

Legislative and Regulatory Issues of Note

Prepared by the CUPA-HR Public Policy Committee

June/July 2011

Key CUPA-HR actions since March 2011

Employer Provisions of Healthcare Law: The committee provided feedback and edits and approved comments that CUPA-HR and SHRM submitted on June 17 responding to a Treasury Department and Internal Revenue Service (IRS) notice on employer provisions of the Patient Protection and Affordable Care Act (PPACA). The committee also approved CUPA-HR signing onto similar comments submitted by the Employers for Flexibility in HealthCare Coalition.

Proposed Regulations of Student Health Insurance Coverage: The committee approved comments that CUPA-HR signed with the American Council on Education (ACE) and other higher education organizations submitted April 12. The comments responded to a proposed rule from the Centers for Medicare & Medicaid Services (CMS) and the Department of Health and Human Services (HHS) on student health insurance coverage under the Patient Protection and Affordable Care Act (PPACA).

Final Implementing Regulations for the ADAAA: On March 25 the Equal Employment Opportunity Commission (EEOC) published its final regulations implementing the Americans with Disabilities Act Amendments Act (ADAAA) in the *Federal Register*. The regulations and accompanying interpretive guidance took effect on May 24. The EEOC issued a proposed rule on September 23, 2009. CUPA-HR filed comments with the American Council on Education on the proposal on November 23, 2009. The committee recommended CUPA-HR host a webinar on the final regulations; which was offered to members for free on June 2.

Incentive Compensation Regulations for College and University Employees: The U.S. Department of Education (DOE) has eliminated safe harbors on incentive compensation for institutional employees engaged in the recruitment or admission of students, or in making decisions regarding the award of student financial aid. The new rules take effect July 1. The committee discussed the regulations and recommended CUPA-HR host a webinar to educate members. The complimentary webinar, co-hosted by the National Association for College and University Attorneys (NACUA) was held on May 24. A white paper also was provided to members.

OFCCP Proposed Update on Affirmative Action Rule for Veterans: On April 26 the Office of Federal Contract Compliance Programs (OFCCP) published in the *Federal Register* its proposed rule to overhaul the federal contractor affirmative action program requirements for covered veterans, including a provision that would require contractors to establish numerical hiring benchmarks for protected veterans. The committee has discussed the issues with the proposal and will review and provide input on the comments CUPA-HR staff are working to prepare with SHRM and other veterans groups. On June 2 CUPA-HR and the other groups submitted a request for an extension of the comment period due to the complexity of the rule. OFCCP has since announced a fourteen day extension until July 11.

Detailed Issue Summaries

LEGISLATION

- ***Legal Workforce Act***

On June 14 the Chairman of the House Judiciary Committee, Lamar Smith (R-TX), introduced the *Legal Workforce Act* (H.R. 2164). The bill would require every employer to use E-Verify for new hires and many employers (including public employers and government contractors) to use e-verify for existing employees (the later within 6 months of enactment). H.R. 2164 contains a relatively strong preemption provision and a safe harbor for good faith compliance. It also includes a pilot program on biometrics. The mandate would be phased in over 2 years, with large employers (10,000+ employees) complying within 6 months and employers with 500-9,999 employees given 12 months, those with under 500 employees 18 months and employers with less than 20 employees 2 years.

We are working with committee staff to see if we can get some relief on the verification of current employees (including additional time), though it may not be likely as the Chairman feels strongly about the importance of this provision. We also have raised the issue that many of our visa holders may not get social security numbers soon enough to be run through the system and are talking with committee staff to see if there is a workable resolution. The committee held a hearing on the bill on June 15 and is expected to mark up the bill as soon as the week of July 4. Whether it moves to the House floor from there remains to be seen.

