A Better Partnership®

Warner Norcross & Judd® LLP
ATTORNEYS AT LAW

Winter 2011

Human Resources Newsletter

HR Focus

The NLRB Wants You to Put Up a Poster

by Steven A. Palazzolo: **spalazzolo@wnj.com**

OK, OK. I know, we have already put out an e-news alert on the proposed National Labor Relations Board (NLRB) poster requirement. And I already did a blog post on the proposed NLRB poster requirement. And now I am doing a newsletter article on the proposed NLRB poster requirement. How come? Well, it could be that I am getting lazy in my old age. Or it could be that we think this is really important. Yeah, I'm going with that one . . . really important.

So, "On December 22, the NLRB published a Notice of Proposed Rulemaking in the *Federal Register*. The proposed rule says all employers subject to the NLRA (and that is almost all private employers, regardless of whether your workforce is unionized) will be required to post a notice informing all employees about their rights under the NLRA."

If you'd like to see a copy of the poster, go to page 6. The NLRB is not kidding about this. In fact, the comment period for this proposed rule ended on February 11. So the proposed rule is well on its way to becoming a final rule and you all (and even Warner Norcross & Judd) will have to post this notice when the rule becomes final, likely within a couple of months.

Plus, did you see the recent statement by Secretary of Labor Hilda Solis? What statement is that you might ask? This one:

When coupled with existing data showing that

continued on page 6

Are Your Non-Compete Agreements Enforceable?

by Scott R. Carvo: **scarvo@wnj.com**

With unemployment rates in Michigan still well above the national average, non-compete agreements are facing increased scrutiny. Michigan courts are more likely than ever to find deficiencies in the agreements and decline to enforce them. So even though an individual signed a document stating he or she would not go to work for the competition, lawyers and judges pick away at the documents until they find a reason to reject them, thereby allowing the individual to remain employed by the competition.

While you may read your employment agreements and understand what you intended, a judge may not. In two recent cases, circuit courts examined non-compete agreements in light of entire employment contracts. The cases show that terms buried within a separate portion of an employment agreement might give the court a reason to decline to enforce your non-compete agreement.

Specifically, courts have declined enforcement because the agreements were written in an inconsistent manner or because the employee's job title changed after signing the agreement.

"So even though an individual signed a document stating he or she would not go to work for the competition, lawyers and judges pick away at the documents until they find a reason to reject them."

INCONSISTENCY

In one case, the text of a non-compete agreement stated that it applied "upon termination," but failed to define "termination." Elsewhere in the employment agreement, "termination" described an event where the employer fired the employee prior to the end of the term stated in the agreement.

The employee declined to sign a new employment agreement and immediately went to work for a competitor. The employer argued that "termination" was meant in a plain and ordinary way and included *any* ending, not just being fired. But because of the way "termination" was used elsewhere in the employment contract, the court held that the non-compete agreement simply did not apply because the employee was not fired. The employee was free to compete with his former employer.

CHANGE IN POSITION

In another case, an employee signed an agreement that specifically mentioned his entry-level job title and did not contain any provision for future promotions. The non-compete agreement within the employment agreement was not specifically limited to any job title; rather, it stated that it would remain in effect for the "duration of [the employee's] employment."

Later, the employee was promoted to a new job with a new title, but the employer did not require him to sign a new employment agreement. After the employee was terminated, the employer sought to enforce its non-compete agreement. However, the court read the non-compete agreement in light of the whole employment agreement, and found that it applied only to the entry-level job. Since there was no valid employment agreement *or* non-compete agreement for the employee's work in his new position, he was free to compete with his former employer

REVIEW YOUR COVENANTS

Restrictive covenants, including non-compete agreements, are entered into for a very legitimate reason: to protect your business interests. Don't let inconsistency or vague language result in an unfavorable court ruling. Reread your restrictive covenants – closely. Or better yet, have an experienced labor attorney review them. We at Warner Norcross & Judd have extensive experience with non-compete agreements and can help you avoid pitfalls.

