SMALL BUSINESS LEGISLATIVE COUNCIL

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FOOT IN THE DOOR - STEPPED ON

In January, 2010, the Occupational Safety and Health Administration (OSHA) proposed a rule that would require employers with 10 or more employees (unless exempt) to record certain work-related musculoskeletal disorders (MSDs) in their OSHA 300 Log. An OSHA 300 Log is a record of work-related injuries and illnesses that many employers are required to maintain.

MSDs are defined by OSHA as disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs (e.g., carpal tunnel and rotator cuff syndrome, herniated spinal disc, low back pain, etc.), but do not include disorders caused by slips, trips, falls, motor vehicle accidents, or other similar accidents. The agency stated that the proposed rule would simply require employers to check a new MSD box on their OSHA 300 Log and that employers are already required to report this information on the current form. As such, OSHA concluded that compliance with the proposed rule would involve five minutes per employer to become familiar with the new rule and one minute per MSD injury or illness to check the new box.

The Office of Advocacy for Small Business, the government agency charged with leading the fight on regulatory issues for small business, filed comments with OSHA, stating among other things that:

- Small business representatives believe that OSHA has understated the cost and complexity of complying with the proposed rule. For example, many small businesses will have to hire attorneys and consultants to advise and train them on the new requirements, engage in additional consultation with the employee, consult with medical professionals, and make complex medical evaluations they are not qualified to make.
- Small business representatives are concerned that small businesses could be held in violation of OSHA recordkeeping rules if they misdiagnose and improperly record a MSD. Others noted that many small businesses do not have qualified human resource specialists on staff as OSHA assumes in its analysis.

Chalk about a victory for the Office of Advocacy. OSHA has at least temporarily withdrawn the proposal. The temporary withdrawal of the rule will allow Advocacy and OSHA to convene a stakeholder meeting to garner additional input from small businesses on this important issue. Said Winslow Sargeant, the Chief Counsel for Advocacy, "When it comes to crafting federal regulations, the input of small business is invaluable. This Advocacy-OSHA meeting on MSD reporting will provide the opportunity for small businesses to voice their concerns on this critical issue. For over 30 years the Office of Advocacy has worked on behalf of small businesses to ensure that their voice is heard within the federal rule making process."

FORM 1099

Public Law 111-148, the Patient Protection and Affordable Care Act (PPACA), signed into law on March 23, 2010, expanded the tax related information reporting requirements known as Form 1099 for the Internal Revenue Service (IRS) for all businesses. The new requirements apply to payments made to most vendors after December 31, 2011.

Public Law 111-240, The Small Business Jobs Act (SBJA),

increased the penalties for inadvertent filing errors.

Senator Mike Johanns (R-NE) and Representative Dan Lungren (R-CA), lead champions of repeal in the 111th Congress, are leading the charge again in the 112th Congress. Both have re-introduced their repeal bills, S, 18, the Small Business Paperwork Reduction Act, and H.R. 4, the Small Business Paperwork Mandate Elimination Act.

Almost everybody on Capitol Hill concedes the new requirement is a bad idea. The President mentioned it in his State of the Union. Senate Majority Leader Harry Reid (D-NV) and Finance Chairman Max Baucus (D-MT) have introduced their own repeal bill.

Senator Johanns' bill includes a spending reduction as an offset. Representative Lungren's bill and the Reid/Baucus bill do not have offsets.

The problem has been getting over the revenue offset hang up. When the expansion was enacted, it was projected to raise $17 billion in tax revenue. To repeal it, in theory, Congress must come up with a comparable amount. In the last round in the 111th, the Republicans held firm on the revenue offset issue. The Democrats were willing to pass a repeal without an offset. In reality, it was more of a partisan stand off over the health care reform bill, with the Republicans making the point that no part of the health care reform would be allowed to continue unless paid for, even if the particular original offset had nothing to do with health care reform, than a debate over revenue offset philosophy.

