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## Health Care Reform Updates

### Federal Judge in Florida Rules Health Care Reform Law Violates U.S. Constitution

Source: Nat'l Financial Partners

On January 31, 2011, the U.S. District Court for the Northern District of Florida ruled that the health care reform requirement, the so-called "individual mandate," set forth in Section 1501 of the Patient Protection and Affordable Care Act (PPACA), which, beginning in 2014 will require that everyone (with certain limitations) purchases federally-approved health insurance or pay a monetary penalty, exceeds Congress' power under the commerce Clause. Significantly, the judge held that the "entire Act must be declared void" because "the individual mandate and the remaining provisions are all inextricably bound together in purpose and must stand or fall as a single unit."

The Florida suit is one of a number of legal challenges to the reform law throughout the country. Two other federal judges have upheld the individual mandate, but a federal judge in Virginia also recently ruled that the mandate violates the U.S. Constitution. However, while the Virginia judge ruled that the individual mandate is severable, the Florida judge went further and declared that the individual mandate is not severable, meaning that the

entire health care law is unconstitutional.

The conflicting rulings in the district courts have led many to believe that the challenge will eventually be decided by the U.S. Supreme Court. The Florida case is now quite likely headed for the Eleventh Circuit Court of Appeals.

In terms of the immediate impact of the case, in the ruling, the judge stated that "officials of the Executive Branch will adhere to the law as declared by the court." On the other hand, according to published reports, government officials have indicated that they do not have plans to halt implementation of the law. The issue of whether or not the law will continue to be implemented may be decided if and when the government appeals the decision to the Eleventh Circuit.

### Senate Rejects Health Reform Repeal Effort

Source: Kaiser Foundation Health News

In its first votes this year on the health care reform law, the Senate on February 2, 2011 rejected an amendment that would have repealed the health care reform law but approved another amendment to undo a provision in the law that will require employers to furnish 1099 statements whenever they do more than \$600 in business with a corporate vendor.

The reform repeal amendment,

offered by Senate Minority Leader Mitch McConnell, R-KY, failed on a 51-47 party-line vote. Under Senate rules, 60 votes were needed for passage for the amendment.

Earlier, the House, where Republicans are substantially in the majority, approved a similar repeal proposal, H.R.2.

The 1099 repeal amendment, offered by Sen. Debbie Stabenow, D-Mich., enjoyed broad bipartisan support and passed on an 81-17 vote. Small employers have complained that the reporting burden of the new requirement, scheduled to go into effect in 2012, is too great.

"We heard small businesses loud and clear, and today both parties came together in a bipartisan manner to respond to their concerns," Senate Finance Committee Chairman Max Baucus, D-Mont., said in a statement.

The House has not yet taken up legislation to repeal the 1099 reporting rule.

## GINA's Discretionary Safe Harbor Notice vs. Mandatory Notice Distinguished

The Genetic Information Nondiscrimination Act (GINA) has a discretionary safe harbor notice employers can provide when seeking medical information from employees or employees' medical providers and a mandatory notice employers must provide when seeking medical information from their own doctors, according to Kerry Leibig, acting assistant legal counsel for coordination for the U.S. Equal Employment Opportunity Commission (EEOC). Employers should know the difference between the two notices.

### Safe Harbor Notice

The safe harbor notice can help employers that are seeking medical information from employees or employees' doctors to fit within the inadvertent acquisition exception to GINA's prohibition on employers' intentionally acquiring genetic information, Leibig explained. If employers use the safe harbor notice in these circumstances, the employers will be deemed to have inadvertently received any genetic information, such as family medical history, that is provided.

The safe harbor notice states that "GINA prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you **not** provide any genetic information when responding to this request for medical information. 'Genetic information,' as defined by GINA, includes an individuals' family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

The notice could be provided as an addendum on a separate sheet of paper to an employee who is seeking

FMLA time off for his or her own condition, for example. Leibig said the EEOC is not suggesting changing the FMLA model certification forms themselves.

