

Employee Benefits & Workers' Comp News



WWW.MOCINS.COM

MOC Insurance Services
Maroevich, O'Shea & Coghlan Insurance

Divisions of MOC Insurance Services
ARM Insurance Agency, Inc.
Farallon Associates Insurance Brokers
San Francisco Insurance Center

101 Montgomery Street, Suite 800, San Francisco, CA 94104
Main (415) 957-0600 | License # 0589960



Health Care

December 2019/January 2020

Volume 27 • Number 6

President Trump Issues New Health Coverage Responsibilities for Employers of Immigrants

New and proposed immigration requirements for documented and undocumented immigrants could impact employers who offer health care coverage.

Prior to the new requirement, immigrants who wanted to qualify for an employer-sponsored health plan had to be able to show that they had a green card, permanent resident or citizenship status. Undocumented immigrants could get coverage if their spouses legally worked in this country and had access to an employer-sponsored plan.

New Requirements

All refugees, asylum seekers or people on temporary visitor visas now must prove they can obtain health in-



This Just In...

Marijuana is an impairing substance and its legalization has huge public and workplace health implications. Before passing any legislation legalizing this substance, the U.S. Congress should proceed deliberately and consider workplace safety when dealing with this complex issue," according to a statement released by the American College of Occupational and Environmental Medicine (ACOEM), the nation's pre-eminent physician-led organization that champions the health of workers, safety of workplaces, and quality of environments.

To date, 33 states and the District of Columbia have legalized the medical and/or recreational use of marijuana. With most

continued on next page

continued on next page

insurance before they receive a visa. Visa applicants will have to demonstrate that they will be covered by an approved health insurance plan within 30 days of entering the United States or they will have to prove that they have the financial means to “pay for reasonably foreseeable medical costs.”

The new requirement was put into effect on Nov. 3 and is part of a presidential proclamation on immigrants and health care, issued by President Trump on Oct. 4.

The requirement is grounded in the U.S. immigration law’s “public charge” doctrine. A public charge is someone who receives certain public benefits. Under Section 212(a)(4) of the Immigration and Nationality Act (INA), an individual seeking admission to the United States or seeking to adjust their status to permanent resident (obtaining a green card) must not be (or likely to be) a public charge at the time they apply.

If you hire an employee who is in the process of obtaining a visa, you will need to ensure they comply. They will not be in compliance if they purchase a plan using subsidies through the Affordable Care Act (ACA) Health Insurance Marketplace or Exchanges; or through the Children’s Health Insurance Program (“CHIP”) for dependents. However, employer-provided coverage, individually purchased plans, and catastrophic or short-term limited-duration plans will count.

As an employer, you are required to provide notices to employees about the availability of health insurance through the Mar-

ketplace and annually provide information about the availability of CHIP. You may want to consider adding information to these notices regarding the potential impact on their immigration status by accepting either of these benefits.

Another option is to upgrade your health benefits, particularly for dependents, so your non-U.S. citizen employees will not be tempted to use Marketplace or CHIP coverage.

Proposed Regulations

Recently, a draft of proposed Department of Homeland Security (“DHS”) regulations was leaked. If the draft is approved, it would modify the public charge rules several ways:

- 1 Any dependence on public benefits would be an issue (the previous rule allowed not more than 50 percent public benefits).
- 2 Adding benefits would place the recipient on the public benefits list.
- 3 Assistance received by a non-US citizen for the benefit of dependents, even US citizen dependents, would be considered in the public charge.

If these regulations are approved, employers could find more non-US citizen employees asking to transfer from the Marketplace, CHIP or Medicaid to their employer’s health plan. This may not be possible because employees only can make changes in plan elections during open enrollment or when certain changes occur. The proposed rules would not count as a change in status.

Americans living and working in states that allow some form of legal marijuana use, it is critical that safety be at the forefront of any policy discussions regarding the use of cannabinoids outside of the standard Food and Drug Administration approval process. The current patchwork of laws to address marijuana use and workplace safety is detrimental to employees, employers, and the general public, notes ACOEM in its statement on the Legalization of Marijuana – Implications for Workplace Safety which was sent to all members of Congress in October.

ACOEM urges legislators to carefully consider the impact of any federal marijuana legislation on workplace safety. “While there is much not known about marijuana, what is known is that marijuana can cause impairment which will interfere with safe and acceptable performance in the workplace,” said ACOEM president Stephen Frangos, MD. “Furthermore, this is particularly concerning for those individuals working in safety-sensitive positions where impairment can affect the health and safety of other workers, customers, the general public, or others.”

