

# Executive Briefing

## Employment & Labor Law / Employee Benefits



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April 2010

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### How Health Care Reform Affects Employers

President Obama signed into law the health care reform bill, known as the Patient Protection and Affordable Care Act (PPACA), H.R. 3590, on March 23, 2010, and the Health Care and Education Reconciliation Act of 2010, H.R. 4872, on March 30, 2010, which contains certain revisions to the PPACA. The health care reform bills contain numerous provisions affecting employers. Below is a summary of the most significant provisions that will affect employers within the next year. Unless otherwise stated, the provisions listed below will be effective for plan years beginning on or after September 23, 2010, (meaning, for calendar year plans, these provisions will take effect January 1, 2011).

- No Lifetime or Annual Limits. Plans cannot impose lifetime limits and may only restrict annual limits on certain benefits. For plan years on or after January 1, 2014, plans cannot impose any annual limits.
- Prohibition on Rescissions. Grandfathered plans (which are generally plans that were in existence on March 23, 2010), may not rescind coverage except for fraud or intentional misrepresentation.
- Coverage of Preventative Health Services. Plans must provide first dollar coverage (i.e., no cost sharing) for preventive care and immunizations.
- Extension of Dependent Coverage. Plans that cover dependent children must extend coverage up to age 26, even if the child is married. For plan years beginning prior to January 1, 2014, grandfathered plans do not have to extend coverage to adult children who are eligible for other employer-sponsored coverage.
- Uniform Explanation of Coverage. Plans must prepare and distribute a summary of coverage in addition to the summary plan description required by ERISA. The summary must meet certain specified criteria (e.g., it must be limited to four pages in length). Failure to comply can result in a \$1,000 penalty for each failure.
- Reporting and Disclosure Requirements. Plans must begin providing financial and claims-related information to the public and the Department of Health and Human Services (HHS). Plans also must annually report to enrollees and HHS the benefits under the plan that improve health.
- Nondiscrimination and Code Section 105(h). Nondiscrimination requirements that formerly applied only to self-insured plans will now apply to insured plans, except those insured plans that are grandfathered.

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- Appeals Process. Plans must implement an effective appeals process meeting certain minimum standards for appeals of coverage determinations and claims. Plans must also implement an external review process in accordance with minimum standards to be established at a later date. Grandfathered plans are exempt from these requirements.
- Patient Protections. Plans must allow enrollees to select their primary care provider from any available participating primary care provider if the plan requires designation of a primary care provider. Prior authorization and increased cost sharing are prohibited for emergency services, whether in-network or out-of-network providers. Plans are prohibited from requiring authorizations or referrals for enrollees before seeking coverage for Ob-Gyn care.
- High Risk Pools Reimbursement. PPACA establishes high risk pools for individuals with pre-existing conditions. Plans must reimburse the high risk pool for medical expenses incurred by the pool for individuals who are encouraged to disenroll from the employer's plan with financial incentives.
- Preexisting Conditions. Plans are prohibited from excluding individuals under age 19 on the basis of a preexisting condition. For plan years on or after January 1, 2014, plans cannot impose any preexisting condition.
- Wellness Programs and Disclosure. Wellness programs cannot require disclosure or collect any information regarding firearm and/or ammunition ownership. Moreover, wellness programs cannot base premiums, eligibility, discounts, rebates or rewards on the basis of firearm and/or ammunition ownership.
- Temporary Reinsurance Program for Retirees. The Secretary of HHS will establish a temporary reinsurance program to provide reimbursements to employers who provide health coverage to retirees over age 55 who are not eligible for Medicare. The reimbursement provided will be 80 percent of claims between \$15,000 and \$90,000 (adjusted for inflation). This program ends January 1, 2014.
- Excise Tax on Nonqualified HSA Withdrawals. Excise taxes for nonqualified HSA withdrawals increased from 10 percent to 20 percent, and from 15 percent to 20 percent for Archer MSA withdrawals.
- New W-2 Reporting. Effective for 2011 plan year reporting, employers are required to report the aggregate cost of coverage provided by the plan on W-2s.