- ***Repeal of Expanded 1099 Information Reporting Requirements***

On April 14 the President signed a bill repealing the expanded 1099 information reporting requirements signed into law last March as a part of the Patient Protection and Affordable Care Act (PPACA). The committee has been following the issue and approved CUPA-HR signing onto a letter to Congress this fall urging repeal of the provision. The expanded 1099 reporting requirement, which was scheduled to take effect in 2012, would have required most businesses to file Form 1099s for every business-to-business transaction of \$600 or more for both property and services. There was bipartisan support for repeal after it was discovered that the 1099 provision could potentially increase businesses' reporting requirements by nine times. The 1099 requirement was included in the PPACA originally because it was projected to raise \$17.1 billion dollars over 10 years so it offset significant costs of the healthcare reform bill.

- ***Employment Non-Discrimination Act***

The Employment Non-Discrimination Act (ENDA, H.R. 1397/S. 811) was reintroduced in the House by Rep. Barney Frank (D-MA) and in the Senate by Sen. Jeff Merkley (D-OR) on April 6 and 13, respectively. ENDA would prohibit discrimination on the basis of an individual's actual or perceived sexual orientation or gender identity in decisions regarding hiring, firing, compensation and other terms, conditions or privileges of employment. ENDA would apply to employers with 15 or more employees, but includes some exemption for religious employers and armed forces. CUPA-HR supported a version of the bill in the previous Congress; however, like other employer groups, CUPA-HR recognized material concerns during the last Congress, particularly related to the level of the EEOC's rule-making authority under the proposed legislation -- a concern heightened after the EEOC issued overly-expansive proposed regulations on the Genetics Information Nondiscrimination Act (GINA) and the ADA Amendments Act (ADAAA). For example, CUPA-HR members could be particularly impacted if the EEOC used the regulatory process to make substantive changes to the bill's religious

institution exemption. CUPA-HR supports the spirit of this legislation and remains open to supporting the bill, depending on the form it ultimately takes when re-introduced. However, congressional action on the bill seems unlikely in the near future. The Senate may hold a hearing or a vote on the bill next year depending on the perceived value in motivating the Democratic base for 2012 election, but there is no chance of passage this Congress.

- ***Paycheck Fairness Act***

The Paycheck Fairness Act (PFA, H.R. 1519/S.797) was reintroduced this Congress by Rep. Rosa DeLauro (D-CT) and Sen. Barbara Mikulski (D-MD) on April 12. CUPA-HR strongly supports the concept of equal pay for equal work, where pay decisions are un-influenced by irrelevant and discriminatory factors such as age, gender, race, religion, color, national or ethnic origin, disability, military status, or sexual orientation. However, the Paycheck Fairness Act, as it has been introduced, could have unintended consequences that restrict employers' flexibility to compensate its employees even based on valid, relevant differences – such as cost-of-living differences among geographic locations, different work responsibilities within similar job categories, or prior documented performance history. Due to concerns about the scope of the legislation's language, including increased potential for class action suits, unlimited punitive damages to employers, and the implication as written that employers are assumed guilty (of gender-based pay disparity) until proven innocent (by having to document conclusively that any differential is "job related and consistent with business necessity") CUPA-HR opposed the bill as drafted. If Senate Majority Leader Harry Reid (D-NV) does bring the bill up for consideration this Congress, it likely will not occur until closer to the 2012 elections, as Democrats see this as a key issue for women voters. The bill is not expected to pass this Congress.

- ***Public Safety Employer-Employee Cooperation Act***

The Public Safety Employer-Employee Cooperation Act (PSEECA) remains a priority for organized labor and Senate Democratic Leadership so it remains on the committee's radar screen. PSEECA would require states to provide collective bargaining rights for state and local firefighters, police and EMTs. The legislation would require the Federal Labor Relations Authority, which is now responsible for overseeing labor relations for federal employees, to establish criteria based on principles in the bill and require each state to meet these criteria. This would not only require states that do not have collective bargaining laws for firefighters, police and EMTs to enact such laws, but would force most, if not all, others states to amend their existing laws to meet the new criteria. Public universities that employ police and EMTs would be affected. CUPA-HR opposes the bill, believing this issue should be addressed at the state level without a new federal mandate. The Republican controlled House is not expected to support or consider the bill, so if it does move this Congress, it would likely be inserted by the Senate into a larger bill, like an appropriations bill.

