Spring 2010

Employment, Labor & Benefits Quarterly

Foster Swift Employment, Labor & Benefits Group

What's Inside:

We have a new look!

Recently, Foster Swift has undergone a re-brand. Through the first quarter of 2010, we are rolling out our new logo, colors and Web site. Our old copper and teal colors have been replaced with a fresh blue and gray.

Protecting Company Interests When Employees Use Social Media

"It takes many good deeds to build a good reputation, and only one bad one to lose it." - Ben Franklin

Social media platforms such as Facebook and Twitter can be great ways to promote a business, inform the public about services offered and connect with your community. These online tools help a business build its reputation in a progressive and cost effective way. Additionally, many employees now have their own Facebook or Twitter account, providing employers with a means to search for job applicants using social media or monitoring employee activities by reviewing their personal web sites.

Employers may legally review social media sites. Employers who wish to review social media or employees' personal web sites should have a policy in place informing employees that the company has a right to monitor employee use of the systems. Upon implementation of the policy, employees may not then claim they had a reasonable expectation of privacy precluding the employer from viewing or monitoring their on-line activities. Such a policy should also advise employees that unauthorized use of the company's systems will result in discipline up to and including termination, which would permit disciplinary action by the employer based on the employee's use of social media. For example, the employer could reprimand an employee for posting on Facebook a statement that he is off to another boring meeting. Care must be taken, however, to refrain from taking disciplinary action against employees based on information that is posted on the internet that is protected under federal or state law. One example to such protection would be an employee criticizing company policies concerning wages, benefits or working conditions, which even if placing the company in a negative light may constitute protected, concerted activity under the National Labor Relations Act.

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Entities and/or individuals should not be sharing information about the Company's proprietary information or ongoing legal matters through social media outlets. An employee's statements on social media sites may be admissible in Court as non-hearsay. It is imperative to keep confidential information out of the hands of the internet viewing public. Proprietary information should be broadly defined to include, among other things: customer information, pricing, internal communications, and financial data. It is advisable that your company's internet policies specifically prohibit dissemination of the company's confidential information or trade secrets to any outside source, except as necessary for company business.

Ultimately, employers and employees alike must think about what image is desired before participating in a social networking site. Employee interests in social activities on the web site should not be unduly restricted, but such activity should not undermine or interfere with the company's legitimate business interests. See one of our practice group members for assistance with developing an effective internet use policy for your business.

DOL Finalizes the 7-Business-Day Safe Harbor for Depositing Participant Contributions and Loan Repayments

Federal law requires that participant contributions to a 401(k) plan be promptly deposited into a qualified trust that is established to hold qualified plan assets. The U.S. Department of Labor has finalized the 7-business-day safe harbor rule for determining when participant contributions must be contributed to the trust. Usually participant contributions to a qualified plan become plan assets as soon as they can be segregated from the employer's general assets; however, for plans subject to ERISA's trust requirement, the final plan asset rule determines when those contributions must be deposited into the trust. The final safe harbor rule provides that employers are considered to have made a timely deposit if participant contributions are deposited into the trust within 7 business days after they (1) are received (if contributions are paid to the employer), or (2) would have been paid in cash (if contributions are withheld from wages). The safe harbor rule applies to plans with less than 100 participants at the beginning of the plan year and is effective immediately.

The final rule also extends the general deposit timing rule and safe harbor rule to plan loan repayments. The final rule clarifies that loan repayments are subject to the maximum deposit timing period for qualified deferred compensation plans and also affirms that the 7-business-day rule is simply a safe harbor. It is not the exclusive means for determining if the general deposit rule has been met.

HITECH: New Security and Privacy Requirements

On February 17, 2010, most of the Health Information Technology for Economic and Clinical Health Act ("HITECH") became binding on the health care industry. The HITECH Act was passed as part of the American Recovery and Reinvestment Act to promote utilization of electronic health records ("EHR"). Along with providing monetary incentives for the utilization of EHR, the HITECH Act imposes an extensive regulatory scheme to protect EHR.