For additional information on any of these topics or the health care reform bills in general, please contact [Tom Dowling](#) or [Sam Wilkerson](#).

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### EEOC Attacks Leave of Absence Policies

The fall of 2009 was an active and fruitful period for the Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act (ADA). In late July, the EEOC announced it had reached a [settlement](#) with AVI Foodsystems, Inc. (AVI) recovering in excess of \$100,000. In late September, the EEOC announced a record-breaking [consent decree](#) recovering \$6.2 million against Sears, Roebuck and Co. (Sears). In addition to these settlements, in August, the EEOC filed a lawsuit against United Parcel Services, Inc. (UPS) in the District Court of Illinois.

The common factors between these settlements and the ongoing litigation are that: (1) all include a claim by the EEOC that the employer violated the ADA by having in place inflexible leave exhaustion policies, which resulted in an employee's termination following a set period of time without determining on an individual basis whether additional leave should have been provided to the employee; and (2) all were pursued under the ADA as class actions. These initiatives by the EEOC clearly show that it is targeting employer leave policies and actively pursuing these claims on behalf of, not only the employee at issue, but an entire class.

**AVI Settlement** - The EEOC argued that AVI violated the ADA when it had in place a policy that prevented employees from returning to work unless they were completely released by their physicians. According to the EEOC, this policy prevented employees with restrictions from returning to work without analyzing whether the employees could perform the essential functions of their position. The EEOC has long taken the position that "no restriction" or "100 percent healed" policies are a clear violation of the ADA. In addition, the EEOC contended that it was a violation of the ADA for AVI to terminate an employee on leave for medical reasons based upon a policy that provided a set limit for the length of time an employee may be on leave, which was either 6 or 12 weeks. Shortly after a lawsuit was filed, the EEOC and AVI reached a settlement.

At the time of the settlement, the EEOC had determined that this policy adversely affected 80 employees, however, there were only six named plaintiffs in the lawsuit. In accordance with the terms of the settlement, AVI must make payments to the named plaintiffs and notify them of an opportunity for employment. In addition, AVI has to provide the other individuals with notice of the opportunity for employment and the option to receive a lump sum payment of \$1,000, or provide this payment if a position cannot be found within 90 days. AVI has to set aside \$75,000 to cover these undetermined payments and any remaining portion of the fund must be donated to the Youngstown Area Goodwill Industries, Inc.

**Sears Settlement** - The central employee at issue in this lawsuit suffered an on-the-job injury and took worker's compensation leave. At various points, the employee allegedly attempted to return to work by seeking a new position that would meet his restrictions, however, he was not

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selected for the open positions. Sears had in place a policy which provided that once an employee was on leave for 12 months following a worker's compensation injury, the employee would be terminated. Consistent with this policy, the employee was terminated when his leave reached 12 months.

When the employee filed a charge with the EEOC, it investigated his complaint and, after unsuccessful settlement attempts with Sears, it initiated a lawsuit which sought relief on behalf of "a class of disabled employees." The central issue was whether this maximum leave policy violated the ADA. Sears initially sought to dismiss the lawsuit, however, the court denied its motion and the matter moved forward. The lawsuit continued for five years until the parties entered into the consent decree. The consent decree was reported by the EEOC as its largest ADA settlement.

Under the terms of the consent decree, Sears was required to pay \$6.2 million for distribution to former Sears employees who have been approved to share in the distribution. The EEOC's motion to distribute the settlement amount to 235 former Sears employees was approved by the district court judge on February 4, 2010. In addition, Sears was required to modify its policy to provide injured employees with notice that their leaves will expire at least 45 days in advance of the expiration date and allow the employees an opportunity to make a request for potential accommodations that would enable them to return to work.

