SPRING / SUMMER 2010

LABOR **PERSPECTIVES**

PPACA creates new design and administrative requirements for group health plans. Also, there are new employment-related obligations imposed by the health care reform law

IN THIS ISSUE

A look at what health care reform means for employers and employer-sponsored health plans	*p.1*
Labor and employment audits: Big Brother is watching you!	*p.4*
Landmark victory for the summary judgment motion	*p.6*
The 2010 HIRE Act could mean savings for Puerto Rico employers	*p.7*
EEOC issues notice of proposed rulemaking on the definition of the "Reasonable Factors Other than Age" defense under the ADEA	*p.8*
Practice group news	*p.10*

A look at what health care reform means for employers and employer-sponsored health plans

by Sandra L. Negrón-Monge

On March 23, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act ("PPACA"). A week later, the President also signed the Health Care and Education Reconciliation Act of 2010, which amended certain provisions of PPACA. Together, these two laws will go into the history books as the new health care reform legislation.

The centerpieces of health reform are individual responsibility provisions requiring individuals to maintain health coverage,[1] the creation of the health insurance exchanges -- allowing individuals and employers to purchase affordable health care -- and the employer mandate under which large employers must offer group health coverage to full-time employees, and contribute to the cost of coverage, or pay a penalty.

In addition, PPACA creates new design and administrative requirements for group health plans. Also, there are new employment-related obligations imposed by the health care reform law.

HEALTH INSURANCE EXCHANGES

Effective in 2014, PPACA requires each state to establish an insurance exchange, which will serve as a market place in which individuals and small businesses that employ 100 or fewer employees can purchase health insurance coverage.[2] Beginning in 2017, states can allow employers with 101 employees or more to purchase health insurance coverage through an exchange.

EMPLOYER RESPONSIBILITY

Effective March 1, 2013, all employers must notify existing and new employees of (a) their potential eligibility for a premium tax credit and cost sharing subsidies; (b) their right to purchase insurance through the insurance exchange; and (c) their potential loss of the employer contribution if the employees purchase their coverage through the exchange.

McConnell Valdés LLC

A MCCONNELL VALDÉS LLC PUBLICATION

continues from page 1

In addition, PPACA requires employers who have more than 200 full-time employees to automatically enroll new employees in their group health plans, subject to any applicable waiting periods. Employers are also required to give adequate notice regarding the auto-enrollment and the opportunity to opt out of the employer-sponsored plan in which they have been automatically enrolled.[3]

Further, effective January 1, 2014, "large" employers must provide minimum essential coverage to their full-time employees or pay a monthly penalty if a full-time employee obtains coverage through the insurance exchange. According to PPACA, a "large" employer is one that, during the prior year, had an average of 50 or more full-time employees. This calculation also includes the aggregate total monthly hours of part-time workers divided by 120. Full-time employees are employees who perform, on average, at least 30 hours of service per week.

Large employers who do not offer any health coverage to their full-time employees are subject to a monthly penalty if any full-time employee receives a government subsidy to purchase health insurance through the exchange.

Moreover, if a large employer does offer any health coverage to their full-time employees, but it is unaffordable because it represents more than 9.5% of the employee's household income, or covers less than 60% of the costs of the coverage, and any full-time employee receives a government subsidy to purchase health insurance through an exchange, then the employer must pay a penalty.

PPACA also creates what are known as "free choice vouchers." Effective in 2014, all employers, regardless of their size, who sponsor group health plans, are required to provide vouchers to certain employees who opt out of the employer's coverage. The voucher consists of the employer's contributions to the cost of the insurance coverage. The employees can use the voucher to purchase insurance through the exchange. In order to qualify for a voucher, an employee would have to have a household income of less than 400 percent of the Federal Poverty Level and the employee's contributions for coverage must be between 8 to 9.5 percent of their household income.

Separately, the health care reform law also imposes upon large employers, beginning on January 1, 2014, additional annual reporting requirements to the federal government and employees about the type of coverage provided, the number of full-time employees enrolled in the plan, and their names, among other information.

CHANGES IN THE DESIGN OF GROUP HEALTH PLANS

The health care reform law adds many new benefit design and administrative requirements for group health plans. PPACA generally grandfathers all group health plans in existence on the day of its enactment,[4] exempting these plans from several of the new requirements.

The following provisions are generally applicable to all group health plans, including grandfathered plans, and are effective for plan years beginning on or after September 23, 2010 (unless a later effective date applies as set forth below).

- Pre-existing conditions exclusions for children under age 19: Plans may not impose pre-existing condition exclusions on children's coverage.
- Rescissions: Coverage cannot be cancelled, except in the case of fraud or intentional misrepresentation of a material fact.
- Extended Dependent Coverage: If a plan offers dependent coverage, then it must offer coverage for adult children until age 26, regardless of whether the adult child is married or attending college.[5]
- Lifetime and Annual Limits: Plans are not permitted to impose lifetime limits on the dollar value of "essential health benefits." Further, plans can only impose annual limits for "essential health benefits" in the amounts to be determined by the U.S. Department of Health and Human Services ("HHS").
- Uniform Explanation of Coverage: Insurance companies, in the case of insured plans, and employers, in the case of self-insured plans, are required to provide a summary of benefits and coverage for enrollees under a plan with a uniform format to be developed by the HHS. This uniform explanation must be provided to current employees on or before March 23, 2012, and to new enrollees at the time of enrollment, subject to a penalty of up to $1,000 per violation.

