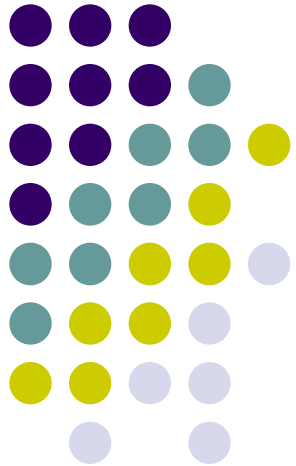
Employment Law Update for CPAs

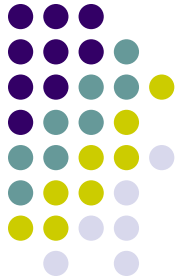
Courtney Bru

McAfee &Taft, P.C.

November 19, 2014



1. Amendments to Unemployment Laws

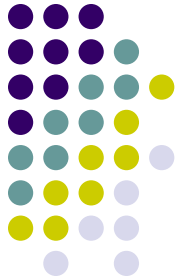


<u>Before November 1, 2013:</u>

"**Good cause**" defined for **other employees**:

- "A job working condition…had changed to such a degree it was so harmful, detrimental, or adverse to the individual's health, safety, or morals, that leaving the work was justified."

1. Amendments to Unemployment Laws

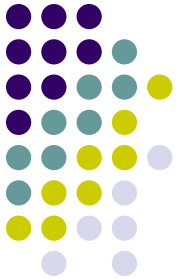


Effective November 1, 2013:

"**Good cause**" defined for **other employees**:

1. "A job working condition…had changed to such a degree it was so harmful, detrimental, or adverse to the individual's health, safety, or morals, that leaving the work was justified."
2. "Substantially unfair treatment of the employee or the creating of substantially difficult working conditions by the employer."

1. Amendments to Unemployment Laws



<u>Before November 1, 2013:</u>

Common law definition of "misconduct:"

- A "deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee, or [of] carelessness or negligence of such a degree or recurrence as to manifest equal culpability…, or [of] an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer's interests or of the employee's duties and obligations to his employer."

1. Amendments to Unemployment Laws

Effective November 1, 2013:

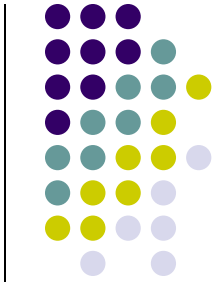
Statutory non-exhaustive definition of "**misconduct:**"

1. Unexplained absenteeism or tardiness
2. Willful or wanton indifference to or neglect of the duties required.
3. Willful or wanton breach of any duty required by the employer;
4. The mismanagement of a position of employment by action or inaction;

1. Amendments to Unemployment Laws

5. Actions or omissions that place in jeopardy the health, life or property of self or others;
6. Dishonesty;
7. Wrongdoing;
8. Violation of a law;
9. Violation of a policy or rule adopted to ensure orderly work or the safety of self or others.

1. Amendments to Unemployment Laws



<u>Effective November 1, *2014*:</u>

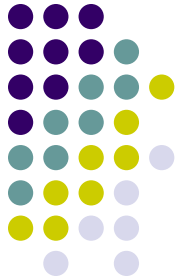
Statutory <u>exhaustive</u> definition of "**misconduct:**"

1. *Any intentional act or omission by an employee which constitutes a material or substantial breach of the employee's job duties or responsibilities or obligations pursuant to his or her employment or contract of employment*; → **Common Law**
2. Unapproved or excessive ~~Unexplained~~ absenteeism or tardiness;
3. *Indifference to, breach of, or neglect of the duties required which result in a material or substantial breach of the employee's job duties or responsibilities*; → **Common Law**

1. Amendments to Unemployment Laws

4. Actions or omissions that place in jeopardy the health, life or property of self or others;
5. Dishonesty;
6. Wrongdoing;
7. Violation of a law;
8. Violation of a policy or rule ~~adopted~~ *enacted* to ensure orderly *and proper job performance* ~~work~~ or the safety of self or others.

