Summer 2011

EMPLOYMENT, LABOR & BENEFITS QUARTERLY

Foster Swift Employment, Labor & Benefits Group

WHAT'S INSIDE:

Medicare Part D Creditable Coverage Notices

by: Jaxine L. Wintjen, CP

Group health plans that offer prescription coverage to Medicare eligible participants must provide notices to participants advising them whether their drug coverage is creditable or non-creditable. Such notice must be provided to participants:

- Before the beginning of the Medicare Part D annual enrollment period;
- Before an individual is first eligible for Medicare Part D;
- Before the effective date of coverage for any Medicare eligible individual who joins the plan;
- Whenever prescription drug coverage ends or changes so that it is no longer creditable or becomes creditable; and
- Upon the individual's request.

The Center for Medicare and Medicaid Services ("CMS") provides Model Notices that may be used by Plan Administrators to comply with the notice requirements. Plan Administrators may modify the Model Notices as necessary to reflect the provisions of their individual plans. Copies of the Model Notices may be downloaded from our web site at www.fosterswift.com.

DOWNLOAD MODEL NOTICES

Go to www.fosterswift.com/news-publications-Medicare-Part-D-Creditable-Coverage-Notices.html

CMS has revised the date by which the Medicare Part D annual enrollment Notice must be provided. Previously, the annual notice must have been provided by November 15 of each year. Effective in 2011, the annual Notice must be provided by October 15 of each year.

Please contact your Foster Swift employee benefits professional for further information.

Universal Availability - Is Your 403(b) Plan Compliant?

by: Terri L. Bolyard

The IRS has recently identified compliance with the universal availability requirement as a recurring problem during its audits of Code Section 403(b) tax deferred annuity plans. The universal availability rule states that if any employee of an organization is permitted to make salary deferrals to a Code Section 403(b) plan, the same deferral opportunity must be

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afforded to all employees of the organization (except in limited circumstances).

In an effort to address this issue, the IRS, through is Employee Plans Compliance Unit (EPCU), has begun sending letters to a national sample of over 300 higher education organizations, including academies, universities, colleges, seminaries, institutes of technology and other college level organizations. The letter instructs the recipient organization to complete and return Form 886-A, which raises a series of questions to determine whether the organization's 403(b) plan is compliant in operation with the universal availability requirement. Based on the organization's response to Form 886-A, the EPCU will either issue a closing letter if the plan appears to be compliant or request further information and offer correction assistance if the plan appears to be non-compliant.

Your organization's complete response is required if your organization receives a letter from the IRS with instructions to complete and return Form 886-A. Failure to respond to the questionnaire or to provide complete information could result in further action or examination of the organization's 403(b) plan.

Visit the EPCU webpage at http://www.irs.gov/retirement/article/0,,id=238459,00.html for more information on this IRS initiative.

Please contact your employee benefits counsel if your organization is a recipient of the IRS EPCU letter or you have questions regarding the completion of Form 886-A.

GINA Recordkeeping Requirements are Coming

by: Michael R. Blum

The Genetic Information Nondiscrimination Act of 2008 (GINA) took effect for employers on Nov. 21, 2009. GINA prohibits the use of genetic information in making employment decisions, restricts employers from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information. GINA's enforcement procedures and remedies are identical to those found in Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA). However, unlike Title VII and the ADA, no record retention requirements currently exist under GINA. That is about to change.

In a notice published in the Federal Register on June 2, 2011, the Equal Employment Opportunity Commission (EEOC) proposed to extend existing recordkeeping requirements under Title VII and the ADA to entities covered by GINA, which include both private sector and state and local government employers. In seeking to extend its recordkeeping requirements to GINA, the EEOC is not attempting to require employers to create any documents that do not otherwise exist. However, records made or kept by employers must be retained under GINA in accordance with the same requirements currently in existence for records preserved under Title VII and the ADA.

Specifically, Title VII and the ADA require any personnel or employment record made or kept by an employer (including requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) to be retained for a period of one year from the date of the making of the record or the personnel action involved, whichever is later. In the case of involuntary termination of an employee, the personnel records of the individual terminated must be kept for a period of one year from the date of termination. Please note that although federal law only requires a one-year

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retention period for these records, the statute of limitations under Michigan's employment laws is longer. Thus, it is recommended that personnel records be kept for at least 6 years following termination, unless a charge of discrimination or lawsuit has been filed.

