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Ideas & Trends

INSIDE THIS ISSUE

PATERNITY LEAVE

Men reluctant to use paternity leave due to fear of losing respect, appearing less dedicated to the job

According to a 2013 Society for Human Resource Management survey, 15 percent of U.S. companies provide some form of paid leave to new fathers. And, according to the Wall Street Journal, major companies like Yahoo, Bank of America, and Ernst & Young, are offering male employees anywhere from six to 12 weeks of fully paid time off when a child is born. Even as more and more organizations trend toward offering paternity leave, many men remain reluctant to take the time off.

Chris Duchesne, vice president of Global Workplace Solutions for Care.com, participated in an interview with Wolters Kluwer Law & Business about paternity leave, why men don't want to use it, and why it's a good idea for employers to offer it as a workplace benefit.

According to Duchesne, dual working families comprise 70 percent of the labor force in the U.S. today, meaning that home and childcare responsibilities no longer fall solely on women. In fact, 40 percent of women are now the family breadwinner. "This new generation of workers (both men and women) have different expectations of fathers," he explained. "They are more involved in home responsibilities than previous generations and expect flexibility in how, when, and where they do their work. This includes not only offerings like paid time off for paternity leave but also the flexibility to work from home a portion of the time upon their return."

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DATA MANAGEMENT

Expert encourages HR to start using Big Data

Big Data has become a critical tool for many businesses and now HR departments are starting to realize the potential this data holds for them. Big Data, used correctly, can play a major role in smooth off-boarding, preventing sexual harassment, and identify employee dissatisfaction before it results in voluntary turnover. Kon Leong, CEO of ZL Technologies (www.zlti.com) discussed with Wolters Kluwer Law & Business what he refers to as "the valuable data most HR departments have yet to tap into."

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AFFORDABLE CARE ACT

Hypotheticals help explain ACA's whistleblower provisions

Imagine three employees—Jane, Mark, and Steve—each one on the cusp of employment termination, each one for a different reason, but each having engaged in protected conduct under the newly-enacted anti-retaliation provisions of the Affordable Card Act ("ACA"). We meet them as their supervisors approach their respective Human Resources department to complete the employment termination. Employees, supervisors, and Human Resources employees need to know how to respond to the individual situations. But, first, some background on the law.

The ACA's anti-retaliation provision

The ACA contains an important anti-retaliation provision. Under the ACA, retaliation against an employee is prohibited if the employee engages in certain behavior, which includes:

1. receiving a credit under section 36B of the Internal Revenue Code;
2. receiving a subsidy under section 1402 of the ACA; or
3. engaging in typical whistleblower behavior regarding violations of Title I of the ACA.

As to the first two items, if an employee works for an employer that does not offer a coverage option that is affordable and provides a basic level of value, then an employee can receive a tax credit or cost-sharing reduction through an exchange. Doing so could motivate an employer to retaliate against such an employee. This is because under the ACA the government can assess a tax penalty to certain noncompliant employers. That penalty can be assessed if any full-time employee receives a premium tax credit through an exchange.

As to the third item, Congress has passed numerous whistleblower statutes protecting employees who identify anything from pipeline safety to fraud on company shareholders. The ACA continues this trend by protecting employees against retaliation when they provide or are about to provide information about potential violations of Title I of the ACA to the Federal Government or the attorney general of a State; testify or are about to testify in a proceeding about a violation; assist or participate in a proceeding; or object to, or refuse to participate in, any activity, policy, practice, or assigned task that they reasonably believe to be a violation of Title I of the ACA.

Title I of the ACA includes various insurance company accountability policies. One commonly-known example—set to start in 2014—is the guaranteed availability protections. These protections disallow denial of coverage because of pre-existing conditions or using other factors—like medical history, gender, and industry of employment—to set premium rates. Another example is the prohibition on lifetime dollar limits on coverage.

Where the ACA prohibits discrimination. The ACA prohibits discrimination in two places. The first went into effect with the ACA in 2010. An individual's employer cannot retaliate against an employee for engaging in any of the three types of conduct listed above. As a practical matter, an employer's incentive to retaliate is strongest in the first two areas and much weaker in the third. The third area will become ripe for retaliation in 2014 when these protections are extended beyond employers and will apply to group health plans or health insurance issuers offering group or individual health insurance coverage. That is, such an entity will be liable for retaliating against individuals even if the entity is not the employer. What matters is that the action affects the employee's compensation, terms, conditions, or other privileges of employment; this includes employer-sponsored health insurance. Finally, the ACA protects employees of health insurance issuers from retaliation in reporting violations of Title I of the ACA.

With this backdrop understood, it helps to consider a few hypotheticals.