When Are Background Checks discriminatory?

by Amanda M. Fielder: **afielder@wnj.com**

With the economy in disarray, employers increasingly are using criminal background checks and credit reports to narrow their application pools. Approximately three out of four U.S. businesses perform background checks, both criminal checks and credit reports, as part of their preemployment screening process, according to a series of surveys from the Society for Human Resource Management. This increased use of criminal background checks and credit reports has peaked the interest of the Equal Employment Opportunity Commission (EEOC), and not in a good way.

In an effort to combat racial discrimination in the workplace, the EEOC launched its E-Race Initiative in February, 2007. Through E-Race (Eradicating Racism & Colorism from Employment), the EEOC sought to identify criteria that contribute to race and color discrimination in employment. The EEOC has found that these facially neutral employment criteria may significantly disadvantage applicants and employees on the basis of race, in violation of Title VII of the Civil Rights Act of 1964.

Indeed, the EEOC has filed at least three notable actions against employers based on their use of criminal background checks and credit reports during the hiring process. In 2008, the EEOC filed suit against Peoplemark, Inc., in the U.S. District Court for the Western District of Michigan, claiming that Peoplemark's policy against hiring individuals with criminal records had a disparate impact on African-American applicants. One year later, the EEOC sued Freeman Companies in Maryland for the same reason, adding that the checks also had a disparate impact on Hispanic and male employees.

And most recently, the EEOC sued Kaplan Higher Education Corp. in December for race discrimination, accusing the company of using a "selection criterion for hiring and discharge, namely, credit history information, that has had, and continued to have, a significant disparate impact on Black job applicants . . ." The EEOC claimed that by using the credit histories as a criterion in hiring, Kaplan was engaging in race discrimination that was "not job related and consistent with business necessity, and for which there are appropriate, less-discriminatory alternative selection procedures." Setting the merits of these cases aside, it is clear that the EEOC has taken a keen interest in the use of criminal background checks and credit reports.

Title VII prohibits facially neutral selection procedures that have the unintentional effect, or disparate impact, of disproportionately excluding applicants of a particular protected class — race, gender, national origin, color or religion. Consequently, even though your use of criminal background checks and credit reports is not intended to screen out members of racial minorities, that might be the result. And if it is, your practices violate Title VII.

To avoid this pitfall, it is critical that you tailor screening procedures to fit the specific requirements of the position. There must be a job-related justification and a business necessity for your pre-employment screening practices. A job involving a high degree of trust with access to highly confidential business information may warrant consideration of the applicant's criminal background. Credit reports should be used when hiring for positions that require financial responsibility. In these instances, the use of preselection screening procedures is lawful because the requirements are tailored to the job descriptions and have a valid business justification. But this is not always going to be the case.

In light of the EEOC's recent scrutiny of criminal background checks and credit reports, give thought to your use of prescreening mechanisms. Ensure that you have job-related justifications for the practices and criteria used. Undoubtedly, this will help you avoid unlawful discriminatory effects on workers.

Health Care Reform UPDATE

by By Sue O. Conway and April A. Goff:
sconway@wnj.com / agoff@wnj.com

Despite Court Ruling, Reforms Move Ahead

Even though a federal judge in Florida ruled in late January that Health Care Reform is unconstitutional, don't expect any changes in the immediate future. Until and unless the U.S. Supreme Court invalidates the law, you can expect that federal and state governments will continue to implement it.

U.S. District Judge Roger Vinson ruled that the Patient Protection and Affordable Care Act of 2010 is unconstitutional because it *requires* nearly all Americans to purchase health insurance by 2014 or face higher taxes. He said the failure to purchase health insurance is "inactivity," which Congress does not have the authority to regulate. However, Judge Vinson refused the plaintiffs' request to suspend the law. So Obama Administration officials have said the federal government and individual states should proceed without interruption to set up insurance exchanges and lay the framework for other sections of the law.

