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New Legislation Affects CDL Holders

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On September 30, 2005, new legislation impacting commercial driver license (CDL) qualification will go into effect as the Wisconsin Department of Transportation (DOT) incorporates the requirements of the Federal Motor Carrier Safety Improvement Act of 1999. The new requirements have a substantial affect on CDL eligibility for commercial motor vehicle (CMV) drivers, including requiring the disqualification of CDL privileges for serious or major offenses committed while operating non-commercial motor vehicles.

In addition to the penalties already in existence for offenses occurring while

operating a CMV, the new regulations will create CDL consequences for major offenses or serious traffic violations that occur while drivers are operating non-CMV's. Beginning September 30, 2005, a first conviction for a major offense while operating any motor vehicle will result in CDL disqualification for one year. A first offense occurring while a driver was transporting hazardous materials will result in CDL disqualification for three years. A second conviction for a major offense in any vehicle results in a lifetime disqualification. Major offenses include: operating while intoxicated, operating under the influence of a controlled substance, refusal to test for intoxication, and leaving the scene of an accident. The new legislation also adds two new major offenses: operating a CMV while the CDL is disqualified, revoked, suspended, or canceled and causing a fatality through negligent or criminal operation of a CMV.

Along with major offenses, the new rules also create CDL consequences for serious traffic violations occurring while a driver was operating a non-CMV. A non-CMV conviction for a serious traffic violation will result in a CDL disqualification of 60 days if there are two serious violations within three years, and 120 days if there are three serious violations within three years, if the conviction results in revocation, suspension, or cancellation of a CDL or regular driver's license or a CDL or non-CMV driving privileges. Serious traffic violations include: speeding 15 miles per hour or more over the speed limit, reckless driving, passing illegally, improper or erratic lane changes, following too closely, and moving violations arising from a fatal accident. The new legislation also adds three new serious traffic violations: operating a CMV without obtaining a CDL, operating a CMV without having a CDL in immediate possession (with an exception for an individual who can

provide timely proof of CDL licensure), and driving a CMV without the proper class of CDL or without the required endorsement.

The new regulations also give the Secretary of the Federal DOT the authority to disqualify a state's CDL driver if the driver poses an "imminent hazard." An "imminent hazard" is defined as "the existence of a condition that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding." A hearing is not required for a disqualification for 30 days or less, but a disqualification over 30 days requires notice and a hearing.

The new legislation also prohibits the issuance of an occupational or other special license allowing the operation of a commercial vehicle.

Other requirements include:

1. The Department of Transportation (DOT), before issuing or renewing a CDL, must obtain the driving record of an applicant from each state that has issued him/her any operator's license during the prior 10 years, and to provide such information in response to another state's request;
2. The DOT must notify within 10 days the commercial driver license information system and a CMV operator's state of licensure, if other than Wisconsin, of any

disqualification of operating privileges for at least 60 days;

3. The DOT must maintain detailed records of actions taken against persons holding CDLs and persons operating CMVs without a CDL, and of convictions of such persons for offenses committed in both CMVs and non-CMV's.



Employers of CMV drivers should be aware of the impact of major offenses and serious violations on CDL eligibility and should prepare to respond to these issues before the legislation goes into effect on September 30, 2005.

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New Laws Clarify Requirements Under Federal Military Leave Law

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President Bush recently signed an amendment to the Uniformed Services Employment and Reemployment Rights Act (USERRA) that expands the maximum duration of health insurance continuation coverage under that law. USERRA generally provides that an employer must allow an individual who voluntarily or involuntarily enters a period of military service to continue to participate in the employer's health insurance plan during the period of service. The amendment to USERRA expands the maximum period of such coverage from 18 months to 24 months. This change is effective for any period of coverage elected by the employee after December 10, 2004.

Furthermore, USERRA has been modified to mandate a notice to all employees pertaining to their rights under the law. This requirement will be satisfied by posting, before March 10, 2005, a notice document published by the U.S. Department of Labor.

