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CCH
Human Resources Management
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IMMIGRATION

Following the "Chipotle crackdown," expert takes fresh look at proper I-9 procedures

Earlier this year, an immigration probe forced Chipotle Mexican Grill, Inc., a Denver-based company that owns and operates almost 1,100 restaurants around the country and employs over 25,000 people, to fire hundreds of employees who were working without proper documentation. Not surprisingly, this crackdown has reportedly caused: disruption as a result of the loss of the employees, a downgrade in the value of the shares of the company, exposure to fines and penalties, and (not least of all) negative publicity.

Chipotle is not alone in this battle. Raids have reportedly resulted in the arrest and deportation of undocumented workers at thousands of other companies around the country. According to the Wall Street Journal, ("Immigration Audit Takes Toll" 3/15/2011) in the fiscal year that ended on September 30, 2010, 2,740 companies were audited by ICE, resulting in a record $7 million in fines for businesses who employed illegal workers. Fines can range from $110 per illegal employee for paperwork violations to $16,000 per undocumented worker. So, what can you do to make sure your company steers clear of any violations and avoids the worries of the dreaded ICE audit?

Complying with Form I-9 procedural requirements

The first step in avoiding the disruption, financial penalties and other negative consequences of employing undocumented or illegal workers is to properly complete and maintain the Form I-9. The 1986 Immigration Reform and Control Act (IRCA) sought to control illegal migration by eliminating employment opportunity as a key incentive for unauthorized individuals to come to the U.S. To accomplish this goal, all U.S. employers are responsible for verifying, through a specific process, the identity and work authorization or eligibility of all individuals, U.S. citizens and non-citizens alike, hired after November 6, 1986. The specific process is the proper completion of the Employment Eligibility Verification Forms I-9 (Form I-9).

The Form I-9 has three sections. The first section is entitled "Employee Information

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HEALTH CARE REFORM

Expert discusses health care reform law implementation, expected developments

On March 23, 2011, the Affordable Care Act turned one year old. During that year, health reform kept many people busy. Group health plans with calendar-year plans spent the second half of 2010 preparing to implement the Act's numerous provisions that took effect on January 1, 2011. The agencies responsible for health reform issued a flurry of guidance to aid implementation, while the courts reviewed, and continue to review, various challenges to the law. A new Congress is in place, and changes to the Act are being discussed. To review health reform's journey over the past year and also to preview what's ahead, CCH, a Wolters Kluwer business, spoke to Joanne Hustead, Senior Health Compliance Specialist at The Segal Company.

CCH: What employer-related provisions of the health care reform law (the Affordable Care Act or the Act) take effect this year?

Hustead: Many new requirements apply to group health plans beginning with the plan year that starts on or after September 23, 2010. For calendar-year plans, that means January 1, 2011. For plans that

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and Verification." Employers must ensure that Section 1 is completed by the employee upon the date of hire (the first date of paid work). Employers must ensure that Section 1 is completed in full, including the signature section and the attestation. Although employers are held responsible for deficiencies in Section 1 (for example, if the information is not complete), employers may not require employees to produce documents to verify Section 1 information. If an employee refuses to sign Section 1 or attest to his or her status, the employer *should not continue to employ the individual.* Furthermore, an employee is *not* required to provide his or her social security number in Section 1 unless the employer participates in E-verify, discussed in more detail below. The failure of an employee to provide a social security number for the Form I-9 will not subject the employer to penalties.

The second section of the Form I-9 is entitled "Employer Review and Verification." Section 2 requires the employer to list the documents that were produced by the worker to verify his or her identity and employment eligibility. There are three groups of documents the employee may use for this purpose. The documents that can be presented are listed on the reverse side of the Form I-9. Which documents are to be used is determined by the employee, *not the employer.* An employee can choose to either provide one document from List A (which establishes both identity and work authorization) or he/she may provide one document from List B (which establishes identity) and one document from List C (which establishes work authorization). Likewise, the employers may *neither require nor accept* any more documentation than the minimum necessary to substantiate identity and work eligibility. Section two must be completed within three business days of the date employment begins, unless the employee is being employed for less than three days. In that case, Section two must be completed the first day employment begins.

