



A NEWSLETTER FROM THE LAW FIRM OF FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.

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Hot Topics

Attorney Spotlight

"Obamacare" Update:

Employee Notice on Health Insurance Exchanges due October 1 along with COBRA Election Notice Changes

Employee Notice Due by October 1

The U.S. Department of Labor (DOL) recently issued guidance regarding the next major step on the road to full implementation of the Patient Protection and Affordable Care Act (PPACA), more popularly known as "Obamacare". The new guidance primarily addresses the requirement that employers give their employees written notice about coverage options available through health insurance exchanges. The notice deadline (which was originally set for March 1, 2013) is October 1, 2013.

According to the law and guidance, the written notice must inform each employee about:

- The existence of the Marketplace (referred to in the statute as Health Insurance Exchanges) including a description of the services provided by the Marketplace, and the manner in which the employee may contact the Marketplace to request assistance;
- The fact that, depending on his/her family income and what coverage may be offered by the employer, they may be able to get lower cost private insurance in the Marketplace; and
- If he/she buys insurance through the Marketplace, the employee may lose the employer's current contribution (if any) to their health benefits.

The DOL has created two model notices designed to comply with these re-

quirements and made them available on their website: one is for employers who do not offer health insurance plans to employees and the other is for employers who do. (Copies of these model notices are available on the DOL's website at <http://www.dol.gov/ebsa/healthreform/>.)

The DOL points out that "... there is no fine or penalty under the law for failing to provide the notice." This does not mean, however, that a fine or penalty will not be added sometime in the future.

As noted above, the notice deadline is October 1, 2013. However, the DOL points out on its website that while each company should "...provide a written notice to its employees about the Health Insurance Marketplace by October 1, 2013, ... there is no fine or penalty under the law for failing to provide the notice." This does not mean that a fine or penalty will not be added sometime in the future. It should also be noted that following the initial deadline, employers are expected to provide new employees with the written notice at the time they are hired.

The notice must be provided in writing "in a manner calculated to be under-



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Joseph J. Bufano is a graduate of Syracuse University and the Hofstra University School of Law. His practice is devoted to representing and advising both private and public sector clients, including school boards and their administrators, corporations and non-profits, as well as municipalities on various general, business, contract, and employment law matters.

In addition to the wide range of legal services offered to our Firm's clients, Mr. Bufano lectures on various topics of interest including employment law matters, cyber-bullying and constitutional law issues.

Prior to entering the legal profession, Mr. Bufano served as a teacher in the Liverpool Central and Syracuse City School Districts and was certified as a school counselor.

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Hot Topics**Employee Notice on Health Insurance Exchanges due October 1 along with COBRA Election Notice Changes (cont'd)**

stood by the average employee.” It may be provided by first-class mail or electronically, provided that the requirements outlined in the DOL’s “electronic disclosure safe harbor rules” are met. Generally speaking, these rules require that the individual sending the electronic written notice “takes appropriate and necessary measures reasonably calculated to ensure that” the system for furnishing the notice:

- Results in actual receipt of the notice (e.g., using return-receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of the transmitted information);
- Protects the confidentiality of the employee and his/her accounts; and
- Apprises the individual of the significance of the document and of the right to request and obtain a paper version of it.

Employers should carefully review their practices and procedures to ensure that beginning soon -- and for the foreseeable future -- this written notice is

provided to every employee regardless of the employee’s full or part-time status or plan enrollment status.

COBRA Election Notice Changes

The DOL guidance also introduced an amended model election notice for COBRA continuation coverage. (A copy of the amended model notice is available on the DOL’s website at <http://www.dol.gov/ebsa/healthreform/>.)

Generally, speaking, the COBRA election notice must be provided to qualified beneficiaries within 14 days after the plan administrator receives notice that an employee has experienced a “qualifying event” as defined by the Act. The notice, which explains the right to continuation coverage and how it works, was modified to include new information about Obamacare. One of the major revisions was the addition of the following language:

“There may be other coverage options for you and your family. When key parts of the health care law take effect, you’ll be able to buy coverage through the Health Insurance Market-

place. In the Marketplace, you could be eligible for a new kind of tax credit that lowers your monthly premiums right away, and you can see what your premium, deductibles, and out-of-pocket costs will be before you make a decision to enroll. Being eligible for COBRA does not limit your eligibility for coverage for a tax credit through the Marketplace. Additionally, you may qualify for a special enrollment opportunity for another group health plan for which you are eligible (such as a spouse’s plan), even if the plan generally does not accept late enrollees, if you request enrollment within 30 days.”

Employers should begin using this model notice on October 1, 2013, as well.