Hypothetical 1: Jane goes on the exchange. Jane works for XYZ, Corp., which is required under the ACA to provide a coverage option that is affordable and provides a basic level of value. However, the CEO has directed the Human Resources department to keep a similar plan in 2014 as it has had in previous years, stating, "We've had this plan for years with no complaints. Why should we change it if everyone is happy?" Jane is not happy with the plan but she has been on it believing she had no other option. She decides that she will go on her state's exchange to obtain a better health insurance plan. She finds one that she likes and enrolls. The CEO learns that Jane has done this and that XYZ is potentially on the hook for a tax penalty from the government. The CEO directs Jane's supervisor to quickly terminate her employment, thinking that perhaps XYZ will be able to avoid the tax penalty if she is no longer an employee. The supervisor follows orders and comes to the Human Resources department to begin Jane's employment termination. Jane has a potential claim against XYZ, Corp. if it follows through with the termination.

Hypothetical 2: Mark goes to HHS. Mark works for ACME, Corp., which is also covered under the ACA. He is concerned, like Jane, that his company is not offering a plan that is consistent with the ACA. But instead of going to an exchange, he makes a complaint to the Department of Health and Human Services ("HHS"), an agency of the federal government. HHS begins an investigation. In the course of the investigation, one of

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HR Quiz

Should reward amounts in different wellness programs be combined for the 30-percent rule?

Q Issue: *Your employer sponsors a group health plan. The total annual premium for employee-only coverage (including both employer and employee contributions toward the coverage) is $5,000. The plan provides a $250 reward to employees who complete a health risk assessment, without regard to the health issues identified as part of the assessment. The plan also offers a "Healthy Heart" program, which is a health-contingent wellness program, with an opportunity to earn a $1,500 reward. Does the reward comply with the final regulations on wellness programs?*

A Answer: Yes. Even though the total reward for all wellness programs under the plan is $1,750 ($250 + $1,500 = $1,750), which exceeds the applicable percentage of 30 percent of the cost of the annual premium for employee-only coverage ($5,000 × 30% = $1,500), only the reward offered for compliance with the health-contingent wellness program ($1,500) is taken into account in determining whether the applicable percentage rules of IRS Reg. §54.9802-1(f)(5) are met. The $250 reward is offered in connection with a participatory wellness program and, therefore, is not taken into account. Accordingly, the health-contingent wellness program offers a reward that does not exceed the applicable percentage of 30 percent of the total annual cost of employee-only coverage.

Health-contingent wellness programs generally award the attainment of a specific health standard and include such programs as those that offer rewards for reaching a specified cholesterol level or body weight. Participatory wellness programs generally are those that reward mere participation.

Source: *IRS Reg. §54.9802-1(f)(5)(ii), Example 4.*

WHISTLEBLOWER

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the vice presidents at ACME is able to learn that Mark filed the complaint. The vice president directs Mark's supervisor to terminate Mark's employment. The supervisor follows orders and comes to the Human Resources department to begin Mark's employment termination. Mark has a potential claim against ACME, Corp. if it follows through with the termination.

Hypothetical 3: Steve and Francine at the insurance company. Francine has throat cancer. She makes an application to General Insurance Company to enroll in a plan. General Insurance Company refuses to enroll her because of her throat cancer. Steve, who works as an agent at General Insurance Company, goes to his supervisor to ask why his supervisor has been denying applications he has worked on, such as Francine's, stating that the ACA disallows this conduct. Steve's supervisor goes to Human Resources to begin Steve's employment termination. Both Francine and Steve have potential claims against General Insurance Company.

Employer response

The method for responding to each of these employees is, for all practical purposes, the same. The Human Resources employee has the opportunity to inform each supervisor of the ACA's protections, but she cannot do so unless she understands the reason for the termination. Supervisors should be queried on the reason for the employment termination. If the reason sounds like any of the above examples, then the supervisor—and potentially other senior management—should be made aware that terminating an employee who has engaged in protected conduct under the act opens the company to liability. The company can then go forward with whatever it decides, whether to retain or terminate employment, with the assurance that it has done so with full information.

The ACA did more than change the landscape for health insurance; it also changed certain dynamics between employers and employees. Congress has made clear that its policy is to protect employees who rely on benefits of the statute that may be at odds with some company interests. Employers, employees, and Human Resources departments will do well to understand the statute to make fully informed decisions. ■

Source: *Article written exclusively for HR Compliance Library: Ideas & Trends by Scott Oswald, managing principal of The Employment Law Group (www.employmentlawgroup.net), 888 17th Street NW, Suite 900, Washington, DC 20006; telephone: 202-261-2806.*