Justice Department officials have already commented that they will immediately appeal the decision to the 11th Circuit Court of Appeals. Given the conflicting court decisions on the issue, it is unlikely that the constitutionality of the law will be definitively resolved until it is brought before and decided by the U.S. Supreme Court in the next few years.

NONDISCRIMINATION RULES DELAYED

Some employers breathed a huge sigh of relief; for others the news came too late. The IRS announced in late December that the nondiscrimination rules for *insured* health plans, a feature of the Health Care Reform law, will be delayed until regulations are issued and plan sponsors have time to implement necessary changes. The nondiscrimination rules were originally scheduled to take effect beginning the first plan year on or after September 23, 2010. The date was January 1, 2011, for calendar year plans.

By way of background, under Health Care Reform, insured group health plans (other than "grandfathered" plans) may not discriminate with respect to eligibility or benefits in favor of highly compensated individuals – generally the top-paid 25 percent of a company's employees. This presumably means that highly compensated employees cannot have better benefits, lower premium contributions or a shorter waiting period for coverage than employees who are not highly compensated. It would also appear to preclude post-employment health insurance or severance arrangements only for executives or other highly paid former employees. Previously, nondiscrimination rules applied to self-insured health plans but not to insured plans.

While the rules for insured health plans are supposed to be similar to those that apply to self-insured plans, the sanctions are quite different. For an *insured* plan, the potential penalty is $100 per individual for each day the violation continues. So if a plan with 500 participants provides discriminatory benefits to the top three executives, the potential penalty is $100 a day for each of the other 497 employees. Compare this to the penalty for a discriminatory *self-insured* plan, which is loss of tax benefits for the highly compensated individuals who benefited from the discrimination.

continued on page 10

Déjà Vu All Over Again: Remedial Amendment Cycles Recycle

By George L. Whitfield: **gwhitfield@wnj.com**

I enjoy the witticisms attributed to Yogi Berra. I've used this one before, but it is clearly apropos to this topic: "Déjà vu all over again." For more than six years, we've been telling you about the "new" remedial amendment period (RAP) submission cycles and advising that once we submit your plan under the new procedures, you won't have to do it again for at least five or six years. Well, guess what? The cycles are beginning again.

HOW IT USED TO BE

Historically, retirement plans were amended to comply with applicable law and guidance and submitted for IRS approval at irregular intervals. For example, the filing deadline for the GUST changes that began with 1994 legislation was extended to 2004. In many ways the process was beneficial because plan amendments reflected the final interpretation of the law. The downside was that plans were required to operate in good faith compliance for years, which was difficult to do, and from the standpoint of the IRS virtually all plans were submitted at one time, which strained resources.

THE STAGGERED RAP CYCLES

After white papers and discussions with practitioners, the IRS established a cyclical filing system in 2005. For this purpose plans were divided into two general categories, individually designed and preapproved. Individually designed plans are those that cannot or choose not to be preapproved plans. Preapproved plans generally fall into two categories, prototype and volume submitter. Prototype plans are required to have a basic plan document and an adoption agreement that enables the employer to choose among the plan design options that are offered. A volume submitter plan consists of plan language, including extensive optional language, that is submitted for IRS approval and then used to create employer plans.

Warner Norcross & Judd sponsors volume submitter plans. Use of our volume submitter documents results in a customized plan that is derived from thousands of flexible choices. In contrast, the separate adoption agreement for a prototype plan can practically offer only very limited choices. Moreover, in our view, prototype plans normally reflect the limitations of the recordkeeping system of the prototype sponsor and make it difficult to move to a new plan provider. For more comparison of the two types of plans read Heidi Lyon's Aug. 12, 2010, article, "You're Moving to a Prototype? Say It Isn't So," on our Web Site at wnj.com/publications.

Maintaining a plan through volume submitter documentation is becoming relatively less costly. The IRS filing fee for individually designed plans was recently raised from $1,000 to $2,500 while the fee for volume submitter filings remains at $300.

