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# FLORIDA

## EMPLOYMENT LAW LETTER

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*DISABILITY DISCRIMINATION*

# 11th Circuit: You aren't 'regarded as' disabled for potential future disability

by Lisa Berg
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

*The U.S. 11th Circuit Court of Appeals (whose rulings apply to all Florida employers) recently held that the Americans with Disabilities Act (ADA) doesn't protect an employee who is the victim of discrimination due to a potential future disability. Therefore, an employer's decision to fire her because it feared she would contract Ebola during a trip to Ghana was deemed lawful.*

## Facts

Kimberly Lowe worked as a massage therapist at a Massage Envy located in Tampa, Florida. She asked for time off so she could visit her sister in Ghana, a country located in West Africa. Her manager initially approved her request, but three days before her trip, one of Massage Envy's owners told her she would be fired if she went ahead with her travel plans. The owner was concerned that Lowe would become infected with the Ebola virus if she traveled to Ghana and would bring it home to Tampa and infect everyone. At the time, there was an Ebola epidemic in Guinea, Liberia, and Sierra Leone, three other countries in West Africa.

Because Lowe refused to cancel her trip, she was terminated before she left. She traveled as planned and did not contract Ebola because there was no outbreak in Ghana at the time.

## I'll see you in court

Lowe returned and filed a disability discrimination charge with the Equal Employment Opportunity Commission (EEOC), alleging that Massage Envy perceived her as disabled or having the potential to become disabled in violation of the ADA.

The EEOC investigated the charge and determined there was "reasonable cause" to believe Massage Envy terminated Lowe's employment because it regarded her as disabled in violation of the ADA. The agency filed suit on her behalf alleging the employer violated the ADA by (1) terminating her and not permitting her to work when she returned from Ghana because it regarded her as disabled and (2) terminating her and not permitting her to return to work based on her association with people in Ghana whom the company believed to be disabled by Ebola.

The district court dismissed the case, and the EEOC and Lowe appealed.

## The law and the court's holding

The "regarded as" disabled prong of the disability definition was

## AGENCY ACTION

***USCIS releases guidance on employment authorization.*** U.S. Citizenship and Immigration Services (USCIS) in August announced new policy guidance to address its discretion to grant employment authorization to foreign nationals who are paroled into the United States, including those who are otherwise inadmissible. The agency explained that certain foreign nationals may be paroled into the country for urgent humanitarian reasons or significant public benefit, but they aren't entitled to employment authorization solely because of that. Instead, they must establish eligibility and apply for employment authorization. USCIS will consider employment authorization for parolees only when, based on the facts and circumstances of each individual case, it finds a favorable exercise of discretion is warranted. The agency said it is taking the action in response to "the national emergency at the southern border."

***New USERRA fact sheet addresses pension obligations.*** The U.S. Department of Labor's (DOL) Veterans Employment and Training Services (VETS) released a fact sheet in August aimed at helping employers better understand their responsibilities toward reemployed servicemembers under the pension provisions of the Uniformed Services Employment and Reemployment Rights Act (USERRA) and related regulations. The fact sheet is available at www.dol.gov/agencies/vets/programs/userra/userra_fs1. USERRA requires that returning servicemembers, upon reemployment, be treated as though they didn't have a break in civilian employment for the purpose of participation, vesting, and accrual of pension benefits from their employers. The law encourages service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment.

***Help desk for federal contractors launched.*** The Office of Federal Contract Compliance Programs (OFCCP) in August launched the Contractor Assistance Portal, an online help desk to provide compliance assistance to federal contractors and stakeholders. It can be accessed at ofccpcontractor.dol.gov/s. The help desk is part of the DOL's effort to assist job creators. The portal allows users to ask questions freely and access reference materials. "We are very excited to launch the Contractor Assistance Portal so the [agency] can provide more access to compliance assistance resources," said OFCCP Director Craig E. Leen. "We want federal contractors to use this tool to ask questions and search answers regarding compliance with the laws and regulations enforced by OFCCP." ✤

drastically expanded when the ADA was amended in 2008. Congress made clear that "regarded as" coverage should be easy for employees to establish. It requires an employee to show only that she was subjected to an adverse action because of an actual or perceived physical or mental impairment. But what about when an employer knows an employee doesn't have an impairment—such as Ebola—but believes she *could* contract it?