Security and Privacy Requirements for Business Associates

Specifically, HITECH applies portions of the Health Insurance and Portability Act ("HIPAA") to entities ("Business Associates") that receive protected health information ("PHI") when providing services to Covered Entities. Previously, only health care providers, health care clearinghouses, and health plans ("Covered Entities") were subject to HIPAA's regulations and civil and criminal penalties. But as of February 17, 2010, Business Associates will be required to comply with the HIPAA security regulations as well as additional HITECH Act privacy and security requirements. The security requirements fall into three specific categories: administrative, physical, and technical safeguards.

Administrative safeguards include:

- implementing security management processes (including risk analysis and management, applying sanctions for violations, and information system activity reviews)
- assigning security responsibility
- implementing workforce security (including authorization processes, workforce clearance procedure, and terminating access procedures)
- establishing information access management
- implementing security awareness training programs for the entire workforce
- implementing security procedures, monitoring, and updates
- establishing a contingency plan
- doing periodic evaluations of the policies and procedures
- establishing business associate contracts with covered entities

Physical Safeguards include establishing:

- policies and procedures to limit physical access to information systems (including contingency and facility security plans, access control and validation of access to the facility and equipment, and maintenance records)
- workstation use and security
- device and media controls

Technical safeguards include implementing:

- access controls (such as unique user identification and emergency access procedures)
- audit controls
- integrity controls
- person/entity authentication
- transmission security

Additionally, the HITECH Act requires a Business Associate to notify the Covered Entity following the discovery of an unauthorized acquisition, access, use or disclosure of PHI. The HITECH Act also requires a Business Associate to take action if a Covered Entity consistently fails to comply with the Business Associate Agreement. Specifically, the Business Associate must take reasonable steps

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to end the violation. Otherwise, the Business Associate must terminate the contract or report the problem.

Impact on Covered Entities

Covered Entities as well as Business Associates should change (or if applicable, adopt) their current Business Associate Agreements to ensure compliance with the HITECH Act. Covered Entities should also ensure that all of their Business Associate relationships are indeed covered by Business Associate Agreements as the civil penalties for "reasonable cause" and "willful neglect" have increased to potential fines of $100,000 and $1.5 million respectively.

Avoid Tax Penalties by Correcting Employment, Severance and Deferred Compensation Arrangements in 2010

Nonqualified deferred compensation arrangements are required to comply, in writing, with the highly technical rules of Internal Revenue Code Section 409A ("Section 409A") effective as of January 1, 2009. A "deferred compensation arrangement" is any arrangement with an employee or independent contractor that could result in compensation being paid in a year following the year in which the compensation is earned. Thus, the term may include traditional deferred compensation plans, as well as employment agreements, independent contractor agreements, bonus arrangements, severance plans, stock incentive plans and management service contracts.

Failure to comply with the rules of Section 409A could result in the employee having to recognize all amounts "deferred" under the arrangement as current income, plus interest and a 20% penalty. The employer could also be subject to penalties and interest for not withholding sufficient income and employment taxes.

The IRS recently published guidance that permits an employer to correct a Section 409A failure in the document that sets forth the terms of the arrangement. The IRS previously published guidance that permits an employer to correct a failure to comply with Section 409A in the operation of an otherwise compliant plan. Corrections made during 2010 avoid significant penalties. After 2010, the correction procedure will continue to be available but, penalties may apply.

We recommend that all employers have their deferred compensation arrangements, including employment agreements, independent contractor agreements, bonus arrangements, etc., reviewed for compliance with Section 409A during 2010, so that any errors might qualify for penalty-free correction.

Michigan Employers Must Ban Smoking in Indoor Work Places

Effective May 1, 2010, smoking will be banned in all public places, including places of employment. A place of employment includes any enclosed indoor area where one or more employees perform work, but excludes the Detroit casinos, cigar bars and tobacco retail stores, home offices and motor vehicles.

The new law prohibits smoking anywhere in an employer's indoor facilities, including private, enclosed rooms or offices occupied exclusively by a smoker. "Smoking" under the new law means the burning of a lighted cigar, cigarette, pipe, or any other matter or substance that contains a tobacco product, but does not include chewing tobacco.