For individually designed plans, the IRS established five-year staggered RAP filing cycles based on the following schedule:

Last Digit of Sponsor EIN	Filing Cycle	Cycle Filing Deadline
1 or 6	Cycle A	January 31, 2007
2 or 7	Cycle B	January 31, 2008
3 or 8	Cycle C	January 31, 2009
4 or 9	Cycle D	January 31, 2010
5 or 0	Cycle E	January 31, 2011

We have been preparing and filing individually designed documents on the applicable cycles. Spreading the filing deadlines over a five-year period levels out the workload for the IRS.

For preapproved plans, the IRS established separate six-year submission cycles for defined contribution and defined benefit pension plans. For defined contribution plans, the deadline for the volume submitter document sponsor to submit plan language for approval was January 31, 2006. The IRS took two years to process all of those submissions and issued its advisory opinion letters simultaneously on March 31, 2008. A filing deadline of April 30, 2010, applied to all plans maintained through the use of that preapproved documentation. For defined benefit plans, the deadline for submitting plan language was January 31, 2008. Simultaneous approval letters were issued on

continued on page 8

union members have access to better health care, retirement and leave benefits, today's numbers make it clear that union jobs are not only good jobs, they are central to restoring our middle class. As workers across the country continue to face lower wages and difficulty finding work due to the recent recession, these numbers demonstrate the pressing need to provide workers with a voice in the workplace and protect their right to organize and bargain collectively.

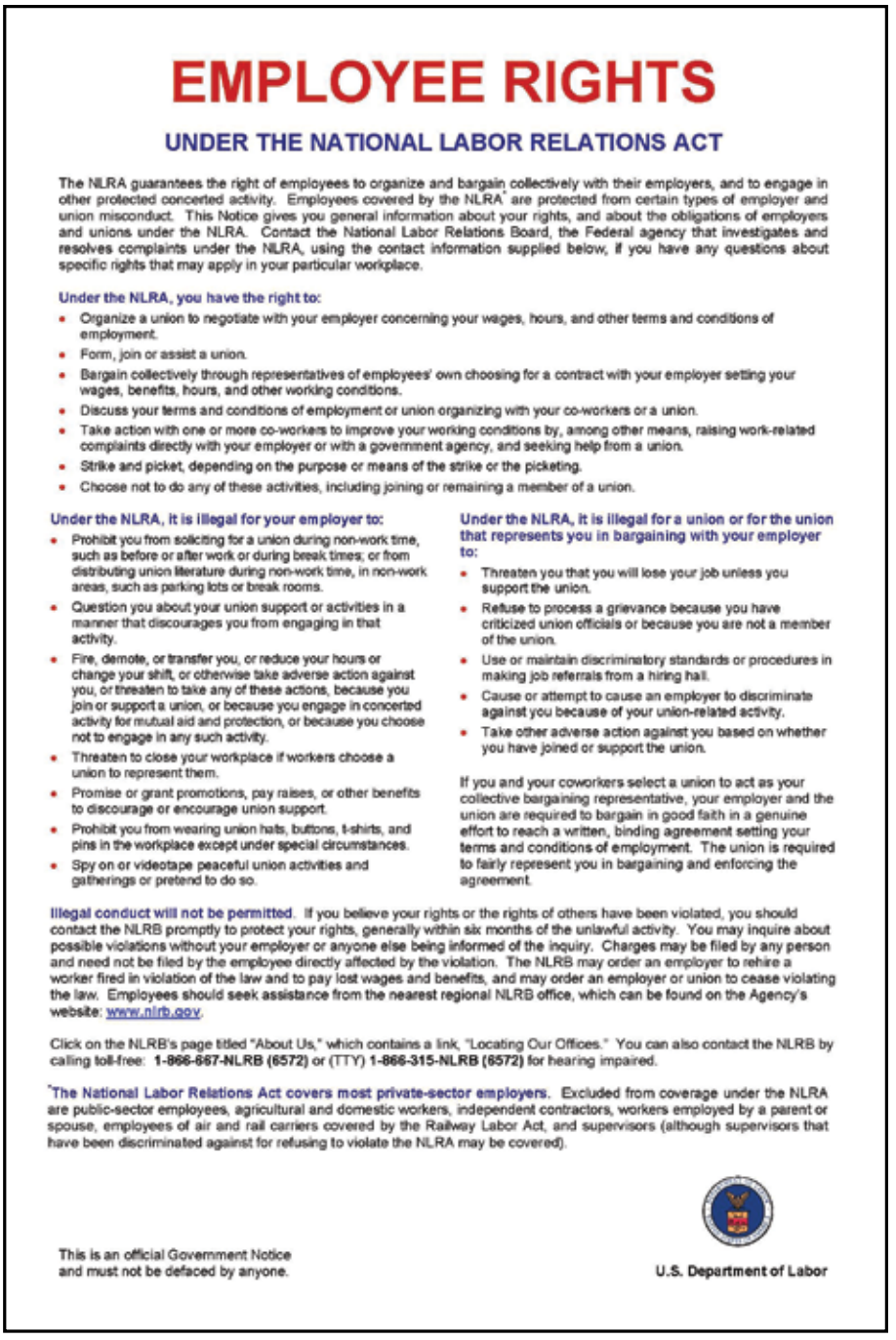
So it seems the administration is pretty clearly indicating that it is going to try to do through rulemaking what it has been unable to do through legislation. From the Department of Labor to the NLRB, to President Obama himself, this administration is doing whatever it can to make it easier for unions to organize your workforce.

