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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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WORKER HEAT PROTECTIONS BEING PUSHED BY OSHA

The Occupational Safety and Health Administration (OSHA) has issued an Instruction effective April 8, 2022, establishing a National Emphasis Program (NEP) for Outdoor and Indoor Heat-Related Hazards. This program has been implemented pending OSHA's pursuit of a health rule governing indoor and outdoor work which it announced about eight months ago, taking comments through January 26, 2022. Both the Obama and Trump Administrations had rejected a heat rule, but it is being pursued during this Administration. Without a specific heat standard, OSHA applies its general duty clause to cite employers for failing to protect their workers. However, judges have vacated citations in many of those cases because OSHA has not been able to prove the heat threat.

OSHA Assistant Secretary Doug Parker who oversees OSHA suggested that OSHA wants to implement an indoor standard as well as one for outdoor work. Employer representatives have expressed concern that any proposed standard should not require all industries and all locations to abide by the same requirements, and instead argued for an industry-specific standard.

The NEP prioritizes on-site (in-person) response by OSHA to complaints and for all employer-reported hospitalizations related to heat hazards. It cites the National Weather Service (NWS) approach to the heat index as creating a greater concern when it is 80°F or higher, and this index is sometimes referred to the apparent temperature, and measures how hot it really feels when relative humidity is factored in with the actual air temperature.

An on-site inspection will be investigated where an employee brings a heat-related hazard to the attention of OSHA such as being exposed to high temperature conditions without adequate training, acclimatization or access to water, rest and shade. OSHA will also inquire during inspections regarding the existence of any heat-related hazard prevention programs on heat priority days, when the heat index for the day is expected to be 80°F or more.

The NEP lists both indoor and outdoor industries known to have heat-related hazard incidents to be considered targeted industries in terms of unprogrammed inspections. The list includes, among many others, saw mills, furniture manufacturing, various transportation industries including local delivery, warehousing, construction, and agriculture.

During heat-related inspections, OSHA shall:

(a) Review OSHA 300 Logs and 301 Incident Reports for any entries indicating heat-related illness(es);

(b) Interview workers for symptoms of headache, dizziness, fainting, dehydration, or other conditions that may indicate heat-related illnesses, including both new employees and any employees who have recently returned to work;

(c) Determine if the employer has a heat illness and injury program addressing heat exposure, and consider the following:

- Is there a written program:
- How did the employer monitor ambient temperature(s) and levels of work exertion at the worksite?
- Was there unlimited cool water that was easily accessible to the employees?
- Did the employer require additional breaks for hydration?
- Were there scheduled rest breaks?
- Was there access to a shaded area?
- Did the employer provide time for acclimatization of new and returning workers?
- Was "buddy" system in place on hot days?
- Were administrative controls used (earlier start times, and employee/job rotation) to limit heat exposures?
- Did the employer provide training on heat illness signs, how to report signs and symptoms, first aid, how to contact emergency personnel, prevention, and the importance of hydration\

OSHA states it will always verify a employer's assertion regarding workplace conditions or worker exposures to heat by interviewing employee(s) at the site.

COBRA COVERAGE NOTICES BEING WIDELY CHALLENGED IN COURT

The Consolidated Omnibus Budget Reconciliation Act (COBRA) requires employers to issue notices to employees that there are options to continue healthcare coverage at their own expense following their termination or certain reductions in work hours. While applicable rules set forth the requirements of such notices, COBRA provisions also include a potential for fines of as much as $110 per employee per day. As a result, certain plaintiffs' law firms are getting involved in suing large employers for failure to meet the legal details in the notices. Over 50 cases have been filed in federal court over the last four years, many of them resulting in large settlements: Home Depot settled a case for $815,000, Fiat Chrysler settled for $600,000, and Costco agreed to pay $750,000. Most of the cases are based on an allegation that the COBRA notices do not contain required information, that they are too complicated for people to understand, or that they were designed to scare people from filing for COBRA by warning against filing false information. In an unusual move, the U.S. Department of Labor has filed an amicus brief supporting one employer, Southwest Airlines, saying the argument used by many plaintiffs' law firms is wrong. The plaintiffs' firms have argued that COBRA notices incorrectly fail to

include contact information for health plan administrators, but the DOL in its brief says that their regulations allow for COBRA notices to include contact information for those responsible for administering COBRA benefits.

Because of this new litigation target by plaintiffs' firms, wise employers will take a look at their COBRA notices to make sure they are clear and consistent with legal requirements.

ROE V. WADE ISSUE RESULTS IN DISCUSSION OF BENEFIT ISSUES

The media has been full of information about a leaked draft of a majority opinion from the U.S. Supreme Court, suggesting that the Court will over turn *Roe v. Wade*, the 50-year-old decision that makes abortion a constitutional right until the fetus becomes viable. Should this opinion be issued, the result is that state law will take precedence. Ironically, this result is the same position that had been advocated by then Senator Biden in his early years in the U.S. Senate.

Because state law will govern, it appears that about half of the states will place significant restrictions on abortion, while the other half will allow potentially more abortions than under the existing law. The result is that workers in states banning or severely limiting abortions may wish to travel to other states to have abortions performed. In response, some large corporations announced changes in their benefits to cover the cost of employees traveling to get abortions in other states. Some of the large corporations announcing such moves include Microsoft, Amazon, CitiGroup, Lyft, and Uber. Other large corporations are reportedly debating whether to offer similar benefits.

EMPLOYERS FACE LIABILITY OVER HOSPITAL PRICES IN HEALTH COVERAGE

Employer-run health plans must learn to use newly available hospital price data to determine fair prices or they could face legal action from plan members.

The Consolidated Appropriations Act of 2020 requires employer-sponsored health plans, acting as fiduciaries, to pay a fair price for services provided, and it requires hospitals and health plans to make the prices paid public. If health plans do not, there could be legal action from plan members.

The new transparency requirements of the Consolidated Appropriations Act and regulations issued during the Trump administration are pushing employers that sponsor health plans to provide more information about, and justify, the prices they pay hospitals. At the same time, the rules provide them with an opportunity to negotiate for better prices. Hospital costs make up the largest segment of health-care costs.

Most plan sponsors are not sure what their transparency responsibilities are under the Consolidated Appropriations Act. Prior to passage, employers did not have the information needed to determine fair prices.

In addition to employers being able to get information on what prices hospitals charge for their services, the new law requires employers to provide more information on how their mental health benefits compare to medical and surgical benefits.

The latest version of RAND's hospital transparency study, based on a comparison of hospital prices and Medicare prices, was released May 5 at the Employers' Forum of Indiana National Hospital Price Transparency conference. The RAND studies have become a benchmark for comparing hospital prices throughout the U.S. The study will continue to increase the number of hospitals and amount of claims data under analysis

Employers also should consult https://employerptp.org/sage-transparency/ to obtain hospital pricing data from several sources.

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