

BWM&S

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PEOPLE ARE CRITICAL to a successful enterprise. Treating employees properly is not just correct, but good business. In this issue are two important articles from BWM&S's Labor and Employment practice: Do Your Managers Really Manage?, page 1, and a summary of BWM&S's sexual harassment compliance program, page 3.

ALSO IN THIS ISSUE: A summary of the Bush Administration's proposed Medicare changes, page 2, and information you need to know about mold and real estate, page 3.

LABOR AND EMPLOYMENT

DO YOUR MANAGERS REALLY MANAGE?

**A summary of findings from White Collar Blues*

In recent years, a new source of employment litigation has gathered steam and come to pose a serious and costly threat to employers. Under the Federal Fair Labor Standards Act (FLSA), employers are required to pay overtime to all employees except those who fall under the so-called "white collar" exemptions: those employees who are paid a salary of at least \$250 per week and who exercise independent discretion and judgment in executive, managerial and supervisory positions.

Problems arise from the service economy's flat organizational structure in which managers share duties with the hourly employees they also supervise, and jobs in the technology sector that look like production work but require high levels of expertise. The plaintiff's bar has filed class actions on behalf of salaried employees, such as restaurant managers, computer programmers, and insurance claims adjusters who have fallen through the cracks of the outdated regulations defining the FLSA's "white collar" exemptions. The result has been headline-grabbing settlements paid by employers who

understandably seek to avoid costly litigation and the prospect of statutory damages that include 2-3 years' back pay, an equal amount in liquidated damages, and mandatory attorneys' fees for prevailing plaintiffs.

These regulations are currently drawing attention for long overdue reform. In the meantime, however, an employer's best defense is to ensure that its classification and utilization of salaried employees as exempt complies with the current FLSA provisions (as well as applicable state laws).

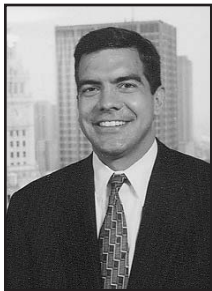
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NEXT ISSUE:

Employment Taxes and LLC Membership — What You Need to Know New BWM&S Directors And More...

SWEEPING MEDICARE CHANGES PROPOSED

HEALTHCARE



John Darrow

President Bush is expected to propose sweeping, long-term changes in Medicare sometime in January. Among the proposals, the President is expected to urge Congress to pass legislation that would authorize the provision of comprehensive prescription benefits for the elderly and disabled.



Kevin Ryan

However, the President also has said that he wants Congress to consider broad Medicare reforms as part of the legislation, including efforts to foster competition between the original fee-for-service Medicare program and private health plans. He has a strong ally in the new Senate majority leader, Senator Bill Frist. It is anticipated that Senator Frist will be able to explain and defend the President's Medicare proposals in a way

that the previous Senate Republican leader, Trent Lott of Mississippi, never could because Senator Lott lacks Senator Frist's medical background.

One idea favored by many of the President's advisers would give Medicare beneficiaries incentives to enroll in more efficient, less costly health plans. If the private health plans did a better job at holding down medical costs, their members would benefit through lower premiums. Conversely, if the traditional Medicare

program costs less, then the government would pass on most of those savings to those enrollees.

Under another proposal, Medicare would offer enhanced benefits, including a cap on out-of-pocket costs, in return for higher premiums. President Bush agrees with Senator Frist that, "drug coverage must be part of comprehensive Medicare reform." Democrats, including Representative Pete Stark of California, have already gone on record maintaining that trading a prescription drug benefit for the end of Medicare as it currently exists is not a price worth paying. However, not all Democrats are opposed to an overhaul of Medicare.

Democratic Senator John Breaux of Louisiana has drafted legislation with Senator Frist to inject market forces into Medicare. Senator Breaux stated: "[j]ust adding prescription drugs to an outdated Medicare program is like throwing lead weights onto a sinking ship."

The President's legislative initiative follows efforts by the Federal Center for Medicare and Medicaid Services ("CMS") to implement a Medicare-endorsed prescription drug initiative. This proposal, which is set forth in a final regulation issued by CMS on August 30, 2002, is designed to help people who are covered by Medicare to buy their prescription drugs at lower costs and obtain other pharmacy services. Under this initiative, CMS would endorse certain discount drug card sponsors that secure rebates from pharmaceutical manufacturers and offer discount card programs to Medicare beneficiaries. CMS anticipates that

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REAL ESTATE

MOLD: A GROWING CONCERN

According to statistics released by the U.S. Environmental Protection Agency, mold has affected between 10 and 25 million workers and between 800,000 and 1.1 million buildings. However, before you quit your job or call in the HAZMAT team, consider these facts: mold exists in virtually all climates and regions, and requires a food source (wood, drywall, ceiling tiles, or carpet), temperatures between 40 and 100 degrees Fahrenheit, and relative humidity of at least 75% on the surface of the food source. Also, there are many different strains of mold, and most are harmless.

