



November 2009

LEGISLATIVE UPDATE

by Jennifer Lunski, Esq.

At Woodruff-Sawyer, we offer a monthly update on legislative changes that impact employee benefit plans. Employers should review the update to ensure their plans and policies are revised and in compliance with the new legislation and regulations. This month includes articles on the following topics:

1. House of Representatives passes the Affordable Health Care for Americans Act
2. California October 2009 Disability Insurance Fund Program
3. Congress is considering extending the COBRA subsidy
4. Mental Health Parity Act applies generally to plan years following October 2009
5. GINA and the ADA
6. Top 10 questions about FMLA

HOUSE OF REPRESENTATIVES PASSES THE AFFORDABLE HEALTH CARE FOR AMERICANS ACT

On Saturday November 7, 2009, the House of Representatives passed the Affordable Health Care for Americans Act by a vote of 220-215. The bill must now be passed by the Senate, where several House Democrats have said they expect it to face significant opposition. It's unclear when the Senate will vote on a version of the health care legislation debated in that chamber. If the Senate passes its bill, the House and Senate bills would have to be reconciled into one document and voted on again.

Key features of the legislation include the following:

- Creation of a public health insurance plan.

- Extensive individual and group market reforms, all of which extend to self-insured plans. (However, there is no limit on the ability of groups to self-insure, as there had been in earlier versions of the bill).
- Creation of a national Health Insurance Exchange, through which individuals and employers can purchase a "qualified health benefits plan" (QHBP). A new federal Health Choices Administration would be created to set up the Exchange and also impose and administer a broad range of market reforms. States and regions may set up their own exchanges but only with federal approval. A new grant program would fund qualifying health cooperatives.
- Individual purchase mandates (enforced through the payment of a 2.5% tax) for any individual that does not hold "acceptable coverage" for any period of time in a year.
- Employer mandates that impose various taxes on any employer that does not provide "acceptable coverage" and that does not pay for a specified percentage of the premium for a base policy (a minimum of 72.5% of individual coverage for each full-time employee, and 65% for family coverage). This requirement is prorated for part-time employees. The bill provides an exemption for small employers. An employer can satisfy the coverage mandate by certifying to the Department of Health and Human Services (HHS) that it will maintain its own plan, but that plan must meet the requirements for qualified health benefits plans after 2018.
- Premium and co-pay subsidies for those with income below 400% of the federal poverty level, and a tax credit of 50% to help small businesses



(those with fewer than 25 employees, with phase-outs starting for those with more than 10 employees and that pay average annual salaries greater than \$20,000) pay for health insurance for their employees.

- A new wellness grant program for small employers.
- The public plan will only be available through the national Exchange, will have geographically adjusted premiums set by HHS, and will pay providers based on negotiated rates that must be at least as rich as current Medicare rates.
- Current and future COBRA participants would be afforded an extended participation period that would be in effect until they are eligible for employer-provided coverage or Health Insurance Exchange provided options become available
- The subsidies provided to individuals and small businesses under the legislation would be paid for through the imposition of tax penalties on individuals who fail to purchase “acceptable coverage” and on employers who fail to offer it, as well as an income tax surcharge of 5.4% to the extent an individual’s adjusted gross income exceeds \$500,000 or a joint filing couple’s adjusted gross income exceeds \$1,000,000.

Most of the changes in health care are not anticipated until 2013 under the current House and Senate versions of the legislation. However, your Woodruff-Sawyer representatives are closely following the legislation in order to keep you informed if and when health care reform happens. In the immediate future, we are advising clients not to make any changes based on the proposed legislation due to the fact that it is constantly evolving and nothing is finalized yet. However, we will inform you immediately when a final bill has passed that could impact your employee benefit plans.

CALIFORNIA OCTOBER 2009 DISABILITY INSURANCE (DI) FUND FORECAST

The State of California Employment Development Department published the Disability Insurance (DI) Fund Forecast in October 2009. The DI program is a component of the State Disability Insurance (SDI) program and provides

benefits to workers who are unable to work due to pregnancy or a non-work related illness or injury. The SDI program includes the Paid Family Leave (PFL) program, which allows California workers to take up to six weeks of paid leave each year to care for a seriously ill child, spouse, parent or domestic partner, or to bond with a new child.

