QUARTERLY BYTES

FEES & BURGESS, P.C.

Volume 9, Issue 3 September 2011

Alabama Legislature Approves Vote On Constitutional Amendment To Opt Out Of Federal Health Care Law

Alabama lawmakers have voted recently to hold a public vote on an amendment to the state constitution that would allow individuals and employers in Alabama to opt out of the federal health care overhaul passed by Congress last year.

The bill, titled HB60 and sponsored by Rep. Blaine Galliher, R-Gadsden, originated in the Alabama House of Representatives and was passed by that body on April 5, 2011. It was approved by the Alabama State Senate on June 9, 2011. It is similar to a bill passed by the Senate last year; however, that bill died in the House of Representatives. The current bill does not go to Governor Robert Bentley for his review. It provides for the proposed amendment to be placed on the ballot of the November 2012 election.

The proposed amendment states that “a law or rule shall not compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system.” It also provides that a person or employer may pay directly for lawful health care services without incurring fines or penalties for paying directly, and a health care provider may accept such direct payment without the requirement of fines or penalties. The amendment would not prohibit the sale of health insurance in private health care systems.

While state legislative action cannot preempt federal law, the amendment, if approved by Alabama voters, could be used in the ongoing federal court cases challenging the federal health care overhaul as unconstitutional. The federal law, titled the Patient Protection and Affordable Care Act, will require most Americans to have health care coverage starting in 2014 or face federal penalties. A group of attorneys general from states across the country filed suit in the Northern District of Florida against the United States Department of Health and Human Services, Department of the Treasury, and Department of Labor alleging that the health care overhaul was unconstitutional. Alabama Attorney General Luther Strange is among them. Earlier this year, District Judge Roger Vinson found the entire law to be unconstitutional.

While federal judges in Virginia and Michigan have upheld the federal health care law, a federal district court judge in Virginia has ruled at least parts of the law are unconstitutional, finding that the decision to purchase health insurance is beyond the power of Congress under the Commerce Clause. With these conflicting rulings by lower court judges, the determination will most likely be made ultimately by the United States Supreme Court.

LITIGATION SPOTLIGHT

Bankruptcy Code Does Not Prohibit Private Employer From Denying Employment To Individual With Past Bankruptcy

This spring, the Eleventh Circuit Court of Appeals determined that the Bankruptcy Code's antidiscrimination provision does not prohibit a private employer from denying employment to an individual on the ground that he is, or has been, in bankruptcy.

In the case at issue, Eric Myers filed a Chapter 7 bankruptcy petition, and his debts were discharged by the bankruptcy court. He then applied for a managerial position at a local TooJay's Gourmet Deli restaurant. He applied to Thomas Thornton, the regional manager of the TooJay's Management Corporation, and completed a two-day on-the-job evaluation. Myers was scheduled to begin work two weeks after the on-the-job evaluation. However, before he began working, he received a letter from TooJay's rescinding their previous offer of employment based on the fact that Myers had previously filed for bankruptcy, and it was against their policy to hire new employees who had done so.

Myers sued TooJay's, alleging that TooJay's had discriminated against him because of his bankruptcy in violation of 11 U.S.C. § 525(b) by refusing to hire him and, alternatively, by terminating him from the job after it had hired him. The district court granted TooJay's motion for summary judgment on the refusal to hire claim, finding that section 525(b) does not prohibit a private employer from refusing to hire someone because of a bankruptcy. The wrongful termination claim proceeded to trial, and the jury found in favor of TooJay's that no employment relationship existed between the two parties.

The Eleventh Circuit noted that while the Bankruptcy Code offers some protection to debtors from discriminatory actions by employers, the acts against which they are protected depends on whether the employer is a governmental unit or a private employer. Section 525(a) provides that a governmental unit may not "deny employment to" a debtor based on his prior bankruptcy. On the other hand, such language is not present in section 525(b) with respect to private employers. The Supreme Court has often held that where Congress includes particular language in one section of a statute and omits it in another section of the same statute, it is presumed that Congress acted intentionally and purposely in the exclusion. Since Congress chose not to include the phrase "deny employment to" in the section regarding private employers, it does not apply to them. Thus, the Bankruptcy Code does not prohibit a private employer from denying employment to a person who is currently, or has previously been, in bankruptcy.

The case is Myers v. Toojay's Management Corp., 640 F.3d 1278 (11th Cir. 2011).

HR CORNER

DOL and EEOC Announce Regulatory Agenda for 2011

The Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC) have announced their regulatory agendas for the remainder of 2011, and they detail a number of rules that the agencies are attempting to implement and/or finalize over the next six to twelve months. Among these proposed rules are the following.

Through its Office of Federal Contract Compliance Programs (OFCCP), the DOL is creating a new compensation analysis tool which it claims will more effectively identify government contractors in violation of Executive Order 11246 (governing affirmative action for federal contractors). In addition, OFCCP has proposed a rule changing the non-discrimination and affirmative action provisions of the Vietnam Era Veterans Readjustment Assistance Act. As currently proposed, this rule may require written, numerical analysis of affirmative action efforts for veterans, similar to the current requirements for analysis and creation of affirmative action goals for women and minorities. Also, the OFCCP plans to implement new rules to enhance affirmative action obligations for federal construction contractors. It also plans to revise regulations for federal contractors regarding sex discrimination, as the current guidelines are over thirty years old.

The DOL is also working to revise its procedures for hearings with its administrative law judges. The DOL hopes to conform such hearings to the rules of procedure used in the federal court system "in order to best manage the complexities of whistleblower and discrimination claims."