What should an employer do with expired documents? Documents that are expired must be rejected, with two exceptions: the U.S. passport and any document from List B. Furthermore, employers cannot refuse to hire an individual because that individual's document has an expiration date. For example, if an employee provides a work permit that expires in six months, the employer cannot terminate that individual's employment because of the limited duration of the permit.

Employer review. Employers must remember that the employee's providing the required documentation does not end the process for the employer. Instead, the employer or employer's representative/agent must personally review original documents that demonstrate an employee's identity and eligibility to work in the U.S. The employer must assure upon examination of the document that the document reasonably appears to be genuine and to relate to the employee. If the documents do not meet this standard, employers may reject the documents and ask employees for other documentation that satisfies the Form I-9 requirements. Employees unable to present acceptable documents should be terminated. Employers who choose to retain such employees may be subject to penalties for improper completion of the form or for "knowingly continuing to employ" unauthorized workers. Sure signs of fraud are social security numbers containing more than 9 digits, with a number that begins with 000 or an 800 or 900 series, with middle digits of 00, or with the last four digits of 0000. Also, employers should note that, except when provided a certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the U.S. bearing an official seal, photocopies are unacceptable.

Section Three of the Form I-9 pertains to updating and reverification. Employers are required to reverify employment eligibility when an employee's employment authorization indicated in Section 1 or evidence of employment authorization recorded in Section 2 expires. An employer may also reverify (as opposed to completing a new I-9) when an employee is rehired within three (3) years of the date from which the Form I-9 was originally completed and the work authorization or evidence of work authorization has expired. Employers must reverify employment authorization on Section 3 of the Form I-9, or complete a new Form I-9 to be attached to the original, no later than the date that the employment authorization or the evidence of the authorization expires. To reverify, an employee may present any currently valid document from List A or C. Employees are not required to present, for reverification purposes, a new version of the same document original presented. Verification is NOT required for U.S. passports or permanent "green cards." Also, documents from List B do not need to be reverified.

Retention. Employers must retain the Form I-9 for either three (3) years from the date of hire or for one (1) year after the employment is terminated, whichever is later. An employer may, but is not required to, copy a document presented by an employee for the purpose of complying with the Form I-9. If such a copy is made, it must be retained with the Form I-9. Copying and retaining such a document does not relieve the employer from the requirement to fully complete Section 2. Also, to avoid allegations of discriminatory treatment, if an employer copies documents for one employee, it should do so for all employees.

What about E-Verify?

Many employers have heard about a system called "E-Verify," but many don't know enough about it to know whether it would

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FORM I-9

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be a useful (or required) tool for them. First of all, what is E-Verify? E-Verify is an Internet-based system that compares information from an employee's Form I-9, to data from U.S. Department of Homeland Security and Social Security Administration records to confirm employment eligibility. It was supposed to expire on September 30, 2009, but was extended to September 30, 2012.

While participation in E-Verify is voluntary for most businesses, some companies may be required by state law or federal regulation to use E-Verify. For example, most employers in Arizona and Mississippi are required to use E-Verify. E-Verify is also mandatory for employers with federal contracts or subcontracts that contain the Federal Acquisition Regulation E-Verify clause. If an employer elects to use the E-Verify system, the employer may only check E-Verify after job has been offered and accepted the Form I-9 completed. Employers may not use E-Verify on applicants (*i.e.,* pre-screening before hiring), and may not use E-Verify selectively to verify some employees and not others. Also, to avoid discrimination claims, an employer may only check your employment eligibility in E-Verify if hired for a new job and not if currently working for him/her. If using E-Verify, the employer must use it for all new employees participating hiring sites, regardless of national origin or citizenship status.

