

Legislative Blast

August/September 2011

FEDERAL UPDATES

NLRB Requires Posting of Notice

On August 25, 2011, the National Labor Relations Board (NLRB) adopted the final rule that requires employers to post a notice advising employees of their rights to join a union under the National Labor Relations Act (NLRA).

This posting notice will go into effect on November 14, 2011 and attached is a copy of the required 11"x17" poster. The poster includes employee's rights under the NLRA as well as examples of unlawful employer conduct. The rule requires the following of employers who are covered by the NLRA:

- Employers must post and maintain the NLRB notice in a conspicuous place and to take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material, or are otherwise unreadable.
- If the employer customarily posts notices to employees regarding personnel rules and policies on an Internet or intranet site, the NLRB's rules must also be posted on such sites.
- In a workplace where 20% or more of the workforce is not proficient in English and speaks a language other than English, the employer must provide notice in the language that such employees speak. The NLRB has offered to provide translations of the notice.
- In a workplace that includes two or more groups constituting at least 20% of the workforce who speak different languages, the employer must provide the notice in each such language. The NLRB has offered to provide translations of the notice.
- Failure to post the notice may be deemed an unfair labor practice.

For additional information on this ruling and a copy of the required poster you can visit the NLRB website at www.nlr.gov. You can also visit the SHRM website at www.shrm.org for additional information.

NLRB Summarizes Stance on Social Media

At the end of August, 2011, a memo from the NLRB has offered some guidance on what can and cannot be prohibited in social media policies. This guidance is to set a clear purpose and set of boundaries to follow when putting together social-media policies, applies to both union and non-union companies and is only the beginning. The guidance basically boils down to this: *"Social media use that involves the "terms and conditions of employment," is directed to other employees and may spur other employees to some sort of action is likely protected activity."* (www.hrmorning.com, Gould 2011). So the next time you follow-up with an employee for postings on social media, think about whether or not the content could be considered protected activity under this new guidance.

For additional information on the NLRB guidance, you can visit www.nlr.gov or www.hrmorning.com/nlr.

NLRB Chairman Change Update

The National Labor Relations Board Chairman Wilma B. Liebman, who has served on the Board for nearly 14 years and under three presidents, has left the agency at the completion of her third term at midnight on August 27. The White House has designated Member Mark Gaston Pearce to be Board Chairman upon Chairman Liebman's departure (www.nlr.gov).

The NLRB has been busy over the summer and updates on additional rulings and proposals can be found on their website at www.nlr.gov.

Pending NLRB Legislation- The NLRB is trying to pass legislation that would alter its process for union representation. The National SHRM (Society for Human Resource Management) has distributed a letter for local chapters to sign and send in which MVSHRM has done. Public comment on this legislation closed 8/22/11 and attached is a copy of our Chapter's letter to the NLRB.

Health Care Reform's Claims and Appeals Rules Amended

The July 2010 interim final regulations have been significantly amended in June 2011. The following chart by Dipa N. Sudra and Jeff Belfiglio, found on the Davis WrightTremain, LLP website outlines the changes:

<i>Provision Relating to Internal Claims Procedures</i>	<i>2010 Interim Final Regulations</i>	<i>2011 Amendment</i>
<i>Urgent care benefit determination</i>	<i>Plan to notify claimant of urgent care benefit determination as soon as possible, but not later than 24 hours after receipt.</i>	<i>Plan to notify claimant of urgent care benefit determination as soon as possible consistent with the medical exigencies, but no later than 72 hours after receipt of claim. Plan must defer to attending provider as to whether a claim is for urgent care.</i>
<i>Provision of diagnosis and treatment codes in notice of adverse benefit determination</i>	<i>Any notice of adverse benefit determination must automatically include diagnosis and treatment codes and corresponding meaning, plan's standard, and discussion of decision (if final).</i>	<i>Eliminates requirement to automatically provide diagnosis and treatment codes, but plan must describe availability, upon request, of such codes and their meanings, and provide such information if requested. Such request not to be treated, by itself, as the start of an internal appeal or external review.</i>
<i>Deemed exhaustion of internal claims and appeals processes</i>	<i>Claimant may immediately seek de novo review if plan fails to strictly adhere to all requirements of 2010 regulations for internal claims and appeals processes.</i>	<i>Same approach, but exception added for de minimis violations that do not cause, and are not likely to cause, prejudice or harm to the claimant. Plan must show violation was for good cause or due to matters beyond its control, and that violation occurred in context of an ongoing, good faith exchange of information. Violation must not be reflective of a pattern or practice of noncompliance. Claimant may request written explanation of violation, which must be provided within 10 days. If external reviewer rejects request for immediate review, within a reasonable time thereafter (not exceeding 10 days) plan must give claimant notice of opportunity to resubmit internal appeal.</i>
<i>Culturally and linguistically appropriate notice³</i>	<i>Plan to provide relevant notices in a culturally and linguistically appropriate manner: A plan covering fewer than 100 participants required to provide non-English language notice if 25% of all participants are literate only in the same non-English language. Plan covering 100 or more participants required to provide non-English language notice if the lesser of 500 participants or 10% of all participants are literate only in the same non-English language.</i>	<i>If 10% or more (determined per census data) of the population residing in the claimant's county is literate only in the same non-English language: Each English version notice sent to an address in such county must include a sentence in the relevant non-English language regarding language services. Plan to provide oral non-English language services (e.g., hotline), to answer questions and assist with filing claims and appeals. Plan to provide written notices in non-English language on request. No tagging and tracking required.</i>
<i>Provision Relating to External Review Requirements</i>	<i>2010 Interim Final Regulations</i>	<i>2011 Amendment</i>
<i>Insured and non-ERISA coverage: Duration of transition period for state external review processes</i>	<i>If state laws do not meet minimum consumer protections of NAIC Uniform Model Act, insured coverage subject to federal external review process. Transitional rule permits plans to use existing state external review process for plan years beginning before July 1, 2011.</i>	<i>Transition period ends on Dec. 31, 2011. Prior to Jan. 1, 2012, state external review process applies in lieu of the federal external review process. For adverse benefit determinations provided on or after Jan. 1, 2012, federal external review process applies unless DHHS determines that a state law meets the regulation's requirements.</i>
<i>Scope of federal external review process for self-funded plans</i>	<i>Federal external review process applies to any adverse benefit determination unless it related to participant's failure to meet plan's eligibility requirements.</i>	<i>Temporary suspension of rule in 2010 regulations (probably until Jan. 1, 2014). Federal external review process applies only to claims involving medical judgment or rescission of coverage, and for which external review has not been initiated before Sept. 20, 2011.</i>
<i>External review decision binding</i>	<i>External review decision by independent review organization binding on parties, except to extent other remedies available under state or federal law.</i>	<i>Clarifies that plan must provide benefits pursuant to the final external review without delay, regardless of whether the plan intends to seek judicial review and unless or until there is a judicial decision otherwise.</i>

For additional information on these amendments, you can visit www.dwt.com/LearningCenter/Advisories or www.bsk.com/archives.

STATE UPDATES

Marriage Equality Act

Passed on June 24, 2011 and effective July 24, 2011, the NYS Marriage Equality Act legalizes same sex marriages in New York State. For fully insured health plans in the state of NY, same sex marriages are treated in the same manner as any other legal marriage. For self-insured plans in NYS, same sex marriages are legal however, the federal government does not recognize them (they only recognize marriage between a man and a woman) and therefore these self-insured plans will not be subject to the new requirements as defined by the Marriage Equality Act.

Wage Theft Prevention Act Reminder

Just a reminder that effective April 9, 2011 Section 195.1 of the Labor Law, requires all employers, other than governmental agencies, to give employees at the time of hire (before work is performed) and on or before February 1st of each year, notice of the following:

1. the employee's rate or rates of pay
2. the overtime rate of pay, if the employee is subject to overtime regulations
3. the basis of wage payment (per hour, per shift, per week, piece rate, commission, etc.)
4. any allowances the employer intends to claim as part of the minimum wage including tip, meal, and lodging allowances
5. the regular pay day
6. the employer's name and any names under which the employer does business (DBA)
7. the physical address of the employer's main office or principal place of business and, if different, the employer's mailing address
8. the employer's telephone number

Additional information on this ruling can be found on the following websites:

www.mvshrm.org, www.shrm.org, and www.labor.ny.gov.

For additional information on both State and Federal legislative updates, you can visit www.shrm.org. As a member of SHRM National, you have access to a great deal of case rulings, trends and other types of law (i.e. compensation and benefits, retirement, recruitment, etc.). As a non-member of SHRM National you are still able to visit their site and have limited access to valuable material.

Pending NYS Legislation

Healthy Workplace Act (S4289-2011)- Establishes a civil cause of action for employees who are subjected to an abusive work environment. This was referred to the labor committee on March 2011 and is still pending with no current votes.

Permitted Deductions from Wages Amendment (S5786-2011)- An act to amend the labor law, in relation to permitted deductions from wages; and providing for the repeal of such provisions.

We will continue to watch this legislation and pass along updates as they occur. If you would like to track this pending legislation, you can visit www.open.nysenate.gov/legislation/bill/S2837-2011.

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