1. Amendments to Unemployment Laws

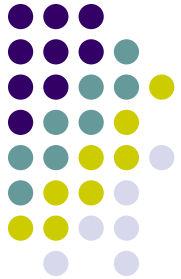


<u>Effective November 1, *2014*:</u>

Potential elimination of long-standing OESC practice:

- Any misconduct violation…shall not require a prior warning from the employer. As long as the employee knew, **or should have reasonably known**, that a rule or policy of the employer was violated, the employee shall not be eligible for benefits.

1. Amendments to Unemployment Laws



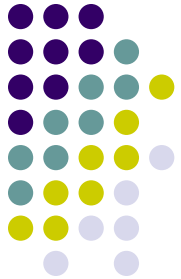
Effective November 1, 2013:

Burden of Proof:

Employer: prove employee engaged in misconduct by (1) signed affidavit or (2) other such evidence.

Shifts to Employee: facts are (1) inaccurate, or (2) do not constitute misconduct

1. Amendments to Unemployment Laws



Before November 1, 2013:

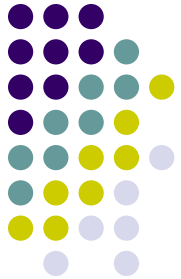
To obtain benefits, claimant must prove "breach in the chain of custody."

- OSWDATA does not specify whether employee or laboratory must create, maintain chain of custody documentation.

Effective November 1, 2013:

To obtain benefits, claimant must prove "the test was not properly conducted."

1. Amendments to Unemployment Laws



Untimely Objections:

Effective November 1, 2014: “An untimely employer objection to a claim for unemployment benefits…may be allowed for **good cause** shown.”

2. ADA Developments

"No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment."

Covered entity = 15 or more employees each working day in each of 20 or more calendar weeks in current/preceding calendar year

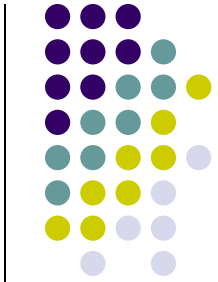
2. ADA Developments

Qualified Individual = an individual who, with or without reasonable accommodation, can perform essential functions of the position

Disability:

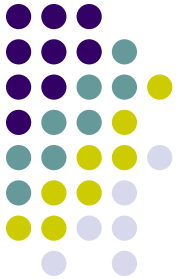
1. A physical or mental impairment that substantially limits one or more major life activities,
2. A record of such an impairment, *or*
3. Being regarded as having such an impairment.

2. ADA Developments – Interactive Process



"To determine the appropriate accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."

2. ADA Developments – Interactive Process

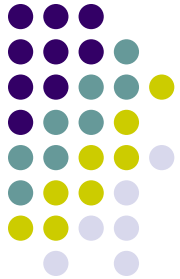


Incorporate expectations into written policies.

Do not wait! May be triggered by:

1. Actual request
2. *Open, obvious disability*
3. *Open, obvious impact on job duties*
4. *Reasonable belief that disability exists*

2. ADA Developments – Interactive Process



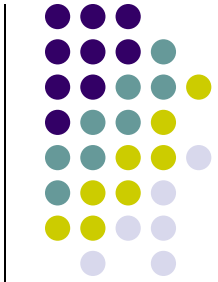
<u>Before</u> the discussion:

Review all qualification standards.

Review all job descriptions to determine essential functions.

Summarize conduct or observations.

2. ADA Developments – Interactive Process



<u>During</u> the discussion:

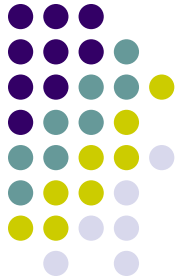
Address only the conduct or symptoms, not assumptions regarding the *cause* of conduct.

When in doubt, assume the impairment qualifies as a disability and move on to potential accommodations.

May request documentation "where the disability and need for accommodation are not obvious or already known."

Document: (1) substance of interactive process, including all requested accommodations; (2) date, time, place of discussion(s); (3) witnesses to the discussion; (4) contact with outsiders.

2. ADA Developments – Interactive Process



<u>After</u> the discussion:

Complete necessary documentation.

Discuss with others, as necessary.

Document: (1) substance of interactive process, including all requested accommodations; (2) date, time, place of discussion(s); (3) witnesses to the discussion; (4) contact with outsiders.

