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Employee Benefits

Qualified Small Employer Health Reimbursement Arrangements: A Glimpse Into the Future of Employer Provided Health Care?

By Stephen R. Penrod

When Congress enacted the 21st Century Cures Act (H.R. 34), they may have given us a sneak peek of what employer provided health care will look like in the not-so-distant future. The 21st Century Cures Act, which was signed into law on December 13, 2016 by President Obama, had strong bi-partisan support in both the House and Senate, and allows small employers to fund stand-alone health reimbursement arrangements that employees can use to purchase health coverage in the individual market. As we wait to see what "replace" looks like following President Trump's and congressional Republicans' promise to repeal and replace the Patient Protection and Affordable Care Act (ACA), the 21st Century Cures Act may signal at least a part of what replace will look like.

By way of background, Internal Revenue Service Notice 2013-54 prohibits stand-alone health reimbursement arrangements and in particular, employer reimbursement of individual health insurance premiums through health reimbursement arrangements. The 21st Century Cures Act creates a qualified small employer health reimbursement arrangement, or QSEHRA, that permits small employers (those with fewer than 50 full-time or full-time-equivalent employees) to reimburse their employees using pre-tax dollars for the purchase of insurance in the individual market.

QSEHRAs have certain requirements:

- an employer offering a QSEHRA cannot offer group health plan coverage to any of its employees;
- a QSEHRA generally must be offered to all of the employer's employees;
- a QSEHRA can be funded only with employer contributions; and
- the maximum benefit for any year cannot exceed $4,950 (or $10,000 if the QSEHRA also covers an employee's family members).

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For more information on any of the topics covered in *The Law@Work*, please contact the authors via the links at the end of each article, or contact Nancy M. Barnes, executive editor or Matthew R. Kissling, associate editor. For information on our Labor & Employment practice, please contact Stephen Richey, practice group leader.

QSEHRAs provide an alternative for small employers that do not want the hassle or the cost of offering group health plan coverage to their employees, but want to provide a defined contribution health plan benefit to their employees in the form of pre-tax contributions that can be used to purchase health coverage in the individual market.

Under current law, a stand-alone defined contribution health plan benefit option is not available to larger employers. The U.S. Departments of Labor, Treasury, and Health and Human Services clarified in *FAQs About ACA Implementation Part 35* on December 20, 2016 that all stand-alone health reimbursement arrangements that do not meet the requirements for a QSEHRA violate the market reform requirements of the ACA, including the prohibition on annual limits on essential health benefits and the requirement to provide preventive coverage at no cost to participants.

In addition to the 21st Century Cures Act, President Trump's 100-day plan, the "A Better Way" proposal set forth by House Republicans and led by Speaker Paul Ryan, and the Empowering Patients First Act introduced by Rep. Tom Price (also Trump's nominee for secretary of the Department of Health and Human Services) all include employer funded stand-alone defined contribution accounts. As this article goes to print, there is much uncertainty as to what replacement of the ACA will look like, but it seems more than likely that employer funded stand-alone defined contribution accounts that can be used to purchase health care coverage in the individual market, through the government (Medicaid or Medicare) or from an employer will be an important part of the plan.

If you have any questions, please contact Stephen Penrod.

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Labor Relations

What to Expect: The NLRB Under President Trump

By Eric S. Clark

On January 20, 2017, the 45th president of the United States was sworn in. As president, Donald Trump has the power to almost immediately appoint two Republicans to the National Labor Relations Board (NLRB or Board), subject to Senate confirmation. As of this writing, it is not clear who President Trump will appoint to the NLRB, but it is reasonable to expect his nominees will be considerably more employer-friendly than President Obama's appointees. This means that for employers, employees and unions, the rules could change substantially.

