WILLCOX SAVAGE

# EMPLOYMENT LAW OUTLOOK

## THE U.S. DEPARTMENT OF LABOR EXPANDS THE FMLA DEFINITION OF "SON OR DAUGHTER"

**William M. Furr**

On June 22, 2010, the U.S. Department of Labor (DOL) issued an "Administrator's Interpretation" expanding the definition of son or daughter under the Family and Medical Leave Act (FMLA). The new definition increases the number of employees who are entitled to take FMLA leave for the birth or adoption of a child or to care for a sick child. In its Interpretation, the Department of Labor states that in order to qualify for *in loco parentis* status under the FMLA, the employee must establish either 1) an intent to provide day-to-day care for the child, or 2) an intent to be financially responsible for the child. Previously, commentators assumed that an employee must establish both criteria.

Under the FMLA, eligible employees may take up to twelve weeks of unpaid leave for the birth, placement, or adoption of a child, or to care for a son or daughter with a serious health condition. The DOL's regulations provide that parents include biological parents, adoptive parents, foster parents, step parents, legal wards, and individuals standing "*in loco parentis*."

The new Interpretation attempts to clarify the requirements for "*in loco parentis*" status. According to the DOL, all that is needed from an employee is a "simple statement asserting that the requisite family relationship exists" (*i.e*. that the employee intends to be responsible for the child's day-to-day care or intends to be financially responsible for the child).

This expanded definition extends FMLA protection to grandparents, aunts, partners (including same-sex partners) and others who intend to be responsible for the child's day-to-day care or intend to be financially responsible for the child. There are currently no restrictions on the number of parents a child may have under the FMLA. Additionally, this is the first time that the Department of Labor has identified same-sex partners as qualifying for benefits under the FMLA.

(CONTINUED ON PAGE 3)

## SUPREME COURT ADDRESSES EMPLOYEE PRIVACY IN TEXTING CASE

**Susan R. Blackman**

In a long-awaited decision, the U.S. Supreme Court ruled in June that the City of Ontario, California did not violate the Fourth Amendment rights of a police officer when it reviewed transcripts of text messages the officer sent using a city-provided pager. One of the main issues in the case was whether the officer had a reasonable expectation of privacy concerning the content of messages he sent while on the job. A Police Department audit found that SWAT Officer Jeff Quon sent or received an average of twenty-eight messages each work day, of which only three were related to police business. He sent personal messages to his estranged wife, as well as his girlfriend, and a number of the messages were sexually explicit. Officer Quon was disciplined for violating Police Department rules.

(CONTINUED ON PAGE 3)

*Please Join our Complimentary Seminar on*

**Health Care Reform**
**What Does it Mean to Your Company?**

**Tuesday, September 14, 2010**
**8:00 am – 10:30 am**

**Willcox Savage**
**Wells Fargo Center**
**440 Monticello Avenue, Suite 2200**
**Norfolk, Virginia 23510**

**Register at:** http://www.willcoxsavage.com/nep/seminars.php
***Seating is limited so register early!***

**Applied for continuing education credit**

**Health Care Reform - A Seminar Series**
***Sponsored by Willcox Savage and Mercer***

## HEALTH CARE REFORM EMPLOYER HEALTH PLAN ISSUES (PART II) – 2012 AND BEYOND

**Cher E. Wynkoop and Ruby W. Foley**

On March 23, 2010, President Obama signed The Patient Protection and Affordable Care Act (PPACA) into law. A reconciliation bill was finalized on March 26, 2010. The new health care law introduces a number of employer health plan changes which become effective on and after January 1, 2011, for calendar year health plans. We described the changes first effective in 2011 (for calendar year plans) in a prior article on Health Care Reform. This article primarily addresses those issues which will impact employer plans in 2012 and beyond.

The changes described below apply generally to both insured and self-insured plans, except that certain of the changes marked with an "*" are not applicable to "grandfathered plans" (*i.e.*, group plans or individual coverage in place as of March 23, 2010). Plan sponsors must carefully consider the relative benefits of retaining "grandfathered" plan status when designing their health plans for 2011 and beyond. Please refer to the spring 2010 issue of the *Employment Law Outlook* for those items that impact both "grandfathered" and "non-grandfathered" plans in 2011.

**Grandfathered Plans**

According to interim regulations, there are a number of changes that could cause a plan to lose its grandfathered status, including:

- entering into a new policy (*i.e.* changing carriers or transition from self-insured to insured) or insurance contract (except for renewal of an existing contract);
- implementation of a significant cut or reduction in benefits;
- an increase in co-insurance charges;
- a significant raise in co-payments or deductibles;
- a significant reduction in employer contributions;
- elimination of all or substantially all benefits to diagnose or treat a specific condition; and
- certain changes to annual or lifetime limits on the dollar value of benefits.

A statement regarding the plan's grandfathered status must be provided with the participants' plan materials. Complete record of plan design as of March, 23, 2010 must be retained to prove ability to retain grandfathered status.

