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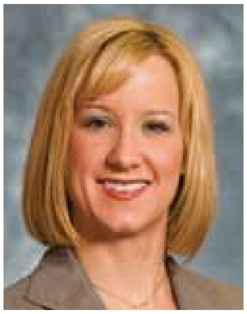
Human Resources Newsletter

HR Focus



Six Ways to Limit Your Chances of a Visit from the DOL

by Jennifer A. Watkins: **jwatkins@wnj.com**

The Department of Labor (DOL) is in the process of adding hundreds of investigators to its staff. And since DOL investigators are responsible for enforcement of fiduciary, reporting and disclosure requirements for employee benefit plans, that means you had better be following the letter of the law. In 2010, the DOL conducted 3,112 civil investigations, almost 75 percent of which resulted in findings of one or more violations.

Here are six ways to avoid a visit from your friendly local DOL investigator:

1) DEPOSIT PARTICIPANT CONTRIBUTIONS AS SOON AS POSSIBLE.
This issue is one of the DOL's top enforcement initiatives.

DOL regulations require that participant contributions, including loan repayments, be deposited to the plan's trust on the earliest date the contributions can reasonably be segregated from the employer's general assets. The DOL's position is that the "earliest date" is determined on a case-by-case basis. Because

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Breaching Your Non-Compete May Be Breaking the Law

by Gregory M. Kilby: **gkilby@wnj.com**

Employers around the country are increasingly relying on the Computer Fraud and Abuse Act (CFAA) to assert a claim for damages where there is evidence that a former employee has misappropriated an employer's electronic data for the benefit of the employee's new employer. While the CFAA is a criminal statute, it also provides a civil cause of action for victims of employee data theft, as well as an avenue into federal court for employers who are usually not diverse from their employees and typically rely on state law claims. An employer may use the CFAA to pursue an employee who "knowingly and with intent to defraud accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value." For any violation of the CFAA, an employer may obtain "compensatory damages and injunctive relief or other equitable relief."

THE "AGENCY THEORY"

One of the earliest decisions on the issue, and certainly one of the most significant, was handed down by the Seventh Circuit in *International Airport Centers, LLC v. Citrin*. In that case, the Seventh Circuit, in an opinion written by Judge Posner, ruled that under common law agency principles, an employee who breaches the duty of loyalty to an employer thereby becomes "unauthorized" to access the employer's data/computers, at least for the purpose of furthering an act of disloyalty to the employer. Put more simply, should the loyalties of a current employee change and the employee's interests become adverse to his current employer, the employee's authorization to access his employer's data would change as well and become unauthorized. Under this "agency theory" the authorization to access was based upon the employee's own subjective loyalties and interests and, if they changed, the employee's authorization to access the employer's computer changed with it. The First Circuit also follows this approach. *EF Cultural Travel BV v. Explorica, Inc.*

"An employer may use the CFAA to pursue an employee who 'knowingly and with intent to defraud accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value'."

THE "INTENDED USE THEORY"

The Ninth Circuit first weighed in on the issue in 2009 in *LVRC Holdings LLC v. Brekka*, (9th Cir. 2009) and held that accessing and e-mailing company documents for use contrary to the company's interests alone did not violate the CFAA. The court found that there is no statutory language to support the contention that authorization terminates when an employee determines to act contrary to the interest of an employer.

Recently, the Ninth Circuit clarified and substantially limited the application of *Brekka*, bringing the law in the Ninth Circuit much more in line with interpretations in other circuits (although not quite as broad as in the Seventh Circuit). Specifically, the Ninth Circuit in *United States v. Nosal*, held that the CFAA's "exceeds authorized access" provision applies where an employer has placed limitations on the employee's "permission to use" the computer and the employee has violated or "exceeded" those limitations.

The court distinguished *Brekka* in which the employee had unfettered access to the company computer and there was no employee agreement prohibiting the employee's conduct. To the contrary, the employees in *Nosal* "were subject to a computer use policy that placed clear and conspicuous restrictions on the employees' access both to the system in general and to [a proprietary] databases in particular." In other words, "an employee 'exceeds authorized access' under [the CFAA] when he or she violates the employer's

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CONGRESS MAKES THREATS

While the Michigan Legislature Passes Bill Banning Project Labor Agreements

by Steven A. Palazzolo: **spalazzolo@wnj.com**

Sometimes the way government works in this country just amazes me. Ok, not sometimes. All the time.

