Warner Norcross&Judd LLP
ATTORNEYS AT LAW

Fall 2008



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Human Resources Newsletter

# HR Focus

## Online Recruiting Raises Unique ADA Compliance Issues

by Sarah A. Luke

With the recent rise in popularity of career Web sites such as Monster.com, which boasts of 18 million resumes posted online and nearly 500,000 available jobs, many employers have taken the initiative to launch their own online recruiting Web sites.

More and more employers are turning to the Internet to identify qualified job applicants. In fact, a recent study by Inavero Institute for Service Research found that 50 percent of hiring managers use online resources to fill nearly 72 percent of their vacant salaried positions. Online recruiting has become a primary technique of many human resources professionals hoping to identify talented applicants in an increasingly large pool.

### CAUGHT UNAWARE

The rise in popularity of online recruiting raises unique compliance issues under the Americans with Disabilities Act, issues about which many employers are unaware. For example, a recent study conducted at Cornell University found that although online recruiting has made significant inroads into human resources processes, most employers had not considered the accessibility of their recruiting Web sites to applicants with disabilities. The majority of human resources professionals were simply unaware of the existence of technologies and Web site design formats that accommodate applicants with disabilities.

This lack of awareness presents a real potential for certain populations of individuals with disabilities to be excluded from this very popular avenue of searching for and obtaining employment.

*continued on page 4*

# Editor's Note | What You Don't Know Can Hurt You

## Can human resources managers be expected to think of everything?

Well, yes. Laws change frequently, new opportunities arise and often it's difficult to keep up with everything that affects the workplace. Just doing the job is difficult enough; finding ways to improve (or save the company money!) is time-consuming, to say the least.

That's where we come in. Warner Norcross & Judd's Human Resources attorneys keep up on the latest legal trends and often offer advice to clients before they know they need it.

For example, the story in today's edition about online recruiting and how it relates to people with disabilities may not be a common subject of discussion among HR managers. But it should be.

The exploding popularity of online recruiting, coupled with companies now using their own Web sites as recruiting tools, is prompting the government to take a closer look. Especially in the area of the Americans with Disabilities Act.

The fact that a recent study conducted at Cornell University found that although online recruiting has made significant inroads into human resources processes, most employers had not considered the accessibility of their recruiting Web sites to applicants with disabilities, presents a serious problem. According to the study, the majority of human resources professionals were "simply unaware" of options available to help applicants with disabilities.

Today, Warner attorney Sarah Luke takes a look at the online recruiting process, tools available to make it better and compliance issues that need to be addressed in a story on Page 1.

Here's another issue that may not be top-of-mind: Hiring disabled individuals. Did you know that in a recent survey a vast majority of the public said they would prefer to give their business to companies that hire people with disabilities? Did you know that tax credits are available for companies that hire disabled individuals? If this is news to you, you might want to check out the article by Warner attorney Steve Palazzolo on Page 3.

Finally, amid all the hoopla surrounding the "bailout bill" for the financial markets, there were a number of employee benefits measures also signed into law. We've got you covered on that front with stories on Pages 2 and 5.

Hopefully, the time you take to read this newsletter will save you time (and money!) in the long run.

***The Editors***

# Flurry of New Laws Impact Health and Welfare Benefits

by Norbert F. Kugele

While the current economic crisis has been grabbing all of the headlines recently, Congress also has enacted and the President has signed a number of new laws that impact the health and welfare benefits that employers offer to workers. Here is a quick summary of some new laws that you may want to know more about:

### EXPANDED MENTAL HEALTH PARITY REQUIREMENTS

Because health plans generally provide less coverage for mental illness and substance abuse than for other medical conditions, Congress has enacted the Paul Wellstone and Pete Domenici Mental Health Parity and Addition Equity Act of 2008. Attached to the Emergency Economic Stabilization Act of 2008, this law states that if a group health plan provides both medical/surgical benefits and mental health or substance use disorder benefits, then the plan must ensure that:

- Financial requirements (such as co-pays, co-insurance and out-of-pocket expenses) that apply to mental health or substance abuse benefits are no more restrictive than the most common or frequent limitations that apply to substantially all medical or surgical benefits.
- Treatment limitations (such as frequency of treatment, number of visits and days of coverage) that apply to mental health or substance abuse benefits are no more restrictive than the most common or frequent limitations that apply to substantially all medical or surgical benefits.
- Criteria for medical necessity determinations and reasons for denying mental health or substance abuse benefits are made available to those covered under the plans.
- Out-of-network providers are made available for mental health or substance use disorder benefits if also made available for medical/surgical benefits.