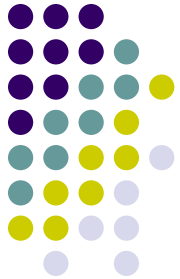
Be willing to have multiple discussions.

Do not make a decision as to reasonable accommodation on the same date.

2. ADA Developments

Critical importance of immediate supervisors: Training to spot potential issues that may trigger the interactive process.

2. ADA Developments – Reasonable Accommodation

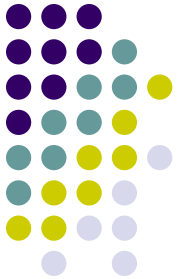


Provide “reasonable accommodation” unless it imposes an “undue hardship” (i.e., “significant difficulty or expense”):

(1) Make existing facilities readily accessible, usable
(2) Job restructuring, including without limitation:

- modified work schedules
- reassignment to vacant position
- acquisition or modification of equipment or devices
- appropriate adjustment of policies

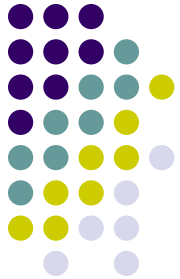
2. ADA Developments – Requests for Accommodations



"Employees have a burden to request accommodation unless the employer has foreclosed the interactive process through its policies or explicit actions."

- Must "made an adequate request."
- Need not be formal or in writing.

2. ADA Developments – Requests for Accommodations



Extended (unpaid) leave may be a reasonable accommodation.

Beware of blanket policies that result in automatic termination at conclusion of STD, LTD, WC, FMLA.

- Multi-million dollar consent decrees!!

2. ADA Developments – Drug Testing, Exams

Status/Condition	Qualifies as "Disability"
Current use illegal drugs	No
Casual use illegal drugs	No
Addiction to illegal drugs Former addiction to illegal drugs Regarded as addicted to illegal drugs	Yes, if substantially limits one or more major life activites
Alcoholic	Yes

2. ADA Developments – Drug Testing, Exams

1. Can ask applicants about illegal drug use, arrests for illegal drug use.
2. Must remain able to perform essential functions, with or without reasonable accommodation.

2. ADA Developments – Drug Testing, Exams

If positive test result, conduct verification interview and "ask about lawful drug use or possible explanations for the positive result other than the illegal use of drugs."

- DOT testing: MRO obtains information.
- OSWDATA testing: MRO "shall not disclose…any information relating to the general health, pregnancy or other physical or mental condition of the applicant or employee."

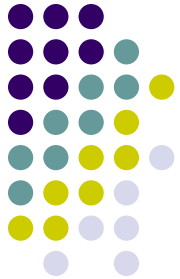
2. ADA Developments – Prescription Drug Use

EEOC v. Helmerich & Payne (N.D. Okla. 2014):

Alleges violation of ADA due to "unlawful qualification standard that screens out or tends to screen out an individual with a disability and which is not job related and consistent with business necessity."

- Policy = self-disclose prescription medications that "could cause impaired job performance."
- Current "Enforcement Guidance" on "Disability-Related Inquiries and Medical Examinations" allows only if position affects public safety and employer can demonstrate "direct threat."

2. ADA Developments – Attendance is an Essential Function



"Regular and predictable attendance" is generally considered an essential function for many positions.

- *Written job description is critical*.

Crowell v. Denver Health & Hosp. Auth. (10th Cir. 2014):

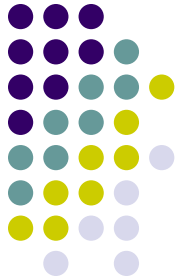
"Although…modified work schedules [may be] a reasonable accommodation, an unpredictable, flexible schedule that would permit Crowell to leave work whenever she has a medical episode is unreasonable as a matter of law."

2. ADA Developments – Attendance is an Essential Function

Hwang v. Kansas State University (10th Cir. 2014):

"It perhaps goes without saying that an employee who isn't capable of working for so long isn't an employee capable of performing a job's essential functions – and that requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation. After all, reasonable accommodations – typically things like adding ramps or allowing more flexible working hours – are all about enabling employees to work, not to not work."