The Equal Employment Opportunity Commission (EEOC) plans to issue a final rule clarifying the "reasonable factors other than age" defense to claims under the Age Discrimination in Employment Act (ADEA), and to discuss the burden of proof for disparate impact claims under the ADEA. In addition, the EEOC plans to issue a rule related to collection of race and ethnicity data to conform to the current instructions on its EEO-1 form. As noted on the form, the rule would propose to make employee self-identification the preferred method of collecting such data.

Employers should continue to monitor the progress of these proposed rules as these published agendas demonstrate that both the DOL and the EEOC plan to continue active rulemaking over the next year.

PROTECTIVE MEASURES

Requirements of Collateral Estoppel

The Alabama Court of Civil Appeals recently reiterated the requirements for collateral estoppel in the context of indemnification by insurance companies. In McDaniel v. Harleysville Mut. Ins. Co, 2011 WL 3528476 (Ala. Civ. App. 2011), the McDaniels filed an action in 2002 against Brian Homes for negligence, breach of warranty, breach of contract, and fraud in the construction of a house. They asserted that at the time of the events giving rise to their action, Brian Homes was covered by a commercial-general liability insurance policy issued by Harleysville Mutual Insurance Company. A judgment was entered in favor of the McDaniels. Harleysville disclaimed liability, and the McDaniels filed an action against Harleysville and Brian Homes pursuant to section 27-23-2 of the Alabama Code, which provides for the application of the defendant's insurance to satisfy a final judgment. Harleysville filed a motion to dismiss, claiming that it had obtained a judgment in federal court declaring that there was no insurance coverage available for claims made against Brian Homes in the earlier action and that Harleysville did not owe a duty to indemnify Brian Homes for that judgment. The trial court granted the motion to dismiss, and the McDaniels appealed.

Harleysville asserted the defense of collateral estoppel, relying on the federal court's declaratory judgment that it was not required to indemnify Brian Homes in the 2002 action. The McDaniels argued that they could not be bound by the judgment entered in the federal court because they were not parties to that action, and the court agreed. For a prior judgment as to an issue to have a preclusive effect on a party's later relitigation of that issue, it must be shown that the person against whom the preclusive effect is sought, or a person in privity with that person, was a party to the prior litigation in which the issue was decided. Since the McDaniels were not parties to the federal court action, that judgment was not binding on them, and the trial court's decision was reversed. Thus, a declaratory judgment holding an insurance company does not have a duty to indemnify an insured is not binding on a potential creditor unless that creditor is named as a party in the action.

FEES & BURGESS, P.C. — Calendar of Events

Fees & Burgess, P.C., is proud to present, and participate in the presentation of, the following upcoming seminars:

Date: September 22, 2011
Location: Jackson Conference Center, Research Park

Service Contract Act and Contract Disputes Act of 1978

At Solvability's 5th annual Rocket City GovCon Conference, Jeff Roth, of Fees & Burgess, P.C., will be presenting a special session on the Service Contract Act and Contract Disputes Act of 1978. This session will focus on Service Contract Act applicability; general requirements; wage and fringe benefit payment requirements; recordkeeping and notice requirements; and problems and penalties, as well as the federal government contracting disputes resolution process flowing from the Contract Disputes Act of 1978.

To register, or for more information, please click here to visit Solvability's website.

Seminars

During these rough economic times, it is important to get the most for your money. The lawyers of Fees & Burgess, P.C., combined, have many years experience working in various fields, as both in-house and private counsel, representing a diverse clientele. Our attorneys have extensive experience in many areas of law, including employment law; intellectual property; supply chain management; mergers and acquisitions; contract negotiation; dispute resolution; and various other fields.

This wide field of knowledge provides our attorneys with the insight and know-how to be able to provide quality training on various topics. Our programs can be customized to fit any business need while keeping the costs of our training competitive, without sacrificing quality.

Topics that Fees & Burgess, P.C., can provide training on include, but are not limited to:

A Recession Era Guide to Collecting on Construction Contracts

Conducting Effective Workplace Investigations

Construction Contracting

Contingent Employees and Labor Outsourcing

Diversity Training

Elements of an Electrical Manufacturing Services Contract

Employment Law Survival Training for Managers

Family Medical Leave Act

Hiring and Firing

Immigration Compliance

Incoterms® 2010

Indemnity and Limitation of Liability Contract Clauses

International Contracting

Limiting Liability for Sexual Harassment

Managing Gender Identity Issues in the Workplace

Negotiation and Resolution of Federal Contract Claims

Privacy in the Workplace

Reducing Employee Benefits Costs for Alabama Businesses

Reducing Risk in Purchasing Terms and Conditions

Reduction in Workforce Strategies

Retaliation and Whistleblowers

Uniform Commercial Code: Primer to Articles 1, 2, and 2A

Violence in the Workplace

Wage and Hour Issues/Fair Labor Standards Act

Americans with Disabilities Act

Managing Employee Use of Internet and E-mail in the Workplace

Ethics, Business Conduct and Compliance in Government Contracting

For more information on these and other programs, please visit us online at www.feesburgess.com; contact us by e-mail at seminars@feesburgess.com; or by phone at (256) 536-0095.

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SPEAKERS

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NEWSLETTERS

FEES & BURGESS, P.C., also publishes *F&B HR Corner,* focusing on human resource issues; and *F&B SCM Memo,* focusing on the supply chain management industry. To receive any of these e-newsletters, please provide your contact information to newsletters@feesburgess.com.

To remove your name from our mailing list, please contact us at newsletters@feesburgess.com.

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