The law provides an exemption for small employers with less than 50 employees during the preceding calendar year (determined on a controlled group basis), and has a cost exemption if a plan can demonstrate (as certified by a qualified actuary) that within the first six months of compliance it results in a 2 percent actual cost increase in the first year and 1 percent increase in subsequent years.



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# One in 150 Kids in America will be Diagnosed with Autism:

## i am autistic

by Steven A. Palazzolo

Every Sunday when I walk into church "Billy" stops me. While that's not his real name, he is a real person. I don't know how old Billy really is but he must be 60 or so. Billy stops me to tell me about something that happened at work.

I used to work with Billy. Billy empties the trash where he works, and he has been doing it for more years than most people can remember. Billy comes to work every day on the bus. He is rarely absent, never tardy and always happy to be there. He takes five weeks of vacation every year — no more and no less. Twice a year, when the time changes for daylight savings time, he tells us all to change our clocks. In short, Billy is a great employee.

But Billy doesn't have much of an IQ. Some people think he dresses funny; his wispy gray hair is often messy. So if he walked into your office would you hire him? Come on, be honest. Would you?

When we talk about the Americans with Disabilities Act we usually think about folks with physical disabilities. But there is a whole untapped pool of people with what some people, including the EEOC, call "intellectual disabilities."

You know, of course, that the ADA requires you to provide a reasonable accommodation to qualified individuals with a disability, including persons with intellectual disabilities. In its "Questions & Answers About Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act," which can be found at www.eeoc.gov/facts/intellectual_disabilities.html, the EEOC states:

> *An individual is considered to have an intellectual disability when: (1) the person's intellectual functioning level (IQ) is below 70-75; (2) the person has significant limitations in adaptive skill areas as expressed in conceptual, social, and practical adaptive skills; and (3) the disability originated before the age of 18. "Adaptive skill areas" refers to basic skills needed for everyday life. They include communication, self-care, home living, social skills, leisure, health and safety, self-direction, functional academics (reading, writing, basic math) and work.*

So that means if Billy came to your door for an interview and he was otherwise qualified for your open job, you couldn't refuse to hire him because of his "disability." But there aren't only good legal reasons to consider this untapped pool of qualified workers, there are good business reasons, too. According to the U.S. Department of Labor's "Business Case for Hiring Disabled Workers":

- 72 percent of the American public view companies that hire people with disabilities more favorably than those that do not.
- 80 percent of the public also agree that they would prefer to give their business to companies that hire people with disabilities.
- As reported by ASAE & The Center of Association Leadership, in an article in Fortune magazine, Pizza Hut Inc. stated that its turnover rate for people with mental disabilities in its Job Plus Program was 20 percent compared to a 150 percent turnover rate among non-disabled employees.
- Fortune also reported that after Carolina Fine Snacks in Greensboro, N.C., started hiring people with disabilities, employee turnover dropped from 80 percent every six months to less than 5 percent; productivity rose from 70 percent to 95 percent; absenteeism dropped from 20 percent to less than 5 percent; and tardiness dropped from 30 percent of staff to zero.

*continued on page 4*

*Online Recruiting* continued

## COMPLIANCE GUIDE

Aware of the potential for adverse impact, the Office of Federal Contract Compliance Programs (OFCCP) issued a regulatory compliance guide to assist government contractors with compliance issues associated with online recruiting. However, given the expansion of the Americans with Disabilities Act, the guidance provided by the OFCCP also proves helpful for federal contractors, public employers and private employers.

The OFCCP guidance provides that an employer should ensure its online application system incorporates "interoperable" electronic and information technologies, rendering it generally accessible. Specifically, the regulations provide that "[i]nteroperability is the ability of a computer system to effectively interact and communicate when an applicant with a disability is using assistive technology/adaptive software and adaptive strategies with the [employer's] application system."