In addition, the U.S. Department of Labor recently issued proposed regulations interpreting USERRA. The proposed regulations provide clarification and specificity regarding USERRA's provisions, including its broad prohibition of discrimination or retaliation by employers against employees or applicants with service

obligations. These clarifications include the following:

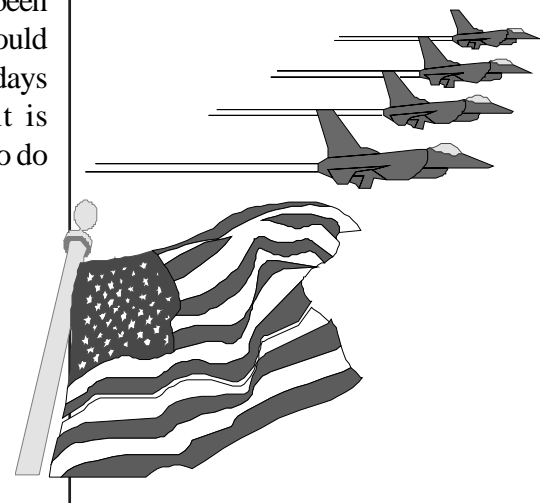
- Employers and potential employers may not discriminate or retaliate against employees or applicants with service obligations;
- All employers, including those with only one employee, are covered by USERRA;
- Qualified National Guard Service is considered “uniformed service,” and therefore is covered under USERRA;
- An employee on leave under USERRA may also work another job during off-duty hours without compromising his/her USERRA rights;
- An employee must be allowed time off from work for purposes of organizing personal affairs and travel prior to actual commencement of military leave;
- An individual returning from military leave may pursue other employment with another employer without forfeiting his/her rights under USERRA;
- There are several exceptions to the 5-year limit on military leave, including if the employee returns or continues with military leave to mitigate the economic impact of his/her employer’s violation of USERRA;
- Employers are generally required to reinstate a returning employee within two weeks of the employee’s request;
- Employers may be able to deny reemployment to a returning employee if:

1. Circumstances have so changed as to make reemployment impossible or unreasonable (such as a reduction in workforce that would have included the employee);
 2. Training the employee for a position in reemployment would cause an “undue hardship” on the employer (which determination can only be made after attempts are made); or
 3. The employment was for a brief, non-recurring period and there was no expectation that the employee’s employment would have continued indefinitely;
- The employee may decide whether or not to apply accrued paid leave to his/her military leave; and
 - Employers must include periods of military service for purposes of vesting and benefit accrual in its retirement plan(s). Further, an employee returning from military leave must be allowed to make up all or part of any elective salary deferrals that he/she would have made. Finally, employers must provide any employer contributions and/or matching contributions that would have been made; these contributions should generally be made within 30 days of reemployment unless it is impossible or unreasonable to do so.

Although it is unclear when the regulations will be issued in final form (the comment period expired on November 19, 2004), employers would be well-advised to act in accordance with the proposed regulations.

If you have any questions regarding the change in USERRA or the proposed regulations, please contact Timothy L. Stewart at Davis & Kuelthau, s.c., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202, (414) 225-1497, tstewart@dkattorneys.com.

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Fifth Amendment Privilege and Employee Investigations

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It is well established that public employees maintain their Fifth Amendment right not to incriminate themselves during a disciplinary investigation by a public employer. Accordingly, during the investigation, the employee may refuse to answer questions or provide statements to his or her employer if such answers or statements could incriminate the employee and form the basis for criminal charges. Such refusal, however, does not prevent the employer from taking disciplinary action against the employee for refusing to answer questions during the investigation. The employer may compel the employee to cooperate with the investigation and to give statements for internal purposes and may take adverse disciplinary action against the employee if the employee refuses to cooperate. In such situations, however, before taking any disciplinary action, employers are obligated to inform the employee that any answers given by the employee during the investigatory interview are protected by the Fifth Amendment from use in subsequent proceedings. A recent Seventh Circuit Court of Appeals case, *Franklin v. City of Evanston*, 384 F.3d 838 (7th Cir. 2004), reaffirmed the obligation for public employers to inform an employee of such immunity from prosecution for statements made during a governmental investigation.

In *Franklin*, Edward Franklin, an employee with the City of Evanston Public Works Department, was arrested while off duty for possessing marijuana. Upon hearing of the arrest, the City began a disciplinary investigation for work rule violations. During a pre-disciplinary meeting, the City questioned Franklin about his conduct. Franklin neither admitted nor denied committing the conduct. Instead, Franklin asked that the disciplinary hearing be postponed until after his criminal case. The City refused. Further, the City never informed him that the answers to the questions could not be used in any subsequent criminal proceeding and that a failure to answer would be viewed negatively. This failure to inform and warn Franklin in this regard was based on City policy, under which such warnings were required only if the City explicitly required an employee to answer questions on pain of losing his or her employment. Franklin was subsequently fired. Franklin sued the City, arguing that it violated his procedural due process rights.