I. Background of the NLRB

Section 153 of the National Labor Relations Act provides that the National Labor Relations Board shall consist of five members "appointed by the President by and with the advice and consent of the Senate." Traditionally, the president has appointed three members of his own political party and two members of the opposing political party to serve on the NLRB. Board members are appointed for staggered five-year terms. The current NLRB is made up of two Democrats (Chairman Mark Gaston Pearce, whose term expires in December 2018 and Lauren McFerran, whose term expires in December 2019) and one Republican (Philip Miscimarra, whose term expires in December 2019). President Trump can appoint (with the advice and consent of the Republican-majority Senate) two new NLRB members to fill the currently vacant seats with terms expiring in December 2020 and December 2021.

II. Recent NLRB Rulings That Could Be Scrutinized

The NLRB is generally not governed by the principals of *stare decisis*. See *NLRB v. Kostel Corp.*, 440 F.2d 347 (7th Cir. 1971) (unlike Article III courts, the doctrine of *stare decisis* does not require that Board policies and standards be unchangeable since it must meet changing industrial conditions with corresponding changes in policies and standards). Accordingly, it is possible that much of the law that was changed/adopted/modified/decided over the past eight years will shift again with the new Trump appointees. Some of the cases/rules that could be subject to scrutiny are:

- Quickie elections
- Micro units
- Contractors in the bargaining unit
- Purple communications – email
- Weingarten
- Beck notices
- Dues for non-members
- Joint employer
- Duty to provide information

Further, there is no reason to believe potential changes will be limited to the list above. President Trump could seek to change more longstanding rules, but these changes will not be immediate. Instead, the Trump Board will largely need to wait until cases are raised to the NLRB. The types of cases that are prosecuted to the NLRB are decided by the NLRB general counsel (GC), who is also subject to appointment by President Trump. Assuming the Trump NLRB and GC will be more employer-friendly, the new NLRB general counsel will have a decision to make about how to best effectuate such policies. Should the NLRB GC prosecute cases to the NLRB, knowing that the NLRB could reverse Obama Board precedent? Or, should the NLRB GC prosecute fewer matters to the NLRB and leave much of the Obama Board rulings undisturbed? In the short term, employers would certainly favor a lower level of enforcement, but in the long term, overturning some of the rulings of the Obama NLRB could favor employers more than a short-term reprieve of enforcement.

III. Is Tradition Binding?

Whether you voted for President Trump, Hillary Clinton or another candidate, it is clear that Trump does not necessarily comply with conventional approaches. While it is traditionally expected that the president will appoint two members of the opposing party to the NLRB, there is no textual requirement for this custom. When Mark Gaston Pearce's term expires in December 2018, President Trump could eschew this longstanding practice in favor of appointing another Republican to the NLRB. In the past, such tradition has been respected and, in part, guarded by members of the Senate in the opposing party who could vote against any overstepping of time-honored boundaries. But, the current Senate has 52 Republican members and could theoretically permit President Trump to ignore past practice. This Senate majority will likely remain in place at least until the 2020 Senate election. Accordingly, President Trump will have the opportunity to replace Board Members Pearce and McFerran with Republican appointees if he chooses to ignore tradition.

IV. Conclusion

We do not know what a Trump Board will look like, but we can expect decisions by the Trump NLRB to more pro-employer. At least from a labor perspective, it will be an interesting four years.

Please contact Eric Clark with any questions.

Attorney Spotlight

JASON RICHARD CARRUTHERS

Associate, Labor & Employment
Atlanta Office

I earned my J.D. at Georgia State University College of Law and bachelor's degree at Indiana State University.

My experience includes counseling and defending small and large companies as they negotiate a complex patchwork of federal, state and municipal labor and employment law.

Call me about Title VII, the Age Discrimination in Employment Act, the Americans With Disabilites Act, the Fair Labor Standards Act, the Older Workers Benefit Protection Act and Section 1981 as well as general Human Resources challenges.

Right now I am really into preparing for Warrior Dash and Tough Mudder.

The most unforgettable place I've visited is Berlin, Germany.

My favorite restaurant is Papadeaux Seafood Kitchen.