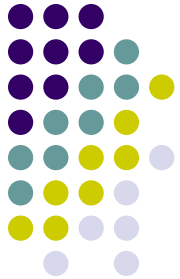
3. FMLA Developments – Redefining “Spouses”



FMLA itself defines “spouse” as “a husband or wife, as the case may be.” 29 U.S.C. § 2611.

FMLA regulations define “spouse” as “a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.” 29 C.F.R. §§ 825.102, 825.122(a).

3. FMLA Developments – Redefining "Spouses"



United States v. Windsor (2013):

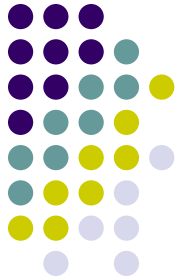
Section 3 of DOMA provided "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

Limited FMLA leave available to same-sex spouses.

Held: Section 3 unconstitutional under 5th Amendment

Impact = federal employment laws, federal tax laws, etc.

3. FMLA Developments – Redefining "Spouses"



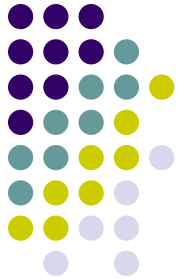
September 16, 2013: IRS, USDOL statement:

Will recognize same-sex marriages for federal tax, ERISA purposes

June 20, 2014: USDOL notice of proposed rulemaking:

"As of June 26, 2013, under the current FMLA regulatory definition of spouse, eligible employees in a legal same-sex marriage who reside in a State that recognizes their marriage may take FMLA spousal leave."

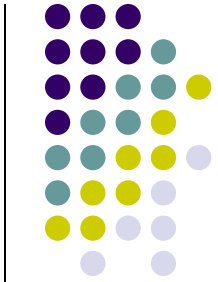
3. FMLA Developments – Redefining "Spouses"



Revisions to 29 C.F.R. §§ 825.102, 825.122(a):

"**Place of Celebration**" Rule – "Husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either (1) was entered into in a State that recognizes such marriages, or (2) if entered into outside of any State, is valid in the place where entered into an could have been entered into in at least one State."

3. FMLA Developments – Redefining "Spouses"



January 14, 2014

Bishop v. United States (N.D. Okla.)

Held: "Oklahoma's constitutional amendment limiting marriage to opposite-sex couples violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution."

October 6, 2014

U.S. Supreme Court refuses to hear *Bishop* appeal

Result = same-sex marriages allowed in Oklahoma

3. FMLA Developments – Redefining “Spouses”

Impact extends to all types of FMLA leave:

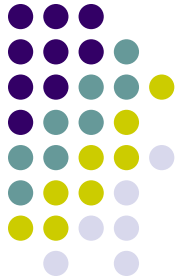
Care for “spouse” with serious health condition.

Military caregiver leave for same-sex “spouse.”

Qualifying exigency leave for same-sex “spouse.”

Revise your written policies accordingly.

3. FMLA – Health Insurance



"*Must* maintain the employee's coverage under any group health plan on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period."

Employee must continue to pay his/her portion of insurance premiums → work out procedures.

Obligation ends when payment is more than 30 days late and employer has given 15 days' written notice advising that benefits may cease.

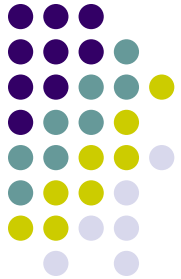
3. FMLA – Health Insurance

Obligation ends when employee advises of intent not to return to work, or fails to return to work.

Failure to return from FMLA leave triggers COBRA obligations. 26 C.F.R. § 54.4980B-10.

Transition from FMLA to LTD *may* trigger COBRA obligations – depends on whether individual remains eligible for health coverage while on LTD.

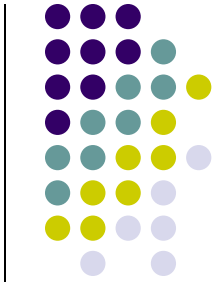
4. New EEOC Pregnancy Discrimination Guidelines



"Disabilities" extend to all stages of (potential) pregnancy:

1. Current Pregnancy – stereotypes, assumptions
2. Past Pregnancy – miscarriage, abortion
3. Potential/Intended Pregnancy – reproductive risks, fertility treatments
4. Use of contraception

4. New EEOC Pregnancy Discrimination Guidelines

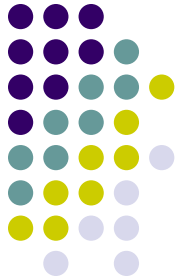


Confirms a “normal pregnancy” is generally not a “disability.”