The Seventh Circuit Court of Appeals ruled in favor of Franklin. In its decision, the court relied on its prior decision in *Atwell v. Lisle Park District*, 286 F.3d 987 (7th Cir. 2002). In *Atwell*, the employer fired the employee for insubordination after the employee refused to answer questions about allegations of financial improprieties and misusing funds. The employee sued the employer, alleging a violation of constitutional rights, and the court decided in favor of the employee. The *Atwell* court concluded that, if a governmental employer compels the employee to answer questions during an

investigation of misconduct, it must first advise the employee that he or she has immunity from criminal prosecution based on his or her answers

In *Franklin*, the court determined that the City construed too narrowly its obligation to provide *Atwell* warnings to its employees. The City should have advised Franklin of his *Atwell* rights prior to his termination. According to the court, the City erred by asking Franklin to respond to the criminal charges against him without advising him that his responses could not be used against him in his pending criminal proceedings. By acting in this manner, the City violated Franklin's right to procedural due process because he was effectively forced to choose between his job and his Fifth Amendment rights. According to the court, the City's policy effectively did not allow employees in Franklin's position an opportunity to tell their side of the story without penalty.

Based on the *Franklin* decision, employers should be cautious of interpreting their obligation to provide employees an *Atwell* warning too narrowly and take inventory of any policies that may be contrary to such required *Atwell* warnings. When an employer intends to ask an employee potentially criminal incriminating questions during the course of an interview, the employer must first warn the employee that the law provides the employee with immunity from prosecution for such incriminating answers during the employer interview. The warning should be given prior to initiating questions. It is advisable to provide the employee with a written warning explaining the immunity and to inform the local district attorney's office that such a disciplinary interview is

going to take place. The employee may not refuse to answer questions on the ground that the answers may criminally incriminate him or her. Such refusal can be grounds for disciplinary action based on the employee's insubordination and any adverse inference the employer draws from the employee's silence.

*This article is adapted from a Legal Comment originally published in the March 2005 edition of the Wisconsin Association of School Boards, Inc., Wisconsin School News. If you have any questions about this topic, please contact Richard F. Versteegen of the Lathrop & Clark LLP, School, Municipal, Labor and Employment Law Team, 740 Regent Street, Suite 400, Post Office Box 1507, Madison, Wisconsin 53701-1507 608.257.7766 / Fax: 608.257.1507.

Older Workers Have More Leeway In Alleging Age Bias

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As a result of the Supreme Court's March 30, 2005 decision in *Smith v. City of Jackson, Mississippi*, it now will be easier for employees to sue their employers for age discrimination.

Prior to the *Smith* decision, an employer could not be liable for age discrimination unless the employee could prove that the employer intentionally discriminated against the employee based on his or her age.

The *Smith* decision expanded the scope of the age discrimination law by establishing that employers now can be held liable for age discrimination if their employment practices or policies have an unintentional but disparate adverse impact on employees age 40 or older. Disparate impact theory, well recognized in Title VII cases, had not been universally accepted in cases arising under the Age Discrimination in Employment Act (ADEA).

In *Smith*, the plaintiffs were police officers, age 40 and older, who challenged a police department plan giving larger salary increases to officers with less than five years of service and smaller salary increases to those with greater seniority. Under the plan, two-thirds of officers under age 40 received pay raises greater than 10%, whereas less than half of officers over age 40 received raises greater than 10%. A group of older police officers sued the City, alleging that the City intentionally discriminated against them and, further, arguing that the plan adversely affected them because of their age. The trial court dismissed both claims. The Fifth Circuit Court of Appeals upheld the dismissal of the disparate impact claim, holding that such claims are not available under the ADEA. The Supreme Court, resolving a split in the federal appellate courts, reversed; holding that the disparate impact claims could be brought under the ADEA.

Despite recognizing the viability of disparate-impact age discrimination claims, the Supreme Court, in *Smith*, held that the plaintiffs could not prevail, because the plan itself was based on a "reasonable factor other than age." The department implemented its pay plan to reduce attrition by making the salaries for its starting positions more

competitive with comparable positions in neighboring departments. Thus, as long as an employer has a reasonable basis, other than age, for its policies, the employer can avoid ADEA liability under the disparate-impact theory.

After *Smith*, the number of age discrimination lawsuits likely will increase because a plaintiff no longer needs to prove that the employer intended to discriminate against him because of his age. Now, even facially neutral policies can be challenged if they disproportionately affect older employees.