So what has been going on in the last month or so that makes me say that once again? Well, for one thing, the National Labor Relations Board is flexing its muscles in ways it has not for a bunch of years. (For more detail, read Rob Dubault's article in this newsletter about all of the things the NLRB is doing to non-union employers.) And while all of this rulemaking and sign posting and complaint bringing is going on, what is Congress doing? Threatening to take away some of the Board's authority. But what has really ticked off Congress is that the Board has filed a complaint against Boeing because the company wants to build a plant in South Carolina (where jobs tend to be non-union) and not in its home state of Washington (where the Boeing jobs are union jobs).

On Thursday, July 21, 2011, on a straight party line vote, the House Committee on Education and the Workplace voted 23-16 to bring a Bill to the floor of the House. The Bill, H.R. 2587, is entitled the "Protecting Jobs From Government Interference Act." (I know, where do they come up with these titles?) Anyway, here's what the Bill says:

> Provided further, That the Board shall have no power to order an employer (or seek an order against an employer) to restore or reinstate any work, product, production line, or equipment, to rescind any relocation, transfer, subcontracting, outsourcing, or other change regarding the location, entity, or employer who shall be engaged in production or other business operations, or to require any employer to make an initial or additional investment at a particular plant, facility, or location.

And when I say "what the Bill says," I'm not kidding! That is the whole Bill! Not surprisingly, there is some difference of opinion about what this little Bill would mean if it were to be signed into law.

According to *The Wall Street Journal*, Democrats say: "the bill would recklessly expose workers to discrimination by removing key NLRB remedies needed to punish bad employers." On the other hand, Republicans say the bill: "takes a critical step to provide employers with the certainty they need to put Americans back to work, right here at home." See **http://blogs.wsj.com/washwire/2011/07/21/house-committee-passes-bill-to-rein-in-nlrb/.**

WHO ARE YOU GOING TO BELIEVE?

And while all of this is going on in D.C., right down the road in Lansing our Legislature passed and the Governor signed a Bill that also limits union power to some degree by banning Project Labor Agreements in certain government construction contracts. For those of you who don't know, a Project Labor Agreement is an agreement by which a contractor must pay union wages, union dues and into union benefit plans for work done on a government project; according to many, this puts non-union contractors at a significant disadvantage in getting this government work. Senate Bill 165 bans requiring Project Labor Agreements on state, local government, school, college and university construction projects using tax dollars. According to the Bill's sponsor, Senator Moolenaar, a Republican from Midland, "This measure creates open and fair competition in participating in state construction contracts and will directly result in cost savings for taxpayers."

U.S. Supreme Court Speaks On SPD v Plan Document… The Good, The Bad and the Ugly

by Vernon P. Saper: **vsaper@wnj.com**

On May 16, 2011, the U.S. Supreme Court decided *Cigna Corp. v Amara.* Many commentators have cited the case as being "good" for employers and plan administrators because the Court found that a Summary Plan Description (SPD) is not a plan document. Therefore, the SPD cannot alter the plan provisions if the language in the plan is different. However, some of these commentators fail to note that the Court still found a way to compensate plan participants based on the SPD and other employee disclosures rather than the actual plan document.

THE FACTS

For years Cigna provided a defined benefit pension plan for its employees, with benefits based on a participant's final average salary and years of service. In 1997, Cigna announced the plan would be changed to a "cash balance" plan. The announcement said the revised plan would be better for participants and would provide an improvement in retirement benefits.

The announcement indicated current plan participants would have an opening account balance in the new plan equal to the "full value" of the benefit the employee had earned prior to 1998. A new SPD was issued for the amended plan, but the lower court found that Cigna's description of the new plan was "incomplete and inaccurate," and did not describe how some employees might not earn any additional benefits for several years. Finally, the lower court found that Cigna had intentionally misled its employees. Some had asked for additional information, but Cigna made a decision not to provide further details.

As a result, the lower court found Cigna had violated the Employee Retirement Income Security Act ("ERISA") disclosure rules, and that employees were likely harmed by the violations. Both parties appealed to the 2nd Circuit Court of Appeals, which affirmed the lower court's decision. An appeal then went to the Supreme Court.