If the employee information does not match government records, the employer will see a tentative nonconfirmation (TNC) response. If an employer received a TNC, the employer must promptly give employee written notification of the TNC and ask the employee whether he or she wants to contest it. If employee chooses to challenge TNC, both the employee and the employer must follow strict procedures. While the challenge is pending, the employer may not fire, suspend, delay first day on the job, withhold pay or training, or limit employment. On the other hand, if the employer receives notice of a final nonconfirmation result from E-Verify, or if the employee does not contest a tentative nonconfirmation, the employer should terminate the employment relationship.

What happens if you have done everything required, but you still face the Chipotle Challenge of federal and/or state immigration record requests, audits and on-site inspections? U.S. Immigration and Customs Enforcement (ICE) is authorized to conduct investigations to determine whether employers have violated the prohibitions against knowingly employing unauthorized aliens and failing to properly complete, present or retain the Form I-9. IRCA mandates that an ICE administrative Form I-9 audit be preceded by the written Notice of Inspection (NOI), providing for the IRCA-mandated 72-hour notice. The NOI will indicate the date, time and place that the ICE agent will arrive, and the documentation that the employer is requested to produce. ICE may also assert general powers to obtain personnel records that pertain to the hiring and employment of an individual employee. In the absence of the employer's willingness to produce the personnel records, ICE may issue an administrative subpoena to obtain these materials.

After the audit, a Notice of Intent to Fine (NIF) may result. When a NIF is issued, employers may request a hearing within 30 days of its service. If a hearing is not requested within the 30-day period, ICE will issue a final order to cease and desist and to pay a civil money penalty. If a hearing is requested, ICE will file a complaint to begin the administrative hearing process which may end in settlement, dismissal, or a Final Order for civil money penalties. Once a Final Order is issued, the penalty is unappealable.

So what does this all mean?

Basically, nothing can prevent the federal or state government from requesting to review your records or conducting audits and on-site inspections. Instead, what is preventable is the employer's receipt of a final order finding that the company knowingly employed unauthorized workers. The way to prevent such a finding, and the crippling penalties that may accompany such a finding, therefore, is to ensure that your employee are all properly documented and authorized to work in the United States. The only way to do this is through proper completion and retention of the Form I-9, or proper participation in the E-verify program. ❑

Source: *Article developed for CCH, a Wolters Kluwer company, by Tina M. Maiolo, Esquire, a Member at Carr Maloney P.C., 2000 L Street Northwest Washington D.C., DC 20036-4907; www.carrmaloney.com.*

For more on the Form I-9, begin at ¶353 in the HR Practices Guide Explanations. Additional information on the E-Verify program can be found at ¶353A in the HR Practices Guide Explanations.

FLSA

Supreme Court defines "complaint" in important FLSA case

Oral complaints are protected under the FLSA's antiretaliation provisions, the U.S. Supreme Court ruled March 22 in a 6-2 opinion authored by Justice Breyer (*Kasten v Saint-Gobain Performance Plastics*, Dkt No 09-834, March 22, 2011, Breyer, S). Resolving a conflict among the circuits, the majority found the scope of the statutory term "filed any complaint "found in FLSA, Sec. 215(a)(3), encompasses oral as well as written complaints. The justices ruled that while the language of this particular section may be ambiguous in isolation, the purpose of the FLSA and the content in which it was enacted compelled the conclusion that oral complaints are protected. The Court vacated a Seventh Circuit decision that held a discharged employee did not engage in FLSA-protected conduct when he made a verbal complaint about the location of the employer's time clocks, which prevented employees from getting paid for time spent donning and doffing protective gear — in violation of the Act.

Commenting on the decision, Attorney Stacy Smiricky, Partner at the Chicago office of Wildman, Harrold, Allen & Dixon

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SOCIAL MEDIA

Expert lists social media do's and don'ts for employers

Often reported on are the do's and don'ts employees should follow when using social media tools such as Facebook and Twitter; do maintain professionalism, don't violate company trade secrets, etc. Equally as important are the do's and don'ts employers should consider when developing workplace rules and regulations for social media use. Molly DiBianca, an associate attorney at Young, Conaway, Stagatt and Taylor, LLP, lists several important tips for employers:

1. Do have a well-written policy. A social-media policy that is carefully drafted can be the most effective tool that an employer can hope to have. Although policies can vary greatly depending on the culture and needs of the organization, there are a few essentials that all policies should include:

(i) Be sure to identify a specific contact person (with contact information) who will be the point person for employees' questions about the policy and make it clear that employees are to ask before acting any time they have any doubts about whether their intended action may violate the policy.