Any person who smokes in violation of the law is subject to a $100 fine for the first violation, and fines of up to $500 for any subsequent violations. Employers are not required to report smoking violations to any police or government authority, but are required to do at least the following:

- Have clearly posted "no smoking" signs (or the internationally recognized "no smoking symbol") at the entrances to and in every building or work area covered by the smoking ban.
- Remove all ash trays and other smoking paraphernalia from any work area covered by the smoking ban.
- Inform any employee or other individual (such as a customer or vendor visiting the workplace) who is smoking in violation of the law that he or she is violating state law and is subject to penalties for doing so.
- If applicable, refuse to serve an individual smoking in violation of the law.

While there is no direct obligation for employers to adopt a written no smoking policy, it would be prudent for employers to do so. However, unionized employers may be required to bargain with the union concerning no-smoking restrictions.

Finally, employers may not take retaliatory or adverse personnel action against any employee or applicant who seeks to enforce his or her rights under the law. Though not clearly defined, presumably this means that employees are protected for bringing complaints to the employer's attention about co-workers smoking in violation of the law.

Important Developments for ESOP Fiduciaries

ESOP fiduciaries, generally the ESOP committee or the ESOP trustees, must make several decisions on behalf of the ESOP and may be subject to legal exposure if their decisions are not consistent with ERISA. In order to serve as an ESOP fiduciary, indemnification of the fiduciary by the employer plan sponsor is often agreed to and set forth in an indemnification agreement. While

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indemnification agreements have been a long time practice between ESOP fiduciaries and the ESOP plan sponsor, recent case law developments call into question the degree to which an indemnification agreement might be honored.

The ninth circuit, in two court cases, invalidated indemnification agreements between the ESOP fiduciary and the plan sponsor. In *Johnson v. Couturier*, the Ninth Circuit Court of Appeals held that indemnification agreements were invalid because the agreements would relieve the ESOP fiduciaries of their fiduciary duties under ERISA and because the ESOP would bear the financial burden of the agreements. Thereafter, a district court (also in the ninth circuit) extended the *Couturier* reasoning and invalidated an indemnification agreement, noting that (1) since the agreement imposed liability on the company and, (2) it was the company's shares that constituted the ESOP's sole asset, the ESOP would be adversely affected should the indemnification agreement be honored.

It is important to keep in mind that the facts of the *Couturier* case are extraordinary. The *Couturier* court noted that the indemnification agreements relieved the ESOP trustees of liability absent deliberate wrongful acts or gross negligence, a standard that violated ERISA's prudent-person standard and essentially acted as full exculpation of the fiduciaries' actions. The court's holding, however, seems to suggest that indemnification agreements would likely be valid if the actions by the ESOP fiduciaries are consistent with ERISA, which is a stricter standard than the "deliberate wrongful acts or gross negligence" standard struck down by the court.

Michigan sits in the sixth circuit and is not technically bound by the decisions of the ninth circuit. However, indemnification agreements should be reviewed and possibly revised in light of these recent court decisions.

Mental Health Parity and Addiction Equity Act

On January 29, 2010, the Department of Labor, the Department of the Treasury, and the Department of Health and Human Services jointly issued interim final regulations for the Mental Health Parity and Addiction Equity Act ("MHPAEA"). The MHPAEA became effective for most health plans on January 1, 2010. The new interim regulations are effective April 5, 2010, and become applicable for group health plans and group health insurance issuers for plan years beginning on or after July 1, 2010.

As a reminder, neither the MHPAEA nor the regulations require that a group health plan provide mental health or substance use disorder benefits. ***If*** a group health plan provides mental health or substance use disorder benefits, then the plan cannot impose lifetime or annual benefit limits on the mental health or substance use disorder benefits unless those same limits also apply to medical and surgical benefits. In addition, the group health plan cannot impose financial requirements or treatment limitations on the mental health or substance use disorder

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benefits, unless those provisions also apply to the medical and surgical benefits.