The maximum weekly benefit amount (MWBA) for 2009 is \$959 and for 2010 is \$987 and is projected to increase to \$1,024 in 2011. California, Rhode Island, New Jersey, New York, Hawaii, plus the Commonwealth of Puerto Rico, are the only states and territories that provide or require statutory disability insurance for their workforce.

CONGRESS IS CONSIDERING EXTENDING THE COBRA SUBSIDY

Due to the fact that the unemployment rate is still high, Congress is considering extending the COBRA subsidy set forth in the American Recovery and Reinvestment Act (ARRA). There are three bills currently under consideration:

1. **S. 2730:** This bill extends the subsidy an additional six months to June 30, 2010, for a total of 15 months. It extends the eligibility period to June 30, 2010, as well. In addition, the bill would increase the COBRA premium subsidy amount from 65% to 75% and expand eligibility to include workers who experience loss of health coverage as a result of an involuntary reduction in hours.
2. **H.R. 3930:** This bill proposes to extend COBRA eligibility.
3. **H.R. 3966:** This bill extends the ARRA subsidy program for involuntary terminations and loss of coverage occurring through June 30, 2010.

Your Woodruff-Sawyer representative will follow this legislation and advise you of changes if and when a bill is passed and signed into law. Until any legislative changes are passed, if you have any individuals whose last day of coverage is December 31, 2009 and their loss of coverage is not until January 1, 2009, they are not eligible for the subsidy. If the loss of coverage is after December 31, 2009, the individual cannot become



an assistance eligible individual. This position has been informally communicated by the Internal Revenue Service (IRS) and the Department of Labor (DOL), who have stated that they will confirm the position officially within the next few weeks.

MENTAL HEALTH PARITY ACT APPLIES GENERALLY TO PLAN YEARS FOLLOWING OCTOBER 2009.

The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (the "Act") was signed into law by President Bush on October 3, 2008 as part of the \$700-billion bailout legislation for Wall Street. This Act applies to all group health plans with 51 or more employees, and will cover an estimated 82 million individuals in self-insured employer health plans that are not governed by state parity laws and another estimated 31 million in plans that are subject to state regulation. The Act generally takes effect for plan years beginning after October 3, 2009.

The following are key provisions of the Act, which apply to group health plans that provide both (1) medical and surgical benefits and (2) mental health or substance use disorder benefits:

- Plan coverage for mental health and/or substance use disorder must be equal to that offered for medical conditions in terms of co-payments, deductibles, co-insurance, and out-of-pocket expenses.
- Plans are prohibited from applying separate limitations on the frequency of treatment, the number of visits, days of coverage, or other similar limits on the scope or duration of treatment for mental health or substance use disorder expenses.
- If out-of-network benefits are provided for medical conditions, then out-of-network benefits must also be provided for mental health and substance use disorder expenses.
- A health plan can be exempted from the Act if it can prove that parity is raising its total plan costs by more than 2% in the first year after enactment of the parity law and 1% thereafter, but plans must first implement parity for at least six months.

- The Act requires disclosure of the criteria for medical necessity determinations (and reasons for denials of coverage) regarding mental health or substance use disorder benefit.

Please note that state mental health parity laws will continue to apply to insured health plans of employers with 50 or fewer employees. However, for health plans of 51 or more employees, this Act will significantly expand the scope and coverage of many state mental health parity laws, and make it easier for plan participants to obtain treatment for a wide range of conditions, including depression, autism, schizophrenia, eating disorders and alcohol and drug abuse. Stronger state mental health parity laws are not preempted by the Act.

GINA AND THE ADA

Our October 2009 legislative update reviewed the interim regulations ("Regulations") on the Genetic Information and Nondiscrimination Act (GINA), which are effective on December 7, 2009. To review, GINA will require many employers to modify their health risk assessments (HRAs). We have also discovered that absent some official guidance from the Equal Employment Opportunity Commission (EEOC), the following programs associated with wellness could violate the Americans with Disabilities Act (ADA) as they would effectively penalize employees who do not participate:

1. Incentives associated with wellness programs; and
2. Discounts or requiring completion of a health risk assessment as a prerequisite to group health plan coverage.

