School Law Matters

December 2013

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Route to: Board ❑ Personnel ❑ Instruction ❑ PPS ❑ Business ❑ Other: _____

Hot Topics

Recent Employee Health Care Notifications Generate Unnecessary Concern about Plan Terminations

By Craig M. Atlas, Esq.

Recently, we have received a number of client questions about notices being sent to their employees from health insurance carriers. These notices have caused some employees to be concerned that their group health coverage plans are being cancelled. Thus far, the notices we have reviewed for clients and their employees are not cancellation notices but rather notices made necessary in order to comply with the federal Affordable Care Act (ACA) or "Obamacare".

Health insurance carriers in New York State are sending notices to individuals covered by group insurance plans, including those provided through school districts and BOCES. For example, Excellus BlueCross BlueShield is issuing a "Rider for New Contract After Termination". The title of this notice alone has caused some people to be concerned that their health plan is being "terminated". This is especially so in the context of news reports and various commentaries about the termination of some health plans due to the ACA.

However, this particular notice is not due to the actual termination of anyone's plan at this time. The purpose of this rider is to bring the plan into compliance with the ACA. It implements amendments in New York State law made by the bill to implement the state budget for health and mental hygiene (Chapter 56 of the Laws of 2013). The new rider is based on model language from the N.Y. State Department of Financial Services (formerly known as the Insurance Department).

Under the N.Y. State Insurance Law, under some circumstances, a person who has been covered by a group policy may have the right of conversion to an individual policy. (The concept is similar to the right to obtain continuation coverage under COBRA. However, it is not exactly the same. Continuation coverage allows a person to continue to be covered by the **group** plan upon payment of the premiums. Conversion enables a person to obtain health coverage through an **individual** policy.)

In the past, a person who exercised the right to convert to an individual policy had to obtain it from the carrier at a relatively high cost. Under the ACA, there will be minimum federal standards for coverage, and an individual may be able to obtain it through the Exchange. In New York State, unlike in some other states, the cost of individual coverage will generally go down in 2014.

Existing group health insurance contracts issued in New York State already had provisions on termination of the contract and the right to a new contract after termination. The new rider amends this language to specifically refer to the coverage that will be available under the ACA.

Excellus has confirmed that its rider mentioned above is not a notice of termination. If you or your employees have questions about any particular notices, we recommend that you contact us or the insurance carrier that issued the notice.

Attorney Spotlight

Craig M. Atlas, Esq.

Craig M. Atlas received a B.A. in 1980 and a Master of Labor and Industrial Relations in 1981 from Michigan State University, and his J.D. *cum laude* from SUNY Buffalo in 1986. He was employed as Law Clerk for the N.Y.S. Public Employment Relations Board (PERB) in Buffalo while attending law school. He is a member and active participant in many national and statewide professional associations of school attorneys and labor relations professionals.

Mr. Atlas devotes a substantial portion of his practice to the representation of school districts and other public employers in proceedings before PERB. He counsels and represents public and private employers in court and before administrative agencies. He also has extensive experience and background in the general representation of school districts and BOCES.

In This Issue …

FMLA

New Guidance from U.S. Dept. of Labor Clarifies Criteria for Employees To Take FMLA Leave to Care for Adult Children

An employee comes to you and asks for leave to care for a 26-year-old daughter who, due to complications associated with her pregnancy, has been ordered by her doctor to undergo bed rest for two months. The daughter is married and her husband is available to assist with her care. Is your employee entitled to take the time off under the Family and Medical Leave Act (FMLA)? According to a recent opinion issued by the U.S. Department of Labor (DOL), the answer is probably "yes." (See U.S. Department of Labor's, Wage and Hour Division, Administrator's Interpretation No. 2013-1.)

The FMLA entitles an eligible employee to take up to 12 workweeks of unpaid, job-protected leave during a 12-month period to care for a "son or daughter" with a serious health condition. The FMLA defines a "son or daughter" as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis", who is either "under 18 years of age; or …**18 years of age or older and incapable of self-care because of a mental or physical disability**. (Emphasis added.)

For years, it has been unclear how the DOL defined "incapable of self-care because of a mental or physical disability." Some "experts" interpreted it as applying only to those adult children with the most severe mental and physical disabilities who were not capable of living independently, while others applied it to adult children with even temporary disabilities like broken legs. The new DOL Administrator's Interpretation comes down somewhere in the middle.