The Future

Almost half of Americans have health coverage through their employer, according to the Kaiser Foundation. Also almost half of the 10.5 million undocumented immigrants in 2017 did not have health coverage, ac-

According to the Pew Research Center. Many of the immigrants who are employed work in low-wage jobs that do not provide employer-sponsored health benefits, or they cannot afford coverage.

People in the country illegally do have some options. Undocumented immigrants can obtain low-cost care through community health centers. Also, federal law requires hospitals to screen and stabilize any patient who seeks emergency care, with some costs covered by Medicaid. Six states and Washington, D.C. use state-only funds to provide Medicaid coverage for income-eligible children through age 18 regardless of immigration status. California recently expanded coverage to young adults through age 25. For a sliding-scale fee, illegal immigrants can receive primary care and prescription drugs at federally funded health care centers in 11,000 communities.

Many of the 2020 Democratic presidential candidates showed interest in expanding health care coverage for undocumented immigrants, although none has provided details of how it would be accomplished.

While some observers worry that free health coverage for illegal immigrants would be expensive and attract more immigrants, others say the expense of providing primary care would eventually pay off, because it would keep people from waiting until they were very sick to seek treatment. The Congressional Budget Office has not provided estimates on actual costs.

If you need help and advice regarding how immigration rules may affect your firm's health care program, please contact us. ■

How Employers Can Avoid FMLA Pitfalls

The FMLA has been law since 1993 but employers can still find the rules confusing.



The Family and Medical Leave Act's (FMLA) paid leave and leave stacking rules aren't new, but they can sometimes trip employers up. FMLA rules generally apply to employers who have 50 or more employees within a 75-mile radius, and only to employees who have been employed for 12 months and worked at least 1250 hours during the past year.

The FMLA allows employees to take 12 weeks of leave in a 12-month period for cer-

tain medical reasons. Employees also can use FMLA leave to take care of critically ill family members or for the birth or adoption of a child. Leave can be taken all at once, intermittently or on a reduced schedule. Special rules apply to service members with a serious injury or illness, or their family members caring for them.

FMLA leave generally is unpaid, although employers can require employees to run FMLA at the same time as other leaves. Running the leaves concurrently prevents "leave

stacking” where employees use all of their unpaid and paid leaves to be away from the workforce for more than 12 weeks.

Paid Leave Exceptions

Employers can require employees to use earned vacation, sick time or paid time off (PTO) time concurrently with FMLA leave. However, employers are not obligated to allow an employee to substitute paid sick leave for unpaid FMLA leave in order to care for a child with a serious health condition when the employer's normal sick leave rules only allow employees to take off work for their own illness.

There is an exception regarding paid leave. The Department of Labor (DOL) states that, “Leave taken under a disability leave plan or as a workers' compensation absence that also qualifies as FMLA leave due to the employee's own a serious health condition may be designated by the employer as FMLA leave and counted against the employee's FMLA leave entitlement. Because leave under a disability benefit plan or workers' compensation program is not unpaid, the provision for substitution of accrued paid leave does not apply.”

However, the DOL adds that if state law permits it, employees can use accrued paid leave to supplement the paid plan benefits, such as in a case where a plan only provides replacement income for two-thirds of an employee's salary.

Year-End Considerations

If you track FMLA leave according to a calendar year, you might end up with a situation where an employee who is giving birth or adopting late in the year can take 12 weeks at the end of the year through Dec. 31 and then on or after Jan. 1 take off another 12 weeks for a total of 24 weeks in less than 12 months. Called leave stacking, it is allowed by federal regulations. Employers are not obligated to help employees maximize their leave duration, but they must provide employees with accurate and truthful information about FMLA.

If you want to avoid leave stacking, you can use a rolling FMLA year. This allows employers to review the previous 12 months and determine how much FMLA leave the employee has used and how much remains,

Employers are permitted by federal law to change their FMLA year to a rolling FMLA year if they give all employees at least 60 days' notice of the change. Any employee on FMLA at that time must be transitioned in a way that provides the employee with the full benefit of their leave.

State laws vary. For example, employers in Wisconsin must use the calendar year when determining FMLA leave. Please call us if you have any questions about FMLA. ■

6 Workers Compensation Regulation Trends to Watch in 2020

The expansion of presumption laws is just one of the predictions made by speakers at a recent workers' comp conference.

Medical billing fraud, presumption laws, drug formularies, medical marijuana, magic mushrooms and opioids are expected to command the attention of various state and federal legislators in 2020, according to speakers at the recent National Workers' Compensation and Disability Conference in November 2019 in Las Vegas, Nev.