Your Woodruff-Sawyer representatives are continuing to follow if and when the EEOC issues guidance on the issue of whether or not certain wellness designs could violate the ADA and will inform clients upon its release. In the interim, we are advising clients who need to modify their HRA to:

1. Remove all questions that ask for genetic information, which includes family medical history.
2. Identify open-ended questions. The Regulations make clear that open-ended questions are problematic since they may elicit responses that include genetic



information. Examples of open-ended questions are: "Have you had any laboratory tests in the last two years?" or "Is there anything else relevant to your health that you would like us to know or discuss with you?"

3. Either remove open-ended questions or add a disclaimer to them. A sample disclaimer provided by the Regulations is as follows: "In answering this question, you should not include any genetic information. That is, please do not include any family medical history or any information related to genetic testing, genetic services, genetic counseling, or genetic diseases for which you believe you may be at risk."

For most Woodruff-Sawyer clients, insurance carriers or wellness vendors manage health risk assessments. Woodruff-Sawyer benefits representatives are working with our clients to ensure that these vendors are in compliance with GINA.

TOP TEN QUESTIONS REGARDING LEAVE LAW¹

1. What's the Difference between FMLA and CFRA?

The Federal Family and Medical Leave Act (FMLA) and California Family Rights Act (CFRA) are federal and state leave laws, respectively, that allow workers to take up to 12 work weeks of unpaid leave from their jobs in a 12-month period to care for their own serious health condition or the serious health condition of a family member (child, parent, or spouse), or to bond with a new child (adopted or biological). A serious medical condition is defined as any illness, injury, impairment, or physical or mental condition involving in-patient care or continuing medical treatment by a health care provider. The definition includes heart attacks, strokes, appendicitis, severe arthritis, complications from other medical procedures, debilitating migraine headaches, and more. Many provisions of CFRA and FMLA overlap so that a leave that

qualifies under one statute often qualifies under another statute. When this occurs leave time runs concurrent.

The main differences between the two are that CFRA does not cover pregnancy as a major health condition whereas FMLA does. Further, employer eligibility is a bit broader under CFRA than FMLA, and family members under CFRA include domestic partners.

2. When is a Company Required to Grant Leave Under FMLA and CFRA?

The company is required to grant leave under FMLA and CFRA when all of the following conditions apply: For both FMLA and CFRA, the employer must have had at least 50 full-time and/or part-time employees during 20 weeks of the prior or current year. For FMLA, the employer must have those employees within a single site within a 75 mile radius of person requesting leave; whereas with CFRA the employer merely needs to have at least 50 employees residing in a 75 mile radius (they can be scattered around). In addition, the employee in question must have worked for the covered employer at least one year, and at least 1,250 hours during the past one year period. Employers may require employees to use available sick leave and vacation leave for either FMLA or CFRA leave.

3. How does Pregnancy Leave Work?

Most pregnant employees are entitled to two leaves: one under the Pregnancy Disability Leave Act (PDL) when an employee is disabled by her pregnancy or by a condition relating to her pregnancy (e.g., gestational diabetes), and the second under CFRA, for an employee to bond with her child. The PDL applies when an employee has only five employees or more, and there is no length of service required for an employee to qualify. An employee may take leave for up to four months under this law. An employee may also take twelve weeks CFRA leave once the child is born, if she otherwise qualifies, and thus pregnancy/childbirth leave extends to a possible total of seven months.

4. Do I Have to Hold Open an Employee's Job When She's on Leave?

Yes, but not indefinitely. Generally the laws governing leave try to strike a balance between protecting an employee from being terminated due to a condition beyond her control and the need for employers to keep

¹: *Top Ten Questions Regarding Leave Law* has been contributed by Diana Maier. Diana is an employment attorney and workplace complaint investigator in San Francisco, CA. She advises a broad range of clients about complying with federal and state leave requirements. For more information on FMLA or CFRA leave, call 415.632.5118 or email diana@dianamaierlaw.com.



their business viable. Employers need not reinstate the highest paid 10% of the workforce where “substantial and grievous economic injury” would occur to the business in doing so. Otherwise, the employee has the right to return to the same or “equivalent” position he or she held prior to leave. Equivalent is different from “similar” or “comparable.” The PDL allows an employer not to keep a position open when a layoff or job elimination would have resulted in her termination regardless of leave or when preserving a job would “substantially undermine” the employer’s ability to operate the business “safely and efficiently.”