Where a charge of discrimination or lawsuit has been filed, the employer must preserve all personnel records relevant to the charge or action until its final disposition. Thus, a "litigation hold" must be placed on the destruction of all relevant documents, including electronic documents and files, so they are not destroyed under the employer's normal document destruction schedules or policies. Documents considered to be relevant are not limited to personnel records relating to the aggrieved person, but include personnel records for all employees holding positions similar to that held or sought by the aggrieved person. Similarly, the employer must preserve application forms or test papers completed by both an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

If you have any questions about GINA or recordkeeping requirements, please contact a member of the Foster, Swift Employment, Labor and Benefits Group.

PPACA Large Employer Calculation Threshold

by: Sheralee S. Hurwitz

As employers work to evaluate the impact of the Patient Protection and Affordable Care Act ("PPACA") on their workers, insurance needs and balance sheet, many are wondering if and when the PPACA will apply to them. The good news is that penalties for failing to offer sufficient insurance coverage options will not be imposed until 2014. The bad news is that the calculation of whether an employer may be subject to penalties, requires more than one level of analysis and calculation. For companies whose workforce levels vary over time, it will take some on-going monitoring to ensure proper compliance.

PPACA THRESHOLD FOR COVERAGE

Under the PPACA, employers with at least 50 full-time *equivalent* employees will be labeled as "large" employers. They will face penalties, beginning in 2014, if one or more of their full-time employees obtains insurance through a health care Exchange and qualifies either for a premium credit or a cost share reduction.

- A "large employer" is defined as one with more than 50 full-time *equivalent* employees during the preceding calendar year.
  - Both full-time and part-time employees are included in the calculation;
  - "Full-time" employees are defined as those working 30 or more hours per week;
  - "Full-time" excludes seasonal employees who work less than 120 days during the year;
  - Part-time employees' hours as a group are included in the calculation also. Hours worked by part-time employees (those working less than 30 hours per week) are included by, on a monthly basis, dividing their total number of monthly hours worked by 120.
    - for example, a firm with 35 full-time employees (30+ hours), also has 20 part-time employees who all work 24 hours per week (so each employee who works 24 hours per week, works a total of 96 hours per month).
    - These part-time employees' hours would be counted as the equivalent of having 16 full-time employees, as follows:

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20 employees x 96 hours per month per employee /120

= 1920/120

= the equivalent of 16 "full-time" (30+ hours a week) employees.

HOW PENALTIES APPLY AND ARE CALCULATED

Regardless of whether a large employer offers coverage, it will only be potentially liable for a penalty beginning in 2014 if at least one of its full-time employees obtains coverage through a health care Exchange and qualifies for either a premium credit or a cost share reduction. To qualify for premium credits in an Exchange, the employee must meet certain eligibility requirements, including that the employee's required contribution for self-only health coverage (through the employer) exceeds 9.5% of the employee's household income, or if the plan offered by the employer pays for less than 60% of covered expenses.

In sum, part-time employees and their hours worked count toward the 50 full-time employee threshold, but if they obtain health insurance through an Exchange, that won't trigger a penalty against their employer. If an employer does not offer insurance, but a full-time employee obtains insurance through a health care Exchange, the penalty calculation against the employer is $2,000 per year multiplied by the number of full-time employees, excluding the first 30.

If an employer offers insurance, but full-time employees enter the Exchange, the penalty is the lesser of (1) $3,000 annually for each employee entering the Exchange, or (2) the penalty calculated for employers not offering insurance at all ($2,000 per year x the number of full-time employees, excluding the first 30).

This is just a brief overview of this very complex issue, and does not address all factors involved in the calculation of the "large" employer threshold or the possible imposition of penalties.

Please direct any questions to a member of Foster, Swift's Employment, Labor and Benefits group.

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Replacement of Form 5500 Schedule SSA

by: Jaxine L. Wintjen, CP

The IRS requires that qualified plans report certain information relating to participants with deferred vested benefits in a qualified deferred compensation plan. For plan years prior to January 1, 2009, plans were required to attach Schedule SSA to Form 5500 to satisfy this filing requirement.

Effective January 1, 2009, the Department of Labor ("DOL") mandated electronic filing of Form 5500. In order to accommodate the electronic filing mandate, a number of changes were made to the Form 5500 and accompanying schedules. One of the changes was to remove the Schedule SSA.