**2012**

- Uniform Explanation of Coverage: All health plans are required to provide new uniform explanations of coverage to all new plan participants and at Annual Enrollment. The Explanations cannot exceed four pages, must be in 12-point font and must be written in a "culturally and linguistically appropriate manner." At a minimum, the Explanation must state cost sharing requirements (deductibles, co-pays) and restrictions and limitations on coverage and must state that the Plan meets/does not meet the 60% actuarial criteria for the value of benefits provided. These notices must be provided in addition to SPDs and SMMs.
- Notice of Material Modifications. Description of "material modification" in coverage must be furnished not later than 60 days before the effective date of the modification.

**2013**

- FSA Limits: Annual contributions to a healthcare FSA will be limited to $2,500.
- Notice of Health Care Exchanges: Employers providing coverage will be required to issue a notice to all employees advising them of where to get information about the Health Care Exchanges. Employers are also required to notify employees whether the employer's plan complies with the minimum 60% actuarial standard for health plans.
- Medicare Tax. The employee-paid portion of FICA (related to Medicare) increases .9% from 1.45% to 2.35% on all wages in excess of $200k for single filers and $250k for joint filers. Employer-paid portion of FICA is not impacted.

**2014**

- Free Choice Vouchers: Any employer offering a group health plan must offer a "free choice voucher" to any employee who is eligible for a premium subsidy from a Healthcare Exchange and whose premium contribution towards the employer's plan is greater than 8% but does not exceed 9.8% of his/her household income (indexed for inflation) and that household income does not exceed 400% of the Federal Poverty Level. The voucher must be for no less than the maximum amount the employer would have contributed to provide coverage to the employee. If the voucher amount exceeds the cost to buy coverage, the employee can keep the difference in cash or as a credit on his/her tax return.
- Free Rider Penalty: A "Free Rider" penalty can be assessed against an employer if an employer (1) does not offer coverage at all, and at least one employee is eligible to receive a premium subsidy on a Health Care Exchange or (2) an employer offers coverage but it does not meet a standard of providing benefits with a 60% actuarial value, or it charges employees more than 9.5% of AGI. If the employer does not offer coverage at all, the employer must pay a "Free Rider" annual penalty equal to

(CONTINUED ON PAGE 4)

## THE U.S. DEPARTMENT OF LABOR EXPANDS THE FMLA DEFINITION OF "SON OR DAUGHTER"

(CONTINUED FROM PAGE 1)

Administrative Interpretations by the Department of Labor do not carry the same weight as the statute itself or the DOL's regulations. We will have to wait to see whether courts around the country agree with the DOL's Interpretation. Some commentators expect conservative courts to reject this new Interpretation. Nevertheless, unless and until courts issue rulings rejecting the DOL's Interpretation, employers should comply with the DOL's expanded definition. We recommend that employers revise their FMLA policies and practices to reflect this expanded definition by the Department of Labor. Human resources professionals and managers should also be trained to recognize that additional employees will now qualify for FMLA benefits. Stay tuned for further developments.■

## SUPREME COURT ADDRESSES EMPLOYEE PRIVACY IN TEXTING CASE

(CONTINUED FROM PAGE 1)

Officer Quon sued the City alleging that the audit of his text messages was an unreasonable government search in violation of the Fourth Amendment of the U.S. Constitution. His estranged wife, his girlfriend, and a fellow officer with whom Quon had exchanged messages joined Quon as plaintiffs in the lawsuit. They also sued the service provider, Arch Wireless, alleging that the company violated the Stored Communications Act (SCA) by turning the transcripts over to the Police Department. The plaintiffs asserted that the SCA prohibited Arch Wireless from disclosing the message content to anyone other than the sender or the intended recipients of the messages. The Police Department was the subscriber of the text messaging service, *i.e.*, it purchased the service for its employees and paid the monthly bills, but the Department was neither the sender nor the recipient of the messages in question.

The City explained that the purpose of the search was to determine whether the overage charges incurred as a result of high usage levels by Officer Quon and others was an indication that the text message character allotment per month was insufficient to meet the work-related needs of the officers. The Department sought to determine how many text messages were work-related to assess whether the existing limit on characters per month should be adjusted. The City also noted that its "Computer Usage, Internet and E-Mail Policy" informed the officers that the City "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." According to the City's arguments, this policy established that Officer Quon did not have a reasonable expectation of privacy in his text messages. Quon countered with evidence that the Department official who was responsible for the City's contract with Arch Wireless told Quon that "it was not his intent to audit [an] employee's text messages to see if the overage [was] due to work related transmissions."

The Ninth Circuit Court of Appeals ruled in favor of Officer Quon and the other plaintiffs. The Ninth Circuit found that Arch Wireless had violated the SCA by turning the transcripts over to the City. The court also found that Officer Quon had a reasonable expectation of privacy in his text messages and that the City's search was an unreasonable intrusion into that privacy. Although the Ninth Circuit recognized that the search was conducted for "a legitimate work-related rationale," the court found that the search was not reasonable in its scope. Specifically, the court opined that the City could have achieved its objectives without having to read the content of Quon's messages, or could have first notified him that his future messages would be audited.