"The proposed rule says all employers subject to the NLRA will be required to post a notice informing all employees about their rights under the NLRA."

OK, now that we have settled that, what do we do? How are we supposed to handle having to put up this poster? How do we answer the questions that are bound to come up?

No easy answer to that. It is going to be a process. And the process has to start with your supervisors. They need to be trained. You need to make sure they know how to answer the questions that come up. They need to know what TIPS stands for and why FOE is a good thing. And they need to know all of this stuff before a union rep shows up at the door.

So if you are looking for one thing to do this year in HR, this is where you should start. Right here and right now.



EMPLOYEE RIGHTS

UNDER THE NATIONAL LABOR RELATIONS ACT

The NLRA guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board, the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten you that you will lose your job unless you support the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take other adverse action against you based on whether you have joined or support the union.

If you and your coworkers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's website: www.nlrb.gov.

Click on the NLRB's page titled "About Us," which contains a link, "Locating Our Offices." You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6572)** or (TTY) **1-866-315-NLRB (6572)** for hearing impaired.

***The National Labor Relations Act covers most private-sector employers.** Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

This is an official Government Notice and must not be defaced by anyone.

U.S. Department of Labor

More IRS Rumblings About Rollovers as Business Start-Ups

by Justin W. Stemple: **jstemple@wnj.com**

Rollovers as Business Start-Ups – affectionately referred to by the IRS as ROBS – are arrangements in which someone uses existing retirement funds to purchase a business without taking a taxable distribution from an IRA or retirement plan. In many cases the retirement funds are the only significant source of personal assets that an entrepreneur has available to fund the acquisition of a business. ROBS may be structured in a way that complies with IRS regulations; however, over the past few years the IRS has made it very clear that it will closely scrutinize ROBS for compliance.

In the past year the IRS initiated a ROBS project to identify common compliance failures, to identify noncompliant ROBS and to design compliance strategies. The project focused on ROBS that applied for and received an IRS determination letter on the form of their retirement plan but did not file a Form 5500 annual report. The IRS contacted the plan sponsors and requested certain recordkeeping and administrative information, including:

- Whether the plan continues to exist
- Whether contributions had been made
- Information on the rollover of assets into the ROBS plan
- Participant information
- Stock valuation and stock purchase records
- General business information
- Why no Form 5500 was filed

The preliminary results of the ROBS project showed that there have been some ROBS success stories where the acquired business was sustainable; however, the IRS found that most had failed or were on the way to failing. The arrangements led to a very high rate of bankruptcy, both personal and business. In those cases the entrepreneur lost both the business and the retirement savings.

