Volume 11, Issue 3

FORUM

Fall 2006

Editors: Glenn R. Davis, Esq. & Steven M. Montresor, Esq.

LATSHA DAVIS YOHE & MCKENNA, P.C.
ATTORNEYS AT LAW

- **Mechanicsburg, PA**
  (717) 620-2424
- **Exton, PA**
  (610) 524-8454
- **Mt. Laurel, NJ**
  (856) 231-5351
- **Maryland**
  (410) 727-2810

IN THIS EDITION:

The Pension Protection Act of 2006 1

NLRB Holds Charge Nurses Are Supervisors 3

Changes to Medicare Enrollment/Participation Process 3

Seminars 4

The material in *FORUM* is for informational purposes only and is not intended to render legal services or advice.

© 2006 LATSHA DAVIS YOHE & MCKENNA, P.C.

THE PENSION PROTECTION ACT OF 2006

By: Angela L. Thomas, Esq. & Douglas C. Yohe, Esq.

In response to continuing pension plan concerns, Congress recently passed the Pension Protection Act of 2006 ("the Act"), a comprehensive reform package. The Act is quite broad and addresses a range of issues, such as funding of defined benefit plans, accelerated funding obligations of employers, rules for cash balance plans, and diversification rights and investment education provisions for plan participants. This article focuses on the rules on automatic enrollment in 401(k) plans, rules that impact charitable contributions and the rule regarding corporate-owned life insurance.

AUTOMATIC ENROLLMENT IN 401(K) PLANS

The Act allows employers the option to automatically enroll employees in a 401(k) plan. There are certain notices and options that must be afforded to participants in order to have a valid automatic enrollment. The Act preempts any state law that would directly or indirectly prohibit or restrict the inclusion of an automatic contribution arrangement in the plan.

Automatic Enrollment Rules

The Act requires enrollment to be accompanied by a notice explaining the time period for making elections, how contributions will be invested in the absence of any contrary direction by the participant, and the participant's right to elect out of the plan or change the rate of contribution. Contribution percentages must be applied uniformly to all employees. Contributions made for automatic enrollees must be invested in accordance with guidelines to be established under Department of Labor ("DOL") regulations. The Act requires DOL to issue final regulations within six months following enactment.

Plans that give automatic enrollees proper notice of their right to opt out of the plan and that invest automatic contributions in accordance with DOL guidelines are treated as complying with section 404(c) of ERISA, which furnishes limited protection against fiduciary liability. Compliance with the notice and investment requirements is also a condition for ERISA preemption of state payroll withholding laws.

Automatic enrollees must be given a 90-day window to elect out of the plan and withdraw the contributions made on their behalf and any earnings related to those amounts. The distribution is taxed in the year of receipt and is not subject to the 10% penalty tax that ordinarily applies to distributions before age 59½. This rule applies to 401(k) plans, section 403(b) plans and eligible section 457(b) plans that have automatic enrollment.

Safe Harbor

The Act creates an optional nondiscrimination safe harbor for automatic enrollment plans. A plan is deemed to satisfy the nondiscrimination rules for elective deferrals and matching contributions if it provides a minimum match of 100 percent of elective

(See **Pension,** page 2)

(**Pension,** *continued from page 1)*

deferrals up to one percent of compensation, plus 50 percent of elective deferrals between one percent and six percent of compensation. The plan does not have to perform the 401(k) and matching contribution discrimination tests if it establishes these minimum match requirements.

A plan qualifies for this safe harbor only if the contribution rate for automatic enrollees is at least three percent during the first year of participation, four percent during the second, five percent during the third, and six percent thereafter. The plan may specify a higher percentage, up to 10 percent.

Employers now have three options for dealing with the 401(k) nondiscrimination rules: (1) perform regular testing and take corrective action if the plan fails the test; (2) institute automatic enrollment and comply with the new safe harbor; or (3) comply with the old safe harbor. The first option involves the least financial commitment, but executives and other highly paid participants may not be able to defer as much as they would like.

Effective Dates

Except for the clarification of the scope of ERISA preemption, the automatic enrollment provisions are effective for plan years beginning after December 31, 2007. Prior to that time, employers can continue to rely on current IRS rules permitting automatic enrollment.

