ON THE HRISON

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Dear Valued Clients and Business Partners,

We hope that this newsletter finds you well and enjoying the Spring weather. Within this newsletter, along with other current and relevant topics, you will find information regarding health care reform, which has been the topic on everyone's watch list recently. While the new legislation is broad and affects health plan providers and employers over the next four years or so, we focus here on information pertaining to small businesses, as well as provisions of the legislation taking effect within this year and into 2011.

Additionally, as we head into summer, some of you may be dealing with seasonal practices such as revised dress code, flextime or early dismissal, etc. Be sure to clearly communicate your organization's policy and procedure to ensure a fair, consistent, and productive workplace.

In This Issue

Health Care Reform (Patient Protection and Affordable Care Act)

Health care reform has been the hot topic for employers and workers alike, even before the landmark legislation making major changes to health care insurance practices in the United States was enacted in March 2010. Although the law will most likely affect employers in a variety of ways over a long period of time, some issues that may be of immediate interest are discussed briefly below.

Near-term Effects on Health Care Plans

While most portions of the health care reform law will be implemented over the next four years, the new law includes several provisions set to be implemented in 2010 and will affect existing health care plans.

As of September 23, 2010 (6 months after the law's enactment), existing health insurance plans:

- are prohibited from setting lifetime caps and must restrict annual limits on benefits (annual limits are prohibited beginning in 2014)
- will no longer be able to cancel coverage for plan participants who become ill
- cannot deny coverage to dependent children of plan participants because of pre-existing health conditions
- must provide coverage for non-dependent children up to age 26 (before 2014, this requirement is limited to non-dependent children who are not eligible for coverage under another employer's health plan)

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By the end of 2010, insurers will be required to report how the money collected for insurance premiums is spent. The amount spent by the plans will determine a medical/loss ratio. According to the law, large health plans (a group health plan for businesses with 101 or more employees) must maintain a medical/loss ratio of at least 85%, and the law requires an 80% medical/loss ratio for small plans (businesses with 100 or fewer employees).

In 2010, insurers must report the medical/loss ratios of the plans. Beginning in 2011, health plans that do not meet these medical/loss ratio standards will be required to pay premium rebates (on a prorated scale) to policyholders. Also, beginning in 2011, employers will be required to report the value of employees' health benefits on W-2 forms. Please note that this requirement is for W-2 forms for wages earned in 2011, which will be issued in January of 2012.

Effects of the Law on Small Businesses

As you may know, businesses with less than 50 employees are exempt from the tax penalties the law will impose on employers that don't provide health care benefits to workers. However, small businesses should know that under the legislation, businesses and tax-exempt organizations with less than 25 employees that provide health insurance coverage to their employees can qualify for a special tax credit. The credit is designed to encourage small employers to offer health insurance coverage to their employees.

In order to be eligible for the tax credit, an employer must:

- employ less than 25 full-time equivalent (FTE) employees who earn an average of $50,000 or less per year
- pay at least half of the cost of health care coverage for their employees

The IRS will use an eligibility formula to determine if a business qualifies for the tax credit. The formula uses the number of work hours an organization reports on its payroll for the year. For example, a company with 10 workers (some part-time) reports 15,400 work hours for the past year. In the IRS formula, the total work hours are divided by 2,080 (or 40 hours times 52 weeks). In this example, the employer would have 7.4 FTE employees, which is then rounded down to seven FTE workers for the company. Please find the IRS-issued determination worksheet at the end of this newsletter.

The tax credit will be on a sliding scale and based on the number of workers and percentage of the health insurance premium that employers pay. The maximum credit available in 2010 is 35% of the premiums paid by qualified small businesses and 25% of the premiums paid by eligible tax-exempt organizations. In 2014, the maximum credit will increase to 50% of premiums paid by small employers and 35% of premiums paid by tax-exempt organizations.

The maximum tax credit will be available only to employers with 10 or fewer FTE employees who earn an average of $25,000 or less each year. Eligible small businesses can claim the credit as part of a general business credit starting with 2010 income tax returns filed in 2011. The tax credit is set to expire in 2016.