The U.S. Department of Labor has identified resources available to employers who wish to make their online recruiting Web sites interoperable. These are available at the Department of Labor's Office of Disability Employment Policy Web site (www.dol.gov/odep/) and the Job Accommodation Network Web site (www.jan.wvu.edu).

## WEB ACCOMMODATIONS

An interoperable recruiting Web site could potentially accommodate individuals with several different types of disabilities including hearing impairments, sensory impairments, motor impairments and cognitive impairments. For example, using large graphics to mark hyperlinks would enable an applicant who suffers from tremors to access the hyperlink more easily. Additionally, a neatly organized screen would aid individuals who are easily distracted in grasping the site's content. Finally, removing the refresh option from the screen would aid users with sensory impairments, making it difficult to repeatedly restart while scrolling through a Web page.

The OFCCP has cautioned that employers who provide an alternative application process for disabled job applicants in lieu of ensuring that their Web sites are interoperable are committing an unlawful pre-employment inquiry into whether an applicant is disabled and that will likely result in liability under the ADA. In contrast, an employer who routinely offers applicants various methods of applying for jobs and affords all such applicants equal consideration may not need to focus on the interoperability of its Web site. Thus, employers walk a fine line when determining the best use of company resources to ensure ADA compliance.

## MORE CHANGE COMING

Employers that choose to focus on the interoperability of their Web sites face a tough challenge. Because the rise in popularity of online recruiting Web sites is relatively recent, there is very little law for an employer to rely on. The Job Accommodation Network and the Department of Labor provide some guidance; however, the enactment of the ADA Amendments in January 2009, which undoubtedly extend the reach of the ADA, will only complicate this area.

If you would like help ensuring that your company's career Web site is interoperable and compliant with the regulatory standards of the ADA, please contact any member of the WNJ Human Resources practice group.

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*Autism* continued

Oh, by the way, you can also get tax credits for hiring disabled people.

So, what do you think now? Would you hire Billy? If you're interested in hiring someone like Billy or starting a program to help people with disabilities while you help your business, give us a call, we can help you.

Oh, yeah. The headline of this article? My son wrote it.*

**The author gratefully acknowledges the contributions of Christopher Palazzolo. "Autism," by Chris Palazzolo, English II. March 25, 2008. Hudsonville Public Schools.*

# Executive Compensation
## After the Bailout

by Anthony J. Kolenic

**The Emergency Economic Stabilization Act of 2008 imposes significant new limits on the executive compensation of financial institutions that participate in the Act's Troubled Asset Relief Program (TARP).** While these limits now apply only to participants in TARP, many see them as the first wave of potential Congressional action on deferred compensation generally. Only time will tell. In the meantime, these are the provisions in place now.

### DIRECT PURCHASES

A financial institution that sells troubled assets directly to the Secretary of the Treasury (where no bidding process or market prices are available) and where the Secretary receives a "meaningful" equity or debt position in the financial institution as a result of the transaction must:

- Limit compensation to exclude incentives for executive officers to take "unnecessary and excessive risks" that threaten the value of the institution (it is not clear what that means).
- Place a "clawback" provision in its agreements providing for recovery by the institution of any bonus or incentive compensation paid to a senior executive officer based on financial statements that are later proven to be materially inaccurate.
- Prohibit any golden parachute payments to its senior executive officers.

Senior executive officers are individuals who are one of the top five executives of a public company whose compensation is required to be disclosed pursuant to SEC rules and also includes their counterparts in non-public companies.

Clearly a new day is dawning for executive compensation.

It appears that the clawback rule applies without regard to whether there was any misconduct on the part of the executive or whether there was even any connection between the executive and the misleading financial statements.

### AUCTION SALES

A financial institution that sells $300 million or more in assets through the TARP auction program (including any sales through direct purchases) is subject to the following:

- The Code Section 162(m) limitation on deductible compensation of the CEO, CFO and the top three highly-compensated officers at the company is reduced from $1 million to $500,000 per year. For the first time, this provision of Section 162(m) will also apply to non-public companies, and in all cases will not contain any exception for "performance-based compensation." In addition, compensation that is non-deductible under this provision may not be deferred to future years in order to allow a deduction at that time. Status as an employee affected by Section 162(m) travels with the employee into the future.
- The Section 280G golden parachute rules will apply to any payments made upon severance from employment of the five individuals noted above by reason of an involuntary termination or in connection with a bankruptcy, liquidation or receivership.
- Any new employment contract with a senior executive officer may not provide any golden parachute in the event of involuntary termination, bankruptcy, insolvency, or receivership.