The MHPAEA defines the term "financial requirement" to include deductibles, co-payments, coinsurance and out-of-pocket expenses. The term "treatment limitation" includes limits on the frequency of treatment, number of visits, days of coverage, or other similar limits on the scope or duration of treatment. According to the MHPAEA and its new regulations, the financial requirements and treatment limitations applicable to mental health or substance use disorder benefits cannot be restrictive than the predominant financial requirements and treatment limitations applied to substantially all medical and surgical benefits covered by the plan.

The new regulations recognize that plans often vary the financial requirements and treatment limitations imposed on benefits based on whether the treatment is provided on an in-network or out-of-network basis, or whether the treatment is rendered on an inpatient or outpatient basis. Therefore, determining the predominant financial requirements and treatment limitations for the entire plan without taking these distinctions into account could lead to an absurd result. The regulations fortunately provide for the following six classifications of benefits: (1) inpatient, in-network; (2) inpatient, out-of-network; (3) outpatient, in-network; (4) outpatient, out-of-network; (5) emergency care; and (6) prescription drugs. The parity requirements for financial requirements and treatment limitations should therefore be applied on a classification-by-classification basis.

The Top Ten Costly Mistakes You Should Avoid Making Under Your Labor Contracts

(PART 1)

The most costly mistakes union employers make are all avoidable. After all, the contractor either negotiated the terms of the collective bargaining agreement (the "Contract" or "CBA") or, at the least, had a right to read it before signing it. Yet, the same mistakes are often being made by sophisticated owners who run small and multi-million dollar businesses.

Why Mistakes Happen

1. **Employers** - need to focus on the entire Contract. Employers often review only the "wage rate" and incorrectly assume the remainder of the Contract is not important. (It is!)
2. **Contractors** - need to get involved in the negotiation process. Contractors often leave the negotiations to human relations or labor personnel or the association and "assume" the contract will be "OK"! (Big mistake! What you don't know can hurt you!)
3. **Change in Union Steward** - Even when employers have blatantly violated language that has been unchanged in their Contracts for 20 years without complaint from the union, a new, more vigilant Union Steward may grieve or sue you for not following the plain language in the Contract.

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Employment, Labor & Benefits Attorneys

Michael R. Blum
mblum@fosterswift.com
Rebecca S. Davies
rdavies@fosterswift.com
Joel C. Farrar
jfarrar@fosterswift.com
Amanda Garcia-Williams
agarciawilliams@fosterswift.com
Matt G. Hrebec
mhrebec@fosterswift.com
Sheralee S. Hurwitz
shurwitz@fosterswift.com
Melissa J. Jackson
mjackson@fosterswift.com
Stephen I. Jurmu
sjurmu@fosterswift.com
Stephen J. Lowney
slowney@fosterswift.com
Frank T. Mamat
fmamat@fosterswift.com
Robert E. McFarland
rmcfarland@fosterswift.com
Johanna M. Novak
jnovak@fosterswift.com
Sherry A. Stein
sstein@fosterswift.com
Derek Walters
dwalters@fosterswift.com
Cole M. Young
cyoung@fosterswift.com

Paralegals

Terri L. Bolyard
tbolyard@fosterswift.com
Jaxine L. Wintjen, CLA
jwintjen@fosterswift.com

Clerk

Lauren B. Dunn
ldunn@fosterswift.com

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What are the "Top 10" Contractor Mistakes?

1. **The Evergreen Clause.**
   Most CBAs have an evergreen clause. This means that, if the contractor fails to give timely notice, the CBA will automatically renew - - for another term, or in some cases, only year-to-year.
2. **Union Security Clause / Union Membership.**
   The most common -- and costly - - error employers make is to assume that just because an employee is not a union member, the employer does not have to pay the employee union wages and fringes. Similarly, an Employer may assume that a union member who does not perform "covered" work does not get union wages or fringes. This assumption may not be correct.
3. **Hours "Worked" versus Hours "Paid".**
   Understand your Contract and the difference between hours paid and hours worked. For example, must the employer make fringe benefit payments on the employees' vacation, personal, and sick days? (i.e., Are payments made on hours paid or hours worked?)

(PART 2 - NEXT ISSUE)

For more information about labor and employment or employee benefits law related issues, please contact any member of the Foster Swift Employment, Labor & Benefits Group.

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