BUT, a pregnancy-related impairment that substantially limits one or more major life activities can be a “disability” under the ADA, requiring accommodation:

- More frequent breaks
- Keep a water bottle at a work station
- Use a stool
- Altering how job functions are performed
- *Providing a temporary assignment to a light duty position.*

4. New EEOC Pregnancy Discrimination Guidelines

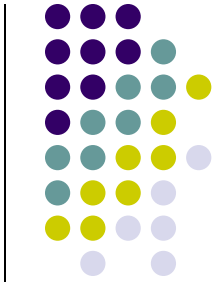


EXAMPLE:
Employer provides light duty, subject to availability, for any employee who cannot perform job duties due to injury, illness or condition that constitutes a "disability."

Pregnant employee requests light duty assignment due to 20-pound lifting restriction.

Employer denies request because pregnancy itself is not a "disability" under the ADA.

4. New EEOC Pregnancy Discrimination Guidelines

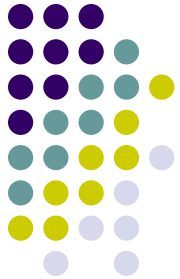


CONCLUSION:

"The employer has violated the PDA because the employer's policy treats pregnant employees differently from other employees similar in their ability or inability to work."

"An employer does not violate the PDA when it offers benefits to pregnant workers on the same terms that it offers benefits to other workers similar in their ability or inability to work… If an employer's light duty policy places certain types of restrictions on the availability of light duty positions (i.e., duration), the employer may lawfully apply those restrictions to pregnant workers…."

4. New EEOC Pregnancy Discrimination Guidelines



Targeting neutral policies with discriminatory impact:

- Deny leave during initial or probationary period of employment.
- Prohibits STD during initial or probationary period of employment.
- Caps consecutive sick leave.

4. New EEOC Pregnancy Discrimination Guidelines

Young v. UPS, Inc. (4th Cir. 2014):

Employer provided light duty assignments for employees who were injured on the job, but did not offer light duty to employees suffering from conditions that were not job-related

Held: Employer's refusal to provide light duty to pregnancy employees with lifting restrictions did not violate the ADA (4th Circuit).

U.S. Supreme Court will weigh in…

- Oral argument: December 3, 2014

5. NLRB Remains Active

National Labor Relations Act (1935):

Section 7 – "*Employees* shall have the right to…engage in other concerted activities for the purpose of…other mutual aid or protection…."

Excludes:

- Purely individual complaints
- Not targeted at group action

Includes:

- During non-working hours
- Any devices

5. NLRB Remains Active

Activities protected by Section 7 include:

Discussions with public, press, non-coworkers.

Activities during working and non-working hours.

Use of employer- or personally-owned devices.

All “preliminary steps,” need “only a speaker and a listener.”

5. NLRB Remains Active

Section 8(a)(1) – prohibits an employer's rule/policy if it "would reasonably tend to chill employees in the exercise of their Section 7 rights." *See* 29 U.S.C. § 158(a)(1).

Unlawful if:

(1) Expressly restricts Section 7 activities; or

(2) Employees would construe as restriction; rule enacted in response to protected activity; *or* rule applied to restrict Section 7 activities.

5. NLRB Remains Active

<u>"PER SE" UNLAWFUL POLICIES</u>:

- "Do not contact media (unless pre-authorized)."
- "Do not distribute/solicit/post/etc. without first obtaining permission from management."
- "*Do not discuss salary information*."
- "Do not discuss details about your job, company business or work projects with anyone outside the company."
- Confidentiality of employment records.
- Limitations on social networking activities.

5. NLRB Remains Active

SUSPECT POLICIES:

- "Disparagement"
- "Defamation"
- "Inappropriate"
- "Disrespectful"
- "Unprofessional"
- "Insubordination"
- Prohibit use of employer name or marks

CANNOT REQUIRE:

- Disclaimer that views do not represent those of employer.