Books I recommend are *The Alchemist*, *The Black Swan: The Impact of the Highly Improbable* and *Outliers*.

Visit my online biography to learn more or contact me at 404.541.2955 (office), 404.276.9569 (mobile) or Jason.Carruthers@ThompsonHine.com.

Employment Best Practices

Considerations When Managing Employees Who Work From Home

By Nancy M. Barnes

As with many employment policies, both opportunities and dangers exist in permitting employees to work from home, and in managing the risks inherent in telecommuting arrangements. Five or ten years ago, the remote employee was somewhat novel. In 2017, the practice has become much more commonplace. According to a Gallup poll in late 2015, 37 percent of U.S. workers reported that they had telecommuted at some point. In addition, the results of the *2014 National Study of Employers*, conducted by Families and Work Institute (FWI) and the Society for Human Resource Management (SHRM), reveal that more employers are allowing employees to work some of their regular hours from home both occasionally (67 percent vs. 50 percent) and on a regular basis (38 percent vs. 23 percent) today than in 2008. Given that courts often consider telecommuting to be a reasonable accommodation under the Americans with Disabilities Act (ADA), most employers should consider in advance how to manage employees effectively when they are not in the workplace.

As a best practice, employers should implement a telecommuting policy to identify those employees or positions that may be eligible for such an arrangement. A written policy helps to prevent claims of favoritism or disparate treatment. In addition, the policy can address some of the pitfalls related to telecommuting, including workplace safety, timekeeping, cybersecurity and tax withholding issues.

When employees work from home, the employer is still responsible for providing a safe workplace and may be responsible for injuries or illnesses incurred under a workers' compensation plan. Employers are advised to consult their company's workers' compensation policies for additional guidance on what may be covered in such situations. In addition, a workplace evaluation of the home office may identify threats or hazards that can be mitigated. Finally, telecommuting employees should be directed to report any injuries incurred at home and to comply with all of the employer's safety-related rules.

In order to avoid violations of federal or state wage and hour laws, non-exempt employees who work from home should be instructed how to accurately record hours worked. Employers should proactively monitor timekeeping to ensure accurate records, and provide a mechanism for employees to acknowledge and verify that the hours reported for the work week are correct and complete so that the employee cannot challenge them in the future. In addition, some categories of time that may or may not be compensable depending upon the circumstances (such as travel time, rest/break times, etc.) need to be addressed explicitly with the employee. Thus, before permitting a non-exempt employee to telecommute, an employer should understand the employee's typical work hours and patterns, ensure that the employee understands the company's expectations with respect to tracking hours worked, and discuss whether there are any special rules that apply when working remotely. Employees should receive specific training on how to track these ancillary situations appropriately in their working hours. In addition, employers should provide specific directions regarding meal breaks and the need for employees to cease all work during those periods if meal breaks are unpaid and last at least 30 minutes. While an employer may have general policies in its handbook addressing timekeeping, a separate policy and written acknowledgement is advised for telecommuting employees.

Cybersecurity is another concern that companies should address when employees work from home. A report from *Computer Business Review* (Nov. 2014) found that a quarter of employees working remotely breached company security guidelines. Because of the increased threat associated with employees who perform work offsite, training and warnings should be provided to telecommuting employees as part of

their transition to that role. The employer's IT department should be involved in developing training and addressing issues with telecommuting employees including encryption, the use of a virtual private network (VPN) and acceptable use and password policies.

Finally, if an employee is telecommuting from a state other than the one where the employer is based or located, the company needs to consider issues related to the payment of local taxes, mandatory contributions to state disability or sick leave programs, and the location of unemployment payments, among other things.