The IRS also reported the common compliance failures that it found with ROBS:

- Plan sponsors failed to file Form 5500. The IRS found many plan sponsors believed they were exempt from the Form 5500 filing requirement because of an exemption for single individual plans with assets under a certain dollar amount. That exemption does not apply when the plan itself, through its employer stock investments, owns the business.
- After the initial employer stock investment, plans were amended to prevent other participants from purchasing employer stock, which may be discriminatory.
- Plan sponsors failed to value the employer stock in the ROBS plan.
- Plan sponsors failed to file Form 1099-R for rollovers into the ROBS plans.

ROBS arrangements are often an attractive source of funds for potential small business owners, but they must be implemented and administered carefully to remain in compliance with IRS regulations. The ROBS project is ongoing and we will keep you apprised of new developments. In the meantime, if you have a ROBS arrangement or are considering one, you need to be aware that the risk of these arrangements is higher than ever and maintaining the plan in compliance with IRS requirements has become more important than ever. Please contact us if you would like to discuss ROBS arrangements.

March 31, 2010. Employers maintaining defined benefit plans through preapproved documents must file those documents for IRS approval not later than April 30, 2012.

HERE WE GO AGAIN

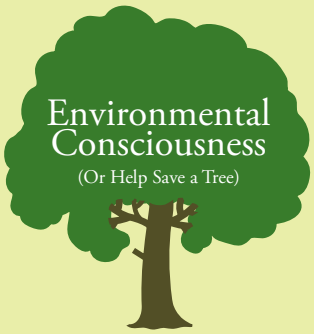
If I wanted to talk like Yogi Berra, I would say "tempus fugit when it's flying." Although hard to believe, the remedial amendment cycles are starting all over once more. For individually designed plans required to be filed by the original Cycle A deadline of January 31, 2007, the next five-year filing deadline is January 31, 2012. For each subsequent cycle it is the next January 31. For preapproved plans the next deadlines for updated plan language are January 31, 2012, for defined contribution plans and January 31, 2014, for defined benefit plans. Although they could vary, presumably the deadlines for filing plans that utilize preapproved documentation will be April 30, 2016, for defined contribution plans and April 30, 2018, for defined benefit plans. The filing deadlines for those plans are still a long way off, but as you can see, the entire process begins all over again during 2011 with initial filing deadlines of January 31, 2012.

A WORD ABOUT CUMULATIVE LISTS AND INTERIM AMENDMENTS

Each year the IRS publishes a Cumulative List of required amendments. When plans are submitted for IRS approval, the IRS will only review amendments required by the applicable Cumulative List. The Cumulative List requirements also apply to preapproved document providers. Accordingly, both individually designed and preapproved plans submitted for IRS review are not up-to-date with the latest legislation and guidance as of the time of filing and the gap is much longer and more significant for preapproved plans. This is an inherent flaw in the staggered filing cycles, particularly those for preapproved plans.

To address the lag, the IRS has been requiring so-called "interim" amendments to reflect new legislation and regulatory guidance. For required changes, the deadline is the tax return filing date for the taxable year related to the effective date of the amendment. For discretionary amendments, the deadline is the last day of that year. This distinction causes significant confusion. Furthermore, the duty to adopt interim amendments that update each plan to the most recent Cumulative List is an unwelcome burden. In some cases, such as the Pension Protection Act of 2006, Congress specified a delayed deadline for plan amendments. While this is helpful, the deadline eventually arrives. The result has been a steady stream of interim amendments rather than amendments geared to the next plan restatement under the filing cycles.

The requirement of interim amendments is a frustrating process for us and is considered a source of unnecessary cost by most plan sponsors. It has been severely criticized. The IRS states that it is seriously studying this problem and has indicated that at least it may eliminate the amendment deadline difference for required and discretionary amendments. We can only hope that there will be further and favorable developments with respect to interim amendments in the near future. Otherwise interim amendments will also continue to be déjà vu all over again.