The 11th Circuit found the ADA protects against discrimination based on a current, past, or perceived disability—not a potential future disability that a healthy person might experience later. It concluded the EEOC failed to state a "regarded as" disabled claim because it didn't allege Massage Envy perceived Lowe to have an existing impairment at the time it terminated her employment. Therefore, the district court didn't err in dismissing the agency's "regarded as" claim.

The 11th Circuit also agreed with the district court that the EEOC failed to state an association discrimination claim under the ADA because it didn't allege Lowe had an association with a *specific* disabled individual in Ghana when it terminated her employment. In fact, the only specific person Massage Envy knew Lowe would associate with in Ghana was her sister. The EEOC, however, never alleged her sister had Ebola or that Massage Envy thought the sister had Ebola.

### *But that's not fair*

The 11th Circuit didn't weigh in on whether it was fair or misguided for Massage Envy to fire Lowe when she refused to cancel her trip to Ghana. Instead, it repeated its oft-cited holding that "an employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or no reason at all as long as its action is not for a discriminatory reason" contrary to federal law. *EEOC v. STME, LLC d.b.a Massage Envy-South Tampa,* Ns. 18-1121 and 18-12277 (11th Cir., Sept. 12, 2019).

### *Employer takeaway*

Despite expansions to the ADA in recent years, including those made to the "regarded as" prong—it still doesn't appear to encompass the mere potential to become disabled in the future. Employers should remember, however, that the Genetic Information Nondiscrimination Act (GINA) protects employees from discrimination based on genetic predisposition (or perceived predisposition) that renders an illness more likely. That doesn't appear to be relevant here, however, because the EEOC based its claim on a decision to travel, and risk of contracting a viral illness isn't the same thing as a genetic predisposition.

*You may contact Lisa Berg at lberg@stearnsweaver.com.* ✤

# ANDY'S IN-BOX

## 'No, you must take FMLA leave,' says the DOL (again)

by Andy Rodman
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Over the past several years, I have been asked the following Family and Medical Leave Act (FMLA) question more times than I can count:

> Do I have to designate time off as FMLA leave if I know it's for an FMLA-qualifying reason but the employee doesn't want it designated as FMLA leave?

In other words, is FMLA leave designation the employee's option?

According to an opinion letter issued by the U.S. Department of Labor (DOL) on September 10, 2019, the answer is a resounding, "No." You must designate time off as FMLA leave if it's for an FMLA-qualifying reason, even if the employee would prefer to delay the use of FMLA leave until paid time off (PTO) is exhausted. Designation isn't an employee *or* employer option.

The DOL rendered its opinion in response to a question arising under a public-sector collective bargaining agreement (CBA). Under the terms of the CBA, employees could delay taking FMLA leave until accrued PTO was exhausted. The employer, however, revised its leave policy so that FMLA leave would commence immediately and run concurrently with the PTO provided under the CBA. The employer made that change in response to a DOL opinion letter dated March 14, 2019, in which the agency opined that "an employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation."

In its September 2019 opinion letter, the DOL reaffirmed its March 2019 opinion, stating that "once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave." So, for the DOL, it didn't matter that, under the CBA at issue, employees maintained the contractual right to delay the commencement of FMLA leave until after exhausting PTO.

In reaching its conclusion, the DOL rejected the 2014 9th Circuit ruling in *Escriba v. Foster Poultry Farms.* There, the *Escriba* court held an employee may decline to use FMLA leave and "save it" for future use. The 11th Circuit hasn't yet addressed this issue head-on.

It's understandable why employees may want to prolong the use of FMLA leave—to "save it up" for use later in the year. It's also understandable why employers may not want to prolong an employee's use of FMLA leave—to prevent an employee from taking more than 12 (or 26) weeks of leave during the applicable 12-month period. But according to the DOL, and in my humble opinion, neither the employee nor the employer has a choice. The employer must issue the FMLA designation notice within five business days (absent extenuating circumstances) after the employer acquires enough information to determine whether leave is being taken for an FMLA-qualifying reason. Period.

Administering the FMLA isn't easy. There are many traps and pitfalls waiting for the unwary. Be sure to consult with your employment lawyer when trying to untangle the statutory and regulatory web.