There are plenty of gray areas within the measure, however. It is not clear how these new rules apply to existing compensation arrangements, although it appears the rules apply in full. There is apparently no transition relief for existing agreements and plans. It is also not clear how the new rules apply to parent or holding companies.

The Act does not recognize the potential impact on the financial institution's decision whether to participate in TARP or the impact on its top managers and the prospect that top executives may choose to leave the organization rather than accept the limitations.

Clearly a new day is dawning for executive compensation. The attorneys in the Employee Benefits Practice Group stand ready to help guide you through these complicated rules.

# Companies With A HEART Can Help Military Reservists

by Sue O. Conway

Employers can add a new option to their section 125 cafeteria plan to allow reservists called to active military duty to withdraw unused amounts in their health flexible spending accounts (FSAs).

The HEART Act (Heroes Earnings Assistance and Relief Tax Act of 2008) was enacted last June to permit "qualified reservist distributions" or QRDs in order to allow reservists called to duty to avoid the dreaded "use-it-or-lose-it" rule that applies to FSAs. The IRS recently issued Notice 2008-82 providing some much-needed guidance on how these distributions will work.

Here are some frequently asked questions regarding this change:

### Q: Who Is a Qualified Reservist?

**A**: A Qualified Reservist is a member of the Army National Guard, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard, Air Force Reserve, Coast Guard Reserve, Reserve Corps of the Public Health Service or any additional service listed under the definition of "reserve component" at 101 U.S.C. 37.

### Q: What Is A Qualified Reservist Distribution?

**A**: A QRD is a distribution of all or a portion of the reservist's health FSA account balance if he or she is a member of a reserve component ordered or called to active duty for at least 180 days or for an indefinite period of time. QRDs are an exception to the general rule that a health FSA can only pay for substantiated medical expenses.

### Q: When Must It Be Requested?

**A**: The request for the distribution must be made before the last day of the plan year (or grace period, if the plan has one) in which the order or call to duty was issued. The reservist must provide the employer with a copy of the order or call to active duty.

### Q: Who May Receive A QRD?

**A**: Only an employee who meets the requirements for a QRD is eligible. Spouses and dependent children are not eligible.

### Q: How Does The 180-Day Requirement Work?

**A**: If an employee's active duty period began before June 18, 2008, but continued beyond June 18 and meets the 180-day or indefinite duration requirement, the employee is eligible for a QRD. If the period specified in the order is less than 180 days, a QRD is not allowed. However, if a subsequent order increases the total period of active duty to 180 days or more, a QRD is permitted. For example, if an employee is ordered or called to active duty for 120 days and the order is subsequently extended for an additional 60 days, the employee qualifies for a QRD.

### Q: What Amount Is Available As A QRD?

**A**: The plan should indicate how the amount available as a QRD will be determined. Here are the options:

- The entire amount elected for the FSA for the plan year minus reimbursements received as of the date of the QRD request
- The amount contributed to the FSA as of the date of the QRD request minus any reimbursements received as of that date
- Some other amount not exceeding the entire amount elected for the plan year minus reimbursements.

We expect most employers will select the second option above and, in fact, that option is the default amount if the plan fails to describe how the QRD amount will be determined.

### Q: When Will A QRD Be Paid?

**A**: The QRD must be paid to the employee within a reasonable time but no more than 60 days after it is requested.

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# Watch For Union Activity With The Passage Of Employee Free Choice Act

by Robert R. Cleary

With a new Democratic administration set to take office next January under President-elect Barack Obama, many employers will be anxious to know what effect, if any, this development may have on their businesses.

In terms of labor and employment law, the most substantial change promises to be quick passage of the Employee Free Choice Act (EFCA). Throughout most of the presidential campaign, the EFCA was under the radar. Be assured, its passage will change federal labor laws as they pertain to unionization.