The notice does not have to be provided for the inadvertent exception to still possibly apply. And it need not be provided when an employee is seeking time off to care for a family member, because GINA has a separate exception for that situation, Leibig added.

**There are six exceptions to GINA's prohibition on acquiring genetic information.** In addition to the inadvertent acquisition exception and the FMLA exception, the other exceptions are when:

- Genetic information is requested as part of voluntary wellness programs or any employer-provided health service.
- Genetic information is required from commercially available documents such as newspapers.
- Genetic monitoring is conducted because of a requirement by an agency to conduct genetic monitoring.
- Genetic information is gathered in forensic labs to detect contamination of remains by forensic lab employees.

The inadvertent acquisition, employer-provided health service and commercially available exceptions are the most common, Leibig noted.

### Mandatory Notice

The safe harbor notice should be distinguished from mandatory notice that is required when an employer requests medical information from the employer's physician, such as for a fitness-for-duty examination, Leibig said. In that instance, the employer must tell the doctor not to collect genetic information. The employer would have more control over its own doctor, which is why the notice is mandatory, she explained.

The employer also must take additional steps if its doctor collects genetic information despite the notice. These steps include no longer using the services of a health care professional who continues to request or require genetic information. The trickiest part of GINA so far for employers is the fact that

family history is included in the definition of genetic information. As a result of this part of the law, there are a lot of practices that used to go on that now are illegal.

Charges are starting to be brought under Title II of the law, Leibig noted. There were 200 charges from the time GINA took effect on Nov. 21, 2009, to the end of the EEOC's fiscal year on Sept. 30, 2010, and there have been 60 additional charge since Oct. 1 of 2010. Leibig stated that since the issuance of the regulations on Nov. 9, 2010, there has been greater understanding of the law and an uptick in the number of charges filed.

### Inclement Weather Pay Practices—DOL Guidance

**Closings**—Employers who elect to close during such periods must pay the weekly salary for an exempt employee during the closure. Thus, regardless of whether an employee was at work for the entire week. The employee should receive their non-fluctuating salary for the week. An employer may require an exempt employee to use accrued leave for days of absence during such a closure but the employer continues to be obligated to pay the full salary of the exempt employee, regardless of whether the employee has a leave balance. Thus, in the latter case, an employer may be required to advance leave.

**Continuing operations**—Employers who remain open during such periods must pay an exempt employee for any partial or whole day the employee reports to work during such periods; however, for days where an exempt employee elects not to report to work, the employer is free to deduct accrued leave for such absences from the employee's leave bank. If the exempt employee is not yet eligible for accrued leave or has exhausted such leave, an employer may make reductions from pay for whole day absences.

An employer may not make partial-day deductions from exempt employee pay for less than a full day absence regardless of whether the employee has any accrued leave.

## I-9 Audits on the Rise in Obama Administration

Immigration raids have decreased and the number of I-9 audits has risen dramatically in the first two years of the Obama administration, according to immigration attorneys.

“In the past two years, the Obama administration has significantly changed the direction of Immigration and Custom Enforcement’s worksite efforts,” stated Kevin Lashus, attorney with Greenberg Traurig in Austin, Texas. “The Bush administration was interested in taking the highest numbers of unauthorized workers into custody during any time frame. **The Obama administration, on the other hand, is interested in targeting the employer that hired them.**”

### Criminal Procedures

While Immigration and Customs Enforcement (ICE) in the Bush administration locked down buildings and herded workers into interrogations and ultimately onto planes for removal, the Obama ICE has increased administrative fines and paper audits—after which employers are asked to dismiss unauthorized workers, Lashus said. Criminal prosecutions of employers also have risen under the Obama administration, he added.

“Raids the way they used to be are not used by ICE anymore,” agreed Mira Mdivani, an attorney with The Mdivani Law Firm in Overland Park, Kan. “In the past, ICE raided workplaces, arrested workers en masse and placed them in deportation proceedings.” **Since April 2009, ICE’s stated priority has been the criminal prosecution of employers**, she remarked. While ICE does arrest some undocumented workers, the agency no longer has spectacular raids where hundreds of workers are arrested, processed and tried makeshift courts set up at plants.