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The IRS has developed Form 8955-SSA to replace the Schedule SSA for plan years beginning on or after January 1, 2009. In general, the filing due date for Form 8955-SSA is the same as Form 5500; it must be filed by the last day of the seventh month following the end of the plan year, plus extensions.

The IRS has announced an extension of time to file Form 8955-SSA for the 2009 and 2010 plan years. The due date for filing Form 8955-SSA for the 2009 and 2010 plan years is the later of:

a. The last day of the seventh month following the end of the 2010 plan year (July 31, 2011 for calendar year plans); or

b. January 17, 2012.

Employers may request a two month extension of the time to file form 8955-SSA by filing Form 5558 with the IRS prior to the original filing deadline.

Filers may either file separate Forms 8955-SSA for the 2009 and 2010 plan years or they may combine the 2009 and 2010 data on the 2009 Form 8955-SSA.

The Form 8955-SSA may be obtained as a fillable form from the IRS web site at www.irs.gov/formspubs. The form is also available from third party software developers or by calling the IRS at (800) 829-3676.

Form 8955-SSA may be filed electronically using the Filing Information Returns Electronically system or on paper at Department of the Treasury, Internal Revenue Service Center, Ogden, UT 84201-0027.

Please contact your Foster Swift Employee Benefits professional for more information.

Are Your Employees (Still) WILBing[1] On Your Time?

by: Melissa J. Jackson

You may recall this topic from the Winter, 2010 newsletter. It is being reprised and updated because the issue is becoming even hotter. As you all know by now, social media continues to flourish in the workplace. Facebook, My Space, Linked In, and Twitter have become commonplace, not only on employees' personal computers, but also on employers' computers. Blogging has become a tool for companies that are marketing, as well as for employees who are bent on revenge.

We asked these questions in the winter newsletter.

- Should an employer be concerned?
- What should a concerned employer do?

The answer to the first question was and continues to be that all employers should be concerned … about the loss of employee productivity, potential damage to the employer's reputation, a breach of confidentiality – and the growing trend for the National Labor Relations Board (NLRB) to become involved in protecting employees. And "yes," the NLRB can be a threat, even to non-union employers.

How do you minimize these risks? The answer still is to let employees know what is and is not prohibited. The easiest way to inform them is to put a policy in the employee handbook. (We are assuming here that you have a handbook and that you actively encourage your employees to refer to the policy; if either of these assumptions is incorrect, you could have even more problems, but that is a topic for another day). As we continually preach, an effective policy will allow effective monitoring. The policy will serve as a defense to claims of defamation, improper discipline

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and termination, and invasion of privacy. It will ensure consistency and uniformity in enforcement. It will inform employees that social media may not be used to harass or discriminate against others. It will remind employees that any restrictive covenants, such as non-compete, non-solicitation, and non-disclosure obligations, extend to the realm of social media.

Nevertheless, the answer is not to simply reserve the right to monitor and discipline as broadly as possible. As we informed you, in January, 2011, the NLRB brought charges against an employer because an employee had complained about her supervisor on her Facebook page. The NLRB charged that the employer violated the employee's right to protest her working conditions. That case was settled in February, 2011. Nevertheless, in May, 2011, the NLRB again brought charges against an employer who fired five employees for complaining about their working conditions on Facebook. The NLRB stated that the posts were protected concerted activity and took issue with the employer's policy, which prohibited employees from making disparaging remarks about the company or supervisors over the internet. This demonstrates that use of the internet will continue to be an arena in which the NLRB will be actively involved – regardless of whether the employer is unionized or not. You do not have the luxury of being IBT![3]

If you have any questions, please contact a member of the Foster Swift Employment, Labor and Benefits Group.

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[1] A translation for the "uninitiated" is Workplace Internet Leisure Browsing

[2] The NLRB protects non-union and union employees from discrimination based on group action (concerted activity).

[3] In Between Technology.

Grace Period For Adopting Certain Internal Claims & Appeals Procedures For Non-Grandfathered Group Health Plans Extended

by: Melissa J. Jackson

The DOL recently issued guidance that extends the grace period for amending non-grandfathered group health plans to comply with certain provisions of the new internal claims and appeals procedures. Prior guidance provided an original amendment deadline of July 1, 2011 for complying with the following provisions:

a. The 24-hour time frame for deciding urgent care claims;

b. The requirement to provide notices in a culturally and linguistically appropriate manner;

c. The broader content and specificity requirements for notices to claimants; and

d. The obligation to strictly adhere to all the requirements of the 2010 regulations governing the internal claims and appeals procedures.