Continuing Extension Act of 2010

Late on Thursday, April 15th, President Obama signed H.R. 4851, the Continuing Extension Act of 2010. Final passage in the House (289-112) and Senate (59-38) guaranteed several extensions to government programs, including Consolidated Omnibus Budget Reconciliation Act (COBRA) health care insurance benefits and emergency unemployment benefits.

The bill provides:

- An extension on the period that individuals may file applications for Federal Emergency Unemployment Compensation (EUC) from April 5, 2010 to June 2, 2010, and the period which individuals may claim and be paid EUC from September 4, 2010 to November 6, 2010.
- An extension on the period that individuals may qualify for the Federal Additional Compensation (FAC), (the extra $25 per weekly benefit amount on state and federal unemployment compensation) will be extended for the same weeks as the EUC extension.
- An extension of the period that the federal government will provide 100% reimbursement for weeks of regular federal extended benefit payments from April 5, 2010 to June 2, 2010, with the state option to

continue the benefit extension period from September 4, 2010 to November 6, 2010.

- **An extension on the eligibility for the COBRA health insurance 65% subsidy for people who have lost their jobs through May 31, 2010. The bill also provides transition relief for individuals who lost their jobs between March 31, 2010, and the date of enactment.**

EUC and FAC payments will be paid for from general revenue, and regular employment benefits will be drawn from the Federal Emergency Unemployment Compensation Account that is funded with FUTA taxes paid by employers.

At this time, it is unclear if Congress will consider a longer extension of unemployment and COBRA benefits; however, this Act represents the third extension of such benefits. The current legislative proposal (H.R. 4213) would extend benefits through the end of 2010.

Hiring Incentives to Restore Employment Act (HIRE)

In March, Congress passed the HIRE (Hiring Incentives to Restore Employment) Act of 2010. Under this law, an employer who hires an employee between February 3, 2010 and December 31, 2010 can receive a tax credit equal to the employer's portion of the Social Security tax. Under the Act, qualified employers receive temporary payroll tax forgiveness of the employer's 6.2 percent share of Social Security payroll taxes on wages paid to new hires who had been previously unemployed. All employers, with the exception of government employers, are eligible for this tax credit (public institutions of higher education are the only government institutions that are eligible for the tax credit).

Hiring Incentives

The employer of a qualified employee will not have to pay the employer match for the 6.2% Social Security portion of that employee's wages in 2010. A qualifying employee is one who:

- is hired after Feb. 3, 2010 and before Jan. 1, 2011;
- certifies by signed affidavit, under penalty of perjury, that he/she has not been employed for more than 40 hours during the 60-day period ending on the date his/her employment begins with the new employer;
- is not employed to replace another employee; and
- is not related to the employer.

This program does not apply to the employee's 6.2% Social Security withholding or to the 1.45% Medicare tax. Since the maximum Social Security base in 2010 is $106,800, the maximum value of the tax benefit is $6,621.60 (which has been referred to as the "$6,000 credit").

Additionally, the $6,000 limit is increased to $12,000 for qualified veterans and reduced to $3,000 for qualified summer youth employees. If the employee is a long-term family assistance recipient, the credit is a percentage of first- and second-year wages, up to $10,000 per employee. Some additional qualifying details apply to these special groups.

Eligible employers were required to pay the tax during the first quarter of 2010 and then apply the credit that would have been allowed between Feb. 3 and Mar. 31, 2010 on the employer's 2nd quarter Form 941. The reason for this was to allow time for the IRS to issue guidance to employers and payroll companies as to how to report the credit.

Retained worker credit

A general business credit of up to $1,000, which cannot be applied against an employer's payroll tax liability, will be allowed for any employer of a "retained employee." A retained employee is one who:

- was employed by the taxpayer/employer on any date during the tax year;
- was employed for at least 52 consecutive weeks; and
- earned wages during the last half of the year equaling at least 80% of his/her wages during the first half of the year.

The credit is 6.2% of wages with a maximum of $1,000 per employee. If an employee earned more than $16,129.03 during the 52 weeks noted above, the credit is $1,000. Since the 52 week requirement cannot be met before Feb. 2, 2011, the first year the credit will be available is 2011. Any such credit cannot be carried back further than 2010 (the year of enactment).