(ii) Specifically reference other company policies, such as an anti-harassment and anti-discrimination policy, conflicts-of-interest policy, and confidentiality policy, and make it clear that they apply equally to conduct in the online world just as they do in the "real" workplace.

(iii) Require all employees to report online conduct that violates any of these policies as soon as they become aware of it — without this provision, you may find that the only people who *don't* know about policy violations are those that are charged with its enforcement.

2. Do educate employees. The goal of a social-media policy is not to "trick" employees into violating it. Instead, the objective is to prevent employees from acting in a way that hurts the organization or themselves. With that in mind, employers are well advised to offer ongoing education to employees. Topics can include proper online etiquette, good online citizenship, as well as more hands-on subjects, such as how to adjust the privacy settings in a social-networking profile.

And don't rule out the value of learning by example. A discussion of headlines involving employees who are terminated or disciplined for online conduct is an excellent training tool and offers employers valuable insight about what conduct their employees find most (and least) egregious.

3. Don't take it personally. When an employee makes negative comments about her job, her employer, or her supervisor, employers often overreact. They tend to take the comments personally and respond with emotion instead of logic. If you discover an online post about your organization written by an employee, it's best to take a step back before you respond.

Ask yourself whether the post really impacts the organization in a negative way or whether it's more akin to traditional water-cooler gossip. Unless you can identify some kind of actual harm to the organization, you may want to consider whether disciplinary action is appropriate at all.

4. Don't be sneaky. "Sneaky" conduct frequently gets employers into trouble. Don't, for example, ever ask (or require) an employee or applicant to give you his password to an online account or profile. Similarly, don't have another employee give you access to her account so you can surreptitiously snoop on her coworker. Don't have someone send a friend request so you can gain access to an employee or applicant's profile without disclosing the real reason

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Can employers test workers to see if they lie?

HR Quiz

Q **Issue:** *There has been a theft of equipment from your company's warehouse. In conducting the investigation into the theft, can you require employees to take a lie-detector test?*

A **Answer:** Yes. While the *Employee Polygraph Protection Act of 1988* (EPPA) prohibits most private employers from using lie-detector tests, either for pre employment screening or during the course of employment, the Act also includes limited exemptions where polygraph tests (but no other lie-detector tests) may be administered in the private sector, subject to certain restrictions. One such exemption allows the administration of polygraph tests to employees who are reasonably suspected of involvement in a workplace incident that results in economic loss to the employer and who had access to the property that is the subject of an investigation.

Under the exemption for ongoing investigations of workplace incidents involving economic loss, a written or verbal statement must be provided to the employee prior to the polygraph test. The statement must explain the specific incident or activity being investigated and the basis for the employer's reasonable suspicion that the employee was involved in such incident or activity.

When polygraph examinations are allowed, they are subject to strict standards for the conduct of the test, including the pretesting, testing, and post testing phases. An examiner must be licensed and bonded or have professional liability coverage. In addition, the Act strictly limits the disclosure of information obtained during a polygraph test.

Source: *29 USC §2001 et seq; 29 CFR Part 801.*

RETALIATION

Retaliating against employees can be very risky business

As a matter of common sense, retaliating against employees for engaging in protected activity is pretty risky business. Yet, EEOC regional attorney John Hendrickson wonders whether legal counsel have neglected to tell employers just how dangerous retaliation is — and it's *so easy to avoid,* he chides.

Speaking to attendees at the Chicago Bar Association's annual labor and employment law update last month, Hendrickson said that EEOC charge traffic is "through the roof" with the down economy. In fiscal year 2010, 99,922 charges were filed, with retaliation charges up dramatically — 36,358 such charges filed last year — amazingly outpacing the number of race discrimination charges that were filed. For the first time in the agency's 45-year history, retaliation charges were more numerous than any other.