## HISTORICAL PERSPECTIVE

The EFCA was originally proposed in the 108th Congress by Representative George Miller (D-CA). Initially, the EFCA failed to sustain any momentum as the Committee on Education in the Work Force and the subcommittee on employer-employee relations took no action on it other than to hold a series of hearings. Miller again introduced the bill in 2007 as House Bill 800. It passed in the House on March 1, 2007, by a vote of 230-195. Later that month, the EFCA was introduced in the U.S. Senate by Senator Edward Kennedy (D-MA). It was reported out of the Committee on Health, Education, Labor and Pensions but failed a cloture vote in the Senate on June 26, 2007, by a 51-48 margin. There can be no doubt that the newly formed 111th Congress will pass the EFCA and it will be signed into law by President-elect Obama.

## WHAT'S IN STORE

The EFCA contains many changes warranting a closer inspection.

The measure has three critical components that employers must familiarize themselves with in order to prevent potentially significant and extensive consequences in their workplace. First, the EFCA provides certification of unions as the exclusive bargaining agent of employees upon presentation of authorization cards signed by a simple majority of the employees in an appropriate bargaining unit. Under current labor law, the National Labor Relations Board will certify a union as the exclusive representative of employees if it is elected by either a majority signature drive, the card check process, or by secret ballot NLRB election, which can be held if more than 30 percent of employees in a bargaining unit sign cards authorizing representation by a union.

This so-called card check certification is a significant change in the current state of the law and can give an advantage to unions during an organizing drive.

Second, once a union is certified as the bargaining representative, the EFCA changes the process of collective bargaining. The Act imposes strict time limits on the negotiation of a collective bargaining agreement. Employers would have to begin negotiations within 10 days of receiving a demand for bargaining from the union unless the parties agree to a longer period of time. Further, if an initial collective bargaining agreement is not reached within 90 days, either party may request mediation with the Federal Mediation and Conciliation Service. If the parties do not reach an agreement after 30 days of mediation, the dispute would be referred to an "arbitration board."

The arbitration board, according to the EFCA, may render a decision settling the dispute and impose a collective bargaining agreement that will be binding on the parties for up to two years. The EFCA's vague legislative language fails to define who or how many individuals make up the arbitration board. It also does not provide guidance as to how that panel would settle bargaining disputes and how it would dictate economic terms and conditions.

## ADDITIONAL PROVISIONS

President-elect Obama's public support of the EFCA is well documented. In fact, he has suggested he would propose additional provisions to the National Labor Relations Act that would make it illegal to replace economic strikers. Under current law, employers have the right to continue operations during an economic strike by hiring permanent replacement workers. The Obama proposal would change the current negotiation dynamic and provide unions a significant strategic advantage in the negotiation process by providing strikers with reinstatement job security.

## PREVENTIVE STRATEGIES

While the EFCA may seem to favor unions, employers are not powerless to implement enhanced preventive strategies.

First, employers should assess the possibility of union activity and determine the potential success of card check certification. Then make sure management carefully educates employees on the process of unionization. Care should be taken to ensure that educating the employees about the implications of unionization is advanced without reflecting any anti-union animosity. If employees know in advance how the union and the collective bargaining process may impact them personally, it will make their decision easier and help them avoid any pressure to sign union authorization cards without knowing all the facts.

Once employees learn about the process and consequences of unionization, employers should train front-line supervisors to recognize early signs of organizing activity in the workplace. Early recognition and action in identifying union organizing is critical.

# HR Attorneys present Successful seminar

More than 300 people attended Warner Norcross & Judd's recent Human Resources Seminar. This year, the program moved to DeVos Place in downtown Grand Rapids to give attendees a chance to spread out a little and attorneys more space for additional breakout sessions.

The daylong event put the emphasis on Employer of Choice initiatives throughout the morning session followed by general breakout sessions of interest to HR personnel in the afternoon. The seminar is a combined effort of the Labor and Employment and the Employee Benefits attorneys at Warner.

Employer of Choice status, participants were told, helps a company attract and maintain the best talent through focused and meaningful recruiting, retention, leadership, compensation and benefits efforts. In return, those people most often make a stronger connection with their employer, feel more invested and are involved as employees, and often stay with the company for a longer period of time.