*Andy Rodman is a shareholder and director at the Miami office of Stearns Weaver Miller. If you have a question or issue that you would like Andy to address, e-mail arodman@stearnsweaver.com or call him at 305-789-3255. Your identity will not be disclosed in any response.*

*This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions.* ✤

## UNION ACTIVITY

***AFL-CIO denounces Scalia for DOL.*** AFL-CIO President Richard Trumka issued a statement after the Senate's September 26 confirmation of Eugene Scalia for secretary of the U.S. Department of Labor (DOL) in which he called Scalia a "lifelong union-buster." "His track record is well documented, and it's clear he has yet to find a worker pro-tection he supports or a corporate loophole he opposes," Trumka said. Trumka's criticism was a continuation of his remarks following Scalia's nomination for the post. When his nomination was announced, Trumka said Scalia had fought ergonomics standards, threatened to destroy workers' retirement savings, challenged the expansion of health care, and dismissed repetitive injuries as "junk science."

***Educator unions respond to ICE raids.*** The presidents of the National Education Association (NEA) and the Mississippi Association of Educators issued a joint statement in August following raids by U.S. Immigration and Customs Enforcement (ICE) in Mississippi in which hundreds of workers were detained, leaving children behind. "As educators, we are outraged that ICE carried out these unconscionable raids on the first day of school, causing chaos and separating families," said the statement from NEA President Lily Eskelsen Garcia and Erica Jones, president of the Mississippi Association of Educators. "We feel their angst and pain. The trauma these students are enduring is inconceivable. The effect the raids will have on their long-term mental and emotional health is profound. We condemn these raids."

***SEIU challenges Executive Orders affecting federal employees.*** Local 200United of the Service Employees International Union (SEIU) who work for the U.S. Department of Veterans Affairs (VA) took legal action in August challenging three of President Trump's Executive Orders affecting federal employees. The union members claim the orders eliminate federal employees' right to perform duties related to union representation, impose unlawful restrictions on collective bargaining, rewrite rules pertaining to employee discipline, and direct agencies, contrary to Congress' intent, to take positions in bargaining. A statement from Local 200United says the orders "seek to upend labor-management relations and the rights of federal employees with respect to the terms and conditions of their employment, to the detriment of those employees, the agencies for which they work, and the American public they serve. The case raises challenges to the orders, including that President Trump lacked constitutional authority to issue the orders and that the specific provisions of the orders violate a variety of federal labor-management statutes. ✤

*WAGE AND HOUR LAW*

# New OT rule sparks questions beyond where to set salary threshold for 'exempt' status

*It has taken several years, but the U.S. Department of Labor (DOL) has finally issued its new final rule determining which employees can be exempt from the law requiring overtime pay. The new rule, slated to take effect January 1, 2020, is far more moderate than the Obama administration's effort to update the salary threshold for the overtime exemption. A federal judge struck down that rule shortly before it was to go into effect in December 2016.*

*A look back at the long road to the new regulation reveals issues that go beyond setting a new salary threshold for exemptions under the Fair Labor Standards Act (FLSA). And while the process has dragged on, some states have taken matters into their own hands, and a bill has been introduced on the federal level that aims to bring more change.*

## *What to expect*

The DOL's new rule sets the minimum salary level for exemption at $684 a week ($35,568 a year). That's up from the current law—in force since 2004—which requires employees to earn at least $455 a week ($23,660 a year). Workers making less than the threshold earn 1½ times their regular rate of pay for all hours over 40 during a workweek.

The DOL estimates 1.3 million more workers will be eligible for overtime pay under the new threshold "without some intervening action by their employers." That means employers will have to hand out raises to employees making less than the threshold if they want to keep them exempt from overtime.

Another provision of the final rule changes the level for workers deemed exempt because they are "highly compensated employees." The new rule changes the pay level to $107,432 per year, up from $100,000.

The DOL's latest rule makes no changes to the "duties test," which stipulates that in addition to making at least the threshold salary, exempt employees must perform work that is executive, administrative, or professional in nature.

The new rule calls for the DOL to conduct periodic reviews of the salary threshold, but it doesn't require automatic updates. Any changes to the salary threshold will continue to require notice-and-comment rulemaking.

Notably, the new rule makes no changes to overtime protections for police officers, firefighters, paramedics, nurses, laborers such as nonmanagement production-line employees, and nonmanagement employees in maintenance, construction, and similar occupations.

## *Unanswered questions*

The unveiling of the rule that was supposed to have gone into effect on the eve of the change from the Obama to the Trump administration startled many employers since it

doubled the salary threshold. The Obama-era rule set a minimum threshold for exempt employees at $913 per week. Many employers thought the change went too far, and a federal judge in Texas agreed.

