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New health care law contains 'surprise' employment law changes

Buried in the mammoth health care reform law are some changes in employment law that will affect companies and their employees.

A few of these changes were added by Congress at the last minute, with the result that not many people are prepared for them or are even aware of them.

Here's a summary of the some of the major changes:

- **Mandatory break time for new mothers**

Employers will be required to provide nursing mothers with "reasonable break time" to express breast milk under an amendment to a federal law that covers labor standards.

Companies will have to provide this time for up to one year after the birth of a child.

Seventeen states and the District of Columbia already have laws on the books with similar requirements. Where the state and federal laws differ, an employer must follow the one that gives the most benefits to nursing mothers.

A few details about the new law will have to be worked out when the Department of Labor issues regulations. For example, the new rule may conflict with various federal and state laws that deal with meal and rest breaks.

Another question that employers and workers may have is: What does "reasonable" mean? The term is not defined in the law, so the length of time employers must allow for a break is also up in the air.

There is also nothing in the new law that explains what kind of penalties will be imposed on employers who fail to follow the rules.

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Employers with fewer than 50 employees may be excused from following the rule if they can

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'Surprise' changes in health care law *continued from page 1*

Congress's last-minute actions have caught many people unawares.

show that it would pose an "undue hardship" for them.

- **Tax credit for providing health insurance**

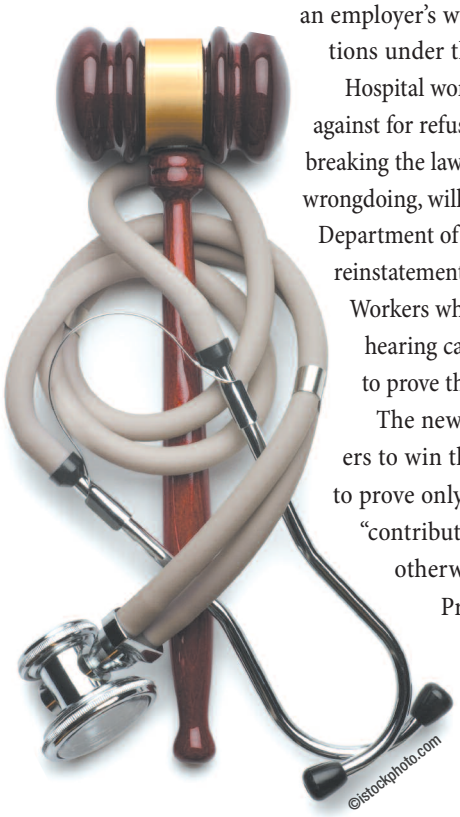
Companies that have 25 or fewer employees and pay averages wages of less than $50,000 are eligible for a tax credit if they provide health insurance to employees.

From 2011 to 2013, the credit can reach up to 35 percent of the employer's health care contribution if the company pays at least 50 percent of the premiums.

Beginning on January 1, 2011, employers will be required to disclose the value of their contribution to each employee's health insurance coverage on the employee's W-2 form.

- **Help for hospital whistleblowers**

Employees of hospitals who "blow the whistle" on an employer's wrongdoing will get new protections under the law.



Hospital workers who claim they were retaliated against for refusing to go along with an employer in breaking the law, or for reporting an employer's wrongdoing, will be entitled to a hearing before the Department of Labor where they can be awarded reinstatement, money damages and attorney fees. Workers who lose at the Department of Labor hearing can still go to court afterward and try to prove their case a second time.

The new law also makes it easier for workers to win their case, because they now have to prove only that their whistleblowing was a "contributing factor" in their getting fired or otherwise being discriminated against. Previously, they had to prove that their whistleblowing was the sole cause.

If employees prove that whistleblowing was a "contributing factor," then they will win unless the employer can prove by "clear and convincing evidence" that it would have taken the same action anyway for unrelated reasons.