The lunch presentation featured members of the firm's Government Affairs group examining the presidential election and what businesses can expect when either of the candidates attains the White House.

The afternoon focused on more "traditional" labor and benefits issues and gave participants a chance to break into smaller groups that were more conducive to question-and-answer sessions.

The afternoon's subjects included a legal update on employee benefits and labor and employment topics, cafeteria benefits plans, the global workforce, retaliation claims, technology and privacy in the workplace and much more.

Based on responses from attendees, the presentations were informative and the topics were right on target.

Here's what people said about the HR Seminar:

- "I liked the questions and feedback in the morning session."
- "Another great seminar! Keep up the great topics and energy."
- "Good stuff, but it deserves two days."
- "I appreciate the speakers' willingness to make themselves available for one-on-one questions following their presentations."
- "Enjoyed the variety of speakers and the audience involvement with voting."
- "Another excellent seminar filled with relevant, knowledge-rich material. Highly useful."
- "Very informative. One of the best seminars I've attended."
- "It was well organized and the content was very relevant to today's environment."

## And The Winner Is ...

The winner of this year's HR Seminar Prize Drawing is **Patrice Shay of Sparks Belting/JSJ Corp**. She won tickets to the Radio City Rockettes Christmas Spectacular Show at Van Andel Arena. Congratulations to Pat and thanks to everyone who attended the seminar.

# Key IRS Benefit Plan Limits For 2009

The IRS recently released its 2009 employee benefits limitations for retirement plans. Earlier this year the IRS issued the 2009 HSA/HDHP adjustments. The following chart lists common limitations relevant for many employers.

| Limitation | 2009 | 2008 |
|---|---|---|
| **RETIREMENT PLANS** | | |
| Qualified Retirement Plans<br>- annual compensation limit | $245,000 | $230,000 |
| Defined Benefit Plans<br>- annual benefit limit | $195,000 | $185,000 |
| Defined Contribution Plans<br>- annual additions limit | $49,000 | $46,000 |
| Catch-Up Contribution Limit | $5,500 | $5,000 |
| Highly Compensated Employee | $110,000 | $105,000 |
| Annual Deferral Limits<br>- 401(k), 403(b), 457(b)<br>- SIMPLE plan | $16,500<br>$11,500 | $15,500<br>$10,500 |
| **SOCIAL SECURITY** | | |
| Social Security Wage Base | $106,800 | $102,000 |
| **HSA/HDHP** | | |
| Annual minimum deductible<br>-Single<br>-Family | $1,150<br>$2,300 | $1,100<br>$2,200 |
| Annual out-of-pocket maximum<br>-Single<br>-Family | $5,800<br>$11,600 | $5,600<br>$11,200 |
| Annual contribution limit<br>-Single<br>-Family | $3,000<br>$5,950 | $2,900<br>$5,800 |
| Catch-Up Contribution Limit<br>-Single | $1,000 | $900 |

*HEART* continued


### Q: Is A QRD Subject To Taxes?

**A**: Yes. A QRD is included in the employee's gross income for income and employment tax purposes. The QRD should be reported as wages on Form W-2 for the year it is paid to the employee.

### Q: Must Our Section 125 Plan Be Amended?

**A**: QRDs are optional. A cafeteria plan is not required to provide for QRDs. However, if a company wants to permit QRDs (and many employers desire to do so), the plan must be amended to allow them. While amendments to cafeteria plans generally can only be effective going forward, a QRD amendment may be retroactively effective to permit distributions that are requested between June 18, 2008 (the date the HEART Act was enacted) and the end of 2009, so long as the amendment is made by December 31, 2009.

### Q: What Should We Do?

**A**: Companies that want to add QRDs in order to benefit employees in the reserves who are called to active duty may contact an attorney in the WNJ Employee Benefits Group for an amendment to their cafeteria plan document.

# I was Wondering

Q:
Are Employee Assistance Programs (EAPs) subject to ERISA, i.e., do we need a plan document for our EAP program?