If you have any questions regarding either the health insurance marketplace notices or the new model COBRA election notice, please feel free to contact our office.

Board Policies**Reminder: Certain Federal Laws Require Board of Education Policies, Procedures**

School district officials must remember that there are a number of federal laws that require the adoption or implementation of a policy, written procedure, or notice. Some of these laws and requirements will already be familiar to districts, but others may not be.

Some of the more commonly known requirements derive from federal laws that prohibit discrimination on the basis of age, disability, and sex. The Age Discrimination Act requires a district to provide notification that it does not discriminate on the basis of age, as well as the adoption of an internal grievance procedure to address complaints of age dis-

crimination. Similarly, the Americans with Disabilities Act (“ADA”) also requires the adoption of a grievance procedure to address complaints, such as an alleged failure to provide a reasonable accommodation for an employee with a disability. With respect to children with disabilities, the Individuals with Disabilities in Education Act (“IDEA”) requires that children with disabilities receive a free appropriate public education. Under the IDEA, districts must have procedures in place for parents to follow if they believe that their child is not receiving a free appropriate public education. Section 504 of the

Rehabilitation Act also requires a grievance procedure, and a notification that the district does not discriminate on the basis of disability. Title IX of the Education Amendments of 1972 (“Title IX”) requires the publication of grievance procedures with respect to alleged discrimination on the basis of sex.

Other federal laws require providing notice of certain information, usually in the form of a poster, in the workplace. Examples include the Fair Labor Standards Act (“FLSA”), the Family and Medical Leave Act of 1993

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Board Policies**Reminder: Certain Federal Laws Require Board of Education Policies (cont'd)**

("FMLA"), and the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). Districts must be sure to have the posters detailing the applicable information placed in a conspicuous location; the posters themselves are made available by the federal government online. It is always a good idea to ensure that the most up-to-date poster is displayed on an annual basis.

Some federal laws designed to ensure the health and safety of children also require affirmative action by a district. The Children's Internet Protection Act ("CIPA") mandates an internet safety policy that governs, among other things, a child's access to inappropriate material while online. Under the Drug-Free Workplace Act, districts must publish a

statement and provide employees with notice that controlled substances are prohibited in the workplace, and what the consequences for violating that prohibition are. Additionally, the Moving Ahead for Progress in the 21st Century Act ("MAP-21") requires a drug-testing policy for employees in safety-sensitive positions, such as bus drivers. For schools receiving grants under the Safe and Drug-Free Schools & Communities Act, there must be a school discipline policy that prohibits certain conduct, such as illegal possession of weapons or drugs.

Some of the less-familiar federal laws that require a policy, procedure or notice, are: the Asbestos Hazard Emergency Response Act (requiring an as-

bestos abatement plan); the Healthy, Hunger-Free Kids Act of 2010 (requiring a wellness policy); the McKinney-Vento Homeless Assistance Act (ensuring enrollment and retention of homeless students); and the Protection of Pupil Rights Amendment ("PPRA") (policies and notices regarding student privacy in certain situations). Additionally, some districts may have obligations under the Health Insurance Portability and Accountability Act ("HIPAA") and the Public Health Service Act.

If you have any questions regarding your District's obligations under any of these federal laws, or for a full list of legally-mandated policies, please contact our office.

Solar Power Projects**Legal and Economic Concerns Related to Solar Power Projects**

With the introduction of special government incentives encouraging solar energy, many New York school districts and BOCES are considering agreements for the installation of solar photovoltaic panels for the production of electricity. While such projects are appealing from an environmental perspective, they also present legal and economic challenges.

The most common type of solar agreement currently being proposed to school districts and BOCES is the "power purchase agreement", or PPA. Under a PPA, the "host" school district or BOCES would agree to allow a developer to install solar panels on the host's property to generate electricity for the host's use. The developer retains ownership of the equipment and covers all of the cost to install it on the host's property. The host, in turn, pays the developer a

fee for the use of the electricity that is generated by the solar panels.

PPAs appear attractive to the hosts because there are no upfront out-of-pocket costs, they promote green energy, and the power is typically offered at a lower cost than is available through traditional energy sources. However, the economic viability of such agreements relies on the host agreeing to purchase electricity from the developer over a long term, usually 20 years, in order for the developer to recover the cost of its investment in the solar equipment. Such a long term agreement presents a significant legal problem, as well as practical and economic issues for the host.

Other solar developers have presented school districts and BOCES with "solar

leases", where the cost to the host entity is a periodic payment to lease the solar equipment from the developer. Although they have a different legal structure than PPAs, similar issues may arise regarding the developer's need for a long-term contract.