**UPS Litigation** - This case is also brought on behalf of a specific named individual. In this case, UPS has a policy which provides for the termination of an employee after the employee has remained absent from work for a period of 12 months. According to the EEOC, had UPS provided this particular employee with an additional two weeks of leave, she would have been able to return to work. As such, the EEOC contends that UPS' "inflexible" policy is a violation of the ADA because it does not allow additional time off beyond the 12-month period as a reasonable accommodation dependent upon the particular needs of the employee. UPS disputes that it had any obligation to provide the employee with leave beyond the 12 months as a reasonable accommodation and that it does not engage in the interactive process with its employees.

This case remains in its initial stages as UPS has filed a motion to dismiss and the court has yet to rule on the pending motion. At this point, UPS has stated that it intends to fully defend the litigation based upon its generous policy of allowing employees 12 months of leave during which they receive medical benefits.

**Bottom Line:** If you have a maximum leave of absence policy, these cases provide valuable insight into the position taken by the EEOC. While the EEOC's position is not binding upon the courts, unfortunately, case precedent is lacking as the other employers have resigned

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themselves to settling versus fully litigating the issue. We will continue to monitor the UPS lawsuit as well as any other cases that address this issue.

For more information regarding return to work policies and general compliance issues with the ADA, please contact [Mindy McPheeters](#).

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### Implementing Policies to Address Social Media

As the use of Twitter, Facebook and other social mediums develop, even if companies do not use these avenues in their own marketing efforts, they should decide if they will attempt to monitor and/or curtail employee efforts in this regard. If not, companies arguably lack control over their employees' actions on the Internet. Accordingly, companies can and should have appropriate limitations in place, such as an Acceptable Use Policy and a Social Media Policy.

The reasons for these policies are widespread. A technological risk to a company, from both its employees and its own use of social media, may exist depending on the technology and the type of behavior at issue. For example, overuse of a company's network and computing resources may result in a bottleneck. Other risks flow directly from an employee's inadvertent disclosure of inappropriate information, including: (1) violation of the privacy rights of another individual by posting confidential or identifying information in a public location; (2) infringement upon the intellectual property rights of others; (3) disclosure of the intellectual property of the company, intentionally or inadvertently, and/or (4) disclosure of confidential business information.

In addition, companies must comply with the same laws and regulations online as they do offline. The same basic principles related to anti-discrimination and harassment laws, securities law and free speech protections, as well as the laws encompassed in the risks addressed above apply to govern online activities. For example, the Federal Trade Commission conducts investigations and enforces its regulations in exactly the same manner, without regard to whether the conduct occurred online. Moreover, companies that have a global presence are not only required to comply with state and federal laws, but they must also comply with foreign laws in those areas.

Finally, any discussion about the risks of an online presence would not be complete without a discussion of the potential for harm to a company's reputation. First, there is the potential that an employee or the company itself could damage the company's reputation through direct conduct. Second, there is the reputational harm that occurs when inaction on the part of the company appears to sanction the misconduct of others. Online, inaction is not an appropriate

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response because information on the Internet can be permanent and has the potential to go viral.

For all of these reasons, companies should put in place appropriate policies to address these risks. As such, the emergence of Acceptable Use and Social Media policies have come to the forefront as preventive measures. The following provides some general guidelines that should be captured by each of these policies.

### Acceptable Use Policy

Companies have more control over an employee's online activities if the activity occurs on company time or uses company equipment. However, even under those circumstances, the company's control is not absolute. Some courts have found that employees have reasonable expectations of privacy even when accessing company resources on company time. When employees use their own equipment on their own time, the issue becomes more complicated. Although companies are essentially prohibited from regulating employees' activities using their own time and equipment, companies still face potential sanctions if they have failed to implement sufficient procedures to prevent employee misconduct.