The Court in *Smith* found that seniority and position were reasonable bases upon which to differentiate in awarding pay raises. It remains to be seen what other factors courts will deem reasonable for employers to consider when implementing policies that disparately impact employees across age groups. Until lower courts further clarify *Smith*, employers should carefully review layoff decisions, pay plans and benefits, and other policies to determine whether they could have an unintentional disparate impact. In addition, employers would be wise to carefully document the business reasons for employment decisions that may impact a broad age range of employees.

Smith v. City of Jackson, No. 03-1160 (March 30, 2005) can be found at: <http://www.supremecourtus.gov/opinions/04slipopinion.html>

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Medicare Prescription Drug Improvement and Modernization Act of 2003 Medicare Part D


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Medicare Part D legislation was signed into law on December 8, 2003 and is known formally as the Medicare Prescription Drug Improvement and Modernization Act of 2003. The new prescription drug benefit is to become effective January 1, 2006. Briefly, there is a \$250 deductible per retiree, then the new benefit covers 75% of the next \$2,000 of drug costs. Part D then covers nothing further until the plan beneficiary has \$3,600 in out of pocket expenses, including the deductible. This is known as the donut hole. After the donut hole is reached the plan beneficiary pays only 5% of the cost of each prescription or (depending on the plan selected) \$2.00 for a generic drug or \$5.00 for a brand name drug.

This legislation was the creation of a subsidy. Group health plans offering actuarially equivalent prescription drug coverage to their retirees will receive a 28% subsidy from the government. This tax-free subsidy is intended to encourage employers to continue providing prescription drug benefits to retirees. Qualified plans will have flexibility in the areas of plan design, formularies, and networks. Employers could, in the initial legislation, provide premium subsidies and cost-sharing assistance for retirees who enroll in Medicare prescription drug plans and Medicare Advantage Plans.

Lawmakers are very concerned about retaining as much of the existing employer based coverage for retirees as possible. This is the reason for the subsidy and the reason for the flexibility in employer plan design. The rules and details surrounding the ability to get the subsidy are there as a safeguard to be certain that employers pay, on behalf of retirees, at least as much as the subsidy.

There are four main options for employers regarding this legislation:

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- (1) Employer Subsidy,
 - (2) Establish a Prescription Drug Plan,
 - (3) Contract with a Prescription Drug Plan, and
 - (4) Discontinue Direct Coverage.

Employers will have a lot to consider with all four of these options. First, the final regulations are not expected until late February. Some time after that we will first see the administrative forms necessary to “subscribe” to the selected options. There are also ongoing questions about what can be paid or taken into account under each scenario. For example, the subsidy option will not allow the plan to consider administrative charges and the calculation must be performed net of rebates and discounts. If the plan chooses to establish a Prescription Drug Plan on its own, it must obtain an insurance license.

Here is the information available to-date:

A. Employer Subsidy

This option is the easiest to implement and requires the least amount of change to the Employer’s Health Plan and to its Union Contracts. The subsidy is equal to 28% of the allowable costs (net of discounts/rebates) attributable to gross prescription drug costs between \$250 and \$5,000. The maximum reimbursement per retiree is \$1,330. While the savings may be substantial, applying for the subsidy will require numerous administrative requirements, including actuarial certification of the plan’s equivalence, frequent data feeds, and data reconciliation. The new administrative costs, as well as the cost for actuarial certification, should be deducted from the potential savings. The specific requirements are still not available from CMS, but appear to be extensive. The employer may also have to consider new open enrollment periods to conform to the time constraints inherent in this option.

Various authors in writing of this option have brought up the “union” argument that they own the subsidy. Obviously discussions over how the subsidy will be shared will certainly surface. Since the subsidy is capped, will the outcome and potential savings produced be enough to offset the actuarial cost, the new administrative fees and burden is a question that is yet to be answered.

B. Establish a Prescription Drug Plan

This option at the onset looks quite attractive as the government subsidy for a PDP is targeted to be 74.5% for standard coverage. In addition the subsidy includes allowances for administrative costs and profit margins. Adjustments may also be provided based on the health status of the participants.

However, there are lengthy requirements and an initial application. Employers must be approved as a risk bearing entity and licensed appropriately. There are plenty of financial risks associated with this approach including adverse selection and utilization. This option would also likely require a dedicated staff as well as sufficient funds to support the initial and ongoing administrative burden. Also you must negotiate with drug providers for pricing data, because PDP proposed pricing must be filed for approval. A PDP is also required to establish a formulary. Drugs not on the formulary will not be counted against the out of pocket maximums. This will undoubtedly require guidance in its preparation as many entities do not have a pharmacist on staff.

It is likely this will only be an option for very large employers with a substantial number of retirees.

