Court Considers Whether Employee Who Refused Drug Test Was Terminated for Gross Misconduct for Purposes of COBRA

A former employee sued his employer for (among other things) failing to provide a COBRA election notice. The employee argued that, although he had received a "release" stating that COBRA information could be obtained from the company's chief financial officer, no proper election notice was provided. The employer argued the employee was not entitled to COBRA because he was fired for gross misconduct.

The court first examined the release provided to the employee and determined it did not contain the information required by the COBRA regulations. Therefore, the court ruled without a trial that the employee was not provided a proper election notice. Next, the court considered the circumstances of the employee's termination to determine whether it related to the employee's gross misconduct. Noting that COBRA does not define "gross misconduct," the court examined the employee's behavior in light of prior case law. It concluded that the employee had engaged in gross misconduct by refusing a drug test, violently destroying customer property, and smoking around dangerous materials when warned not to do so. However, the court also found substantial evidence that gross misconduct was not the reason for termination. For example, the employee was counseled repeatedly about his poor work habits (which, according to the court, would not rise to the level of gross misconduct), and the employer had previously stated (in conjunction with the employee's claim for unemployment benefits) that the reason for termination was "lack of work." In light of the contradictory evidence, the court concluded that the applicability of COBRA's gross misconduct exception must be determined at trial.

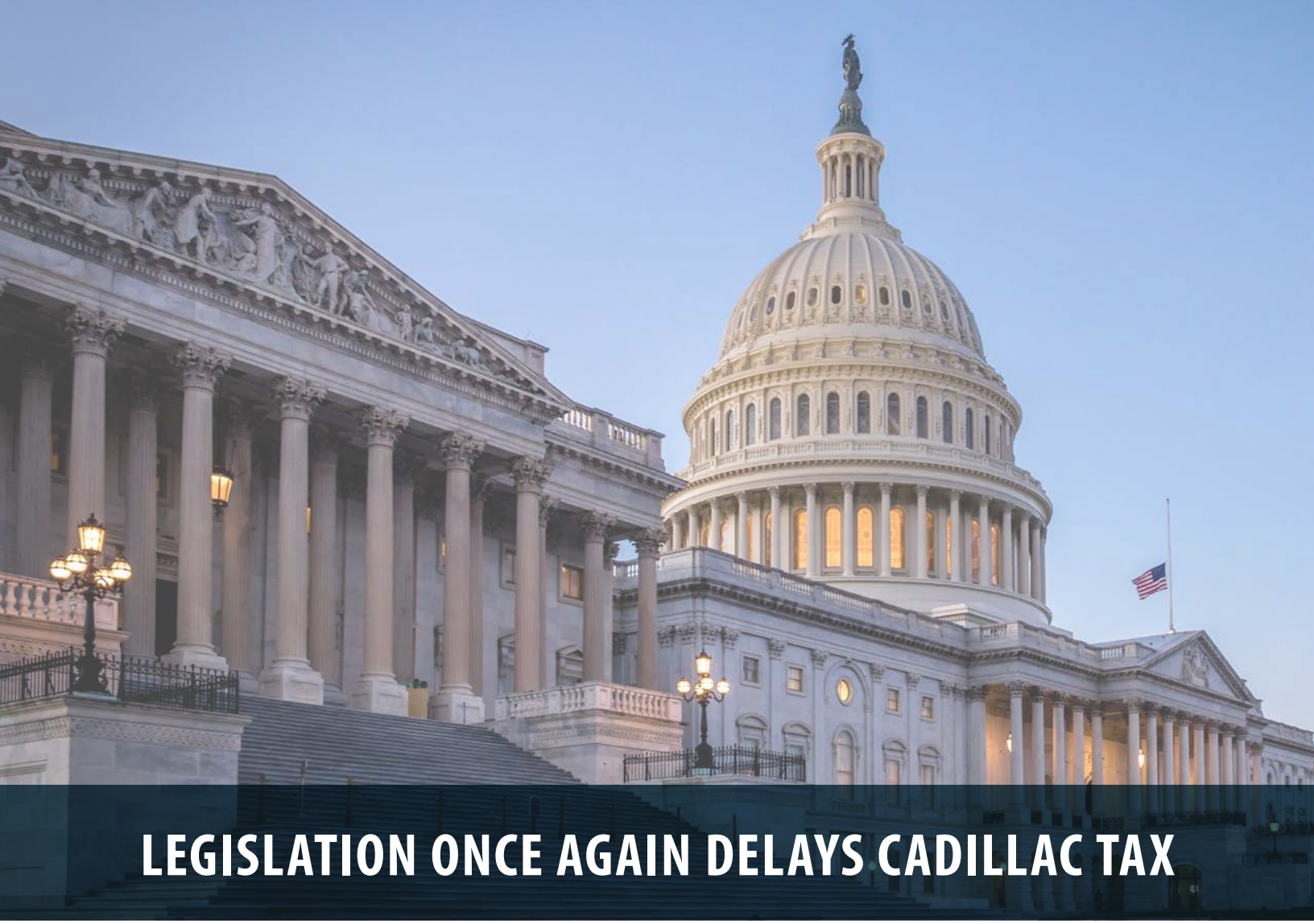
When an employee is terminated for gross misconduct, the employee and any covered dependents lose the right to elect COBRA coverage, and the employer is not required to provide an election notice. The stakes are high for both employees and employers. Because gross misconduct terminations tend to involve disputed facts, there is an increased risk of a court challenge, and the factual disputes often preclude either side from obtaining judgment without a costly trial. In addition, an employer that is wrong about gross misconduct can face not only having to pay an award of retroactive COBRA coverage but also an imposition of penalties of up to $110 per day for failure to provide the election notice that would otherwise be required. Given this uncertainty, we generally recommend that an employer avoid denying COBRA coverage on account of gross misconduct except in situations involving the most flagrant conduct that clearly constitutes a substantial and willful disregard of the employer's interests. Even then, legal counsel and any insurer should be involved in the decision.