As a result, creating an effective Acceptable Use Policy requires more than simply drafting a carefully-worded statement. An effective Acceptable Use Policy requires the company to educate its employees on the risks attendant with the use of social media, while also providing information on the best practices to mitigate those risks. For example, a company should instruct its employees that if an employee is engaging in conduct that might be viewed as an endorsement of the company's product, the employee must disclose his or her relationship to the company.

### Social Media Policy

Every company needs a Social Media Policy. A robust Social Media Policy should include Intellectual Property Protections; a Privacy Policy; guidelines governing employees' use of both internal and external technologies; necessary disclaimers; anti-fraud protections; and a policy governing advertising and sweepstakes, if necessary. Any attempt to craft a truly robust social media policy must include the needs of the various stakeholders within an organization. Input from the Legal Department, Information Technology, Human Resources, and Marketing is necessary to ensure that the policy fulfills the goals of the company, while still ensuring the company's compliance with applicable law.

For more information regarding online risks to employers and appropriate preventive measures, please contact [Jasmine Campbell](#).

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## Inside Washington

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### *New Laws, Regulations and Agency Guidance*

**DHS** . . . On March 17, 2010, the Department of Homeland Security (DHS) [announced](#) a joint effort with U.S. Citizenship and Immigration Services (USCIS) in the creation of a trio of initiatives to strengthen the efficiency and accuracy of the E-Verify system. These initiatives include a new agreement with the Department of Justice that will streamline the adjudication process in cases of E-Verify misuse and discrimination; an informational telephone hotline for employees to provide a more timely, effective and seamless customer experience for workers seeking E-Verify information; and new training videos focusing on E-Verify procedures and policies, employee rights and employer responsibilities in English and Spanish.

**DOL** . . . It was no April fool's on April 1, 2010, when Secretary Solis officially [announced](#) the Department of Labor's long publicized "We Can Help Campaign" in Chicago, Ill. During the announcement, Secretary Solis stated, "We can help, and we will help. If you work in this country, you are protected by our laws. And you can count on the U.S. Department of Labor to see to it that those protections work for you." The campaign will include bilingual public service announcements, the launching of a new Web site, and a toll free hotline. It will target industries where it is viewed that low wage workers are predominant such as: construction, janitorial work, hotel/motel services, food services, and home health care.

**EEOC** . . . On March 9, 2010, the EEOC issued an [informal discussion letter](#) pertaining to the use of credit checks as an employment background tool. While the EEOC noted that the use of such a method is not a per se violation, it also stated that if this method disproportionately screens out women, minorities or another protected class, then it could be a violation of Title VII. The EEOC cited to previous testimony on this issue which stated that credit checks are not an accurate indication of an individuals' ability to perform a specific job. Showing that it's not going down without a fight, the EEOC filed an appeal of the recent decision in an Iowa District Court which required it to pay \$5.4 million in attorneys' fees. The award of attorneys' fees was made after the judge dismissed the EEOC's pattern and practice discrimination case on summary judgment and, ultimately, held that the EEOC had engaged in gross errors when pursuing the action.

**ICE** . . . On March 2, 2010, the U.S. Immigration and Customs Enforcement (ICE) announced it had issued notices of inspection to 180 businesses in Louisiana, Mississippi, Alabama, Arkansas and Tennessee. According to an ICE spokesman, "this effort is a first step in ICE's long-term strategy to address and deter illegal employment." The notices inform employers that

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ICE will be inspecting their hiring records to determine whether employers are complying with employment laws.

**IRS** . . . On March 18, 2010, President Obama signed into law the Hiring Incentives to Restore Employment ([HIRE](#)) Act. The HIRE Act [provides](#) a payroll tax credit for qualified employers who hire employees who have been unemployed for 60 days or more and if the employee is not a "replacement." In addition, if the employee remains employed for 52 weeks, the employer may be entitled to a \$1,000 tax credit. New tax forms pertaining to these credits have recently been released by the IRS.

For more information regarding "Inside Washington," please contact [Mindy McPheeters](#) or [Stephanie Scheck](#).