- **Employer-sponsored health plans**

As for the changes in how employers operate group health plans for employees, there are many new rules:

- Annual or lifetime dollar limits on claims are prohibited.
- Children of covered employees must be covered up to age 26.
- Plans may not exclude preexisting conditions for children under age 19 beginning this year. (For adults, the prohibition begins in 2014.)
- Once an individual is covered, a plan may not take away coverage unless a worker commits fraud or intentionally misrepresents an important fact.
- Employers cannot charge some employees more than others for health insurance.
- Certain preventive services and immunizations must be covered without cost to employees.
- Taxes on withdrawals from health savings accounts for non-health related reasons will go up. Contributions to a flexible spending account are capped at $2,500. Expenses for over-the-counter medications (other than insulin) are no longer eligible for tax-free reimbursement from FSAs and HSAs.
- Starting in 2014, employers who don't provide health insurance to employees must pay $2,000 per employee to the government, although the first 30 employees are free. Therefore, a company with fewer than 30 employees will not have to pay anything.
- Starting in 2011, every plan must pay $2 per participant per year to the government for research.

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Employee's LinkedIn profile may be used against her

In one of the first cases of its kind, a company is using an employee's LinkedIn profile as evidence against her in a federal lawsuit.

The company sued a former employee, claiming that she took company secrets and client lists with her to her new job. The employee was responsible for recruiting contract workers for a placement firm that specialized in IT work.

In its lawsuit, the company said that judging from the employee's LinkedIn profile, she had made connections with over 20 of the company's workers. The company claims she violated her non-compete agreement by emailing the employees and asking if they were "still looking for opportunities" and inviting them to "visit my new office and hear about some of the stuff we are working on."

Social media, including LinkedIn, Facebook and Twitter, can be a great way to stay in touch and make connections, but they can also lead to trouble as unguarded comments can be used later as damning evidence against an employee or against an employer.

Many companies have begun implementing policies covering how and when employees can use social media, especially on company laptops, smart phones and pagers.

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Screening an employee's credit may be illegal

It may be illegal for an employer to conduct a credit check of a job applicant or an employee, according to a recent letter from the Equal Employment Opportunity Commission.

Even though credit checks don't violate any federal employment laws, they could violate discrimination laws if they have a disproportionate impact on women, minorities or other protected groups, the EEOC says.

However, an employer can still conduct credit checks if it can show that doing so is necessary for it to operate safely or efficiently. For instance, screening the credit of a job applicant or employee might be appropriate if the person is to handle large amounts of cash.

More sex harassment suits are being brought by men

Even though the overall number of sex harassment complaints has declined in recent years, the number of these complaints filed by men is on the increase.

The number of harassment claims filed by men has doubled in the past 20 years. Last year, male employees claiming harassment hit an all-time high of 14 percent of the cases.

Most of these claims involve male-on-male harassment.

Although same-sex harassment cases had been filed for years beforehand, the U.S. Supreme Court definitively allowed these claims under the federal sex discrimination laws back in 1998.

Restaurant's tip-pooling arrangement was okay

A restaurant's tip pooling arrangement, which required tips to wait staff to be shared with non-waiters such as kitchen workers, didn't violate federal labor laws, according to a decision by a federal appeals court.

The Vita Café in Portland, Oregon paid its waiters and waitresses $2.10 more than the federal minimum wage.

Under its tip pooling policy, the café redistributed tips to all restaurant employees, with the majority (between 55 and 70 percent) going to kitchen staff and the remainder to the servers in proportion to hours worked.

A waitress sued the café, claiming this violated federal wage rules.

But the court decided that there is no general rule that tips are the property of an employee, and that employees must be allowed to keep all of their tips only if the café has taken a "tip credit" toward its minimum wage obligations.

Employee can prove retaliation with less evidence

An employee who claimed her employer fired her in retaliation for complaining about gender and age discrimination can prove her case with less evidence than if she had sued for age discrimination itself, a federal appeals court has ruled.

After 22 years with Xerox and being named one of the company's top eight employees in the country, the employee was fired. She claimed she was fired by a new supervisor who immediately began making negative decisions about her because of her age and gender.

She sued Xerox under Title VII, a federal anti-discrimination law that prohibits an employer from retaliating against a worker who has filed a discrimination complaint with the Equal Employment Opportunity Commission.

At trial, the jury was told that if her age and gender were "motivating factors" in firing her, then she proved retaliation, *even if* the employer had other motives for getting rid of her. The jury awarded her $67,000 in damages.

Xerox appealed, arguing that the jury should have been told that in order to win, the employee had to prove that the employer would not have fired her *but for* her EEOC complaint. This would be the test in an age discrimination case under the Age Discrimination in Employment Act, where employees must show that they wouldn't have been discriminated against but for their age.

But the court said that the test for retaliation under Title VII is easier than the test for age discrimination itself. Therefore, the employee won.

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