THE "GOOD"

The Supreme Court first held that a SPD is not a "plan" document. Therefore, in a positive holding for plan sponsors, the Court clarified that the SPD cannot take the place of the plan, so a conflict between the provisions of the Summary and the writing of the plan will be settled in favor of the plan document. This is a "good" holding for employers because sometimes the plan and the SPD are inconsistent. According to this case, the plan language controls. The SPD is written in simpler language, and often will not set forth all of the details and/or exceptions which might be written into the plan document. So a decision by the Court that the SPD is not part of the plan, and therefore the SPD language cannot be enforced under ERISA, is comforting to plan sponsors.

THE "BAD"

On the other hand, bad facts can often be blamed for bad law. In this case, the misrepresentations by the plan sponsor were so egregious that the lower court felt it had to find a way to remedy the situation. The lower court held that the disclosures made to employees should form the basis of the new plan. Accordingly, the lower court "reformed" the plan document to permit employees to receive benefits in line with what the disclosures seemed to explain, but which were definitely different from the actual plan document. Finally, after "reforming" the plan document, the lower court ordered enforcement of the reformed plan by Cigna. In effect, the lower court amended the plan to be as disclosed to employees and then ordered Cigna to pay benefits under the terms of the amended plan. To its credit, the Supreme Court said the lower court could not do that under ERISA.

> "SPDs and other communications to employees do not trump plan documents. For benefits to be enforced they must be provided by the plan document."

THE "UGLY"

If the Supreme Court had stopped there, the case could have gone back to the lower court for further proceedings. However, a majority of the Court did not stop there. Instead, the Court's opinion goes on to explain to the lower court how the case might have been handled. The Court advised the lower court that any one of several alternatives might be used to reach the same result by using an "equitable" remedy to provide compensation to participants who were actually harmed, even if they did not rely on the misleading disclosures made by Cigna. The Court

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Obama NLRB: Boldly Going Where No Board Has Gone Before

by Robert A. Dubault: **rdubault@wnj.com**

All the major federal administrative agencies that regulate the workplace have been increasingly active during the past two and a half years. Budgets, staffing and enforcement activity have all increased. But of all the federal agencies, the National Labor Relations Board (NLRB or Board) has probably done more lately than any other to raise its public profile and attempt to reshape the law. The NLRB is charged with enforcing the National Labor Relations Act (NLRA), which regulates many aspects of the employer-union relationship and provides all employees with the right:

- to form, join or assist labor unions;
- to engage in other concerted activity for mutual aid and protection and;
- to refuse to engage in such activities.

In addition to the Board's widely-publicized pursuit of unfair labor practice charges against Boeing for its decision to locate certain production work in South Carolina instead of Washington, the NLRB has made other headlines in the past several months.

POSTING REQUIREMENT

In December 2010, the Board proposed that all employers covered by the NLRA would be required to post a notice informing employees of their rights under the Act. According to the Board, the posting is needed because many employees are unaware of their legal rights. The notice requirement has not been finalized, but if the final notice looks at all like what has been suggested by the NLRB, it would:

- inform employees in detail of various actions that they can take;
- detail actions that employers are prohibited from taking and;
- provide NLRB contact information for filing a complaint if an employee believes his or her rights have been violated.

SOCIAL MEDIA & EMPLOYEE DISCIPLINE

As noted above, employees have the right under the NLRA to engage in concerted activity for mutual aid and protection. This includes discussing working conditions, wages and benefits with coworkers. Employers are prohibited from interfering with this right by either promulgating overly-restrictive rules or disciplining employees who engage in such activities. Recently, the Board has taken up two cases involving employees who claimed that they were terminated because they discussed or sought to discuss with co-workers via the social media site Facebook some term or condition of employment. One case involved an emergency medical technician who claimed she was fired after she posted complaints about her supervisor on her Facebook page. That case was ultimately settled, but part of the settlement required the employer to modify its social media policy. The other case, which is still pending, involves a car salesman in Illinois who claims he was fired after criticizing the food his employer served during a promotional event because he believed it reflected poorly on the dealership and cost he and his co-workers sales (and commissions). He filed an unfair labor practice charge over his discharge and the regional office of the NLRB took the position that his discharge was unlawful because his comments/criticisms were protected activity under the Act.