Just before the rule was to take effect on December 1, 2016, a month and a half before the Trump administration began, Judge Amos Mazzant issued a preliminary nationwide injunction blocking it. Then in August 2017, he issued a final judgment saying the rule set an excessively high salary threshold. His ruling was appealed, but the Trump administration decided against defending the prior administration's rule. So the question of how far the DOL's authority extends didn't have a chance to be aired during an appeal.

Even though employers were unhappy about the 2016 rule's salary threshold, they were relieved the new rule didn't change the duties test. Many had feared that workers who qualify for exempt status because of their managerial and supervisory duties would lose their exemption if they sometimes performed nonexempt tasks. Particularly in small workplaces, managers often pitch in to work alongside nonexempt workers, leading some to question the validity of the exemption. Should the rule spell out that exempt workers must spend a certain percentage of their time on managerial work to maintain their exempt status? The rule writers didn't go there.

Another question that came up during the rulemaking process relates to how often the salary threshold should be updated. Some employee advocates wanted scheduled updates built in to keep the threshold up with the times. The new final rule doesn't include automatic updates but instead stipulates that periodic updates will go through the notice-and-comment process.

The debate over changes to the rule also saw some questioning of whether a regional—rather than a nationwide—level should be set since paychecks of at least $684 a week are more common in some areas of the country than others. In the end, however, the rule writers stuck with a nationwide level.

## *Where we stand*

The new rule allows many more workers to earn overtime, but several states are taking action that could make even more eligible, and some of those state proposals would set a threshold even higher than the 2016 federal rule. Democrats in Congress also are getting into the act with the introduction of the Restoring Overtime Pay Act of 2019, a measure not expected to get through both houses of Congress because of the Republican majority in the Senate.

Even without congressional action and presuming a new rule is issued, there's the possibility another lawsuit could thwart the process again. ✤

*PERSONNEL POLICIES*

# Why your company needs an antibullying policy

*Bullying in the workplace is a common occurrence that's often ignored or overlooked by management. Sometimes it may be ignored because, unlike sexual harassment, there's usually no legal requirement that an organization have an antibullying policy. It also may be overlooked because leaders take a hands-off approach, believing employees should work out their own issues. It may sometimes be ignored because more than 70 percent of bullies in the workplace are the bosses, according to the Workplace Bullying Institute.*

## *Bullying vs. harassment*

The opportunity for bullying at all levels is enhanced by the anonymity of social media, and workplace bullying can be fueled by the political or economic environment. However, in the workplace it is usually different from what you may remember as schoolyard bullying. The schoolyard bully is often the misfit or the loner, while the workplace bully may be a highly skilled, ambitious employee who seeks to harm or intimidate coworkers who might share his credit.

Bullying is related to other forms of harassment, and the types of harassment prohibited by law can be seen as a form of bullying. But there are differences. Bullying includes any words or actions that make an employee feel uncomfortable, threatened, or intimidated. Employers should ensure that employees feel safe at work and that minor conflicts don't escalate to an uncontrollable level. Bullying leads to low morale, poor performance, and high turnover. But it's also important to note that a large proportion of workplace violence is carried out by employees who were bullied or hazed, which creates an antibullying culture.

## *Creating a policy and culture*

An antibullying policy should be similar to other workplace harassment policies. It should include definitions, explanations, reporting procedures, consequences for violations, and antiretaliation provisions.

The policy should clearly define bullying and specifically state that the company will not tolerate it. Workplace bullying can be defined as (1) abusive conduct that is threatening, humiliating, or intimidating; (2) actions that interfere with others' work (e.g., sabotage) or prevent work from getting done; or (3) verbal abuse. You should cite numerous examples of the type of behavior that can constitute bullying, including:

- Threatening or intentionally intimidating someone, such as violence and blackmail;
- Shouting or raising your voice in public or in private;
- Not allowing someone to speak or express himself (e.g., ignoring or interrupting);

- Hurling personal insults, using obscene gestures and using offensive nicknames; and
- Publicly humiliating someone in any way (e.g., spreading rumors or hazing).

You must enforce your policy fairly and consistently to build an antibullying culture. Steps that will build such a culture include:

(1) **Conducting a thorough investigation when bullying is reported.** Investigate bullying claims the same way you would investigate claims of sexual harassment. Request written statements from the victim, accused bully, and any witnesses. Document the investigation and your findings so you can support any action you take.