While Hendrickson noted several interesting developments, such as the 400 EEOC systemic discrimination investigations now underway nationwide and that the use of conviction and credit records as employment selection tools are on the agency's radar, he advised that the major developments last year were in the area of retaliation.

Risky business. When a charge of discrimination has been filed, there is a very small chance that the EEOC will find reason to believe a violation has occurred — 10 percent or less, according to Hendrickson. Given those low odds and recent case law on reprisal claims, which Hendrickson characterizes as favoring employees, it's hard to fathom why employers continue to risk retaliatory conduct that may spawn a new charge more likely to succeed than an original charge that was unlikely to move forward. And, recapping developments over the last year, Hendrickson observed that the standard as to what constitutes retaliation is getting looser.

Associational reprisal claims. You no longer have to be the person who engaged in the protected activity to bring a claim of retaliation, so long as you are associated with that person, Hendrickson observed. Indeed, in January, the Supreme Court held that an employee who was fired shortly after his fiancée filed an EEOC charge against their employer had standing to file a Title VII retaliation lawsuit (*Thompson v North Am Stainless,* USSCt, January 24, 2011).

"While initial charges of employment discrimination are unlikely to result in an unfavorable EEOC finding, retaliation claims face less of a hurdle in court — it's just not worth the risk of employer liability."

Temporal proximity may be enough. Earlier this month, the Seventh Circuit said that a trial court's belief that timing was not enough to support an inference of causation was untenable, determining that in this case, the jury should make that determination. In concluding that the lower court had erred in granting summary judgment for the employer, the court also noted that one of the employer's shifting explanations for discharging the employee - that he was fired for photographing the workplace (which he was doing to show the EEOC or a court how his workstation was set up) came close to admitting retaliation (*Loudermilk v Best Pallet Co,* 7thCir, February 18, 2011).

Screaming, pounding and threats. Also significant was a Wisconsin district court's rejection of an employer's contention that because the employees who brought retaliation claims were not discharged, nor did they experience any other tangible loss in pay, benefits, or position, the EEOC could not establish they suffered an adverse employment action in support of their retaliation claims. The court stressed that an adverse employment action "need not be tangible." (*EEOC v Chrysler Group, LLC,* EDWis, February 17, 2011).

Here, the manager allegedly was screaming and pounding his fists on the table while threatening termination, the court noted, and threw a notepad at a complainant demanding that she write a statement confirming that she was not accusing the supervisor of sex discrimination. "This scenario paints a much more hostile and intimidating atmosphere than if [the manager] delivered his message in a normal tone of voice." Further, a trier of fact could find the warnings of possible termination constituted anticipatory retaliation, a materially adverse action. Because the employer's conduct, if true, may be enough to dissuade a reasonable worker from making a charge of discrimination, and because a reasonable finder of fact could infer the requisite causation to support a claim of retaliation, material issues of fact precluded summary judgment.

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SOCIAL MEDIA

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for the request. The bottom line here is, if it sounds sneaky, looks sneaky, or smells sneaky, then a jury will hold you accountable for such unpalatable behavior. ❑

Source: *"Social Media Dos and Don'ts for Employers," published in the Delaware Employment Law Blog on March 17, 2011, by Molly DiBianca, an associate attorney in the Wilmington, Delaware office of Young, Conaway, Stargatt and Taylor, LLP; www.delawareemploymentlawblog.com.*

For more on social media use in the workplace, including sample workplace policies, see ¶2428 and ¶2429 in the HR Practices Guide Explanations.

HEALTH CARE REFORM

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do not operate on a calendar-year basis (*e.g.,* July 1 - June 30 plan year), these new requirements will take effect at the start of the plan year that begins in 2011.

Which specific requirements apply to a group heath plan depends on whether the plan is "grandfathered." A grandfathered plan is one that was in effect on March 23, 2010, with a plan design that has stayed largely the same since then.

