

SMAC

SMAC Legislative Report

Of CALIFORNIA

News from the Small Manufacturers Association of California

A compilation of news and commentary on the recent actions of California legislators and bureaucrats in Sacramento

OBAMACARE LAW REQUIRES SMALL BUSINESS TO PROVIDE ENHANCED HEALTH CARE COVERAGE

"We needed someone to spend 24 hours a day reading through all this stuff. "We have to make sense out of this."
Sandi Webster co-owner Consultants 2 Go

"the bill lowers the equal work standard and specifically prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility."
Attorney Ryan Krueger, Sheppard, Mullin, Richter & Hampton LLP

By Tom Martin
SMAC Executive Director
& Legislative Chairman

It's crunch time for thousands of small-business owners who must comply with requirements of the health care law for the first time, according to Associated Press reporter Joyce M. Rosenberg.

Federal and state laws require that an employer must have at least 1 but not more than 50 employees to qualify as a small business for purposes of group health insurance. Starting January 1, 2016, a small business can have as many as 100 eligible employees.

Brand new businesses have a difficult time qualifying for coverage. To address this problem, the law says that a small company must have employed a non-owner W-2 employee at least 50% of the preceding calendar year or 50% of the preceding quarter. So, for example, if a business wants to start a group health plan April 1st, which is the start of the 2nd quarter, then the company must have had one W-2 employee no later than February 15th of the same year – this is the midway point of the 1st quarter. Also, the business cannot be formed primarily for the purpose of buying health coverage.

Companies with 50 to 99 full-time employees must offer affordable insurance to employees and their dependents starting Jan. 1, 2016. They also must file tax forms with the government by Jan. 31, and annually thereafter, detailing the cost of their coverage and the names and Social Security numbers of employees and each of their dependents. While companies of all sizes subject to the law must file the forms, smaller

businesses without big staffs to handle the paperwork may have to hire someone to do it — at a cost of hundreds or thousands of dollars.

"It's probably going to be a big nightmare for a lot of businesses," says David Lewis, president of OperationsInc., a human resources provider. He expects his company's business to be up 20 percent this year as businesses seek help to comply with the law.

The enrollment period for buying insurance starts November 1st. All the new requirements are likely to take many small-business owners by surprise, says Bob Wheeler, a certified public accountant in Los Angeles.

Companies that don't currently offer insurance must sign up for policies that meet the law's standards for minimum coverage and that employees can afford. Finding the right policy can be a steep learning curve.

One marketing firm, which has nearly 100 employees, hired a human resources executive this year to do the research into the different plans. The owners of the marketing company want to give their staffers good insurance but are worried about the cost.

"We needed someone to spend 24 hours a day reading through all this stuff," co-owner Sandi Webster says. "We have to make sense out of this."

Even companies that already offer insurance may be in for a surprise if their current plans don't meet the law's requirements, says Lewis, the OperationsInc. president.

MINIMUM MANDATED ESSENTIAL BENEFITS

Small businesses that offer health insurance coverage must offer plans that include 10 minimum essential benefits. These include:

1. Outpatient care you receive in a doctor's office and not in the hospital;
2. Evaluation and treatment in the emergency room;
3. Inpatient care after you've been admitted to a hospital;
4. Care before and after your baby is born;
5. Treatment that includes psychotherapy and counseling for mental health and substance use;
6. Prescription medicine;

7. Physical and occupational therapy, speech-language pathology, psychiatric rehabilitation and other services to help recovery from an injury, disability or chronic condition;
8. Laboratory tests;
9. Preventive services such as screenings, counseling and vaccinations; and
10. Pediatric services for children under age 19 that includes dental and vision care.

Source: HealthCare.gov Blog: 10 health care benefits covered in the Health Insurance Marketplace

“For some businesses, it’s going to be more expensive than the plan they’ve been offering and that they hope to renew,” Lewis adds.

Owners must make some strategic decisions — for example, do they want to forgo offering an insurance plan and pay the government an annual \$2,000 per employee penalty. For some, the penalty might be cheaper.

The new tax forms require employers to gather information on employees’ pay and health coverage, as well as the number of months workers and their dependents were covered. For many small businesses, that information must come from more than one source — payroll companies and health brokers or insurers. They then must make calculations to determine whether their coverage was affordable according to the health care law. If they make a mistake in their math, they can face penalties from the IRS.

RECORDKEEPING LABOR INTENSIVE

Companies that try to do the work themselves will find it labor-intensive. And asking employees for information about their families may cause friction, says Samantha Reynolds, a spokeswoman for A Plus Benefits in Boise, Idaho.

“You don’t want to just send a letter and say, answer these questions,” she says.

Some payroll companies will, for a fee, compile the forms, but coordination between them and a health broker or insurer still can be a hassle.