(2) **Encouraging immediate reporting, and ensuring retaliation doesn't occur.** The complaint process should be similar to your other harassment complaint procedures. Employees should know to whom they can report bullying, and the process should facilitate speaking up as soon as possible after an incident, without fear of retaliation from the company.

(3) **Providing training for managers on bullying behavior and how to enforce the policy.** Each incident will have a different precipitating cause and will occur under various circumstances. Managers should be taught to provide a safe workplace where standards promoting a positive attitude, respect, and workplace decorum are enforced.

### *Bottom line*

Developing an antibullying strategy, both to reduce the chance of violence and to build a positive culture, is the right thing to do. It will create an environment that will generate the best work product from your employees and the best business results. ✤

*SETTLEMENTS ANNOUNCED*

## Tallahassee Memorial agrees to pay $375K over leave policy

On August 29, the Equal Employment Opportunity Commission (EEOC) claimed victory by announcing a settlement with Tallahassee Memorial Healthcare, Inc., over the healthcare system's leave policy. The agency had claimed the healthcare system was inflexible in extending its leave policy beyond 12 weeks of Family and Medical Leave Act (FMLA) leave for those persons whose illness also qualified as a disability under the Americans with Disabilities Act (ADA). The government claimed the healthcare system had denied requests for extended leaves rather than engaging in an interactive process with each individual to determine if he or she could be accommodated. ✤

*HEALTH INSURANCE*

# Individual coverage HRAs probably not option for 2020

*On his very first day in office, President Donald Trump issued an Executive Order instructing federal agencies to lessen the Affordable Care Act's (ACA) burden on the organizations and individuals who were subject to its requirements. More than two years later, the ACA is limping along, but the Trump administration is still working to carry out that order.*

*Its most recent effort is the creation of a new type of health reimbursement arrangement (HRA) that is intended to give employers more options in how they assist employees with the financial burdens of obtaining health insurance and health care. While employers theoretically could adopt the new type of account—called an Individual Coverage HRA (ICHRA)—starting in January 2020, a number of unresolved issues could stand in their way. Let's look at the new accounts, how they work, and the questions that need to be answered before they can be considered a viable option for most employers.*

### *Some background*

Before the ACA, many employers sponsored HRAs that paid or reimbursed employees for insurance premiums and a variety of other eligible health expenses. The system has long been considered a form of self-insured health insurance.

After the ACA's passage, however, the federal agencies charged with its interpretation and enforcement concluded HRAs were inherently incapable of meeting the market reforms the Act made applicable to all health plans. Therefore, for several years, employers were specifically prohibited from using HRAs to reimburse employees for the cost of:

(1) Premiums for individual health coverage; and

(2) Most health expenses other than vision, dental, and other "excepted benefits" (unless they were integrated with a health plan).

All that changed in 2016 when Congress, in a rare show of bipartisan unity, passed a law authorizing a new type of HRA for employers with fewer than 50 employees. With the new Qualified Small Employer HRA (QSEHRA), those employers could contribute up to $4,950 per employee per year (indexed for inflation) to their HRAs. The employees, in turn, could use their QSEHRA to purchase an individual health insurance policy. Employers that offer a QSEHRA may not offer a group health plan to any of their employees.

While QSEHRAs predated the Trump administration by about a month, they appear to have served as

inspiration for the new ICHRA, which will be available starting in January 2020.

As with the QSEHRA, employees may use ICHRAs to purchase coverage on the individual health insurance market. Unlike the QSEHRA:

- Employers may offer an ICHRA to some classes of employees while offering group health coverage to others (but still can't offer both an ICHRA and group health insurance to the same employees);
- There is no limit on employer contributions to an ICHRA (employee contributions are not allowed); and
- Any employer may offer an ICHRA regardless of size.

## *Hold your horses*

While ICHRAs may seem appealing, as with most benefits, the devil is in the details. From a legal perspective, perhaps the biggest uncertainty that remains is how they can be used to avoid penalties under the ACA's employer mandate. While the Act is under attack on several fronts, as long as it's still in effect, employers with 50 or more full-time employees will be required to offer health coverage that meets the law's minimum requirements.

The regulations say ICHRAs can satisfy those requirements, but the information provided on the topic is vague at best. Generally, they say that if an ICHRA is considered "affordable," it also will be deemed to provide minimal essential coverage and minimum value, the other two requirements of the employer mandate. To be considered affordable, an ICHRA would need to cover the cost of a "silver" level health plan offered through the federal Health Insurance Marketplace (or a state exchange) in the particular geographical area. The regs identify this—the most crucial part of the analysis—as one of several areas on which additional guidance will be forthcoming.