If you would prefer to receive our newsletters electronically, please e-mail us at editaddress@wnj.com and we will be happy to make the change. Changes to e-mail or U.S. Postal Service addresses also may be sent to editaddress@wnj.com.

Michigan Medical Marijuana Act does not Override Employment Policies

by Robert A. Dubault: **rdubault@wnj.com**

In a case that has been closely watched by employers, a federal court has held that Wal-Mart did not unlawfully terminate an employee who tested positive for marijuana in violation of company policy, even though the employee possessed a registry card under the Michigan Medical Marijuana Act (MMMA). The *Casias v. Wal-Mart Stores, Inc.* decision is the first one to address whether the MMMA provides any sort of employment protection for medical marijuana users.

The facts in the case were straightforward. Casias was hired by Wal-Mart to work in a store in Battle Creek. He was an at-will employee. Under Wal-Mart policy, he was subjected to drug testing upon hire – which he passed. Casias was a good employee for the company. He had been promoted and was named associate of the year in 2008.

In mid-2009, Casias was issued a medical marijuana registry card and he began using marijuana outside of work hours. Following a workplace injury, Casias was subjected to a mandatory drug test pursuant to Wal-Mart's policy. Casias, who disclosed his medical marijuana card to his supervisor and the testing laboratory, tested positive for marijuana and was terminated under Wal-Mart's policy.

Casias sued Wal-Mart claiming wrongful termination. Specifically, Casias claimed that although he was otherwise an at-will employee, his termination was in violation of the public policy of the State of Michigan – namely the MMMA. In support of his claim, Casias argued that the reference to a "business" in the MMMA – which states registry cardholders cannot be "denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marijuana in accordance with this act" – was evidence of the public policy prohibiting his termination. The court rejected this argument, finding that the term "business" could not stand alone, and that it was merely a modifier for a "licensing board or bureau."

Casias also argued that because the MMMA states only that nothing in the Act requires "an employer to accommodate ingestion of marijuana in any workplace or any employee working while under the influence of marijuana," employers could not take action against employees for non-workplace use. The court rejected this argument as well.

In the end, the court granted Wal-Mart's motion to have the case dismissed. In the eyes of the court, the MMMA was directed at governmental action, such as protection from prosecution under certain circumstances, and it in no way regulates private employment.

As the court forcefully stated:

> In contrast to what the MMMA does address – potential state prosecution or other potential state action – the MMMA says nothing about private employment rights. Nowhere does the MMMA state that the statute regulates private employers, that private employees are protected from disciplinary action should they use medical marijuana, or that private employers must accommodate the use of medical marijuana outside of the workplace.

The *Casias* decision is the first – and hopefully last – word on whether the MMMA in any way regulates the employment relationship. In light of *Casias*, employers can continue to develop and enforce their workplace drug-testing policies. Should you have any questions about the *Casias* decision or how to develop an enforceable drug-testing policy, please contact any member of Warner Norcross & Judd's Labor and Employment Law Practice Group.

Because of the potentially draconian penalties, many sponsors of insured health plans scrambled to remain "grandfathered" under the Health Care Reform law or changed their health plans to comply with the new requirements. Some refrained from increasing employee contributions and cost-sharing for 2011 in order to remain "grandfathered;" others completely redesigned their offerings.

The IRS issued Notice 2011-1 delaying the application of nondiscrimination rules just days before the compliance deadline for calendar year plans. Unfortunately this last-minute notice came too late for those who had already made costly plan changes.

Under Health Care Reform, insured group health plans may not discriminate with respect to eligibility or benefits in favor of highly compensated individuals. This presumably means that highly compensated employees cannot have better benefits, lower premium contributions or a shorter waiting period for coverage than employees who are not highly compensated.