Given the overwhelming popularity of social media sites and the growing number of people who use them on a regular basis, employers who plan to develop and even those who have established social media policies would be well advised to carefully consider whether the policy could raise issues under the NLRA. In addition, before taking employment action against an employee for statements he or she made on a social media site or a blog, the employer should carefully evaluate whether the statements or posts might be protected under the NLRA.

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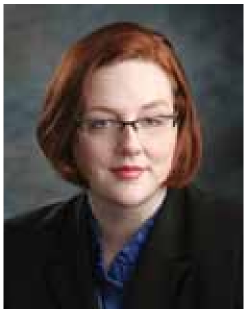

Cafeteria Plans Elections: When Should Requested Mid-Year Changes Be Approved?

by April A. Goff: **goff@wnj.com**

Participants in a cafeteria plan are only permitted to change their elections mid-year in accordance with IRS regulations. Those regulations have been in effect for over a decade, but many plan sponsors still struggle with whether a particular request should be approved. This article is intended to be a refresher of the rules and a reminder that help is available if a particular situation stumps you in your plan's administration. While the rules are relatively clear, they're easily muddled when dealing with the intricacies of a particular participant's situation.

DO PARTICIPANTS HAVE TO BE ALLOWED TO CHANGE THEIR ELECTIONS ON A PRE-TAX BASIS?

A cafeteria plan must permit participants to change their elections at least annually during open enrollment. Cafeteria plans are not generally required to allow mid-year requests to change elections, but the overwhelming majority of plans do. Individuals who qualify for coverage due to a HIPAA Special Enrollment right or a Qualified Medical Child Support Order must be permitted to enroll in coverage mid-year, but an employer can require that the coverage be made on a post-tax basis outside of the cafeteria plan until the next enrollment period.

WHAT TYPE OF EVENTS MAY TRIGGER A VALID MID-YEAR ELECTION CHANGE?

The outline below lists all of the permissible mid-year election triggering events. We caution however, that the cafeteria plan document must be reviewed to determine whether a change is permissible before a request is approved. A plan document may generally refer to guidance provided in temporary, final or IRS regulations or may specify explicitly which events the plan will recognize as permitting a mid-year election change.

Change in Status:

- change in marital status (marriage, divorce, legal separation or annulment);
- change in number of dependents (due to birth, death, adoption and placement for adoption);
- change in employment status of employee or employee's spouse or dependent (including termination or commencement of employment, commencement of or return from an unpaid leave of absence and a change in worksite);
- dependent ceases to satisfy eligibility requirements (including attainment of age, student status or any similar circumstance);
- change in residence of the employee, spouse or dependent that affects eligibility for coverage (e.g., if an employee moves from outside the service area of his health plan) and;
- commencement or termination of adoption proceedings, for purposes of adoption assistance provided through a cafeteria plan.

Automatic Cost Changes: The plan's cost increases or decreases during a period of coverage.

Significant Cost Change: The cost charged to the employee significantly increases or decreases during the period of coverage.

Significant Curtailment of Coverage: An individual has a significant curtailment of coverage during a period of coverage and similar coverage is available under the plan.

Addition or Improvement of a Benefit Package Option: A new benefit package option is made available under the plan during the coverage period, or an existing option is significantly improved.

Change in Coverage of Spouse or Dependent under Another Employer Plan: A change is made under another employer's plan in accordance with IRS regulations or the other employer has a different period of coverage.

Loss of Other Health Care Coverage: If the employee, spouse or dependents lose coverage under any group health plan sponsored by a governmental or educational institution–including coverage under a State Children's Health Insurance Program (SCHIP).

HIPAA Special Enrollment Rights: A participant may be permitted to revoke an existing election and/or to make a new election for HIPAA Special Enrollment Rights.

COBRA Qualifying Events: A participant may be permitted to elect to increase payments under the employer's cafeteria plan to pay for continuation coverage for the employee, spouse or dependents.

Judgments, Decrees or Orders: An employee may be permitted to add coverage under a Qualified Medical Child Support Order or to cancel coverage if the judgment requires another individual to cover that child.

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most companies have the ability to transfer funds electronically, the "earliest date" is often within a few days of pay dates, and sometimes even the same day. It is not acceptable to rely on the maximum time permitted under the regulations, which is the fifteenth business day of the following month.

