BEAN KINNEY & KORMAN PC ATTORNEYS

EMPLOYMENT LAW NEWSLETTER

Volume 5, Issue 5

September 2013

In This Issue

Obama Administration Postpones Health Care Reporting and Penalties Until 2015..................Page 1

Severance Agreements: What Are They Good For?..........................Page 2

2300 Wilson Blvd., 7th Floor
Arlington, VA 22201
703.525.4000
www.beankinney.com

Business & Corporate Services

Appellate Practice
Business Services
Construction Law
Copyright/Trademark
Creditors' Rights
Criminal Defense
e-Commerce
Employment Law
Government Contracts
Land Use, Zoning & Local Government
Landlord/Tenant
Lending Services
Litigation
Mergers & Acquisitions
Nonprofit Organizations
Real Estate Services
Title Insurance
Tax Services

Individual Services

Alternative Dispute Resolution
Domestic Relations
Negligence/Personal Injury
Wealth Management & Asset Protection
Wills, Trusts & Estates

OBAMA ADMINISTRATION POSTPONES HEALTH CARE REPORTING AND PENALTIES UNTIL 2015

BY JENNIFER A. HARPER, ESQUIRE

On July 2, the Treasury Department announced that the Obama Administration will delay the Affordable Care Act's mandatory employer and insurer reporting requirements for another year. These requirements will not take effect until 2015 while the Treasury Department works out new rules to help businesses navigate the complexities of the health care mandate.

The Treasury Department similarly delayed until 2015 the assessment of penalties, also known as shared responsibility payments, for large employers that do not meet minimum standards of health care coverage under the Affordable Care Act. Large employers are defined in the act as having an average of at least 50 full-time employees on business days during the preceding calendar year.

The postponement does not affect the individual mandate regarding coverage or the on-going development of health care "exchanges"—the government-sponsored health care marketplace where individuals and businesses will be able to shop for health care plans offered by private providers.

The reprieve comes three months before open enrollment in the health care marketplace is scheduled to begin. Open enrollment is due to start on October 1, 2013. Coverage is supposed to start on January 1, 2014. The Department of Health and Human Services has developed the website HealthCare.gov to assist individuals and businesses in choosing affordable health care plans. With the new postponement, employers will have an opportunity to fully assess their existing health care plans and determine whether to continue with the plan in place, expand coverage or offer alternative coverage through the health care marketplace. There also is the cost-analysis of making shared responsibility payments in lieu of coverage or in the event existing coverage does not meet the minimum standards.

(Continued to next page)

The additional year will enable both the government and employers to develop a practical system for reporting employee coverage. With the myriad of federal agencies involved in implementing the health care mandate, the rules need to be simple, consistent and easy to understand. The Treasury Department recognized this need in delaying the reporting requirements until the system can be tested in a real world environment and any glitches are fixed before going live.

While the postponement helps iron out key provisions, employers and insurers should not ignore the mandate altogether. The remaining aspects of the mandate remain in effect and employers in particular should use the additional time to conduct an internal audit before reporting and penalty payments are required in 2015.

The Treasury Department said it will issue formal guidance describing the transition within the next week. We will provide a detailed interpretation of the guidance as soon as it is published.

The full text of the Treasury Department's announcement can be found on its website at http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx.

Jennifer Harper is a shareholder at Bean, Kinney & Korman P.C. in Arlington, Virginia, focusing her practice in employment law. She can be reached at jharper@beankinney.com or 703.525.4000.

SEVERANCE AGREEMENTS: WHAT ARE THEY GOOD FOR?

BY RACHELLE E. HILL, ESQUIRE

Employers frequently use severance agreements when terminating an employee or when an employee resigns with the hopes of reducing potential liability. In our practice, we often advise employers to offer severance pay that is memorialized in an agreement containing a general release, covenant not to sue and often indicates that the employee is resigning. Since an employee has no legal entitlement to severance pay, the majority of the time, he or she accepts the offer and typically the employer does not hear anything else from the employee. However, this is not the case with all employees and it is imperative employers understand the benefits and downsides to severance agreements and how the EEOC and Virginia Unemployment Commission view these agreements.

In practice, severance agreements significantly reduce a company's liability exposure by minimizing the risk of litigation and administrative proceedings. Offering pay that an employee is not already entitled to will often placate an otherwise disgruntled employee by providing additional financial assistance. Typically a severance agreement will offer severance pay, include a confidentiality and non-disparagement clause, a general release by the employee of all claims and often indicate that the employee is resigning from his or her employment.

However, what if an employee refuses to agree to language indicating he or she resigned or counters with a demand for significantly more pay? In reality, what an employer believes it is receiving differs from how the administrative bodies of the EEOC and Virginia

Unemployment Commission view the agreements.

Mutual Releases and Covenant Not to Sue

Severance agreements typically require the employee to release the employer from any claims he or she has through the date of the agreement and an express agreement not to sue the employer. Employers are most often concerned about discrimination claims filed with EEOC and offer severance in hopes of avoiding any potential claim which, even if frivolous, can cause a company to incur substantial costs defending the action. EEOC guidelines conclude that while a signed release and waiver may be enforceable where it is knowingly and voluntarily consented to, it cannot be used to limit an employee's right to testify or assist in any investigation conducted by the EEOC or prevent an employee from filing a charge of discrimination with the agency (http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html). Additionally, an employer cannot require an employee to return the severance pay prior to filing a charge.

Requiring Employee to Resign

Typically a severance agreement will include language indicating the employee is resigning instead of being terminated. Employers often request this language based on the belief that such language would cut off any claim for unemployment. In Virginia, an employee that quits his or her job is not eligible for unemployment compensation. However, how should an employer respond where an employee refuses to agree to such language? Is there any benefit to an employer to mandate such language? The answer is that employers should not let this one issue be a sticking point for finalizing a severance agreement. The Virginia Unemployment Commission has determined that voluntarily leaving, which would typically disqualify an employee for benefits, does not include situations where an employee quits in lieu of discharge. When the only alternative to resigning is that the employee will be discharged, the Virginia Unemployment Commission concludes that this is not a voluntary act and the employee will not be disqualified from receiving benefits. However, employers can allocate severance payments for any period following separation so as to be counted as wages.

The foregoing only touches on the issues Virginia employers should be aware of when offering severance. In most cases, it is still highly recommended for an employer to offer severance, as it is an effective way to reduce future liability. But like many issues in law, this is not black and white.

In our next newsletter in November, we will provide a detailed list of considerations for employers when deciding whether to offer severance and negotiating amounts.

Rachelle E. Hill is an associate attorney at Bean, Kinney & Korman, P.C. in Arlington, Virginia. She practices in the areas of employment law and commercial litigation, with an emphasis in creditors' rights. She can be reached at 703.525.4000 or rhill@beankinney.com.

This newsletter was prepared by Bean, Kinney & Korman, P.C. as a service to clients and friends of the firm. It is not intended as a source of specific legal advice. This newsletter may be considered attorney advertising under the rules of some states. Prior results described in this newsletter cannot and do not guarantee or predict a similar outcome with respect to any future matter that we or any lawyer may be retained to handle. Case results depend on a variety of factors unique to each case. © Bean, Kinney & Korman, P.C. 2013.