PROVISIONS REGARDING CHARITABLE CONTRIBUTIONS

The Act includes many changes for charitable contribution deductions and charitable organizations, including the following:

- An exclusion from gross income for qualified charitable contributions up to $100,000 from a traditional individual retirement account ("IRA") or a Roth IRA that otherwise would be included in income.

- A boost in the charitable deduction limit from 30% to 50% of adjusted gross income for qualified conservation contributions if the contributions do not prevent the donated land from being used for farming or ranching purposes. The charitable deduction limit would be raised to 100% for eligible farmers and ranchers. The change applies for tax years 2006 and 2007.

- Effective for contributions made after September 1, 2006, a recapture rule applies if property for which a fair market value deduction was claimed is not used for an exempt purpose of the donee organization.

- No deduction will be allowed for charitable contributions of clothing or household items if those items are not in good condition or better. In addition, the IRS may deny a deduction of any item with minimal monetary value.

  These rules do not apply to any contribution of a single item of clothing or a household item for which a deduction of more than $500 is claimed if the taxpayer includes with his/her return a qualified appraisal of the donated property.

- In case of a charitable contribution of money regardless of amount, the donor must maintain a cancelled check, bank record or receipt from the donee organization showing the name of the donee organization, the date of the contribution, and the amount of the contribution.

- For bequests and gifts made after the enactment date, charities receiving a fractional interest in an item of tangible personal property must take complete ownership of the item within 10 years or the death of the donor, whichever is first. In addition, the donee is required to take possession of the item at least once during the 10-year period as long as the donor is alive, and use the item for the organization's exempt purpose. Failure to comply with these requirements results in the recapture of all tax benefits plus interest and the imposition of a 10% penalty.

DEATH BENEFITS UNDER CORPORATE-OWNED LIFE INSURANCE

For any new life insurance contracts issued after August 17, 2006, and for any existing contracts where there is a material change after that date in the death benefit or other material change, the Act provides that amounts received under certain employer-owned life insurance contracts will be included in income of the policyholder (employer) to the extent such proceeds exceed the premiums and other amounts paid by the policyholder for the contract, unless the following conditions are met:

- The insured person was an employee at any time during the 12-month period prior to death or at the time the contract was issued is a director, highly compensated employee, one of the five highest paid officers, or in the highest paid 35% of employees; or

- Amounts received are paid to a family member, a trust established from a family member or the insured's estate, or used to purchase an equity interest of the insured.

Certain notice and consent requirements must be met.

If you have any questions regarding automatic enrollment, charitable contributions or company-owned life insurance, please contact Douglas Yohe or Angela Thomas.

NLRB Holds Charge Nurses Are Supervisors

By: Angela L. Thomas, Esq.

On September 29, 2006, the National Labor Relations Board (the "Board") expanded the definition of "supervisor" under the National Labor Relations Act ("NLRA"). The Board held that permanent charge nurses employed at an acute care hospital exercised supervisory authority in assigning employees within the meaning of the NLRA. The ruling is significant for employers because any employees who qualify as supervisors under the NLRA cannot be included in a collective bargaining unit.

The decision was actually the lead decision in three combined cases. The other two cases involved a manufacturing facility and a nursing facility.

Some labor experts estimate that millions of employees may now be barred from joining unions. However, the Board majority indicated that it did not anticipate such a significant impact and would continue to review each case on an individual basis. The ruling came from a 3-2 vote by the Board.

To be a supervisor under the NLRA, an employee must exercise any of the delineated supervisory duties. These duties include "assigning" work and having "responsibility to direct" work. In the lead case, the Board found that a regular part of the permanent charge nurses' duties included assigning nursing personnel to specific patients for whom they would care during their shift. It determined that such assignments consisted of giving "significant overall duties" to an employee, meeting the definition of "assign" under the NLRA.

The Board further found that the permanent charge nurses exercised independent judgment in making the personnel assignments. In contrast, the Board rejected the contention that the employer's rotating charge nurses exercised supervisory authority for a "substantial" part of their work time. The Board suggested that a worker can be classified as a supervisor if he or she spends at least 10 to 15 percent of his or her time overseeing the work of others.

In the case involving the nursing home, the Board rejected the contention that the charge nurses were supervisors. It found that the nurses lacked authority to assign other employees since they did not have the authority to require nursing assistants to stay past the ends of their shifts, come in from off-duty status or to shift section assignments.