The Form 5500 Annual Report asks whether the employer failed to transmit any participant contributions within the period described in the regulations. This question must be answered "yes" if there have been late deposits–even if the employer has corrected the violations. If there have been late deposits, very often the DOL will send the employer a follow-up letter requesting confirmation that the employer took appropriate corrective actions. Our experience has been that a DOL investigation will sometimes follow, even if the employer has already corrected the violations and responds to the follow-up accordingly.

The Form 5500 is signed under penalty of perjury and plan administrators must always complete it truthfully. If a late deposit has been discovered, it should be corrected and reported on the Form 5500 as required. The only way to avoid inquiries from the DOL is to avoid making late deposits in the first place. Deposits should be made as soon as possible after each pay date on a consistent schedule.

2) MAKE SURE YOUR PLAN HAS A PROPER FIDELITY BOND.

Another of the DOL's hot-button issues is inadequate bonding of plan fiduciaries and individuals who handle plan funds. A company often has a fiduciary policy or a policy protecting directors and officers, but not a true ERISA bond protecting the plan. Generally, the amount of the ERISA bond should be at least 10 percent of the amount of funds handled, but in no event less than $1,000 or more than $500,000 for each plan covered.

The Form 5500 asks whether the plan is covered by a fidelity bond and for what amount. Answering this question "no" would obviously tip off the DOL to an issue, as would a bond below the required level.

Plan sponsors should know what level of coverage the plan has and answer the question accordingly. If the bond is inadequate, the plan administrator should seek to increase it immediately.

> "In 2010, the DOL conducted 3,112 civil investigations, almost 75 percent of which resulted in findings of one or more violations."

3) PROMPTLY RESPOND TO PARTICIPANTS' INQUIRIES OR REQUESTS FOR INFORMATION.

Certain plan documents must be made available for examination by any participant or beneficiary. These include the latest summary plan description, latest Form 5500, any applicable collective bargaining agreements, the trust agreement and plan document. If a participant or beneficiary submits a written request for these documents, the plan administrator must provide them within 30 days of the request. If a plan administrator does not, it may be liable for a penalty of up to $110 per day.

The participant or beneficiary may complain to the DOL if the plan administrator does not comply with information requests. These complaints often trigger an inquiry from the DOL and, depending on the response, the DOL may investigate the plan. A large number of investigations are based on participant complaints.

The best practice is to keep plan records updated and organized, and respond to participant or beneficiary inquiries as soon as possible.

4) DISTRIBUTE REGULAR, ACCURATE PARTICIPANT STATEMENTS.

Plans must distribute regular benefit statements to participants and beneficiaries. For defined contribution plans, statements generally must be distributed once each calendar quarter if the plan allows participant investment direction, and once each calendar year if the plan does not allow investment direction. For defined benefit plans, statements generally must be distributed at least once every three years. Finally, participants and beneficiaries may also request statements once during any 12-month period.

Just like with routine plan documents, participants may complain to the DOL if they have trouble obtaining accurate statements. Statements should be accurate, easy to understand and distributed in a timely fashion.

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computer access restrictions including use restrictions." The court went on to say that "as long as the employee has knowledge of the employer's limitations on that authorization, the employee 'exceeds authorized access' when the employee violates those limitations. It is as simple as that."

In *Nosal*, the Ninth Circuit basically adopted the "Intended Use Theory" previously articulated by both the Fifth and Eleventh Circuits. The "Intended Use Theory" provides that an employee's own subjective changing of allegiances (which is sufficient according to the *Citrin* "Agency Theory"), is not sufficient by itself to terminate authorization to access data/computers; yet an employer is not required to expressly notify the employee that his access has been terminated either. Rather, the employer can implement certain restrictions on access and use of information obtained thereby, ahead of time by policies and agreements, that are known by the employee, and if the employee still violates those limitations by accessing information and using it for improper purposes–not for its intended use–that access will be considered as having been unauthorized for purposes of the Computer Fraud and Abuse Act.

To date, the Sixth Circuit has not addressed this issue. A limited number of district courts within the Sixth Circuit (but not the E.D. or W.D. of Michigan) have addressed the issue and have rejected the Seventh and First Circuit's broad reading of the CFAA, relying instead on the more narrow interpretation advanced by the Ninth Circuit in *Brekka*. In short, it appears as if district courts in the Sixth Circuit will rely on the strict language of the employer's computer/data access policy. No court in the Sixth Circuit has addressed the issue after the Ninth Circuit decided *Nosal*.