IRS Releases Additional Sample of
Employer Shared Responsibility Penalty Form

The IRS has released sample Notice CP 220J, which will be used to notify applicable large employers (ALEs) that for one or more months the IRS has charged them an employer shared responsibility payment (ESRP)–the Code § 4980H penalty that may be assessed against ALEs that fail to offer adequate health coverage to full-time employees and their dependents. (You can access a copy of the sample notice here: https://www.irs.gov/pub/notices/cp220j_english.pdf.) The Notice follows last year's release of Letter 226J (initial letter notifying ALEs of proposed ESRP) and Forms 14764 (ALE's response to proposed ESRP) and 14765 (list of employees receiving premium tax credit). ALEs may use Form 14765 to change information previously reported on Forms 1095-C, potentially reducing or eliminating their ESRP liability. The IRS noted in Letter 226J that it would review information submitted by ALEs and contact them, or would send non-responding ALEs a notice and demand for the proposed ESRP.

The sample Notice indicates that it is for the tax period ending December 31, 2015, and states an amount due of $0. (Presumably, this is just for purposes of the sample document. Actual notices are expected to include a dollar amount, with instructions for making payments, and to omit the statement that money is not owed.) The Notice provides summary information about the ESRP, including circumstances that can trigger liability, and it describes steps the ALE can take to challenge the ESRP. A reminder is included that the ESRP is not deductible for federal income tax purposes.

Release of the Notice came with little fanfare, but it is the next step in the IRS's collection efforts for the 2015 tax year. ALEs receiving the Notice should already have received a Letter 226J and hopefully were able to make any necessary changes to their prior reporting or make any applicable arguments to minimize or eliminate the initially assessed ESRP liability. ALEs receiving a Notice CP220J will want to confirm that the IRS made any appropriate adjustments to their ESRP based on arguments and information previously submitted.



LEGISLATION ONCE AGAIN DELAYS CADILLAC TAX

AND SUSPENDS HEALTH INSURER FEE

In January, the short-term spending bill passed by Congress included important provisions relating to the Affordable Care Act. Here are highlights:

Cadillac Tax: The effective date of the Cadillac tax (an excise tax on high-cost employer-sponsored health coverage) has been delayed until 2022. Originally set to take effect in 2018, the Cadillac tax had previously been delayed until 2020.

Health Insurer Fee: The annual fee on health insurance providers that took effect in 2014 will not apply in calendar year 2019. This fee was also suspended for calendar year 2017, but does apply for calendar year 2018. After the 2019 suspension, barring further legislative action, the fee will apply again for the 2020 calendar year. (As background, the annual fee is payable by insurers based on their proportionate share of the insurance market for U.S. health risks in the previous calendar year).

The legislation's main focus was to continue temporarily to fund government operations, although it also reauthorized the Children's Health Insurance Program (CHIP) for six years. The additional delay in the implementation of the Cadillac tax is welcome news for those struggling to determine the potential impact of the tax on their plans and will also give the IRS more time to resolve administrative issues surrounding the tax. Similarly, the one-year suspension of the health insurer fee (which is treated as an excise tax) is helpful; although the fee is not directly assessed against employer plan sponsors, it affects premiums paid by employers that sponsor insured plans. Efforts to change or perhaps repeal both taxes are likely to continue.

CAN WE ASK EMPLOYEES TO COME TO THE HR OFFICE TO PICK UP THEIR SPD'S?

QUESTION: We have employees who become eligible for benefits during the course of their employment. Can we just put a stack of summary plan descriptions (SPD's) in the human resources office and ask employees to come pick one up instead of furnishing the SPD's by mail?

ANSWER: While having a supply of SPD's available on the human resources office may be a good idea, it is not an advisable approach to satisfying the requirement to furnish SPD's to employees. As background, DOL regulations require that SPD's be furnished in a way that is "reasonably calculated to ensure actual receipt" and "likely to result in full distribution" to all individuals who are required to receive them (generally all participants covered by the plan, including COBRA participants.) Because of the nature of these rules, whether a particular delivery method is satisfactory will depend on the facts and circumstances regarding the employer's workplace and workforce.