Specifically, the Interpretation states that, "[a] parent will be entitled to take FMLA leave to care for a son or daughter 18 years of age or older, if the adult son or daughter:

1) has a disability as defined by the [Americans with Disabilities Act] ADA;
2) is incapable of self-care due to that disability;
3) has a serious health condition; and
4) is in need of care due to the serious health condition …."

It is only when **all** four requirements are met that an eligible employee is entitled to FMLA-protected leave to care for his or her adult son or daughter.

ADA Disability and FMLA "Serious Health Conditions"

As interpreted by the Equal Employment Opportunity Commission, the ADA definition of disability is a physical or mental impairment that substantially limits a "major life activity." This differs from the FMLA's definition of a "serious health condition," for which an employee is entitled to take FMLA leave to care for an adult child incapable of self-care. A serious health condition is defined by statute and regulations in a rigid and often counter-intuitive manner. It is defined as an illness, injury, impairment, or physical or mental condition that involves "inpatient care" in a hospital or "continuing treatment by a health care provider." These include conditions requiring an overnight stay in a hospital; conditions that cause the patient to be incapacitated for more than three consecutive calendar days and that require ongoing medical treatments; chronic conditions that cause occasional periods of incapacity and that require treatment by a health care provider; and incapacity due to pregnancy.

In our initial example, the employee's adult daughter clearly has a serious health condition, i.e., incapacity due to pregnancy. But she does not necessarily have a disability as defined by the ADA.

The Interpretation notes that the ADA includes examples of major life activities that, if impaired, are recognized as disabilities, such as "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." The definition also includes impairments involving the "operation of a major bodily function," such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, … [etc.." The Interpretation goes on to say that "while pregnancy itself is not a disability under the ADA, pregnancy-related impairments, such as gestational diabetes, may be disabilities within the meaning of the ADA if they substantially limit a major life activity."

Since the employee's daughter, in our example, has a pregnancy-related impairment requiring two months of bed rest, her condition would most likely satisfy the definition of disability under the ADA.

Child Incapable of Self-Care Due to Disability

The FMLA regulations define "incapable of self-care" to mean that "the individual requires active assistance or supervision … [for] self-care in three or more of the 'activities of daily living' (ADLs) or 'instrumental activities of daily living' (IADLs)." Activities of daily living include "activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping … using telephones and directories… etc."

In the example, the employee's daughter is not permitted to leave her bed for two months. Accordingly, she will need active assistance and supervision with respect to hygiene, bathing, dressing, as well as cooking, cleaning, shopping, etc. Thus, the daughter would meet the test of being

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FMLA

New Guidance on FMLA Leave to Care for Adult Children (cont'd)

incapable of self-care due to her disability. But that is not the end of the inquiry.

Child In Need of Care from Parent

While we have already established that the daughter has a serious health condition as defined by the FMLA (i.e., incapacity due to pregnancy), the question then becomes whether your employee is entitled to FMLA leave to care for that daughter because she is "in need of care" from the parent.

In our example, the daughter is married and her husband is available to help care for her. Is your employee therefore "needed?" This question must be answered by a physician.

The parent may be needed to care for his or her adult son or daughter if, for example, due to the serious health condition the adult child is "unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor." However, the phrase "needed to care for" also includes providing "psychological comfort and reassurance" that would be beneficial to a son or daughter with a serious health condition who is receiving inpatient or home care.

Whenever an employee requests leave of this nature, employers should (as a matter of course) have the employee obtain a medical certification from the patient's attending physician. The medical certification form for care of an immediate family member (available online at http://www.dol.gov/whd/forms/WH-380-F.pdf) requires the attending physician to "[e]xplain the care needed by the patient and why such care is medically necessary."

Applying this standard to our example, if, in the physician's opinion, the daughter would be psychologically comforted by having her parent present, the parent is technically "needed to care for" the daughter. Stated differently, even though the daughter's husband is available to assist with her care (even if he was available at all times to care for the adult daughter), when the doctor certifies that the daughter would be psychologically comforted by the presence of the parent, the criteria for FMLA leave eligibility is met. In our experience helping clients with these issues, we have found that more often than not, this is not a difficult criteria for employees to meet.

Conclusion

While an employee must satisfy all four criteria described above in order to be entitled to take an FMLA leave to care for an adult child, our example illustrates that these criteria may be met fairly easily. Nevertheless, work closely with your employment lawyer when faced with these requests to verify that each has been met. Every request must be reviewed independently based on its unique facts. Given that the penalties for FMLA violations can be severe and permitting extended leaves when you are not legally required to do so can lead to costly staffing and production problems, it is important to make the right decision in these matters. If you have any questions about the foregoing, please feel free to call our office.