Intern vs. Employee - What's the Difference?

As the school year comes to a close, many students and/or graduates may be looking for workplace experience either in the form of a summer job or an internship. Companies offering internships should be familiar with the criteria for establishing the position as an internship rather than employment, so as not to violate the Fair Labor Standards Act (FLSA). The U.S. Department of Labor (DOL) has released a new set of standards to help employers determine whether interns must be paid the minimum wage and overtime for their services under the FLSA. The standards apply only to those interns working for "for-profit" private sector employers.

The following six criteria must be applied when determining whether an internship should be considered training rather than employment:

- The internship, even though it includes actual operation of the facilities of the employer, must be similar to training that would be given in an educational environment;
- The internship experience must be for the benefit of the intern;
- The intern must not displace a regular employee, but work under close supervision of staff;
- The employer that provides the training derives no immediate advantage from the activities of the intern and on occasion its operations might be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and intern understand that the intern is not entitled to wages for time spent as an intern.

If all of these factors apply, an employment relationship does not exist under the FLSA and the law's minimum wage and overtime provisions do not apply to the intern. If any of these factors does not apply, then the intern may be considered an employee and is most likely subject to minimum wage and overtime requirements.

Tips for Successful Internship Programs

- **Make it a learning experience.** Coordinate with applicable learning institutions to ensure that the internship is structured around a classroom or academic experience and satisfies any requirements of for-credit programs affiliated with the intern's college or university.
- **Make it a temporary arrangement.** The internship should be of a fixed duration established prior to the outset of the internship. Furthermore, unpaid internships generally should not be used by employers as a trial period for individuals seeking employment at the conclusion of the internship period. If an intern is placed with the employer for a trial period with the expectation that he or she will then be hired on a permanent basis, that individual generally would be considered an employee under the FLSA.
- **Establish and communicate the terms and conditions of the internship program.** Determine whether the intern will be compensated, the workspace the intern will use, and what type of supervision will be provided. Offer an orientation program to inform the intern of his/her roles and responsibilities, but ensure that these meet the FLSA criteria if the internship is unpaid. Additionally, all corporate policies and procedures should be reviewed with the intern during orientation, including safety requirements and nondisclosure and non-compete agreements (if applicable).
- **If the internship is paid, adhere to federal, state and local time-keeping requirements.** Be sure that the intern is aware of what constitutes working hours and accurately reports his/her working hours to help the company comply with the FLSA and/or state and local wage and hour laws.
- **Contact outside resources if you are unsure of the nature of the relationship.** It has been widely publicized that the DOL is cracking down on employers by conducting audits specifically focusing on wage and hour violations under the FLSA. If you are unsure if your internship program is in compliance with FLSA regulations, seek outside counsel, such as Imageon or a qualified attorney.

New Tool Helping Employers Comply with Disability Nondiscrimination Laws

As of this month, the U.S. Department of Labor (DOL) is making a new tool available to help employers ensure that their employment policies and practices do not discriminate against qualified individuals with disabilities.

The online *Disability Nondiscrimination Law Advisor*, the latest product in a series of "e-laws advisors" developed by DOL, helps employers determine, quickly and easily, which federal disability nondiscrimination laws apply to their business or organization and their responsibilities under those laws.

By answering a few questions about the nature of an organization, such as the size of its staff and whether the business receives federal financial assistance, the advisor generates a customized list of federal disability nondiscrimination laws that are likely to apply, along with easy-to-understand information about employers' responsibilities under each relevant law.

The laws addressed by the Disability Nondiscrimination Law Advisor include:

- Titles I and II of the Americans with Disabilities Act of 1990.
- Section 188 of the Workforce Investment Act of 1998.
- Section 504 of the Rehabilitation Act of 1973, as amended (as it pertains to federal financial assistance).
- Section 503 of the Rehabilitation Act of 1973, as amended.
- The Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.

You can access the advisor by following this link.