5. NLRB Remains Active

May prohibit use of “social media to post or display comments about workers or supervisors or the Employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer’s workplace policies against discrimination, harassment, or hostility on account of age, race, religion,” etc. Limit content to matters not in violation of securities regulations and other similar laws.

May prohibit disclosure of confidential, sensitive, or non-public information in certain industries – healthcare.

5. NLRB Remains Active

NLRB has struck down “blanket” confidentiality policies, including “need to know” policies.

Section 7 right to discuss discipline of coworkers.

Can prohibit disclosure only if “a legitimate and substantial business justification.”

And “may decide in some circumstances that to achieve [objectives]…hold in strict confidence.”

6. Social Media Developments

Screen applicants, either before or after conditional offers of employment

Monitor employees (to ensure compliance with policies)

Prevent disclosure of trade secrets or other confidential information

Monitor for violations of non-competition agreements.

6. Social Media Developments

Risks:

- Discrimination/retaliation
- Defamation
- NLRA
- Federal communications acts
- Common law right of privacy
- Public policy exception to at-will employment (i.e., the *Burk* tort).

6. Social Media Developments

"Facebook is not used as a means by which account holders carry on monologues with themselves; it is a device by which users share with others information about who they are, what they like, what they do, and where they go, in varying degrees of detail."

→ Protected by NLRA Section 7

6. Social Media Developments

- Facebook discussion regarding tax withholdings from paychecks.
- Employee “liked” discussion comments.
- Terminated for “disloyalty” in violation of Section 7.
- Written “Internet/Blogging” policy provided that “inappropriate discussions about the company, management, and/or coworkers…is subject to disciplinary action,” in violation of Section 8.

6. Social Media Developments

New Oklahoma statute (40 O.S. 173.2):

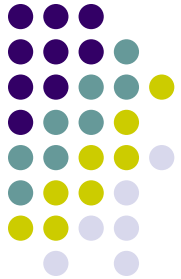
- Cannot require applicant or employee "to disclose a user name and password or other means of authentication for accessing personal online social media account through electronic communications device."
- Cannot require applicant or employee to access personal social media account in presence of employer.
- Cannot retaliate for refusing to allow access.

6. Social Media Developments

New Oklahoma statute (40 O.S. 173.2):

- Can require disclosure for accessing any device "provided or subsidized by the employer."
- Can conduct investigation based on "specific information about activity on a personal online social media account" to ensure compliance with "applicable laws, regulatory requirements or prohibitions against work-related employee misconduct."
- Can access own computer system or IT network to review social media accounts accessed while utilizing employer's networks.

7. Affordable Care Act – Provisions Already in Effect



U.S. DOL model notices:

1. For employers that offer a health plan.
2. For employers that do not offer a health plan.

U.S. DOL COBRA Model Election Notice:

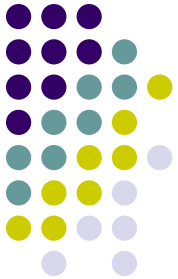
- informs qualified beneficiaries of coverage options available through exchanges.*

All available at: http://www.dol.gov/ebsa/healthreform/regulations/coverageoptionsnotice.html

7. Affordable Care Act – Provisions Already in Effect

For plan years beginning on or after January 1, 2014, a group health plan shall not apply any waiting period that exceeds 90 days.

7. Affordable Care Act: ~~Delays~~ "Transitional Relief"

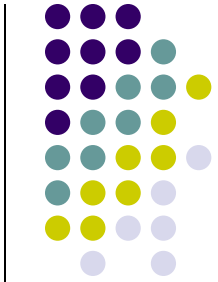


Employer Mandate:

1. **No coverage:** an applicable large employer fails to offer minimum essential coverage to at least 95% (or 5, if greater) of its full-time employees and their ***dependents*** for a particular month, *and* at least one full-time employee enrolls in the Exchange, *and* that employee receives a premium tax credit or a cost-sharing reduction based on the employee's household income.