Even if your company is not inclined to allow employees to telecommute other than on a sporadic basis, employers still have to consider how to handle situations where an employee seeks to telecommute as an accommodation for a disability. Requests for such an accommodation must be handled on an individual, case-by-case basis depending on the employee's position and role in the company as well as the scope of the request (e.g., working from home once a week on an ongoing basis, working from home every day for a predetermined period of time, etc.). The first step in the case of an accommodation request is to engage in the interactive process with the employee as required by the ADA to understand what the person is proposing, the restrictions on the employee's activities and the length of time the accommodation may be in place. With that information, the employer must then consider the person's role and whether essential functions will be impacted by the request. The length of time proposed may also affect whether the request results in undue hardship to the company. The bottom line is that employers cannot reject such accommodation requests out of hand, even if they have written policies prohibiting telecommuting.

All signs indicate that telecommuting and flexible workplaces are only going to increase in the coming years. Some companies are already reaping the benefits of a reduced physical footprint, less overhead and higher employee morale. Other employers report increased productivity and retention of employees as a result of these programs. Regardless of whether your company enthusiastically embraces the concept of telecommuting or approaches the possibility with a sense of dread, nearly all employers need to prepare to address the practice in a consistent and thoughtful way to avoid pitfalls and potential future liability.

Please contact Nancy Barnes with any questions.

Workplace Safety

OSHA Update: New Anti-Retaliation Guidance, Walking-Working Surfaces and Fall Protection Standards, and Beryllium Exposure

By M. Scott Young and Candice S. Thomas


In the final weeks of 2016 and early part of 2017, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) provided guidance and recommended practices to assist employers in creating effective anti-retaliation programs as well as issued two final rules updating standards for walking-working surfaces, fall protection systems and beryllium exposure.

Recommended Practices for Anti-Retaliation Programs

As it currently stands, OSHA is responsible for enforcing 22 whistleblower laws protecting employees who raise or report concerns about hazards or safety violations. Employers are prohibited from retaliating against employees for engaging in activities protected under these laws, which include: filing a report with OSHA or other governmental agency about a possible violation; reporting a concern or possible violation to the employer; reporting a workplace injury, illness or hazard; cooperating with law enforcement; refusing to violate the law; or engaging in any other statutorily protected activity.

To combat potential retaliation, OSHA provided guidance to assist employers in establishing and maintaining effective anti-retaliation programs in their workplaces. OSHA recommends these five key elements for an effective anti-retaliation program:

- **Management leadership, commitment and accountability.** Senior management should lead by example and demonstrate a culture of valuing employees' concerns about possible violations.
- **System for listening to and resolving employees' safety and compliance concerns.** Employers should establish reporting procedures that provide for fair and transparent evaluation and effective resolution of the concerns raised.
- **System for receiving and responding to reports of retaliation.** Employers should clearly define roles and responsibilities of all individuals involved in responding to reports of retaliation.
- **Anti-retaliation training for employees and managers.** Employers should provide training for both employees and managers that is tailored to the specific whistleblower laws and company policies that apply to them.
- **Program oversight.** Employers should implement an oversight plan ensuring that the anti-retaliation program is improved and modified as needed.

Final Rule Updating Walking-Working Surfaces Standards and Fall Protection Systems Requirements

OSHA provided general industry employers with walking-working surfaces standards specific to slip, trip and fall hazards. The final rule included a new section under the general industry Personal Protective Equipment standards establishing employer requirements for using fall protection systems. By aligning the fall protection requirements for general industry with those for construction, OSHA has made compliance easier for employers performing both types of activities. The rule provides employers with greater flexibility and permits employers to choose which fall protection systems would best fit their workplaces. Specifically, employers can choose from several fall protection options, including guardrail, safety net, personal fall arrest, positioning, travel restraint and ladder safety systems. The rule also requires employers to ensure worker training for employees who use personal fall protection systems and work in other specified high-hazard situations.

The final rule, Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems), states that it "increases consistency between the general industry and construction standards, which will make compliance easier for employers who conduct operations in both industry sectors."