“These days, ICE investigates the employer without the employer’s knowledge for months before serving a notice of I-9 inspection on the unsuspecting employer.” Mdivani said. “So while the decorum is much nicer, the consequences for the employer may be much more serious, including

criminal and civil liability.” the focus has changed, Mdivani concluded, to prosecuting employers, not workers.

Some raids may continue where undocumented workers are present, according to Hector Chichoni, an attorney with Duane Morris in Miami. But Secretary of the Department of Homeland Security Janet Napolitano, “has pledged over and over to increase the focus on criminal punishment for employer violators.” He added that under the Obama administration, possibly in association with other federal agencies such as the Labor Department and Internal Revenue Service, ICE inspections will continue and possibly increase.

“Instead of raids, the Obama administration has focused on auditing and investigating employers to determine if they are satisfying the Form I-9 requirements and are knowingly or unwittingly employing illegal workers,” Chichoni said. “The fines for simple Form I-9 violations range from \$110 to \$1,100 per violation, with the higher range applicable to employers with a higher percentage of mistakes. Employers with large workforces that fail to properly manage the Form I-9 process can face fines of hundreds, or even millions, of dollars. Employers and their managers also can face criminal prosecution if they deliberately neglect their legal responsibilities in this area.”

There are many more I-9 audits in The Obama administration, according to Bonnie Gibson, an attorney with Fragomen, Del Rey, Bernsen & Loewy in Phoenix. “There were so few audits in the Bush administration that I don’t have any basis for comparison,” she remarked. There is a new crop of audit staff, and ICE investigators and fines and pending notices of intent to fine are up dramatically.”

Another change has been the increased cooperation among ICE and other government enforcement agencies. Gibson said ICE recently established a joint agency task force to gather information from multiple government sources and to target joint enforcement efforts.

Fusion centers have been established to facilitate cooperation among

agencies added Mary Pivec, an attorney with Keller and Heckman in Washington, D.C. Wage and Hour investigators, ICE auditors and tax auditors are all in one place at the fusion centers to share resources, leverage information and pursue top-to-bottom audits, she said. An employer in trouble tends to have violations that crisscross the workforce enforcement realm, so the government thinks it makes good sense to maximize its resources and have agents from different departments investigate together, Pivec said. What starts out as a wage and hour audit may become an ICE audit, as investigators have been cross-trained to recognize what might be violations of laws other than the ones they enforce, she commented.

### Technical Violations

In the past, an I-9 audit may have ended with a reprimand and a fine,” Mdivani added. “Now, it is ICE’s policy to use I-9 audits to lay the foundation for criminal prosecutions. When ICE is unable to do so, they still get their pounds of flesh.” She said that even in the case of a recent audit of Abercrombie & Fitch, where there wasn’t a single unauthorized worker. “ICE fined the employer \$1 million for what essentially were paperwork I-9 violations. Under these circumstances, every employer is vulnerable.

### Reminder.....Form 300A

Beginning February 1 of each year, employers with 10 or more employees must post the OSHA-required Form 300A which summarizes an employer’s reportable injuries and illnesses for the prior year. The Form 300A posting period is **February 1 ~ April 30**. An employer subject to this requirement must post the OSHA 300A even if the employer had no reportable injuries/illnesses in the prior year. All of the data is extracted from the Form 300, however, employers do not post Form 300 since it provides confidential medical information.