All group health plans must continue coverage for adult children up to age 26, eliminate lifetime dollar limits, comply with restrictions on annual dollar limits, stop terminating coverage retroactively (with limited exceptions) and stop applying pre-existing condition exclusions to children under age 19. For calendar-year group health plans, these requirements took effect on January 1, 2011.

Group health plans that have lost their grandfathered status must comply with these additional requirements: required coverage of an extensive list of preventive services (without imposing cost sharing when provided in network), revised internal claims rules plus new binding external review of coverage determinations, new rules applicable to emergency services provided in hospital emergency rooms and new patient protection rules relating to choice of primary care providers and direct access to ob-gyn services.

New tax requirements relating to over-the-counter (OTC) medicines and drugs took effect for OTC medicines and drugs (other than insulin) purchased on or after January 1, 2011. Group health plans may not pay for such OTC medicines and drugs unless the patient presents a valid prescription. These new rules also apply to account-based plans such as Flexible Spending Arrangements (FSAs), Health Reimbursement Arrangements (HRAs) and Health Savings Accounts (HSAs). These rules apply to all plans, regardless of plan year or grandfathered status.

Another new requirement affecting only insured group health plans took effect on January 1, 2011. This is the requirement that insurers spend a set percentage on medical claims or quality improvement as opposed to administrative costs and overhead (called the medical loss ratio). In the large group market, insurers must spend 85 percent of premiums on medical claims (80 percent in the small group market). Insurers that do not meet these targets have to provide premium rebates.

CCH: What do employers need to do to comply with these provisions?

Hustead: For calendar-year plans, much of the hard work was completed in 2010, before the start of the plan year. This included:

- Making key decisions (*e.g.,* whether to change the types of dependent children eligible for coverage, convert the plan's lifetime dollar limit to an annual dollar limit, apply for a waiver of the annual limits rules and keep the plan's grandfathered status);
- Providing special enrollment for adult children and for individuals who had lost coverage or benefits due to operation of a now-prohibited lifetime dollar limit;
- Informing participants of plan changes in connection with open enrollment; and
- Revising plan documents, Section 125 cafeteria plan documents and open enrollment materials and forms.

Plans that do not operate on a calendar-year basis need to complete this work this year.

The Internal Revenue Service (IRS) gave plan sponsors extra time in 2011 to adopt amendments to their Section 125 cafeteria plans to comply with the new OTC rules. Plan sponsors have until June 30, 2011 to make any necessary amendments to these documents to reflect the new prescription requirement.

Plan sponsors that sought and obtained a waiver of the new annual limits rules will need to provide participants with a notice explaining that the government granted a one-year waiver of the new rules. Plan sponsors will also need to apply again, later this year, to continue the waiver into next year. Applications are due no later than 30 days before the start of the next plan year.

CCH: What provisions are currently causing or expected to cause problems for employers?

Hustead: The most complicated provisions to implement are two of the requirements that apply only to non-grandfathered plans: the preventive services requirement and the new external review requirement. Determining precisely what preventive services must be provided is complicated and requires help from plan administrators or insurers. Internal and external review requirements can also be more onerous than previous procedures. Finally, employers who are grandfathered need to evaluate all potential plan changes to assure that they can keep that status.

CCH: How is health care reform affecting employees so far?

Hustead: Employees who were able to add adult children back onto their group plan probably saw the most direct and immediate benefit, particularly if this coverage did not cost them extra because they already had family coverage. Those enrolled in non-grandfathered plans should be seeing enhancements to their plan's preventive coverage. Of course, enhanced benefits can mean increased costs, some of which may be passed on to employees.

CCH: Did any of the agencies' health reform guidance that has been issued so far surprise or disappoint you? If so, which guidance and why?

Hustead: The agencies have issued several interim final regulations and other forms of guidance including several sets of

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RETALIATION

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An ounce of prevention. As Hendrickson points out, awareness of employee protections against retaliation will grow — and the case law has tipped toward protecting employees. While initial charges of employment discrimination are unlikely to result in an unfavorable EEOC finding, retaliation claims face less of a hurdle in court — it's just not worth the risk of employer liability. Training supervisors and managers to refrain from retaliatory conduct following a complaint of discrimination would be a wise and timely business investment. ❑

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answers to Frequently Asked Questions. That said, we were surprised by the approach taken in the grandfathering regulations issued in June 2010. The grandfathering regulations leave very little room for plan changes before a group health plan loses its status as a grandfathered plan.