“The companies have to trust and depend on their HR and payroll providers to gather and handle it,” says Mark Sinatra, CEO of Staff One, a human resources provider.

Cathy Trlica already has hired a company to do the paperwork for her Caring Senior Service franchise. She’s estimating that about 30 of her employees will want the insurance she’ll offer starting Jan. 1; others are likely to be covered through their spouses’ policies. But compiling the tax forms will be too time-consuming for her small office staff.

“There’s no way we have the capability of doing that internally,” Trlica says.

KNOW THE LAW

CALIFORNIA EQUAL PAY LAW TO FACE INCREASED SCRUTINY JANUARY 1, 2016

Sheppard, Mullin, Richter & Hampton LLP attorney Ryan Krueger reports that California Governor Jerry Brown signed the **California Fair Pay Act**, a bill making various changes to strengthen the California Equal Pay Act, which addresses gender wage inequality.

The bill, **S.B. 358**, was introduced by Senator Hannah-Beth Jackson, D-Santa Barbara, and was supported by labor and equal rights groups, in addition to the California Chamber of Commerce.

CHANGED TO “SUBSTANTIALLY SIMILAR WORK”

Existing law (Cal. Labor Code §1197.5(a)) generally prohibits an employer from paying an employee at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. Effective January 1, 2016, several changes will be made to this law. Significantly, the bill lowers the equal work standard described above and specifically prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, subject to exceptions.

This modification will make it easier for employees to demonstrate unequal pay by lowering the standard for comparing their wages to the wage of another employee. This will effectively expand the pool of employees deemed doing the “same work” or holding the “same position.” For example, a female housekeeper who cleans hotel rooms may challenge higher wages paid to a male janitor who cleans the lobby and banquet halls.

Currently, the existing standard is subject to the following exceptions: where the payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex.

Attorney Krueger, in the National Law Review, reports this legislation clarifies that the exceptions are satisfied where the employer demonstrates the wage differential is based upon a seniority system, a merit system, a system which measures earnings by quantity or quality of production or a bona fide factor other than sex, such as education, training, or experience. With regard to the bona fide factor defense the revised statute provides:

- This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity.
- For purposes of this subparagraph, “business necessity” means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve.
- This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

With respect to these exceptions, the revised legislation also requires that “each factor relied upon [be] applied reasonably,” and that “one or more factors relied upon account for the entire wage differential.”

Currently, California Labor Code §1197.5(d) requires that employers maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment of the persons employed by the employer for a *two* year period. S.B. 358 extends this records retention requirement to *three* years.

EMPLOYEES MAY COMPARE THEIR WAGES

The bill includes a provision to reduce “pay secrecy” by protecting employees inquiring about the wages of other employees, according to the Sheppard, Mullin, Richter & Hampton attorney. It restricts employers from prohibiting an employee from disclosing the employee’s own wages, discussing the wages of others, inquiring about another employee’s wages, or aiding or encouraging any other employee to exercise his or her rights under this section.

S.B. 358 expressly prohibits employers from discharging, discriminating or retaliating against any employee for invoking or assisting the enforcement of this section. The bill then creates a new private cause of action whereby an employee may bring a civil action seeking reinstatement and reimbursement for such discrimination or retaliation. The legislation specifies a one-year statute of limitations period to bring such a claim.

Attorney Krueger says the biggest takeaways from S.B. 358 are that it creates a new cause of action, eases the burden on employees to establish a prima facie case, and makes it more difficult for an employer to demonstrate that wage differences are justified. In light of the above modifications, employers are encouraged to audit their salary structure and recordkeeping practices and policies to ensure compliance with the law. Employers are also

encouraged to train managers not to restrict (or give the appearance of restricting) employees from discussing wages.

Attorney Krueger recommends that to the extent employers discover pay differences between employees doing *substantially similar work*, employers are encouraged to analyze the basis for the differences and whether the differences are supported by adequate justification. To the extent the differences are not supported by a seniority system, a merit system or a system which measures earnings by quantity or quality of production, employers are encouraged to analyze whether the difference in pay is based on a bona fide factor other than sex (i.e., what factors caused the wage differentials, are the factors job-related, and are they consistent with an “overriding legitimate business purpose”).

For example, to the extent such wage differentials are based on factors such as prior experience and education, employers are encouraged to re-evaluate these requirements to ensure that such prior experience and education are consistent with an “overriding legitimate business purpose.”

Employers should also ensure they are maintaining records of employee wages and wage rates, job classifications, and other terms and conditions of employment going back *three* years. As a reminder, employers are already required to maintain copies of employee wage statements and payroll records going back three years under California Labor Code §§ 226(a) and 1174.