When deciding which legal issues to accept for further appellate review, the U.S. Supreme Court declined to revisit the Ninth Circuit's ruling concerning the SCA violation. Therefore, the outcome of that determination still stands. The issues that the Supreme Court examined involved whether the City's search of Quon's messages was reasonable. The Supreme Court noted that, since the pagers were issued to assist SWAT team members in responding quickly to crises and Police Department matters, Quon could have anticipated that the City might need to audit pager messages to assess the SWAT team's performance. Despite this observation, the Court chose not to confirm whether Quon had a reasonable expectation of privacy in the messages, as the Court determined that the City's search was constitutional either way. The Court found that the scope of the search was reasonable and justified by the City's legitimate objectives.

Citing rapid technology changes, the Court declined to enunciate any across-the-board standards for when and how government employers may search electronic communications of employees. The Court did note, however, that "employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated."

The lesson for all employers, both public and private, is that a comprehensive and clear policy on electronic communications can help avoid legal disputes. In addition, employers should ensure that supervisors are well aware of the policies and do not make statements to employees that contradict the policies, as allegedly happened with Officer Quon.■


### Labor & Employment Law Contacts

| | | |
|---|---|---|
| William M. Furr, Chair | wfurr@wilsav.com | 757/628-5651 |
| Wm. E. Rachels, Jr. | wrachels@wilsav.com | 757/628-5568 |
| Samuel J. Webster | swebster@wilsav.com | 757/628-5518 |
| Susan R. Blackman | sblackman@wilsav.com | 757/628-5646 |
| David A. Kushner | dkushner@wilsav.com | 757/628-5668 |
| Luba I. Seliavski | lseliavski@wilsav.com | 757/628-5624 |
| Bryan C.R. Skeen | bskeen@wilsav.com | 757/628-5509 |

### Employee Benefits

| | | |
|---|---|---|
| James R. Warner, Jr. | jwarner@wilsav.com | 757/628-5570 |
| Cher E. Wynkoop | cwynkoop@wilsav.com | 757/628-5581 |
| David A. Snouffer | dsnouffer@wilsav.com | 757/628-5678 |
| Ruby W. Foley | rwfoley@wilsav.com | 757/628-5605 |

### Workers' Compensation

| | | |
|---|---|---|
| Stephen R. Jackson | sjackson@wilsav.com | 757/628-5642 |
| Robert L. "Bo" Foley | bfoley@wilsav.com | 757/628-5547 |

## HEALTH CARE REFORM
## EMPLOYER HEALTH PLAN ISSUES (PART II) – 2012 AND BEYOND

(CONTINUED FROM PAGE 2)

$2,000 multiplied by the number of full-time employees. Failure to meet the 60% actuarial value / 9.5% income test thresholds subjects the employer to a "Free Rider" penalty equal to $3,000 per employee who qualifies for a subsidy on the Exchange up to a maximum of $2,000 multiplied by the number of full-time employees.

- Annual Limits: No health plan can impose annual limits on "essential health benefits." (Note: Recent regulations provide that the maximum "annual limit" for 2011 may not be less than $750,000; for 2012, not less than $1,250,000; and for 2013, not less than $2,000,000).

- Annual Reports to IRS: All health plans are required to provide a new report to the IRS each year detailing the names and Social Security numbers of enrollees, whether the Plan covers "essential health benefits," the length of any waiting period, the employer/employee cost share, etc.

- *Clinical Trials. Health plans cannot discriminate (or disallow) employees from participating in clinical trials for cancer or other life-threatening diseases or conditions.

- *Cost-Sharing Restrictions. Sponsors of group health plans must pay at least 60% of the total cost of coverage and out-of-pocket limits cannot exceed those allowed for high deductible health plans (currently $5,950 (Individual) and $11,900 (Family)).

- Eligibility Waiting Periods. Large employers may not have eligibility waiting periods exceeding 90 days.

- Pre-existing Conditions. No health plan can impose a pre-existing condition on anyone, regardless of age.

- *Wellness Programs. The law codifies HIPAA's regulations on Wellness programs and increases the incentive cap to 30% from 20% that employers are allowed to grant if employees participate in wellness programs.

- *Quality of Care Reporting. All health plans must file an annual report related to various quality of care items (effective case management, preventing hospital readmissions) based on regulations to be issued by HHS.

**2018**

- Cadillac Plans/Excise Tax. Plans offering very rich coverage ("Cadillac" plans) will be subject to a 40% excise tax on the amount by which the aggregate costs of coverage (including both the employee and employer portions) exceed $10,200 (Individual) and $27,500 (Family). Note: In determining plan costs, medical, Rx, and contributions to FSAs and HSAs are included.■

WILLCOX SAVAGE

440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510

Return Service Requested