MEDICAL MALPRACTICE REFORM

As anticipated in the last Weekly, House Judiciary Committee Chairman, Lamar Smith (R-TX) with Phil Gingrey, M.D. (R-GA), and David Scott (D-GA), has introduced a medical malpractice liability bill, H.R. 5. In a tip of the hat to "those who come before", the bill carries the same title as the bill considered in 2003, the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011. A summary follows:

Non Economic Damages

In any health care lawsuit, the amount of noneconomic damages, if available, is limited to more than $250,000, regardless of the number of parties against whom the action is brought or the number of separate claims or actions brought with respect to the same injury. For purposes of applying the limitation, future noneconomic damages shall not be discounted to present value.

Punitive Damages

The amount of punitive damages, if awarded, in a health care lawsuit is limited to $250,000 or as much as two times the amount of economic damages awarded, whichever is greater.

Punitive damages may, if otherwise permitted by applicable State or Federal law, be awarded against any person in a health care lawsuit only if it is proven by clear and convincing evidence that such person acted with malicious intent to injure the claimant, or that such person deliberately failed to avoid unnecessary injury that such person knew the claimant was substantially certain to suffer.

In determining the amount of punitive damages, if awarded, in a health care lawsuit, the trier of fact shall consider only the following:
(A) the severity of the harm caused by the conduct of such party;
(B) the duration of the conduct or any concealment of it by such party;
(C) the profitability of the conduct to such party;
(D) the number of products sold or medical procedures rendered for compensation, as the case may be, by such party, of the kind causing the harm complained of by the claimant;
(E) any criminal penalties imposed on such party, as a result of the conduct complained of by the claimant; and
(F) the amount of any civil fines assessed against such party as a result of the conduct complained of by the claimant.

Several Liability Only

In any health care lawsuit, each party shall be liable for that party's several share of any damages only and not for the share of any other person. Each party shall be liable only for the amount of damages allocated to such party in direct proportion to such party's percentage of responsibility.

Contingency Fees

In no event shall the total of all contingent fees for representing all claimants in a health care lawsuit exceed the following limits: (1) rorty percent of the first $50,000 recovered by the claimant(s); (2) thirty-three and one-third percent of the next $50,000 recovered by the claimant(s); (3) twenty-five percent of the next $500,000 recovered by the claimant(s); and

(4) fifteen percent of any amount by which the recovery by the claimant(s) is in excess of $600,000.

Collateral Source

In any health care lawsuit involving injury or wrongful death, any party may introduce evidence of collateral source benefits. If a party elects to introduce such evidence, any opposing party may introduce evidence of any amount paid or contributed or reasonably likely to be paid or contributed in the future by or on behalf of the opposing party to secure the right to such collateral source benefits. No provider of collateral source benefits shall recover any amount against the claimant or receive any lien or credit against the claimant's recovery or be equitably or legally subrogated to the right of the claimant in a health care lawsuit involving injury or wrongful death.

Periodic Payments

In any health care lawsuit, if an award of future damages, without reduction to present value, equaling or exceeding $50,000 is made against a party with sufficient insurance or other assets to fund a periodic payment of such a judgment, the court shall, at the request of any party, enter a judgment ordering that the future damages be paid by periodic payments.

Statute of Limitations

The time for the commencement of a health care lawsuit shall be 3 years after the date of manifestation of injury or 1 year after the claimant discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of a health care lawsuit exceed 3 years after the date of manifestation of injury unless tolled for any of the following (1) upon proof of fraud; (2) intentional concealment; or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person.

Outlook

Unlike some of the other alternative health care reform proposals, medical malpractice reform can be “layered” on top of any system so it would not be disruptive. A number of States have enacted similar reforms, which is a double-edged sword. While some Democratic policy makers are likely to be more receptive because of their state’s activity, there will be policy makers who argue why should the Federal government get involved since the states are active?

The trial lawyers are always a formidable opponent having thwarted tort reforms of all kinds for three decades.