Transition Relief (plan year 2015) = 70%

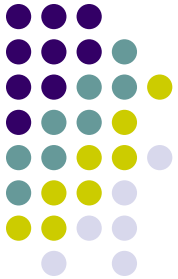
7. Affordable Care Act: ~~Delays~~ "Transitional Relief"



Employer Mandate:

1. **Penalty**: 1/12th of $2000 for all FTEs in excess of 30, per month (including any full-time employees that are offered "minimum essential coverage").

7. Affordable Care Act: ~~Delays~~ "Transitional Relief"

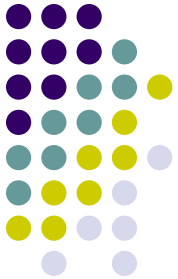


Employer Mandate:

2. **Inadequate coverage:** an applicable large employer fails to offer affordable health insurance with minimum value to substantially all full-time employees and their ***dependents*** for a particular month, *and* at least one full-time employee enrolls in the Exchange, *and* that employee receives a premium tax credit or a cost-sharing reduction based on the employee's household income.

Transition Relief (plan year 2015) = 70%

7. Affordable Care Act: ~~Delays~~ "Transitional Relief"



Employer Mandate:

2. **Penalty**: 1/12th of $3000 for all full-time employees that receive credit/reduction in the exchange, per month, up to:

   1/12th of $3000 x NUMBER OF FULL-TIME EMPLOYEES MINUS 30

Transition Relief (plan year 2015): if 100+ employees

1/12th of $3000 x NUMBER OF FULL-TIME EMPLOYEES MINUS ***80***

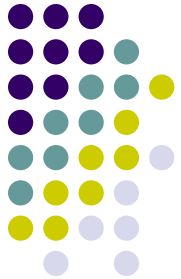
7. Affordable Care Act: ~~Delays~~ "Transitional Relief"

Transition Relief (plan year 2015) – Dependents:

1. Not previously provided "dependent" coverage in 2013 or 2014,
2. 2015 plan does not provide "dependent" coverage or inadequate "dependent" coverage, *and*
3. Take steps during 2014 or 2015 to extend coverage to "dependents,"

No assessments solely on account of failure to provide "dependent" coverage.

7. Affordable Care Act: ~~Delays~~ "Transitional Relief"



Assessments may be delayed until 2016, if...

1. Employer employs at least 50 but fewer than 100 FTEs or equivalent during 2014;
2. Employer does not reduce the size of its workforce or the hours of service solely for the purposes of meeting these criteria;
3. Employer does not eliminate or materially reduce the coverage, if any, offered as of February 9, 2014; *and*
4. The employer certifies satisfaction of these criteria and provides.

8. “Ban the Box” Movement

EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions under Title VII

- Focus on race, national origin – “African Americans and Hispanics are arrested in numbers disproportionate to their representation in the general population.”
- Must be job-related and consistent with business necessity

8. “Ban the Box” Movement

EEOC Litigation Strategy:

- File suit based on use of criminal background checks, credit checks in hiring process
- Required to pay $750k attorney’s fees and costs
- Dismissed case, noting “something more, far more, than what is relied upon by the EEOC in this case must be utilized to justify a disparate impact claim based upon criminal history and credit checks.” EEOC’s expert witness committed “an egregious example of scientific dishonesty.”

8. “Ban the Box” Movement

To adopt “fair hiring policies” to remove “unfair barriers to employment of people with criminal records.”

8. “Ban the Box” Movement – Statewide

California
Colorado
Connecticut
Delaware
Hawaii
Illinois
Maryland
Massachusetts
Minnesota
Nebraska
New Jersey
New Mexico
Rhode Island

8. “Ban the Box” Movement – Municipalities, Counties

Boston, MA
San Francisco, CA
Chicago, IL
Baltimore, MD
Austin, TX
New York, NY
Seattle, WA
Memphis, TN
Philadelphia, PA
St. Paul, MN
Oakland, CA
Berkeley, CA
Providence, RI
Jacksonville, FL
Cincinnati, OH
Detroit, MI
Washington, D.C.
Durham, NC

9. Severance Payments are Taxable

U.S. Supreme Court unanimously ruled FICA taxes must be withheld on severance payments, at least those based on employee functions, seniority or otherwise related to employment "services."

These types of severance payments are "wages."

Questions?

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