Plan sponsors should be aware that the delay applies *only* to insured health plans. Self-insured health plans (including HRAs) and cafeteria plans (including FSAs) continue to be subject to nondiscrimination requirements.

OTHER NEWS

The Department of Labor's recent "Frequently Asked Questions – Part V" (FAQs) provide news concerning the effective dates of two other Health Care Reform requirements – automatic health plan enrollment and the 60-day advance notice of health plan changes.

Automatic Enrollment: The Health Care Reform law requires employers with more than 200 full-time employees to automatically enroll new employees in their health plans and to continue the enrollment of current employees from year to year unless they opt out (similar to 401(k) automatic enrollment). While the law appeared to make this requirement effective immediately upon enactment, the new FAQs confirm that employers are not required to comply until the DOL issues regulations on how automatic enrollment will work. Furthermore, the DOL does not intend to complete this rulemaking until 2014.

60-Day Notice: Likewise, the new law requires group health plans to give enrollees at least 60 days' prior notice of any material modification to their health plan coverage, but there was some confusion on when this goes into effect. The FAQs indicate compliance will not be required until such time as health plans must provide enrollees with a summary of benefits and coverage. This summary does not need to be provided until March 23, 2012 (24 months after Health Care Reform was enacted), and is subject to future standards from federal agencies.

Strategy, Risk Management and Best Practices: The Changing World of HR

Date: May 25, 2011
Time: 8 a.m.- 4:30 p.m.
Location: DeVos Place, Grand Rapids, MI

Our popular HR Seminar is back this spring. We're offering a three-track, power-packed day for benefits and HR professionals.

Registration opens in mid-March.

Save The Date

Human Resources Attorneys

LABOR AND EMPLOYMENT ATTORNEYS

Edward Bardelli	(616) 752.2165
Andrea Bernard	(616) 752.2199
Scott Carvo	(616) 752.2759
Robert Chovanec	(616) 752.2120
Gerardyne Drozdowski	(616) 752.2110
Robert Dubault	(231) 727.2638
Daniel Ettinger	(616) 752.2168
Amanda Fielder	(616) 752.2404
Kathleen Hanenburg	(616) 752.2151
Angela Jenkins	(616) 752.2480
Tara Kennedy	(616) 752.2717
Gregory Kilby	(616) 752.2181
Jane Kogan	(248) 784.5193
Jonathan Kok	(616) 752.2487
Toni Kujawa	(248) 784.5172
Matthew Nelson	(616) 752.2539
Dean Pacific	(616) 752.2424
Steven Palazzolo	(616) 752.2191
Louis Rabaut	(616) 752.2147
Janet Ramsey	(616) 752.2736
Paul Sorensen	(616) 752.2135
Mary Tell	(616) 752.2793
Karen VanderWerff	(616) 752.2183
Donald Veldman	(231) 727.2603
Elisabeth Von Eitzen	(616) 752.2418

EMPLOYEE BENEFITS ATTORNEYS

Sue Conway	(616) 752.2153
April Goff	(616) 752.2154
Scott Hancock	(616) 752.2713
Anthony Kolenic, Jr.	(616) 752.2412
Norbert Kugele	(616) 752.2186
Mary Jo Larson	(248) 784.5183
Heidi Lyon	(616) 752.2496
John McKendry, Jr.	(231) 727.2637
Vernon Saper	(616) 752.2116
Justin Stemple	(616) 752.2375
Jennifer Watkins	(248) 784.5192
George Whitfield	(616) 752.2102
Lisa Zimmer	(248) 784.5191

Warner Norcross&Judd® LLP
ATTORNEYS AT LAW

900 Fifth Third Center
111 Lyon Street NW
Grand Rapids, MI 49503-2487

PRSRT STD
U.S. Postage
PAID
Grand Rapids, MI
Permit # 564

ADDRESS SERVICE REQUESTED

GRAND RAPIDS | HOLLAND | LANSING | MUSKEGON | SOUTHFIELD | STERLING HEIGHTS

wnj.com