of Independent Business et al v. Sebelius, Secretary of Health and Human Services*

November, 2012: President Obama re-elected;
Democrats control the Senate

Repeal of ACA won't happen anytime soon.

Employers need to be prepared for implementation of ACA starting January 1, 2014 – less than 9 months away.

Affordable Care Act (ACA):
Executive Summary

So what do you need to know and do now to avoid penalties in 2014?

First, determine if you are a “large employer” or a small business.

Large employers have 50 or more full-time employees.

Affordable Care Act (ACA):
Executive Summary

Full-time employees (FTEs) are those who work 30 or more hours a week and are not seasonal or temporary employees.

An employee's "hours of service" includes paid leave (e.g., vacation, holiday, illness, incapacity, layoff, jury duty, military duty or LOA).

Divide the number of part-time employees by 2 and add the result to the total number of FTEs.

Check your 2013 average employee hours over a six-month period to see if you meet the test for “large employer”.

Affordable Care Act (ACA):
Executive Summary

If small employer, no IRS penalty for not offering insurance.

If large employer and you wish to avoid IRS penalties, you must offer your employees (and their dependents):

- affordable insurance
- with “essential benefits”
- and “minimum value”

Affordable Care Act (ACA):
Executive Summary

2014 Plans must be "**Affordable**"

- Employee's contribution to the cost of the insurance coverage offered by the employer is less than 9.5% of employee's "household income"
- "Household income" includes income of employee's spouse and dependents
- Therefore, employee will have to report spouse's and dependent's income to his/her employer

Affordable Care Act (ACA): Executive Summary

2014 Plans must provide "**Minimum Essential Benefits**"

- Determined by HHS via regulations
- Includes coverage of:
  - Ambulatory patient services
  - Emergency services
  - Hospitalization
  - Maternity and newborn care
  - Mental health and substance use disorder services, including behavioral health treatment
  - Prescription drugs
  - Rehabilitative services and devices
  - Laboratory services
  - Preventative and wellness services and chronic disease management
  - Pediatric services including oral and vision care
- Some items being challenged (e.g. "contraceptive mandate" challenged on religious grounds)

Affordable Care Act (ACA):
Executive Summary

2014 – Plans Must Have **“Minimum Value”**

Health plan must provide benefits having an actuarial value of at least 60% of costs.

- Determined by computing the ratio of (1) the total expected payments by the plan, computed in accordance with the plan's cost-sharing rules (deductibles, co-insurance, co-payments, out-of-pocket limits), toward the costs a standard population is expected to incur at standard pricing for the essential health benefits, over (2) the total costs a standard population is expected to incur at standard pricing for essential health benefits.

- IRS safe harbor for compliance with minimum value requirement:
- Minimum Value calculator
- "Design-based" safe harbors (checklists)
- Certification by actuary

Affordable Care Act (ACA):
Executive Summary

<u>Employer Mandate</u> – Starts in 2014

Two potential penalties:

1. Section 4980H(a) Penalty – Employer Does Not Offer Plan (or offers Plan without Minimum Essential Coverage)

- For any calendar month that an employer fails to offer "minimum

essential coverage" to substantially all (95%) of its "full-time“ employees and their dependents, the employer will be assessed ($166.67)*(No. of full-time employees minus 30) if during that month any full-time employee receives coverage through an exchange and qualifies for the premium or cost-sharing subsidy.

- Penalty is $2, 000/year per full-time employee

Affordable Care Act (ACA)
Executive Summary

- **Employer Mandate** – Starts in 2014

  – Employers with 50 or more employees must offer affordable minimum essential health coverage to all full-time employees

  – Or else pay a fine (penalty) of $2,000 per employee, calculated by taking the number of full-time employees less 30 and then multiplying times $2,000. So, for 100 full-time employees, the fine would be:

    (100 – 30) x $2,000 = $140,000

Affordable Care Act (ACA):
Executive Summary

2. Section 4980H(b) Penalty – Employer Offers Plan That is Not Affordable or Does Not Provide Minimum Value

- An employer that offers minimum essential coverage to full time employees that is either not "affordable" or does not provide "minimum value" will be assessed monthly the amount of $250 (i.e., $3,000/year) for each full-time employee who qualifies for a tax subsidy for that month for health coverage purchased on an exchange.

- Penalty is capped at the amount of the Section 4980H(a) Penalty the employer would have been assessed had the employer offered no coverage.

Affordable Care Act (ACA):
Executive Summary

2014 - Offering Coverage to Full-Time Employees

An employer will be deemed to have offered coverage to "substantially all" full-time employees and their dependents if coverage is offered to 95% of full-time employees and their dependents (or, if greater, 5 employees).

Employer is required to offer coverage to dependents of full-time employee, but is not required to offer coverage to spouse of full-time employee.

Transition: For 2014, dependent coverage not required if taking steps to cover in 2015.

Affordable Care Act (ACA)
Executive Summary

Individual Mandate – Starts in 2014

- Get insurance or pay a penalty of $95-$285 in 2014;
- $695 - $2085 for individuals in 2016 (greater for a family)
- Must provide proof of insurance with your 2014 tax return
- IRS can take your tax refund to collect your penalty

Affordable Care Act (ACA)
Executive Summary

Individual Mandate (continued):

- Beginning in 2014, families that do not purchase healthcare insurance will be taxed annually either $2,085 or 2.5% of their income.

Affordable Care Act (ACA):
Executive Summary

2014 - Employer Compliance Options

Why not just terminate our group health plan and pay the shared responsibility payment?

Costs of Group Health Plan: Employer premiums, compliance costs, litigation risks, etc.

Benefits of Group Health Plan:

- Employer and Employee premiums are excluded from gross income
- No shared responsibility (penalty) payment
- Ability to influence health decisions of employees (e.g., wellness programs)
- Employers have leverage to negotiate lower benefit costs for group compared to individual insurance market
- Recruiting tool
- Public image for governmental entities

Affordable Care Act (ACA):
Executive Summary

2014 - Employer Compliance Options

Calculating cost:

- Self-only coverage: if cost = $5,600 per year for each employee, then:

  - For an employee earning $30,000/year, the employee cost cannot exceed $2,850 (i.e., 9.5% of $30,000). Employer cost = $2,750 (i.e., $5,600 - $2,850). This is $750 more than $2,000 penalty.

  - Employee and spouse ("household income") earning $100,000/year, employee cost cannot exceed $9,500. Employer cost = $0 or $2,000 less than penalty.

Affordable Care Act (ACA):
Executive Summary

<u>Issue re Families:</u>

- Some families might be unable to afford family health plan premiums through their employer, while also ineligible to qualify for the subsidies to help them buy an alternative plan on an ACA exchange.
- **Affordable coverage can’t cost more than 9.5 percent of family income. People with coverage the law considers affordable cannot get subsidies to go into the new insurance markets.** The purpose of that restriction was to prevent a stampede away from employer coverage.
- **What counts as affordable is keyed to the cost of self-only coverage offered to an individual worker, not his or her family.** A typical workplace plan costs about $5,600 for an individual worker. **But the cost of family coverage is nearly three times higher, about $15,700, according to the Kaiser Family Foundation.**
- **So if the employer isn’t willing to chip in for family premiums — as most big companies already do — some families may be out of luck.** They may not be able to afford the full premium on their own, and they might be locked out of the subsidies in the health care overhaul law.

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QUESTIONS?

Thanks for Your Attention!