1 Medical Billing Fraud

The medical billing coding error rate in 2018 was 8.1%. While not all errors are related to fraud, many have a fraud element to them, including miscoding for lack of proper documentation and invalid diagnoses, up-coding to increase payouts, making up codes and mismatching services.

2 Presumption Laws

In many states, presumption laws, such as cancer presumption laws, exist to benefit first responders, such as firefighters, police officers and EMTs. They shift the burden of proof of medical causation so that the disease is “presumed” to be work-related in absence of compelling evidence to the contrary.

These laws, thought by some to be more the creation of politics than science, are typically the largest cost drivers of workers compensation for public employees.

Now presumption laws are starting to expand into other industries and professions, such as fire truck mechanics, school teachers and jail guards.

One new trend, implemented in Georgia and Colorado, for dealing with public employees is to offer a lump-sum payout to offset medical costs rather than treating their occupational cancer or PTSD through the comp system.

3 Drug Formularies

More states are creating, refining and updating their drug formularies. Comp-Pharma estimates \$1.1 billion has been saved using drug formularies over the past

eight years, as a result of (1) specifying that only certain drugs should be prescribed, (2) using set time frames, (3) enforcing dosage limitations and (4) restricting dangerous interaction with other drugs.

4 Marijuana

There are several issues facing legislators throughout the country:

- ✱ States continue to expand legal access, including looking to allow marijuana for all medical uses.
- ✱ Research continues on medical uses and side effects.
- ✱ States are reviewing the legality of home cultivation and deciding on open container laws.
- ✱ Marijuana is still illegal at the federal level.

5 Magic Mushrooms

Petitioners and some legislators in several states, including California, Colorado, Iowa and Oregon, are trying to legalize magic mushrooms, psilocybin and ibogaine and ecstasy. While unclear about its use for treating anxiety and depression, research has shown that magic mushrooms can be used successfully in smoking cessation programs.

6 Opioids

Prescribing rates for opioids have dropped, according to the CDC and the Workers Compensation Research Institute. The number of prescriptions per 100 patients fell from 81.3 in 2012 to 28.7 in 2018 while the cost of opioids decreased from 22% to 13% from 2015 to 2018.

Several state legislatures have bills pending relating to minimizing opioid prescriptions.

At the federal level, in the Senate's Judiciary Committee, the pending John McCain Opioid Addiction Prevention Act will "establish registration requirements for practitioners who are licensed to prescribe controlled substances.... Specifically, a practitioner must agree to limit the supply of opioids prescribed for the initial treatment of acute pain, as a condition of obtaining or renewing a registration through the Drug Enforcement Administration. An opioid that is approved and prescribed for the treatment of addiction is not subject to the limit." ■



Are Your Workplace Policies Up to Date about Vaping?

The popularity of vaping is sending some employers scrambling to craft workplace policies governing the use of electronic cigarettes.

Vaping is when users puff electronic cigarettes — also called e-cigs, vaporizers and electronic nicotine delivery systems — to inhale an aerosol that usually contains nicotine, and/or flavorings and other chemicals. The e-cigarettes are battery-operated and usually look like a traditional cigarette, pen or USB flash drive.

According to the federal Centers for Disease Control and Prevention (CDC), 33 deaths related to vaping have been confirmed in 24 states since Oct. 15, 2019.

Policy Considerations

Since smoking is banned from most workplaces, many employers are treating the smokeless alternative like cigarettes. If you decide to follow a similar track in your workplace, you should evaluate your smoking policies so they are clear about what products are banned and what areas of the worksite are covered by any ban.

Employers also should consider state and local regulations when developing a policy. For instance, some statutes — including Alaska, California, Delaware, Hawaii, Maine, Massachusetts, New Jersey, New York, North Dakota, Rhode Island, Utah and Vermont, as well as Washington, D.C. — prohibit vaping in places where smoking is banned. Other states have banned vaping in child care facilities, state government buildings, schools and enclosed workspaces. Some lo-



cal municipalities also have enacted bans on e-cigarettes in enclosed workplaces.

Another consideration is whether your company employees belong to a union. If so, the union may want to have a say in any policies you develop about vaping.

If you decide to institute a new policy or update an old one, some states have regulations about how much notice you need to give employees. Human resource advisors suggest giving employees 60 to 90 days' notice. ■

Employee Benefits & Workers' Comp News



The information presented and conclusions within are based upon our best judgment and analysis. It is not guaranteed information and does not necessarily reflect all available data. Web addresses are current at time of publication but subject to change. This material may not be quoted or reproduced in any form without publisher's permission. All rights reserved. ©2019 Smarts Publishing. Tel. 877-762-7877. <http://smartspublishing.com>. 30% total recycled fiber. Printed in the U.S. on U.S.-manufactured paper.