- ***Tax Parity for Health Plan Beneficiaries Act***

Senator Chuck Schumer (D-NY) and Congressman Jim McDermott (D-WA) have re-introduced the "Tax Parity for Health Plan Beneficiaries Act" (S. 1171/H.R. 2088), that would remove some federal tax inequities that exist for employer-sponsored health coverage provided to non-spouse, non-dependant beneficiaries. Federal Tax law has not kept up with the increase in employers offering health benefits to domestic partners of employees, requiring nearly a 50% increase in payroll tax obligations for these employees compared to similarly situated co-workers with spousal coverage. The discrepancy in taxation between spousal coverage and domestic partner health coverage forces employers to create and maintain separate systems for income tax withholding and payroll tax obligations, placing a significant administrative burden

on employers. This legislation would remove these federal tax inequities and will permit a Voluntary Employees' Beneficiary Association (or a VEBA) to provide full benefits to domestic partners or other non-spouse, non-dependent beneficiaries without endangering an employer's tax-exempt status.

This year's legislation is largely unchanged from last year's bill, and the House and Senate bills will once again track one another. The only modifications that have been made are (1) a slight change in the title (to the Tax Parity (as opposed to Equity) for Health Plan Beneficiaries Act), (2) some non-substantive redrafting necessitated by passage of the health reform act last year, and (3) the addition of a new provision requested by several employers to make clear that 401(h) accounts, which are accounts attached to defined benefit pension plans that can be funded to finance retiree medical benefits, can be used to finance health benefits for the domestic partners (and other non-spouse, non-dependent beneficiaries) of retirees. CUPA-HR is a member of the Business Coalition for Benefits Tax Equity, a group of employers and business trade associations, supporting the proposed legislation.

- ***Public Employee Pension Transparency Act***
Rep. Devin Nunes (R-CA) and Sen. Richard Burr (R-NC) have introduced legislation called the "Public Employee Pension Transparency Act" (H.R. 567 and S. 347) that would establish federal accounting and disclosure standards for state and local public pension plans and ban any federal bailouts. It would also prohibit state and local government from issuing tax-exempt bonds if they fail to comply with the new standards.

Proponents of the bill, like the U.S. Chamber of Commerce and anti-tax groups, believe it will allow citizens to "accurately judge the performance of the state and local authorities in managing the public trust." However, others feel it would create a worrisome precedent regarding federal regulation of state and local governments and taxation of their bonds. Nunes originally introduced the bill at the end of last Congress, drawing opposition from the National Association of Counties, the National Leagues of Cities, the National Association of State Retirement Administrators and the National Council on Teacher Retirement, as well as the American Federation of State, County, and Municipal Employees (AFSCME). A hearing was held on the bill on May 5 in the House Ways and Means Subcommittee on Oversight.

REGULATIONS

Treasury and IRS

- *Comments on Certain Employer Provisions of PPACA*
On May 3 the Treasury Department and Internal Revenue Service (IRS) issued a request for public comment on issues relating to the shared responsibility provisions included in the Patient Protection and Affordable Care Act (PPACA) that will apply to certain employers beginning in 2014. The notice requested input from the public on several issues that will affect employers in advance of issuing a proposed rule; it does not constitute guidance. Specifically, the Treasury and IRS sought on the penalties for failure to offer affordable coverage and the definitions of employer, employee and hours of service. They were also seeking comments on the best method to determine if an employee is full-time, how to determine if an employer is a large employer and how the 90-day waiting period for group health plans should be interpreted. The committee approved of CUPA-HR signing on two different sets of comments, one with SHRM and the other with the Employers for Flexibility

in Health Care Coalition that were submitted on June 17.