## Social Security Replacing Smaller Portions of Workers' Income

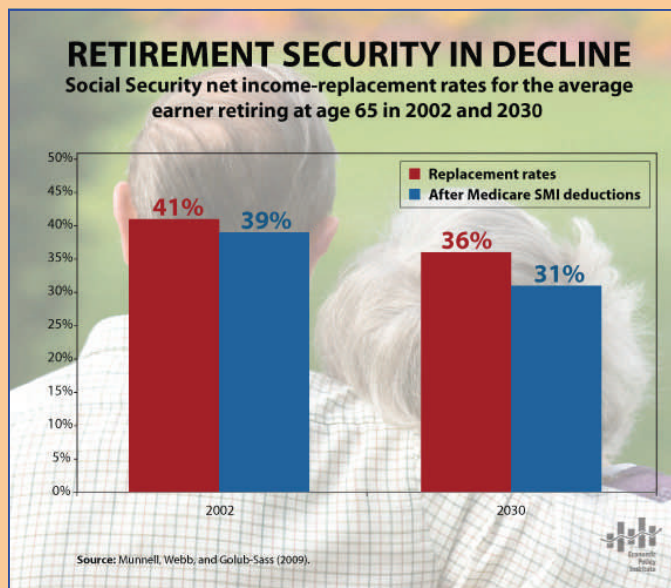
At a time when many policymakers are debating different ways to reduce Social Security benefits, it is worth pointing out that these benefits are already modest and the portion of workers' income that Social Security replaces is falling. In 2010, the average Social Security benefit was \$14,052, less than the minimum wage for a full-time worker.

The chart shows Social Security income replacement rates in 2002, compared with projected replacement rates in the year 2030. The income replacement rate, which was 41% in 2002, is projected to fall to 36% in 2030.

The reduced replacement rate results from Congressional action in 1983, which raised the normal retirement age in gradual steps, from 65 to 67, for workers born between 1938 and 1960. When the change is fully effective (for all workers born in 1960 or later), the average benefit at age 65 will be reduced by about 13%.

Moreover, even that low 35% replacement rate does not take into account other costs that will further reduce senior's net benefits. When Medicare Supplementary Medical Insurance is factored in, the Social Security income replacement rate will fall to 31% in 2030.

Source:  
Economic Policy Institute



## OSHA NEWS RELEASE

The U.S. Department of Labor's Occupational Safety and Health Administration announced that it has temporarily withdrawn from review by the Office of Management and Budget its proposal to restore a column for work-related musculoskeletal disorders on employer injury and illness logs. The agency has taken this action to seek greater input from small business on the impact of the proposal and will do so through outreach in partnership with the U.S. Small Business Administration's Office of Advocacy.

"Work-related musculoskeletal disorders remain the leading cause of workplace injury and illness in this country, and this proposal is an effort to assist employers and OSHA in better identifying problems in workplaces," said Assistant Secretary of Labor for Occupational Safety and Health Dr. David Michaels. "However, it is clear that the proposal has raised concern among small businesses, so OSHA is facilitating an active dialogue

between the agency and the small business community."

According to the Bureau of Labor Statistics, MSDs accounted for 28 percent of all reported workplace injuries and illnesses requiring time away from work in 2009.

The proposed rule would not change existing requirements about when and under what circumstances employers must record MSDs on their injury and illness logs. While many employers are currently required to keep a record of workplace injuries and illnesses, including work-related MSDs, on the OSHA Form 300 (Log of Work-Related Injuries and Illnesses), the vast majority of small business are not required to keep such records. The proposed rule would require those employers already mandated to keep injury and illness records, and to record MSDs, to place a check mark in the new column for all MSDs.

Prior to 2001, OSHA's injury and illness logs contained a column for repetitive trauma disorders that included noise and many kinds of MSDs. In 2001, OSHA separated noise and MSDs into two columns, but the MSD column was deleted in 2003 before the provision became effective. This proposal would restore the MSD column to the Form 300.

OSHA and the U.S. Small Business Administration's Office of Advocacy jointly will hold a meeting to engage and listen to small businesses about the agency's proposal. Small business from around the country will be able to participate through electronic means, such as telephone and/or a Web forum. Details of the meeting will be announced within 30 days. OSHA will conduct a stakeholder meeting with other members of the public if requested.

Under OSHA, employers are responsible for providing a safe and healthful workplace for their employees.