For example, any increase in the percentage of coinsurance paid by participants results in loss of grandfathered status, no matter how small. Initially, plan sponsors could not enter into new insurance contracts without the plan losing grandfathered status, but the agencies changed their approach to that issue in an amendment released in November 2010. The bottom line is that it is difficult for plans to remain grandfathered. Once a plan loses its status as a grandfathered plan, it must comply with additional requirements.

CCH: What guidance do you expect the agencies to issue this year?

Hustead: The three most significant pieces of new guidance expected this year with direct, short-term implications for employer-sponsored plans are:

- **Uniform Disclosure:** The Act requires the agencies to develop standards for uniform plan disclosures no later than March 23, 2011 (12 months after enactment). This short four-page summary must describe, in a culturally and linguistically appropriate manner, the plan's benefits, exclusions or limits and cost-sharing provisions. Group health plan sponsors and health insurance issuers must provide these summaries to plan participants by March 23, 2012. The Act will also require plan sponsors to notify participants of any material modification to plan terms no later than 60 days prior to the effective date of the modifications.
- **W-2 Reporting:** The Act requires employers to report the aggregate cost of employer-sponsored health coverage on their employees' W-2 forms. The IRS delayed the effective date of this requirement so that it now applies to coverage provided during 2012 (rather than 2011).
- **Essential Health Benefits:** This fall the U.S. Department of Health and Human Services (HHS) may issue a proposed rule defining the term "essential health benefits." This concept is important to health insurance issuers because they must provide these benefits in coverage offered through the state-based Exchanges beginning in 2014. In the short term, its primary significance to employer-sponsored plans is in the context of lifetime and annual dollar limits, as the Act prohibits (lifetime) or restricts (annual) dollar limits on essential health benefits.

The IRS may also issue guidance this year on the new nondiscrimination requirements applicable to insured group health plans, which prevent discrimination in favor of highly compensated employees. Although these requirements apply to non-grandfathered plans with the plan year beginning on or after September 23, 2010, group health plans will not be required to comply until guidance is issued.

Other guidance expected this year includes guidance for the states on the federal rules that will govern the Exchanges, as well as guidance on the Consumer Operated and Oriented Plans (CO-OP) Program. The latter aims to foster the creation of nonprofit health insurance issuers that will offer benefit plans in the individual and small group markets.

Finally, all of the regulations released in 2010 as interim final regulations (e.g., continuing dependent coverage to age 26) need to be finalized. The agencies could issue these in final form this year.

CCH: How will the new Congress affect the health care reform laws?

Hustead: Repeal of the Affordable Care Act is not likely, but there are likely to be targeted efforts to change or undo specific provisions of the law or affect its implementation.

On January 19, 2011, the House of Representatives passed H.R. 2, the "Repealing the Job-Killing Health Care Law Act." This short bill would repeal the entire Act. On February 2, 2011, the Senate voted on the House-passed bill during debate on a transportation bill, but H.R. 2's supporters fell short of gaining the 60 votes needed for approval. President Obama has said he would veto repeal legislation if it should reach the White House.

One effort targeting a specific section of the law has gained traction: repeal of the Act's expansion of an existing tax-reporting provision involving the Form 1099. On February 2, 1011, by a large margin, the Senate approved legislation repealing the revisions made by the Act to this reporting requirement. Legislation targeting other provisions will likely be debated in the coming weeks and months.

Congress is also expected to attempt to affect implementation of the Act by restricting how certain federal agencies use appropriated funds. This will likely happen as appropriations bills (spending bills) move through Congress.

Finally, there may be a technical corrections bill moving through Congress this year — a bill that would fix perceived drafting errors in the law, but not undo or revise major sections.

CCH: How do you expect the pending judicial proceedings related to health care reform to go?