Additional Information

This information is being provided to you as a courtesy. For specific information about how the information in this newsletter affects your business, please do not hesitate to contact us at:

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Or visit us on the web at: www.imageon-consulting.com or www.hrison.com

3 SIMPLE STEPS

If you are a small employer (business or tax-exempt) that provides health insurance coverage to your employees, determine if you may qualify for the **Small Business Health Care Tax Credit** by following these three simple steps:

1

Determine the total number of your employees (not counting owners or family members):

Full-time employees: _____
(enter the number of employees who work at least 40 hours per week)

+

Full-time equivalent of part-time employees: _____
(Calculate the number of full-time equivalents by dividing the total annual hours of part-time employees by 2080.)

= ☐ total employees

If the total number of employees is fewer than 25 **GO TO STEP 2**

2

Calculate the average annual wages of employees (not counting owners or family members):

Take the total annual wages paid to employees: _____

÷

Divide it by the number of employees from STEP 1: _____
(total wages ÷ number of employees)

= ☐ average wages

If the result is less than $50,000, **AND**

3

You pay at least half of the insurance premiums for your employees at the single (employee-only) coverage rate, then

» you may be able to claim the **Small Business Health Care Tax Credit.** Find out more information at **IRS.gov**

IRS

U.S. Department of Labor
Wage and Hour Division

(April 2010)

Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act

This fact sheet provides general information to help determine whether interns must be paid the minimum wage and overtime under the Fair Labor Standards Act for the services that they provide to "for-profit" private sector employers.

Background
The Fair Labor Standards Act (FLSA) defines the term "employ" very broadly as including to "suffer or permit to work." Covered and non-exempt individuals who are "suffered or permitted" to work must be compensated under the law for the services they perform for an employer. Internships in the "for-profit" private sector will most often be viewed as employment, unless the test described below relating to trainees is met. Interns in the "for-profit" private sector who qualify as employees rather than trainees typically must be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek.*

The Test For Unpaid Interns
There are some circumstances under which individuals who participate in "for-profit" private sector internships or training programs may do so without compensation. The Supreme Court has held that the term "suffer or permit to work" cannot be interpreted so as to make a person whose work serves only his or her own interest an employee of another who provides aid or instruction. This may apply to interns who receive training for their own educational benefit if the training meets certain criteria. The determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program.

The following six criteria must be applied when making this determination:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act's minimum wage and overtime provisions do not apply to the intern. This exclusion from the definition of employment is necessarily quite narrow because the FLSA's definition of "employ" is very broad. Some of the most commonly discussed factors for "for-profit" private sector internship programs are considered below.

Similar To An Education Environment And The Primary Beneficiary Of The Activity

In general, the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience (this often occurs where a college or university exercises oversight over the internship program and provides educational credit). The more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation, the more likely the intern would be viewed as receiving training. Under these circumstances the intern does not perform the routine work of the business on a regular and recurring basis, and the business is not dependent upon the work of the intern. On the other hand, if the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the interns' work.

Displacement And Supervision Issues

If an employer uses interns as substitutes for regular workers or to augment its existing workforce during specific time periods, these interns should be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek. If the employer would have hired additional employees or required existing staff to work additional hours had the interns not performed the work, then the interns will be viewed as employees and entitled compensation under the FLSA. Conversely, if the employer is providing job shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs no or minimal work, the activity is more likely to be viewed as a bona fide education experience. On the other hand, if the intern receives the same level of supervision as the employer's regular workforce, this would suggest an employment relationship, rather than training.

Job Entitlement

The internship should be of a fixed duration, established prior to the outset of the internship. Further, unpaid internships generally should not be used by the employer as a trial period for individuals seeking employment at the conclusion of the internship period. If an intern is placed with the employer for a trial period with the expectation that he or she will then be hired on a permanent basis, that individual generally would be considered an employee under the FLSA.

Where to Obtain Additional Information

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

U.S. Department of Labor
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200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us

[*] The FLSA makes a special exception under certain circumstances for individuals who volunteer to perform services for a state or local government agency and for individuals who volunteer for humanitarian purposes for private non-profit food banks. WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. WHD is reviewing the need for additional guidance on internships in the public and non-profit sectors.