Purchasing

New Law Designed to Make "Piggybacking" On Existing Purchase Contracts Easier

Governor Cuomo recently signed legislation that amends General Municipal Law section 103(16), also known as the "piggybacking" provision affecting government purchasing. Piggybacking is the practice of a municipal entity such as a school district or BOCES purchasing supplies or materials from an existing contract procured by another municipal entity.

The law as amended is intended to create a more permissive standard for determining if a contract may be made available for a New York municipality to purchase under it. Prior to the amendment, contracts could only be made available for piggybacking if they were "let in a manner that constitutes competitive bidding consistent with state law". This required the municipality to confirm that the contract was let through a process of sealed public bids and awarded to the low bidder.

The new standard is intended to broaden the range of available options for municipalities to purchase under this statute. Specifically, it extends eligibility for piggybacking to contracts let through a "best value" process. Best value purchases do not strictly require sealed bids or award of the contract to the lowest responsible bidder. As such, the minimum procurement standard is now much lower for a contract to be made available for New York piggybacking.

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Purchasing

Law Designed to Make "Piggybacking" on Existing Purchase Contracts Easier (cont'd)

In order to piggyback from a contract let under the "best value" process, a municipality must have previously authorized procurement of its own contracts under "best value" by rule, regulation or resolution. For school districts and BOCES, this means that their Board must pass a resolution authorizing purchase contracts to be let under the "best value" standard before they can piggyback off of a contract that was procured by any process other than competitive bidding.

One effect of the amendment may be to permit municipalities to purchase from contracts let by "national cooperatives" – organizations created under the auspices of a municipal entity in another state that offer purchase contracts negotiated based upon massive volume purchases. Prior to the amendment, there was a serious question whether national cooperative contracts met the standards required for New York contract procurement. Implementation of the best value standard may address this concern. School districts and BOCES can expect to see more aggressive marketing campaigns by national cooperatives seeking to make their contracts available to New York municipalities.

While this amendment addresses some of the legal issues that surround the practice of piggyback purchasing, school districts and BOCES should still thoroughly examine a prospective contract and its origins before proceeding to purchase from it.

Should you have any questions about this amendment to the General Municipal Law or the process of piggyback purchasing, please feel free to contact our office at (315) 437-7600.

FERPA

Protect Student Privacy Rights When Entering Into Service Contracts

As most of you are aware, the Family Educational Rights and Privacy Act ("FERPA") limits when and how personally identifiable information in student records may be disclosed to others outside the school setting. If a school district uses a contractor to perform certain services (e.g., computer services, data storage/analysis, etc.), sometimes it is necessary to allow the contractor to have access to certain student information. Under these circumstances, the law makes the district responsible for seeing to it that the contractor complies with FERPA by limiting the re-disclosure of the student information to others.

In light of this requirement, if a contractor (with access to student information) presents your District/BOCES a proposed contract that lacks a provision on confidentiality, we recommend that the contractor be required to add a provision ensuring that the contractor complies with all applicable federal and state laws and regulations, including specifically, FERPA and the regulations of the U.S. Department of Education.

Similarly, if the State Education Department (SED) uses a contractor to provide services that require access to student data (like inBloom), SED must have a written agreement designating the contractor as its authorized representative, and placing strict limits on the contractor's use of the information. According to SED, the contracts between SED and inBloom and other vendors for storage and analysis of student data include extremely detailed confidentiality provisions.

Despite these protections, a group of concerned parents recently brought a lawsuit in Albany County, trying to prevent SED from sharing student information with inBloom. The lawsuit is based on the Personal Privacy Protection Law. (That law is part of the N.Y. State Public Officers Law. It applies to state agencies but not to local governments.) Nevertheless, this case demonstrates the care that must be taken with respect to the confidentiality of student information.

A judge denied the parents' request for a temporary restraining order in this case and it is currently scheduled to be heard on January 3, 2014.

If you have any questions, please feel free to contact our office.

Upcoming Events

Attorney(s)	Date(s)	Event/Program/Location
Don Budmen	**12/19/13**	**Client In-Service Program on *Student Discipline for School Administrators***
Joseph Bufano	**12/20/13**	**Client In-Service Program on *Dignity Act Coordinator Training***
Michael Dodd	**1/31/14**	**Client In-Service Program on *Employee and Student Harassment and The Dignity for All Students Act***
Joseph Bufano	**2/13/14**	**Client In-Service Program on *The Dignity for All Students Act***

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.