Because of the legal and economic challenges arising in either type of solar agreement, some school districts and BOCES are considering pursuit of special legislation that would address the legal issues and make solar agreements more viable for New York municipalities. Should your district or BOCES be interested in pursuing a solar project, or be contacted by a developer soliciting such a project, please feel free to contact our office for advice and guidance.

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Breach of Contract Cases**State's High Court Clarifies Time Limits for Suing Breach of Contract Claims**

A recent decision from the New York State Court of Appeals highlights the need for school districts to act promptly to sue breach of contract claims and potentially provides a strong defense to such claims brought against them. The case, Hahn Automotive Warehouse, Inc. v. American Zurich Insurance Co., provides new clarity on the statute of limitations affecting breach of contract cases. The case solidified that the time limit in which a breach of contract case must be filed begins to run when a plaintiff has the right to demand payment under a contract and cannot be extended by a plaintiff's delayed demand for payment.

In Hahn, Zurich provided insurance coverage that required Hahn to pay estimated premiums that were later reconciled with actual claims data to determine a final premium amount owed. When the reconciliation showed that Zurich was owed more premium than Hahn's estimated payments, Zurich was supposed to bill Hahn for the premium adjust-

ments. In 2005, after eight years of coverage under this arrangement, Zurich realized that it had not billed Hahn for premium adjustments dating back to 1997, and attempted to invoice Hahn to recover these premium adjustments.

Hahn argued, and the Court agreed, that any of Zurich's bills for debts that arose more than six years before the commencement of court proceedings were barred by New York's statute of limitations for contract claims. Most importantly, the Court held that the time limits on Zurich's breach of contract claims began to run at the point where Zurich had the right to demand payment from Hahn for premium adjustment. The Court reasoned that any other rule would permit a party in Zurich's situation to extend the statute of limitations indefinitely by simply failing to make a demand for payment.

The Hahn decision will impact any party seeking to obtain payment of an amount alleged to be due based upon

a breach of contract theory. Such claims will now be required to show that any court action was commenced within the applicable time period after the party first had the right to request the payment allegedly due under the contract. A party considering a breach of contract action will now have to act sooner than before the rule to ensure that a claim is filed within the appropriate time deadline.

The Hahn rule could potentially impact claims involving school districts, where the statute of limitations for pursuing a contract claims against a school district is one year. Moreover, disputed claims tendered to your school district should be acted upon promptly to ensure preservation of such defenses in future litigation.

If you have any questions about this subject or need assistance in responding to and defending against a disputed claim arising from a contract, please feel free to contact us.

Upcoming Events

<u>Attorney(s)</u>	<u>Date(s)</u>	<u>Event/Program/Location</u>
Eric Wilson Craig Atlas	10/18	OCM BOCES Conference - Affordable Health Care Act Presentation
Eric Wilson	10/23	Client In-Service Program on SRO Training
Benjamin Ferrara	10/24	Panel presentation on the New Section 3020-a Process; NYSSBA Pre-Convention Law Conference- Rochester NY
Henry Sobota	10/25	OCM BOCES/MASLA Affordable Health Care Act Presentation
Donald Budmen Joseph Bufano	10/29	DASA, Social Media: Rules for Public Schools Search & Seizure; Reasonable Suspicion at SUNY Cortland Educational Leadership Conference
Joseph Shields Colleen Heinrich Eric Wilson Michaela Perrotto	11/5 or 6 (Choose either date)	Ferrara Fiorenza Law Firm Breakfast Briefing on Recent Developments in School Law, Presented at our firm's Rochester Office, 400 Meridian Centre Blvd., Suite 110, Rochester, NY
Eric Wilson	11/7	Presentation on Appointments and Layoffs, NYSASBO School Business Mgt. Workshop, Albany, NY
Benjamin Ferrara	11/15	Presentation on Contract Provisions and Superintendent's Duties; NYSCOSS Legal Counsel's Briefing at Herkimer BOCES
Donald Budmen	11/15	Presentation on Social Media and Defamation Issues, NYSCOSS Legal Counsel's Briefing at Herkimer BOCES
Joseph Shields	11/15	Presentation on New Laws and Court Decisions, NYSCOSS Legal Counsel's Briefing at Herkimer BOCES
Marc Reitz Susan Johns Eric Wilson Heather Cole	11/20	Ferrara Fiorenza Law Firm Breakfast Briefing on Recent Developments in School Law, Presented at St. Lawrence-Lewis BOCES Conference Center in Canton, NY

Please note that "Client In-Service" programs are being provided to particular clients at their request. If you are interested in having us present a program for you, please contact us so we can schedule one to suit your needs.