C. Contract with a Prescription Drug Plan

The next option is to contract with an external entity that will handle these responsibilities. If you already contract with a PBM who handles your prescription drug program, this seems a natural extension of that policy. The external PDP would receive all subsidy payments and may in turn pass along some discount to the employer. The issue currently is that it is not known who will be the chosen PDP's. In fact it is not currently known if there will be sufficient interest in organizations seeking to become PDP's. Most of the larger PBM's are staying away from this option, as they are concerned about the financial risk. Until more information is available, it is thought that

most employers will apply for the subsidy themselves and study available PDP alternatives.

Plan design requirements exist in both of the PDP options. This will lead to plan beneficiary dissatisfaction and most probably re-negotiation with the unions.

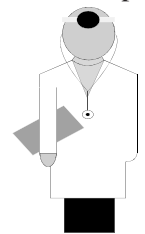
D. Discontinue Direct Coverage

This appears to be the simplest option of all. Medicare Part D would become primary for prescription drugs for Medicare Plan Beneficiaries. Employers may choose to pay a portion or all of the \$35 per retiree per month premium. Employers could "wrap-around" Medicare by offering supplemental benefits or coordinating coverage as they do with Medicare Part A and B.

Recently, I attended a teleweb conference on this option. Simply stated, the attorney speaking on this topic suggested the following:

- (1) The employer could pay the \$35 per month premium and the deductible.
- (2) The employer COULD NOT pay the donut hole, unless the employer had no further expectations for Medicare Part D payment.
- (3) The employer could pay the 5% when the plan beneficiary reached the catastrophic level.
- (4) The employer could make retirees either join or stay out of Part D. Employer substantiation of retirees opting out of Part D would be a requirement for the employer subsidy.
- (5) The deductible could not be prorated.

- (6) Employers can participate and drop the program annually, but do need to inform retirees in a timely fashion.
- (7) It is currently thought, although this is not a fact yet, that a subscriber may be able to use Health Savings Account monies (not Section 125) for the donut hole.
- (8) The monthly premium is a qualified expense under a VEBA as it is for medical coverage.
- (9) There will be adjustments to the premium each year for both cost of living and other risk factors.
- (10) Part D does not apply to active employees over 65.
- (11) An actuary must be involved and perform a certified calculation as to the employer's current plan equivalency.



My concern with the attorney's statement was this: How can a plan "wrap around" or coordinate benefits with Medicare Part D if the plan beneficiary must pay the "donut hole?" There is still research to be done on this particular point, but as other articles have pointed out it appears that until the Medicare Eligible Retiree can prove they have paid \$3,600 themselves, the 95% coverage available under Part D will not kick in.

As stated previously, the forms needed are not yet available from CMS. I will be checking into these frequently. Preliminary information states that they will be extensive.

I understand that Milliman USA have conducted a seminar on this topic for employers. Obviously, they can assist

an employer with the actuarial testing of their plan. Employers will have to ask the TPA (insurance company) to sort out the retirees on an appropriate basis from a data standpoint. Employer's must request that the PBM, inform, with all due haste, as to how they will be providing data as it must be with and without discounts, rebates and fees. We will also need to establish the frequency and linkage for reporting and data reconciliation purposes, as soon as CMS makes the final rules available.

As a condition of receiving the subsidy, an employer incurs several obligations. They must:

- (1) File an annual Attestation of Actuarial Equivalence,
- (2) Submit to audits as determined necessary by CMS, and

- (3) Must meet disclosure requirements to their Medicare Eligible Retirees.

Deadlines

1. To obtain the subsidy for 2006, a plan sponsor must file the Attestation of Actuarial Equivalence with CMS no later than September 30, 2005.
2. A plan sponsor must also inform their Medicare eligible retirees and spouses as to whether the prescription drug coverage offered by the Plan is creditable. Plan Sponsors must also provide information if the plan is no longer creditable and assist retirees in applying for Part D at that time.

What should you do now?

- (1) Analyze and document the entire

retiree population including coverage options, contribution rates, subsidy caps, etc.

- (2) Determine which retiree groups would likely qualify for the subsidy.
- (3) Identify which retirees fit into that group and verify that you have complete indicative data on retirees and their dependents.
- (4) Determine the capabilities of your carriers. CMS will require individual-level claims data from our carriers to determine the amount of the subsidy level.
- (5) Understand your administrative challenges and responsibilities. Your final strategy could be very dependent upon this evaluation.
- (6) Determine a communication and disclosure strategy that is thorough and effective

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