Employers that offer an ICHRA also are required to obtain documentation, no later than the first day of the plan year, from employees showing they and any dependents are enrolled in an individual health policy that meets the ACA's minimum



## WORKPLACE TRENDS

***Report details persistent wage gap affecting black women.*** Black women who work full time year-round typically are paid 61 cents for every dollar paid to white, non-Hispanic men, according to a fact sheet from the National Women's Law Center released in August. The wage gap also contributes to the wealth gap, the fact sheet says, and is an obstacle to black women's economic security over their lifetimes. The report says that in 1967, a black woman working full time year-round typically made 43 cents for every dollar a white man made. In 2017, the most recent year for which figures are available, the gap had narrowed by just 18 cents. The wage gap is wider in certain areas. The report lists the 10 worst states for black women's wage equality: Louisiana, a wage gap of 53 cents; Washington, D.C., a gap of 49 cents; Utah, 47 cents; South Dakota, 47 cents; New Jersey, 44 cents; Mississippi, 44 cents; Connecticut, 43 cents; South Carolina, 43 cents; Alabama, 41 cents; and Texas, 41 cents. The gap for the United States as a whole is 39 cents.

***Workers want adaptability in workplace design, survey finds.*** Employees deeply value flexibility and adaptability when it comes to their workspaces and schedules, according to Capital One's 2019 Work Environment Survey. Respondents cited design elements like natural light and adaptable spaces as important, along with flexible furniture arrangements, such as alternative desks. Also, most respondents said they perform better when they have spaces for collaboration and space for focused, heads-down work. They also want flexibility in terms of where and when they work. The top two perks professionals cited were flexible hours and the ability to work remotely. Nearly all professionals surveyed agreed it's important for companies to create programs and spaces that support mental health and well-being.

***Survey shows employers planning to hold down raises in 2020.*** A survey from Willis Towers Watson released in August shows U.S. employers plan to hold the line on budgeted pay raises in 2020 despite low unemployment and a tight labor market. However, the survey found that some employers are projecting modestly larger discretionary bonuses next year, while others are adding separate promotional budgets in their efforts to supplement employee salaries. The 2019 General Industry Salary Budget Survey found salary increases are expected to hold steady in 2020 for exempt nonmanagement employees (3.1%), management employees (3.1%), nonexempt hourly employees (3%), and nonexempt salaried employees (2.9%). Companies are budgeting slightly smaller increases for executives (3.1% in 2020 versus 3.2% this year). Almost all companies (96%) plan to give raises next year. ✤

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10-24 Workplace Violence Could Happen at Your Facility: Assessing Your Risks and Identifying Safeguards to Protect Employees

10-25 FMLA Certifications: How to Get the Medical Information You Need to Properly Designate Leave and Decrease Abuse

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10-30 Onsite Clinics, Telehealth, Health Fairs and Flu Shots: What You Must Know to Avoid Legal Hassles

10-30 Post-accident Drug Testing: Balancing Safety, Legal Considerations, and OSHA's Antiretaliation Stance

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10-31 Termination and Performance Management Discussion Training: De-escalation Tactics for Managing Unexpected Outbursts, Threats of Violence, and the Risk of Lawsuits

requirements. Notice of this requirement and other information are required at least 90 days before the beginning of the plan year in which the ICHRA is offered. Similar requirements apply to new or newly eligible employees.

Considering that most employers with a January plan year will be planning their open enrollment in the next month or so, it appears unlikely that many will be able to implement an ICHRA for 2020.

### *Final thoughts*

Apart from the legal uncertainties, employers considering a switch from health coverage to an ICHRA will want to make sure their employees have access to decent individual coverage first. In many parts of the country, there is no individual health insurance market other than the ailing federal Health Insurance Marketplace. While the administration says the HRAs will boost the individual market, that isn't likely to happen for 2020.

Even in areas where good individual coverage is available, the entire concept of an ICHRA will be a shock to many employees. Few are likely to be excited about the prospect of being set loose to find a policy on their own. Careful consideration, planning, and communication would be necessary if you want to avoid a major revolt among current employees and potential damage to your ability to recruit in a tight labor market.

If you do want to seriously consider an ICHRA for 2020, work with your attorney to make sure you are fully considering and addressing all the legal requirements and ramifications. ✤



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