OSHA's final rule on Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems) became effective on January 17, 2017, but some of the provisions have delayed effective dates, including:

- Ensuring exposed workers are trained on fall and equipment hazards: May 17, 2017
- Inspecting and certifying permanent anchorages for rope descent systems: November 20, 2017
- Installing personal fall arrest or ladder safety systems on new fixed ladders over 24 feet and on replacement ladders/ladder sections, including fixed ladders on outdoor advertising structures: November 19, 2018
- Ensuring existing fixed ladders over 24 feet, including those on outdoor advertising structures, are equipped with a cage, well, personal fall arrest system or ladder safety system: November 19, 2018
- Replacing cages and wells (used as fall protection) with ladder safety or personal fall arrest systems on all fixed ladders over 24 feet: November 18, 2036

Final Rule on Beryllium Exposure

In an effort to increase workplace protections to reduce health risks associated with beryllium exposure, OSHA issued a final rule affecting general industry, construction and shipyards. Key provisions of the rule include:

- Reducing the eight-hour permissible exposure limit (PEL) for beryllium to 0.2 micrograms per cubic meter;
- Establishing a short-term exposure limit of 2.0 micrograms per cubic meter over a 15-minute sampling period; and
- Requiring employers to take specific steps to reduce the airborne concentration of beryllium and to provide additional protections, including personal protective equipment, medical exams, medical surveillance, training and a written exposure control plan.

The standards were originally scheduled to take effect on March 10, 2017, but have been delayed in accordance with the Trump administration's Inauguration Day memorandum that halted and postponed new regulations. The rule's effective date has been pushed back to March 21, 2017 to allow for further review. There are further staggered compliance dates; employers in all three sectors will have until:

- March 12, 2018 to comply with most of the requirements;
- March 11, 2019 to provide any required change rooms and showers; and
- March 10, 2020 to implement engineering controls.

For more information, please contact Scott Young, Candice Thomas or any member of our Labor & Employment group.

Workers' Compensation

Managing the Industrial Concussion

By Janis B. Rosenthal

Concussions are relatively common traumatic brain injuries that may be suffered by employees in the course of their employment. Concussions can be caused by a bump, blow or jolt to the head, or by a hit to the body that causes the head and brain to move rapidly back and forth. A person does not necessarily lose consciousness after suffering a concussion and there may be no visible signs of injury. Concussions may result in blurred vision, language/speech difficulties, loss of consciousness, headache, dizziness and alteration of mental status, including confusion. Nausea, fatigue, irritability, sleep disturbances and sensitivity to light and noise may also accompany a concussion.

Medical experts recommend immediate evaluation by an emergency room physician if someone receives a bump, blow or jolt the head and has any symptoms of concussion. It is crucial that a concussion be evaluated as soon as possible and that any changes in cognitive, physical or behavioral functions be addressed. A CT scan or MRI can assess the brain immediately after injury. The injured employee may need to rest and slowly return to normal activities; time often allows the brain to heal, but a thorough medical examination must be performed to make sure that it is safe for the employee to drive to work and perform their job.

Although 80 to 90 percent of concussions resolve within seven to 10 days, sometimes symptoms are prolonged and result in long-term disability. Brain cells may be damaged and chemical changes around the brain may occur. If symptoms persist beyond the expected time frame for recovery, which is usually three weeks to three months, an

employee may be diagnosed with post-concussion syndrome. This diagnosis results when there is a head trauma and at least three of the following persistent symptoms: headache, vertigo/dizziness, fatigue, irritability, personality change, difficulty in concentrating and performing mental tasks, memory impairment, insomnia, or reduced tolerance to stress, emotional excitement and alcohol. Symptoms of depression or anxiety can magnify these symptoms when an employee fears permanent brain damage. If symptoms remain, the employee may need to be evaluated by multiple providers, including physicians (e.g., neurologists, psychiatrists), psychologists, occupational therapists, vocational experts and physical therapists; speech therapists also may assist if an injured worker has difficulty in speaking following a trauma. Accommodations can assist the employee in returning to productivity following a concussion.

For more information, please contact Janis Rosenthal.