A:
It depends. Often the answer is yes — an employer-sponsored EAP is an ERISA plan, but it depends on whether the program provides medical care. Plans that provide medical care are subject to ERISA. According to Department of Labor advisory opinions, if an EAP has trained counselors who provide counseling service, the EAP probably provides medical care and is subject to ERISA. If the EAP only provides referrals to other professionals and is not staffed by trained counselors, it is probably not an ERISA plan. This is a gray area and many employers (and EAP firms) are unaware that an EAP may be an ERISA plan. Whether or not it is subject to ERISA has implications for plan document and SPD requirements, 5500 reporting, COBRA, etc. If you are in doubt, the safest route is to treat your EAP as an ERISA plan.

Q:
Our health insurance is self-funded; therefore, we have access to PHI. Can we take any follow-up action based on that PHI? Specifically, an employee was treated for an addiction, and our mission is to treat addictions. Staff must report if they have relapsed or have an addiction issue. Can we follow up with this employee?

A:
Probably not. HIPAA prohibits an employer from using health plan information for any purpose other than providing health plan benefits. This means that health plan information cannot be used in connection with any other employee program, such as FMLA, disability, workers' compensation, etc. In this particular case, the employer cannot look to the health plan to determine whether the individual may have relapsed or has an ongoing addiction issue.

To the extent that the health plan provides treatment for drug addiction, the health plan could look at health plan records to determine eligibility for a drug treatment program, but that information cannot be used for making any employment decisions about an individual.

*'I Was Wondering' gives readers an opportunity to ask questions of our HR attorneys. Not all questions will be answered publicly. To submit a question, please send it by e-mail to Tim Gortsema at tgortsema@wnj.com.*

The new mental health parity requirements will go into effect for plan years beginning after October 3, 2009. If your plan is on a calendar year, you will have to be compliant for 2010. The Departments of Labor, Health and Human Services, and Treasury are required to issue regulations within a year that should clarify these requirements.

### EXTENSION OF COVERAGE FOR SERIOUSLY ILL COLLEGE STUDENTS

Health plans often extend coverage for dependent children while they are in school, but do not necessarily allow for coverage during a medical leave of absence from studies. "Michelle's Law" — named after a student who attended college full time while undergoing colon cancer treatment in order to not lose coverage under her parents' health insurance — addresses this gap in coverage. The law amends ERISA to require that a group health plan that provides dependent coverage for college students allow such coverage to continue if the student must take a leave of absence from studies because of a serious illness or injury. This coverage must continue for up to one year or, if shorter, until the date the student would age out of or otherwise lose coverage, and must be the same coverage that would otherwise be available to a dependent. In order to continue coverage for the child during the leave of absence, the employee must provide a written certification from the child's treating physician.

This law will go into effect for plan years beginning on or after October 9, 2009.

### NEW BICYCLE COMMUTERS TRANSPORTATION FRINGE BENEFIT

Also attached to the Emergency Economic Stabilization Act of 2008, this new law allows employers to reimburse employees on a monthly, tax-free basis for expenses of a bicycle used regularly for travel between the employee's residence and place of employment — including costs of buying, maintaining and storing the bicycle. Unlike other transportation fringe benefits, this cannot be funded by employee pre-tax salary reductions and must therefore be paid by the employer. The benefit per employee is limited to $20 per month, and does not apply if the employee is receiving another qualified transportation fringe benefit, such as a van pooling or transit pass benefit.

The new law goes into effect for plan years beginning on or after January 1, 2009.

### CHANGE IN DEFINITION OF DEPENDENT CHILD

Under the Fostering Connections to Success and Increasing Adoptions Act of 2008, the definition of a "dependent child" has been changed to clarify, among other things, that a taxpayer may not claim a child as a dependent if the child is married. This change in definition may have an impact on who may be covered on a pre-tax basis under your group health plan — particularly if your plan does not exclude children who are married.

This change goes into effect beginning on January 1, 2009.

### WHAT TO DO NOW

Before the start of the new year, you should look at your health plans and cafeteria plans to see if the definition of eligible dependents needs to be updated to reflect the clarification made to the law. You can also consider whether to implement the new bicycle transportation fringe benefit for 2009.

During 2009, you should evaluate and make necessary amendments to your health plans to make sure that you will be in compliance with the new mental health parity and student medical leave requirements.

If you have any questions about these new laws, please contact Norbert F. Kugele at 616.752.2186 or nkugele@wnj.com, or any other member of Warner's Employee Benefits Practice Group.

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