According to DOL Technical Release 2011-01, the amendment deadline for calendar year plans with respect to the provisions listed above has been extended until January 1, 2012. Non-calendar year plans, however, must work through a two-part grace period extension. The grace period for items (a), (b), and (d) above, for non-calendar year plans, has been extended until plan years beginning on or after January 1, 2012. The same grace period applies to

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item (c) above, but solely with regard to the requirement to disclose diagnosis and treatment codes (and their meanings.) The grace period for the remaining content and disclosure requirements of item (c) has been extended only until the first day of the first plan year beginning on or after July 1, 2011.

Please contact your Foster Swift employee benefits professional if you have any questions regarding the foregoing.

HAPPENING NOW – Proposed 401(k) Plan Legislation

by: Terri L. Bolyard

On May 18, 2001, Senators Herb Kohl (D-WI) and Mike Enzi (R-WY) introduced new legislation to the Senate Finance Committee that is designed to protect retirement savings in 401(k) plans. If adopted into law as written, the Savings Enhancement by Alleviating Leakage in 401(k) Savings Act of 2011 (the "SEAL Act") would give terminated plan participants a longer period of time in which to repay plan loans, cap the maximum number of outstanding plan loans for any one participant at three, permit continued elective deferral contributions after receipt of a hardship distribution, and prohibit plans from issuing loans through debit cards. Our employee benefits attorneys are continuing to monitor the progress of this legislation and will provide timely updates to our clients.

United States Supreme Court Addresses Legal Significance of a Summary Plan Description

by: Lauren B. Dunn

The United States Supreme Court recently held that for purposes of ERISA Sec. 502(a)(1)(b) (recovery of benefits due), the terms of a summary plan description ("SPD") cannot be enforced as terms of the plan it summarizes. In *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), a group of plan participants brought suit claiming, among other things, that disclosures describing their pension plan's conversion from a defined benefit plan to a cash balance plan failed to provide them with accurate information regarding their benefits. Specifically, the participants argued that the SPD failed to inform them that their accrued benefits under the defined benefit plan could wear away as their respective benefits under the cash benefit plan increased.

The district court held in favor of the plaintiffs and reformed the terms of the cash balance plan. The Solicitor General argued that the district court enforced the terms of the cash balance plan as written which included the terms of the SPD. The Supreme Court reversed reasoning that while ERISA requires plan administrators to furnish an SPD, the "syntax" of ERISA Sec. 102(a) suggests that plan information provided by an SPD is not part of the plan itself. Furthermore, the Supreme Court reasoned that the basic objective of an SPD is to provide clear, simple communication; making the language of an SPD legally binding may lead to plan administrators sacrificing simplicity in order to describe the terms of the plan in the "language of lawyers." Accordingly,

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the Supreme Court held that the terms of an SPD provide information about a plan but do not constitute terms of the plan for purposes of ERISA Sec. 502(a)(1)(b). Nevertheless, misrepresentations in an SPD can form the basis of equitable relief. Plan Administrators should therefore ensure that the terms of the SPD conform to the terms of the plan.

If you have any questions, please contact a member of the Foster Swift Employment, Labor and Benefits Group.

MEET OUR NEW ATTORNEY

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Lauren joined Foster Swift as a summer associate in 2009 and continued her employment as a law clerk during her last year of law school. Lauren is a member of the firm's Employment, Labor & Benefits Group. She focuses in the areas of employee benefits and employment law.

Lauren received her law degree from Wayne State University Law School and her undergraduate degree, magna cum laude, from Western Michigan University. During her second year of law school, Lauren was an Assistant Editor for the Wayne Law Review, which lead to her election to the board as Production Editor during her third year.

Before joining Foster Swift, Lauren worked as a Student Attorney for the Free Legal Aid Clinic at Wayne State and was a Legal Intern for the Michigan Department of Education's Office of Career & Technical Education.

Lauren practices in the Foster Swift Lansing office and assists employers across Michigan. For more information about Lauren, including recent publications, visit fosterswift.com and search "Lauren Dunn."