Department of Health and Human Services

- *Proposed Regulations of Student Health Insurance Coverage*

On April 12 CUPA-HR joined other higher education associations in filing a community comment letter on the Department of Health and Human Services (HHS) proposed regulations on student health insurance coverage under the Patient Protection and Affordable Care Act (PPACA) and the Public Health Service Act. The proposed rule would define “student health insurance coverage” as a type of individual health insurance coverage and, pursuant to section 1560(c) of the PPACA, specify certain PPACA and Public Health Service Act requirements as inapplicable to this type of individual health insurance coverage.

The rule would apply the same consumer rights and protections to student health insurance coverage as other plans that fall under the PPACA, including the Patient’s Bill of Rights.

Insurers would no longer be able to impose lifetime limits on coverage, drop coverage due to unintentional mistakes on an application or deny or exclude coverage for students under age 19 because of a pre-existing condition. Under the rule, student health plans would be allowed to have annual dollar limits on essential health benefits of no less than \$100,000 for policy years beginning before September 23, 2012. Plans beginning after that date would need to comply with the PPACA’s annual limit restrictions of no less than \$2 million.

Student health plans affected by the rule are: plans that are provided by a college or university through a health insurance company; only available to enrolled students and their dependents; and available regardless of the students’ health status. The higher education community had worked closely with the White House on this issue since the webinar CUPA-HR organized with the White House on healthcare reform last summer.

Department of Education

- *Incentive Compensation Regulations for College and University Employee*

The U.S. Department of Education (DOE) has eliminated safe harbors on incentive compensation for institutional employees engaged in the recruitment or admission of students, or in making decisions regarding the award of student financial aid. The new rules take effect July 1. The committee discussed the regulations and recommended CUPA-HR host a webinar to educate members. The complimentary webinar, co-hosted by the National Association for College and University Attorneys (NACUA) was held on May 24.

Department of Labor

- **OFCCP**

- *Section 503 Proposal*

Based on the committee’s feedback, on September 21 CUPA-HR filed comments with SHRM on the Department of Labor’s Office of Federal Contract Compliance Programs’ (OFCCP) efforts to strengthen the affirmative action obligations for individuals with disabilities under the regulations implementing Section 503 of the Rehabilitation Act of 1973. OFCCP published an Advanced Notice of Proposed Rulemaking (ANPRM) on possible changes to government contractor obligations under Section 503 of the Rehabilitation Act on July 23. The Rehab Act predates the ADA and imposes duties on federal contractors to ensure equal opportunities for individuals with disabilities. OFCCP is considering adopting measures that would make the data collection and affirmative action requirements for applicants and

employees with disabilities similar to those currently required for women and minority applicants and employees. The CUPA-HR and SHRM comments expressed concern about this requirement as there are significant obstacles to collecting accurate data on individuals with disabilities. The OFCCP has not taken any further action on the ANPRM and it remains unclear as to when they will move forward with this proposal.

- *Rescission of Compensation Standards Proposal*

On January 3, the Office of Federal Contract Compliance Programs (OFCCP) published a Notice of Proposed Rescission (NPR) proposing to rescind its current systemic compensation discrimination standards and self-audit guidelines for evaluating pay practices for federal contractors and subcontractors under Executive Order 11246. The compensation standards and the voluntary self-audit guidelines were both adopted in 2006. In the NPR, the OFCCP asserts that the standards have limited the agency's ability to effectively investigate, analyze and identify compensation discrimination and that the guidelines are rarely used by federal contractors. The agency's view is controversial, as many in the employer community welcomed the 2006 changes. The OFCCP did not specify an alternative to the current standards, other than that it intends to adhere generally to "Title VII principles" in investigations of contractors' compensation practices. The committee approved comments that were filed with SHRM on March 4. It is unclear when OFCCP will take further action on their rescission proposal.