Hustead: Litigation challenging the Act continues to move through various courts around the country. So far, two federal district courts (in Virginia and Florida) have declared the individual mandate unconstitutional, and two (in Virginia and Michigan) have upheld it. The district court in Florida invalidated the entire law because it concluded that the individual mandate was not severable from the rest of the Act. It is likely that these legal issues will continue to be reviewed in the courts for some time, as cases are appealed and work their way up to the Supreme Court, which will ultimately decide the fate of the law. ❑

Source: *Joanne L. Hustead is a senior health compliance specialist in the Washington, DC office of The Segal Company. She specializes in research and analysis of federal laws and regulations that have an impact on health benefit plans. She can be reached at 202.833.6451 or jhustead@segalco.com. This interview was originally published in the February 22, 2011 issue (No. 486) of CCH's Employee Benefits Management Directions.*

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HR Notebook

Consumer prices increase 0.5 percent in February

The Consumer Price Index for All Urban Consumers (CPI-U) increased 0.5 percent in February on a seasonally adjusted basis, the Bureau of Labor Statistics (BLS) of the US Department of Labor reported March 17. Over the last 12 months, the all items index increased 2.1 percent before seasonal adjustment.

Though the seasonally adjusted increase in the all items index was broad-based, the energy index was once again the largest contributor. The gasoline index continued to rise, and the index for household energy turned up in February with all of its components posting increases. Food indexes also continued to rise in February, with sharp increases in the indexes for fresh vegetables and meats contributing to a 0.8 percent increase in the food at home index, the largest since July 2008.

The index for all items less food and energy rose in February as well. Most of its major components posted increases, including the indexes for shelter, new vehicles, medical care, and airline fares. The apparel index was one of the few to decline.

Jobless rate falls to 8.9 percent in February

Nonfarm payroll employment increased by 192,000 in February, and the unemployment rate was little changed at 8.9 percent, the BLS reported March 4. Since a recent low in February 2010, total payroll employment has grown by 1.3 million, or an average of 106,000 per month.

The jobless rate was down by 0.9 percentage point since November 2010 with gains in manufacturing employment (+33,000), construction employment (+33,000), professional and business services (+47,000), employment services (+29,000), health care (+34,000), and transportation and warehousing (+22,000). Employment in both state and local government edged down over the month with local government losing 377,000 jobs since its peak in September 2008.

Mass layoff events, associated initial claims both down in February

Employers took 1,421 mass layoff actions in February involving 130,818 workers, seasonally adjusted, as measured by new filings for unemployment insurance benefits during the month, the BLS reported March 22. Each mass layoff involved at least 50 workers from a single employer. The number of mass layoff events in February decreased by 113 from January, and the number of associated initial claims decreased by 18,981. In February, 291 mass layoff events were reported in the manufacturing sector, seasonally adjusted, resulting in 26,060 initial claims. Both figures decreased over the month, with manufacturing initial claims reaching its lowest level in program history (data begin in April 1995).

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LLP and member of CCH's Employment Law Daily Advisory Board, notes that the majority's broad reading of the phrase "filed any complaint" is not surprising. Further, the decision is similar to other employment-related statutes under which employees' rights and employers' obligations are triggered by non-written complaints. "The employer community can only hope that common sense will guide the extent to which Kasten may be deemed applicable in future cases to oral complaints such as 'the time clock is in such an inconvenient place that we ought to be paid for walking to and from it.' Such complaints could impose additional burdens on employers to investigate every employee gripe. Cautious employers will do so," Smiricky stated.

While the majority emphasizes that an employee's non-written complaint must be sufficiently clear and detailed for a reasonable employer to understand it as an assertion of rights, the very nature of such oral complaints invites fact disputes: exactly what do the employer and employee each say was the content and context of the employee's oral complaint about the unpaid time? Such fact disputes may decrease employers' ability to resolve such cases on summary judgment. As such, Smiricky recommends that employers train their supervisors and managers to be aware of these types of non-written complaints, report them immediately to the person responsible for investigating those complaints, and thoroughly document both the oral complaint and the company's investigation of it. ❑