IMPLICATIONS FOR EMPLOYERS

From an employer's standpoint, the *Nosal* case is very helpful – even though it is out of the Ninth Circuit. While it was a criminal case, the same standards of "access" that apply criminally under the CFAA also apply to civil actions. That is, it allows employers to implement clear and unambiguous policies that define the scope of permissible authorization for employees to access and use their computers as well as any data from those computers. If they have such policies, then under *Nosal* employers may have a valid CFAA claim against employees who exceed that authorization. If they do not, and their employees have "unfettered access" to the computers and data, then under *Brekka* or the district court decisions out of the Sixth Circuit, the employer will not then be allowed to assert CFAA claims against them because the limitations on access were not set at the outset.

In other words, the lesson for employers is to have comprehensive computer access and data use policies specifying not only what portions of systems employees are permitted to access, but when access is granted, specifying the permitted uses associated with such access. It is also a good idea for more sophisticated employers to have an on-screen warning for access to sensitive data that reminds employees of the employer's policy and the proper use of such sensitive data.

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then indicated that failure to provide proper information, in violation of ERISA, constitutes harm to employees, even if they don't rely on the misleading information.

This is "ugly" because it gives no useful guidance to employers. The Court's decision can be interpreted as allowing a lower court, which finds that employees have been harmed by errors in communication with respect to benefits, to fashion any reasonable remedy under the guise of "equitable" relief.

THE "TAKE AWAY" FROM THIS CASE

The Good – SPDs and other communications to employees do not trump plan documents. For benefits to be enforceable they must be provided by the plan document.

The Bad – It is "bad" for a court to rewrite the terms of a plan as a means of providing benefits as described in an SPD or other communication. The law does not authorize the court to fashion that type of remedy.

The Ugly – Notwithstanding the "good" and the "bad," a court MAY provide for payment of compensation to participants as an equitable remedy; such compensation just might equal the amount of benefit the participants thought they would receive from the misleading or inadequate written disclosures. This is "ugly" because according to this decision, a court can always find a way to do what the Supreme Court said, in the first instance, it could not do.

The Cigna case is dangerous to plan sponsors. It holds that a court can compensate employees in a manner never intended under the plan.

The importance of SPDs and other benefit disclosures and communications has never been greater. Notices, disclosures, communications and SPDs must be written and reviewed carefully before being delivered to your employees. If they are not written correctly, the mistake can be very costly.

NEW ELECTION RULES

Most recently, on June 21, 2011, the Board published proposed rules which would substantially overhaul the procedures by which it conducts elections to either certify or decertify a union as the representative of a group of employees. The present rules have been in place for decades and they either require or allow for a number of election-related issues to be resolved before an election is held. Some of these issues require a hearing, and the party who is unhappy with the outcome of that hearing may file an appeal to the NLRB before the election occurs. This can have the effect of delaying the scheduling or holding of an election, and critics complain that it allows a party (usually the employer) to slow the process down and buy time to communicate its position to its employees. Under the proposed rules, the pre-election process would be streamlined, and many of the procedural steps that currently exist would be delayed until after an election. Some steps, which are currently mandatory, would become totally discretionary. In addition, employers would be required to provide additional information about their employees much more quickly than under the present rules. At present, elections are typically held within about five or six weeks of when a petition is filed. Under the proposed rules, it has been predicted that elections could be held in as little as two or three weeks. This obviously would give the non-petitioning party much less time to communicate its message to the affected employees. Opponents of the proposed rules claim that this proposed expedited process is the Board's way of appeasing organized labor for the failure to pass the controversial Employee Free Choice Act. They also criticize the fact that the Board has expedited the time period for public comment on its new election rules.

The Board's recent decisions and actions have not gone unnoticed in Congress and it's a safe bet that the Republican-controlled House of Representatives will continue to put pressure on the Board in a variety of different ways (including legislation or through the appropriations/budgeting process). Whether you agree or disagree with the Board's recent initiatives, one thing is clear: the Board has raised not only its public profile, but also awareness of the NLRA and the rights it protects. Thus, even if the proposed posting requirement or the changes to the election rules are never enacted (or if they are enacted in some modified form), the Board will still have succeeded in making many more people aware of the federal labor laws.