The regulations include several examples of acceptable SPD distribution methods. While hand-delivery of SPD's to employees at the worksite is a specifically approved method, the regulations caution that it is not acceptable "merely to place copies of the [SPD] in a location frequented by participants." In other words, the DOL envisions a system that puts the SPD's into the hands of the individuals who must receive them (that is, a system "reasonably calculated to ensure actual receipt"). Furthermore, an approach that requires action on the part of employees in order to receive their SPD's may not be viewed as likely to result in "full distribution." Employees may not be aware of the importance of receiving an SPD, or they might not pick it up within the applicable time frames –for example, a participant newly covered under an existing plan must be furnished an SPD within 90 days after the participant first becomes covered. Bear in mind that the ultimate legal responsibility for distributing SPD's and SMMs rests with the plan administrator (generally the employer). Approaches that are more likely to meet the standards set forth in the regulations include mailing and electronic distribution, so long as applicable requirements for electronic delivery are met.

IRS UPDATES GUIDANCE
ON EMPLOYER SHARED RESPONSIBILITY

The IRS has updated Q&A guidance on its webpage relating to Code § 4980H employer shared responsibility (pay or play penalty) for applicable large employers (ALEs). Here are highlights:

2018 Adjusted Penalty Amounts: In Q&A-54, the IRS announced the adjusted penalty amounts per full-time employee for Code § 4980H failures occurring in the 2018 calendar year–$2,320 under Code § 4980H(a) and $3,480 under Code § 4980H(b).

Adjustment to Affordability Standard: Q&A-39 has been updated to reflect that the 2018 required contribution percentage used to determine whether employer-sponsored health coverage is "affordable" is 9.56%.

Expired Transition Relief: Q&A-2 notes that no transition relief is available for 2017 and future years. Transition relief that was available for the 2015 plan year (including months falling in 2016 for non-calendar-year plans) has now expired.

The updated Q&A guidance can be accessed here: https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act

As a reminder, the IRS has begun sending Letter 226J to inform ALEs of their potential liability under Code § 4980H for the 2015 calendar year–the first-ever assessment of employer shared responsibility penalties. Employers and their advisors should be on the lookout for this letter so that they are prepared to promptly review and respond to such correspondence. Various forms of transition relief applied for purposes of Code § 4980H for the 2015 plan year; ALEs receiving a proposed penalty assessment should review the relief to determine whether penalties may be avoided or reduced.

HHS CONTINUES HIPAA ENFORCEMENT ACTIONS

Health and Human Services' (HHS) Office for Civil Rights (OCR) recently announced two additional resolution agreements involving alleged violations of HIPAA's privacy and security rules. The first followed a health care provider's report of five "small" breaches of protected health information (PHI) over a six-month period. (A "small" breach affects fewer than 500 individuals.) OCR's investigation revealed the theft or loss of (i) several computers from multiple facilities, (ii) a laptop and list of passwords from an employee's car parked overnight at home, (iii) an unencrypted USB drive from an employee's car parked at a worksite, and (iv) a hard drive that had been removed from a computer due to be replaced.

In addition to a $3.5 million payment, the provider agreed to a two-year corrective action plan requiring that the provider institute numerous changes to improve its HIPAA compliance practices. It is interesting that one of the violations noted by OCR was the provider's practice of keeping password lists near computers. Given the proliferation and increased complexity of passwords, and the requirement that they be changed frequently, the practice of keeping password lists near computers has become somewhat common. This case illustrates one of the hazards associated with utilizing this practice.

> "... a reminder that failure to implement reasonable safeguards for the disposal of PHI can result in settlement payments or penalties for impermissible disclosures. Together, the settlements signal OCR's continued emphasis on enforcement."

The second agreement, which involved a moving/storage company (a HIPAA business associate), stemmed from OCR's receipt of an anonymous complaint that an individual had obtained medical records containing the PHI of more than 2,000 individuals from an unlocked truck in the storage company's parking lot and tried to sell the records to a shredding and paper recycling facility. During OCR's investigation, the storage company went out of business. A receiver agreed to pay OCR $100,000 and to catalog the remaining medical records in the storage company's possession and formulate a plan for their disposal.

At $3.5 million, the size of the first settlement is noteworthy compared to the relatively small number of affected individuals–521 in total–and may be the first settlement reflecting OCR's enhanced tracking of small breach notifications to identify systemic problems compromising PHI. The second settlement follows prior resolution agreements involving records left in a dumpster and on a retiring physician's driveway, and serves as a reminder that failure to implement reasonable safeguards for the disposal of PHI can result in settlement payments or penalties for impermissible disclosures. Together, the settlements signal OCR's continued emphasis on enforcement.

This publication was written by Carolyn Cox, Moreton & Company, In-House Corporate Counsel. Carolyn provides Moreton & Company clients with Compliance services. For additional questions, please contact her at 801-715-7110 or ccox@moreton.com.

Moreton & Company - Idaho
2501 East State Avenue, Suite 200
Meridian, ID 83642
208-321-9300

Moreton & Company - Utah
101 South 200 East, Suite 300
Salt Lake City, UT 84111
801-531-1234
www.moreton.com

Moreton & Company - Colorado
4600 South Ulster Street, Suite 610
Denver, CO 80237
303-385-2100