- *OFCCP Proposed Update on Affirmative Action Rule for Veterans*

On April 26 the Office of Federal Contract Compliance Programs (OFCCP) within the Department of Labor published in the *Federal Register* its proposed rule to overhaul the federal contractor affirmative action program requirements for covered veterans. The rule would clarify and provide greater detail in the steps that a federal contractor must take to comply with the Veterans' Readjustment Assistance Act and its amendments. The proposed rule would also increase collection obligations and require contractors to establish numerical hiring benchmarks for protected veterans.

The Obama administration has put a priority on increasing affirmative action efforts for federal contractors and we expect to see other proposed rules from OFCCP in this area for the construction industry, as well as one dealing with requirements for persons with disabilities.

The committee has discussed the issues with the proposal and will review and provide input on the comments CUPA-HR staff are working to prepare with SHRM and other veterans groups. On June 2 CUPA-HR and the other groups submitted a request for an extension of the comment period due to the complexity of the rule. OFCCP has since announced a fourteen day extension until July 11.

- ***Wage and Hour Division***

- *"Right to Know" Proposal*

A "Right to Know" proposed rule was expected to be issued in April. The rule would require employers to provide workers with details about why they have been classified as an independent contractor or employee. It would require employers provide employees with details on how their pay is computed (hourly or exempt) and why. The proposal has not yet been issued, but other agency activities have indicated that they still intend to release it – though the timing is unclear.

- *FMLA Changes*
DOL has been conducting a survey of employers over the past six months gathering information to measure the impact of the FMLA. The information obtained through the survey will supplement the normal time-use information also provided by employers to the Bureau of Labor Statistics. The results of the survey are expected in January 2012. Employer groups have suspected for some time that this survey may be used as grounds to reverse the FMLA regulatory changes made by the Bush administration.
- ***Occupational Safety and Health Administration***
 - *MSD (Ergonomic Injury) Proposal*
The Occupational Safety and Health Administration (OSHA) is now revisiting a rule that would require employers to record Musculoskeletal Disorders (MSDs or Ergonomic injuries) injuries in a separate column on "the form 300" injury and illness logs. In January, OSHA had said that they were "temporarily" withdrawing the proposal from OMB review. The proposal had been languishing at OMB since mid July. Over the last few months, OSHA has been soliciting more input on the proposal from small businesses. It is unclear how or when they will proceed, but OSHA has indicated that they are moving forward again.
 - *I2P2 Proposal*
OSHA plans to propose a rule that would require that all employers create a workplace Injury and Illness Prevention Program (I2P2). OSHA has said it will convene a Small Business Regulatory Flexibility Act review panel (the first step to a proposed regulation) in June 2011. California, which is one of the state's that has opted out of OSHA by creating its own state plan, already has a similar requirement. Businesses have had few complaints about the California rule, but business groups are concerned that the OSHA regulation will be more onerous.
- ***Office of Labor-Management Standards***
 - *Proposal to Change Reporting Requirements for Employers Facing Union Organizing*
On June 20, the Office of Labor-Management Standards (OLMS) released a proposed rule that would increase reporting requirements for employers facing union organizing campaign. Under the Labor-Management Reporting and Disclosure Act (LMRDA), an employer must report any agreement or arrangement with a third party consultant to persuade employees about union organizing. However, attorneys and other consultants hired to provide advice to employers facing organizing campaigns generally do not trigger the reporting requirement unless they speak directly to employees. DOL's proposal would significantly narrow this "advice exemption," requiring employers to report substantially more information, including correspondence with attorneys. The committee will be discussing the possible impact of the proposals and CUPA-HR's position in the next call.

Equal Employment Opportunity Commission

- *Final Implementing Regulations for the ADAAA*
On March 25 the Equal Employment Opportunity Commission (EEOC) published its final regulations implementing the Americans with Disabilities Act Amendments Act (ADAAA) in the *Federal Register*. The regulations and accompanying interpretive guidance took effect on May 24.