"Before taking employment action against an employee for statements he or she made on a social media site or a blog, the employer should carefully evaluate whether the statements or posts might be protected under the NLRA."

Entitlement to Medicare or Medicaid: If an employee, spouse or dependents either become entitled to or lose coverage under Medicare or Medicaid, the employee can make a corresponding election to cancel, reduce or reinstate coverage under the accident or health plan.

FMLA or USERRA Leave: An employee taking leave under the federal Family and Medical Leave Act or Uniformed Services Employment and Reemployment Rights Act may revoke an existing election of accident or health plan coverage.

Pre-Tax HSA Contributions: If HSA contributions are permitted under the cafeteria plan, employees may elect, revoke or change salary reduction elections for HSA contributions with respect to salary that has not become currently available at the time of the election. A participant must be permitted to change his or her election at least on a monthly basis.

WHAT OTHER RULES APPLY?

Any requested change in election must be on account of and correspond with the event. This consistency rule applies to each participant, spouse and dependent. For example, if an employee elects single coverage during open enrollment and then marries someone who has a child that would satisfy the definition of an eligible dependent under the group health plan, the employee may add the new spouse and stepchild mid-year. If the employee also requested at the same time to drop life insurance coverage, that would need to be denied as it would be a change that was not consistent with the change in status event.

The plan may permit "tag-along" changes for existing spouses and dependent children. The plan should consistently follow the same rules for all similarly situated participants in order to avoid potential litigation and to avoid adverse tax consequences to the plan participants and the potential disqualification of the plan.

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5) ENSURE THAT FEES ARE REASONABLE AND DO NOT PAY EXPENSES WITH PLAN ASSETS.

The Form 5500 requires large plans to disclose service provider fees charged to the plan. Excessive plan fees have become another top investigative issue for the DOL, and investigators are likely to carefully review Schedule C to identify potential red flags. Also, while many administrative expenses may be paid from plan assets, some may not. Contact us for help with determining whether fees are reasonable and sorting out what expenses may be paid with plan assets.

6) RESPOND PROMPTLY TO DOL LETTERS REQUESTING INFORMATION.

No explanation is necessary for this one. Ignoring the DOL's inquiries will do the opposite of making them go away, so please don't try it!

Form 5500 filings are a common source for investigators to select plans for investigation. Red flags include plans with a large percentage of assets in real estate, limited partnerships or the like, noncash contributions, loan defaults, low diversification ratios, unreasonably low rates of return, an adverse accountant's opinion and notes or disclaimers on the financial schedules. Remember, the Form 5500 is signed under penalty of perjury. If you are concerned that any of these red flags may apply to your plan, we can help you fix them, but you must answer the Form 5500 truthfully.

In addition to the above triggers, the DOL will also target a plan for investigation based on other factors, such as bankruptcy filings or media reports that a company is in financial trouble. Too often, plans sponsored by employers experiencing severe financial difficulty are vulnerable to inappropriate behaviors by the employer, such as delaying deposits of participant contributions to the plan, loans to the company or other misbehaviors. Sometimes, investigators target specific industries or simply choose plans at random.

What do you do if you receive a notice that the DOL is investigating your plan? Contact us immediately! The sooner you call us, the more likely we can help make the process run smoothly and take steps to reduce your potential liability.

Other Developments in HR

What else is going on in the world of employee benefits and labor and employment law? Here is a list of the electronic alerts we have sent to our Human Resources clients over the last few months. All of them are available at wnj.com/publications.

New Michigan Law Changes Taxes
and Withholding on Retirement Income
by Jay Kennedy and Mary Jo Larson (June 14, 2011)

Disclosure Deadlines Extended – Slightly
by George Whitfield (June 1, 2011)

Drug Reimbursement Amendment Required Soon
by April Goff (June 1, 2011)

New Deadline for Medicare Creditable Coverage Notice
by April Goff (May 23, 2011)

Want to Complain About Your Employer?
There's an Ap for That
by Steve Palazzolo (May 10, 2011)

Health Care Reform's W-2 Reporting Guidance
by April Goff (May 3, 2011)

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