Problems arise when a particularly susceptible person encounters a high concentration of a certain type of mold. People with chronic respiratory diseases, such as asthma, and others with impaired immune systems are at a heightened risk of being affected

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BWM&S LAUNCHES ON-LINE SEXUAL HARASSMENT COMPLIANCE PROGRAM

A Simple and Effective Solution for Middle Market Companies

LABOR AND EMPLOYMENT LAW

Sexual harassment claims have continued unabated even after the U.S. Supreme Court provided a virtual roadmap for employers to follow. Employers simply cannot afford to operate without strong sexual harassment policies and procedures in effect. It is also important for companies to institute employee training on those policies and procedures. Most major corporations have taken steps to initiate these efforts. But for many companies, especially those without sufficiently staffed and funded human resources departments, creating a policy and delivering internal training have proved to be difficult and expensive tasks.

To help bridge this gap, BWM&S created a web-enabled program that allows a company to

quickly establish a sexual harassment policy and deliver effective individual training at a cost of only \$40 per employee.

“We see so many good companies with no stated sexual harassment policy,” says Martin LaPointe, head of BWM&S’s Labor and Employment practice. “Our program uses technology to help companies of all sizes establish and deliver an effective solution very quickly.”

Employees participate in training from their computers, through a secure website. After reviewing their company’s sexual harassment policy, the program provides real-life audio/visual scenarios and detailed questions that reinforce the policy. Immediate feedback is provided for each answer

to emphasize specific policies and procedures. Employers are made aware of any potential problems instantly. At the completion of training, employers receive documentation showing that each employee has completed the training.

The product is customized with messages from company leadership as well as special terminology unique to a company or industry. To find out more, contact your BWM&S attorney or Martin LaPointe at 312/840-7012. **B**

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DO YOUR MANAGERS REALLY MANAGE?

Because the FLSA’s provisions focus on the actual duties being performed, regardless of job titles and descriptions and whether employees are paid a salary rather than an hourly wage, employers may wish to consult with employment and labor counsel and other specialists to ensure compliance. Doing so can simply be good business: Armed with the advice of his or her attorney, an employer can seek to avoid the pitfalls of the FLSA altogether. In addition, under the FLSA, an employer that seeks and follows the advice of such experts will establish a “good faith” defense that will provide a shield against liquidated damages and limit any award of back pay to two years in the event of litigation.

*“White Collar Blues: The Proliferation Of Employee Collective Actions For Unpaid Overtime Under The FLSA,” co-authored by BWM&S attorneys Martin LaPointe and Jay Dobrutzky, appears in the Winter 2003 issue of the CCH Labor Law Journal. For more information, please contact your BWM&S attorney, or Martin LaPointe at 312/840-7012, or Jay Dobrutzky at 312/840-7089. **B**



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BULLETIN

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SWEEPING MEDICARE CHANGES PROPOSED

pharmacy benefit managers (PBMs) would play a key role in this program. PBMs have been a major force in bringing pharmaceutical cost savings to the private sector, and are well poised to leverage their expertise, clinical programs and relationships to benefit the Medicare program.

CMS expects this initiative to yield average overall savings of up to 15 percent, and as much as 25 percent or more on individual drugs. These savings must be shared with enrollees, either directly or indirectly through pharmacies via lower prices or pharmacy services. The initiative will also promote the use of generic drugs by educating beneficiaries about generic drugs and providing information on generic alternatives.

However, the future of this initiative is somewhat uncertain because of a legal challenge brought by the National Association of Chain Drug Stores and the National Chain Pharmacy Association.

There seems to be a consensus among the legislators, regulators and the President that a prescription drug benefit needs to be added to the Medicare program. Whether that benefit will be tied to an extensive revamp of Medicare is unclear because of costs and competing political views as to how such a benefit should be crafted by Congress.

Continued coverage of this evolving story will be included in future issues of The Bulletin. For more information, please contact your BWM&S attorney, or John Darrow at 312/40-7003, or Kevin Ryan at 312/840-7051. **B**

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MOLD: A GROWING CONCERN

by so-called "toxic" molds. Unfortunately, sampling and culturing the mold spores in your home or office is not a reliable method of determining your health risk since people's allergic reactions to different molds can vary greatly. There are currently no accepted standards for judging what is a tolerable or normal quantity of mold. Scientific uncertainty as to the causal link between reported illnesses and mold further complicates matters.

Insurance companies and courts have attempted to craft a reasonable response to the country's concerns about toxic mold. In many cases, insurers deny claims based on the policy's pollution, product and/or workmanship or prior incident exclusions. Others have responded by simply eliminating mold coverage from their policies. The courts have tried to balance the actions of insurance companies by holding that mold damage is covered if it is the result of a covered peril, such as mold arising

from water damage caused by extinguishing a fire.

For building owners, managers and tenants, moisture control should be an essential part of an overall preventative maintenance program. In addition, building owners should consider provisions in tenant leases that require tenants to promptly report water infiltration, plumbing leaks, or mold growth. Contractors and subcontractors should address potential liability for mold claims in the initial contract. Any evaluation of potential building materials should include an assessment of the propensity of the material to support or resist mold growth.

Lenders and borrowers acquiring property should investigate current and historical events of water infiltration and mold contamination by performing physical inspections, requiring seller disclosures, reviewing maintenance records and interviewing property occupants.

For more information on these and other preventative measures, contact your BWM&S attorney or Joseph E. Meiers at 312/840-7063. **B**