The ADAAA was signed into law by President Bush in September 2008 and took effect for

employers January 1, 2009. The law was intended to overturn several U.S. Supreme Court decisions that Congress felt interpreted the ADA too narrowly. Specifically, the ADAAA expanded what qualifies as a disability so that more individuals are entitled to accommodations under the ADA. The EEOC issued a proposed rule on September 23, 2009. CUPA-HR filed comments with the American Council on Education on the proposal on November 23, 2009.

The final rule does reflect several substantial changes to the EEOC's proposed rule addressing the concerns raised in the comments. However, the EEOC does make clear that the scope of coverage of the ADA is now much broader. The rule states that short-term and/or episodic conditions may now be considered "substantially limiting." Also, while an individual analysis is still required for all disabilities, the final rule does include a list of conditions that "in virtually all cases" satisfy the definition of disability because of certain characteristics that are associated with the condition. Impairments included in this list are autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy and schizophrenia. CUPA-HR hosted a free webinar for members on the ADAAA final regulations on June 2.

National Labor Relations Board

- *Election Time Frames*

On June 21, the NLRB released a Notice of Proposed Rulemaking (NPRM) changes procedures for elections held to determine if employees wish a union. The changes would limit employers' ability to challenge bargaining unit composition, election misconduct and voter eligibility. The rule also would shorten election time frames from the 38 day median to somewhere in the 10-21 day time frame. The effect would be to greatly limit and employers' ability to communicate with employees about the union prior to the election. The committee will be discussing the possible impact of the proposals and CUPA-HR's position in the next call.
- *Posting Proposal*

On December 20, the NLRB released a Notice of Proposed Rulemaking (NPRM) which would require employers subject to the National Labor Relations Act (NLRA) post a notice in the workplace informing employees of their rights under the NLRA. According to the NPRM, if an employer fails to post the notice they could be charged with unfair labor practices, have time limits of other unfair labor practice charges extended and the Board may consider their lack of compliance as evidence of unlawful motive in other unfair labor practice cases. President Obama issued an Executive Order in 2009 that required government contractors display such a poster. The NLRB will use the same language as in the DOL poster. Board Member Brian Hayes (R) filed a dissent to the rulemaking, asserting "the Board lacks the statutory authority to promulgate or enforce," the NPRM. The committee approved comments that CUPA-HR, along with 180 other organizations, submitted with the Coalition for a Democratic Workplace (CDW) on February 22. It is unclear when the NLRB could move forward with a final rule.
- *Move to Reconsider Graduate Student Collective Bargaining*

On October 25, the National Labor Relations Board (NLRB) issued a 2-to-1 decision allowing graduate students at New York University a full hearing to look at the merits of their organizing drive with the United Auto Workers. Members Becker and Pearce ruled to reverse a regional director's decision that the 2004 NLRB case, *Brown University*, prohibited

NYU graduate students from organizing.

Under the Bush administration, *Brown* found that graduate students are primarily students, not employees, and are not entitled to collectively bargain under the National Labor Relations Act. *Brown* reversed a decision under the Clinton administration that ruled that graduate students were employees and could organize. The case was returned to the regional director for a full hearing. On June 16, NLRB regional office in Manhattan issued its decision. The acting director dismissed the petition to form a union because of the 2004 *Brown University* precedent, but also declared that teaching and research assistants at NYU might be formally considered its employees. The case will now go to the full NLRB for a hearing. According to ACE's legal counsel, the UAW has 20 days to appeal and the community will likely be invited to submit an amicus in the proceeding sometime after the 20 days. ACE plans to provide a draft brief for sign on by associations and interested institutions. The committee continues to closely watch this issue.

Legislative Issues Committee Members

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Andy Brantley, President and CEO

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Committee Charge

The Legislative Issues Committee works with CUPA-HR staff to determine the association's position on emerging federal legislative, regulatory and public policy issues and to recommend strategies for advocacy and timely dissemination of information to our members. The committee also works with national office staff to ensure that CUPA-HR is the voice for higher education workforce issues.