5. Should Employers Require Fitness for Duty Exams?

Under both the federal and California family and medical leave laws, an employer may institute a uniformly applied policy practice that requires all similarly situated employees who take leave because of their own serious health conditions to submit a “fitness-for-duty” report as a condition for returning to work.

6. What Accommodations are Employers Required to Make Under ADA, and The Fair Employment and Housing Act as it Relates to Leave?

An employee who is deemed to have a “disability” according to the Americans with Disabilities Act (ADA) or the Fair Employment and Housing Act (FEHA), is entitled to a reasonable accommodation. While no specific leave of absence is required, case law generally holds that time-off is a reasonable accommodation if the time off is finite and reasonable in scope, and the employee will be able to perform the essential functions of her job once she returns to work. Under both ADA and FEHA, the qualified employee must (1) have a physical or mental impairment that substantially limits one or more major life activities; (2) have a record of such impairment; or (3) is regarded as having such an impairment.

Upon returning to work after a leave, the employer and the individual with a disability should engage in an informal process to clarify what that employee needs and identify the appropriate reasonable accommodation(s). The employer may choose among reasonable accommodations as long as the chosen accommodation is effective. If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the

less expensive or burdensome accommodation as long as it is effective. Similarly, the employer may choose the one that is easier to provide.

7. How Do Payments and Benefits Work During Leave?

Employers need not pay for leave and employers may require an employee to use sick or vacation days when on leave. However, employees on leave are generally entitled to enrollment in benefits just as if they weren’t on leave for the first 12 weeks of leave. If the employee fails to return to work for a reason other than medical condition causing leave, employer may ask to be reimbursed for the premium payments. During pregnancy leave an employee must be allowed to use any accrued vacation time, sick leave, or other accrued personal time off during leave. An employer may also choose to have an employee’s sick leave used up by the leave.

8. What Do Leave Laws Require An Employee to do vis a vis Notice In Order to be Granted Leave?

An employee must give advance notice of leave to her employer, at least 30 days notice when possible. If 30 days notice is not possible then the employee must notify the employer of her need for leave as soon as possible. The employee must also give an accurate and specific reason that she needs the leave, though a medical certification form will provide much of this. She must also give her employer a projected return to work date and keep the employer apprised of any developments affecting leave status while she’s gone.

9. What Do Leave Laws Require An Employer to do Vis a Vis Leave for An Employee?

An employer should give an employee notice of the type of leave being granted to her, a medical certification form for the employee’s medical provider to fill out, information on whether an employee will receive benefits while on leave, and notice if the employer is expecting the employee to use vacation time, sick, or paid time-off while on leave.

10. What Can I do if I’m still Confused About Leave or the way Leave Laws Interact?



California leave is a tricky area and it may be worth engaging an HR specialist or HR attorney for advice when making decisions. However, there are also informal avenues to explore the topic further. The Department of Fair Employment and Housing website, for instance, has great summaries of different leave laws, how they interact, and what to do about them. Some law firm and legal websites also explain leave and the differences between leave laws.

The information provided in this Legislative Update should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only and you are urged to consult an attorney concerning your own situation and any specific legal questions you may have.

Woodruff-Sawyer is one of the largest independent insurance brokerage firms in the nation, and is an active partner of International Benefits Network and Assurex Global. For over 90 years, Woodruff-Sawyer has been partnering with clients to implement and manage cost-effective and innovative insurance, employee benefits and risk management solutions, both nationally and abroad. Headquartered in San Francisco, Woodruff-Sawyer has offices throughout California and in Portland, Oregon.

For more information, call 415.391.2141 or visit www.wsandco.com.

About Jennifer

Jennifer is Compliance Officer in the Benefits practice at Woodruff-Sawyer & Co. She consults directly with our Employee Benefits clients on all matters of compliance and leads both internal and external trainings. She has also conducted numerous trainings on ERISA, COBRA and HIPAA to Department of Labor employees, the Department of Justice and to employers that sponsor ERISA-covered plans. A published expert on ERISA, COBRA and HIPAA rules and regulations, Jennifer has investigated a broad spectrum of company employee benefit plans and has extensive experience negotiating with industry fiduciaries and service providers.

Before joining Woodruff-Sawyer, Jennifer was a Senior Investigator at the US Department of Labor (DOL), Employee Benefits Security Administration in San Francisco. Jennifer can be reached at 415.402.6577 or jlunski@wsandco.com.