Finally, in the manufacturing case, the Board again rejected the contention that the "lead persons" at issue were supervisors under the NLRA. It found that they spent a great deal of time actually performing hands-on work of the type performed by undisputed collective bargaining unit employees.

In light of this decision, employers would be wise to revisit what "assigning" authority certain employees are granted. By vesting employees with shift or patient assignment responsibilities, it may be possible to render such employees "supervisors" under the NLRA.

If you have any questions about the recent Board decision or any other employment and labor law issues, please contact Glenn Davis or Angela Thomas.

Changes to Medicare Enrollment/Participation Process

By: David C. Marshall, Esq.

The Centers for Medicare and Medicaid Services ("CMS") has published regulations that will significantly affect the Medicare enrollment process for new providers. As of June 20, 2006, these regulations also impose a continuing reporting obligation on providers. Providers should take note of the following provisions:

- New Enrollments. Even though the deadline for obtaining a National Provider Identifier ("NPI") is May 23, 2007, all new applicants for Medicare enrollment must obtain an NPI and include that number on CMS Form 855 (the Medicare enrollment application form). If CMS notifies an applicant that its enrollment application is incomplete, the applicant must adequately respond to CMS within 60 days. If it does not, CMS is authorized to reject the enrollment application. Rejection of an enrollment application is not subject to appeal, although an applicant may reapply. Finally, CMS is authorized to conduct on-site visits before granting Medicare enrollment.

- Reporting Changes for Existing Providers. A provider must now submit all changes in enrollment information, along with supporting documentation, via Form 855 within 90 days of the change. Examples of changes that must be reported using this

*(See **Medicare,** back page)*

LATSHA DAVIS YOHE
& MCKENNA, P.C.
ATTORNEYS AT LAW

1700 Bent Creek Boulevard, Suite 140
Mechanicsburg, PA 17050

2006 SEMINARS 2007

AAHSA 2006 Annual Meeting & Exposition	November 4, 2006 San Francisco, CA	"Best Practices in Employment Decisions"	Glenn R. Davis, Esq., and Angela L. Thomas, Esq.
AAHSA 2006 Annual Meeting & Exposition	November 8, 2006 San Francisco, CA	Fair Housing Preconference	Kimber L. Latsha, Esq.
PANPHA Financial Seminar	November 15, 2006 Masonic Village Elizabethtown, PA	"Non-Profits in the Crosshairs: An Update on Tax Exemption Issues Facing Pennsylvania Providers and Potential Solutions"	Kimber L. Latsha, Esq. and Nick Luciano, *Regulatory and Legislative Affairs Manager, PANPHA*
AAHSA Audio Conference	December 14, 2006	"Human Resources and Culture Change"	Angela L. Thomas, Esq.
WE-PANPHA	January 11, 2007	"Admission Agreements"	Kimber L. Latsha, Esq.
PBI 13th Annual Health Law Institute	March 13-14, 2007	"Representing the Senior Housing Industry"	Kimber L. Latsha, Esq.

*(**Medicare,** continued from page 3)*

process include changes in officers, directors, board members, and management personnel. Changes to a provider's corporate structure (which may not rise to the level of a change in ownership) must also be reported within 90 days. Failure to comply with this requirement can lead to deactivation or revocation of Medicare billing privileges.

- Changes of Ownership. Under the new regulations, the current owner and the prospective owner must complete and submit a Form 855 before the closing of a transaction involving a change of ownership. Failure to comply may result in sanctions to the current owner (even after the actual change of ownership), denial of assignment of the Medicare provider agreement, or deactivation of the new owner.

- Revalidation of Enrollment Information. The new regulations require all Medicare providers to resubmit and revalidate the accuracy of enrollment information every five years. CMS will contact each provider directly when it is time to submit this information. As a practical matter, many longstanding Medicare providers may be required to file a complete Form 855 for the first time. These revalidations must be provided to CMS within 60 days of receipt of notification. CMS may conduct site visits to validate a provider's enrollment information.

The regulations contain many other provisions that affect the completion of Form 855, as well as CMS' rights and powers governing the enrollment process. Compliance with these new regulations is critical from a Medicare participation standpoint. Please do not hesitate to contact David Marshall with any questions you may have regarding your organization's duties under these new regulations.