Given the new requirements, employers should also identify and consider which documents justify pay scale decisions and will assist in proving one or more of the defenses provided by the statute. This is just one more reason why employers should strive to have written, accurate, and up to date job descriptions. Such documents may be the key for justifying differences in pay when necessary.

EMPLOYERS OFFERING PAID OFFSHORE SURGERY TO REDUCE MEDICAL COSTS

A small but growing number of self-insured companies of all sizes will offer their employees the option of having major operations, such as heart bypass surgery and hip or knee replacements at vetted hospitals overseas – from Puerto Rico to Thailand says Joe Harken of the Medical Tourism Association.

Close to 1 million Americans leave the country for medical care every year.

“My wife thought I was crazy,” says Wayne Wright of Marshall, Texas. But he underwent double knee replacement in the Cayman Islands in March under a medical travel option offered by his employer – and saved more than \$6,000.

"I didn't pay a penny out of my pocket, including airfare, and the resort hotel," he said. "We got treated like royalty and my knees feel great."

Employers are doing this because after covering all medical costs, travel and sometimes offering a bonus, companies can end up paying only half of what it would cost for the employee to have the procedure in the U.S.

WHAT ARE SMALL EMPLOYER OPTIONS FOR EMPLOYEES ON DISABILITY?

A California Chamber of Commerce report states the federal Family Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) do not apply to small employers who have fewer than 50 employees.

For an employee simply being on disability does not afford job protection on its own. However, California regulations on disabilities offer worker protections..

One of the "reasonable accommodations" under the Fair Employment and Housing Act is a leave of absence. Even employers with fewer than 50 employees need to make an effort to provide a paid or unpaid leave for treatment and recovery.

Although the recent regulations give some definition on what is a reasonable accommodation, there is no guidance on how long of a leave would be considered acceptable. This must be decided on a case-by-case basis, and several factors come into play, including, but not limited to:

- The length of time requested;
- How critical is the individual's job;
- How large is the company; and
- How busy is the company (given seasonal issues).

It is always wise to seek counsel in making these critical decisions. The various governmental entities that evaluate these situations are increasingly sensitive, and employers should be similarly responsive.

ROBOT MAKER ADEPT TECHNOLOGY JOINS GLOBAL LEADER OMRON CORP.

OMRON Corporation (a global leader in the field of automation based on its core sensing and control technology, and Pleasanton, CA based Adept Technology, Inc. a global, leading provider of intelligent robots, autonomous mobile robot solutions and services, announced that the two companies have entered into an agreement whereby OMRON will acquire Adept.

OMRON is acquiring 100% of the outstanding shares of Adept common stock through an all cash tender offer followed by a second-step merger. OMRON will offer Adept investors \$13.00 per share of Adept common stock, which represents a 63% premium over the closing price for Adept's common stock on September 15, 2015. This values Adept at

approximately \$200 million. OMRON will fund the tender offer through cash on hand.

Founded in 1983, Adept Technology is the largest U.S.-based manufacturer of industrial robots. Adept intelligent automation product lines include industrial robots, configurable linear modules, machine controllers for robot mechanisms and other flexible automation equipment, machine vision, and systems and applications software. Adept provides specialized, cost-effective robotics systems and services to high-growth markets including Packaged Goods, Life Sciences, Disk Drive/Electronics and Semiconductor/Solar; as well as to traditional industrial markets including machine tool automation and automotive components.

CALIFORNIA OFFERS HELP TO SMALL BUSINESSES LOOKING FOR CONTRACTS

The California Department of General Services, Procurement Division's, Office of Small Business and Disabled Veteran Business Enterprise Services (OSDS) is the state's certifying agency that administers the Small Business and DVBE Certification Programs.

In addition, the OSDS's Communications & Outreach section assists small and disabled veteran businesses by participating in outreach events, providing resource guidance and supporting the businesses through advocacy.

State agencies with annual expenditures over \$100,000 employ a liaison to small business and Disabled Veteran Business Enterprise (DVBE) suppliers, to help them resolve contracting issues with the state. The small business & DVBE advocate's duties include.

- Make information regarding pending solicitations available to, and consider offers from, California small business suppliers capable of meeting the state's business need.
- Ensure that payments due on a contract with a small business are made promptly, as provided for in Government Code, Section 927 et seq.

For questions regarding the Small Business & DVBE Advocate program, contact Advocate@dgs.ca.gov

Thanks and a tip of the hat to:

California Chamber of Commerce
Joyce M. Rosenberg , Associated Press
Ryan Krueger, attorney, Sheppard,
Mullin, Richter & Hampton LLP

Tom Martin can be reached at 951-353-0770

Or

Tomforsmac2@gmail.com

*If emailing please list
SMAC Newsletter in the subject*