Moreover, effective for plan years beginning after January 1, 2014, all plans must eliminate annual limits on essential health benefits, all pre-existing condition exclusions, extend coverage to children up to age 26 regardless of whether coverage under another employer plan is available, and have no waiting periods exceeding 90 days.

The following provisions are not applicable to grandfathered group health plans, and are effective for plan years beginning on or after September 23, 2010.

- Non-discrimination Based on Salary: Plans are prohibited from establishing eligibility rules that discriminate in favor of highly compensated individuals.

- Preventive Care: Plans must cover certain preventive services without any cost-sharing, including certain immunizations and screenings for infants, and certain additional preventive care and screenings for women.
- Appeals Process: Plans must implement an external appeals process in addition to the internal review process required by the U.S. Department of Labor claims procedure regulations.
- Patient Protections: Plans cannot require advance authorization for emergency services and OB-GYN care. In addition, plans that require or allow designation of a primary care provider must allow the participant to choose any participant provider who is available to accept the participant.

Moreover, effective for plan years beginning after January 1, 2014, all plans, except grandfathered plans, cannot discriminate based on a participant's health status, and can generally provide rewards or rebates under a wellness program that do not exceed 30% of the cost of coverage.

EMPLOYMENT-RELATED OBLIGATIONS

PPACA amends the Fair Labor Standards Act ("FLSA") to require employers to give an employee a reasonable break time to express milk for her nursing child for one year after the child's birth. The employer is not required to pay the employee for this break time.

Employers are required to provide a place where the employee can express milk, other than a bathroom, that must be shielded from view and free from intrusions. Further, the amendment exempts employers with fewer than 50 employees if the requirement would impose undue financial hardship when considered in relation to the size, financial resources, or structure of the employer's business.

PPACA also amends the FLSA to include whistleblower protections to employees who provide information that the employee reasonably believes to be a violation of PPACA to an employer, the federal government, or a state attorney general. The amendment also prohibits employers from retaliating against any employee who participates in investigations into alleged violations, or objects to or refuses to participate in any activity that the employee reasonably believes to be a violation of PPACA.

As an additional protection to employees, PPACA amends the FLSA to prohibit discrimination against employees because they received federal subsidies to obtain group health coverage. In addition, the Age Discrimination in Employment Act was amended to expressly protect individuals against discrimination through their exclusion from participations in or denial of benefits under any health program or activity.

RETIREE REINSURANCE PROGRAM

PPACA establishes a temporary reinsurance program to reimburse employer-sponsored plans for a portion of the claims incurred by early retirees age 55 or older who are not eligible for Medicare. Interim final regulations released in May 2010 contemplate that this reimbursement program will be implemented by June 1, 2010. In addition, PPACA establishes that the program will end upon the earlier of January 1, 2014, or the exhaustion of the $5 billion allocated for the same.

In sum, the health care reform will affect employers and group health plans differently, depending on their particular circumstances, such as, for example, whether the employer is large or small, whether the plan is self-insured or fully-insured, or whether the benefits offered can satisfy the minimum essential coverage standards. However, almost all employers will face numerous challenges concerning the creation of administrative processes and employee communications, and the implementation of benefit program design changes.

For further assistance with the new health reform requirements or additional information about the new statute, please contact any of the members of our Welfare Benefit and ERISA Litigation Practice Team, within the Firm's Labor & Employment Law Practice Group.

[1]The individual responsibility provisions included in PPACA are not applicable to the residents of Puerto Rico and other U.S. territories.

[2]Establishment of the insurance exchanges is optional for U.S. territories.

[3]PPACA does not specify the effective date of this requirement, but it appears to be contingent upon the issuance of federal regulations.

[4]Plans maintained pursuant to a collective bargaining agreement ("CBA") in effect on March 23, 2010, are grandfathered until the CBA related to the plan expires.

[5]Grandfathered plans do not need to offer coverage to an adult child before January 1, 2014, if the adult child is eligible to participate in another employer-provided plan.

Labor and employment audits: Big Brother is watching you!

by Jorge A. Antongiorgi-Betancourt and Rica López de Alós

The refusal to allow an inspection by the local Department of Labor, or to furnish information, or allow the examination of documents constitutes a misdemeanor punishable by fine and/or imprisonment

Government intervention in private affairs is a subject that always divides public opinion. There are sectors in our society that still resent the government's exercise of regulatory and monitoring authority over such affairs, based upon an "Orwellian" fear of government intervention. Whether such fear is exaggerated or not, it is a fact of life that the government exercises constant supervision over affairs that concern those individuals or interests, that on account of its public policy, it has determined deserve special protection.

This is particularly true in the case of employees, who are subject to a myriad of protective statutes. The Commonwealth of Puerto Rico has entrusted the Secretary of the Department of Labor and Human Resources ("DOL") with the task of enforcing those labor and employment protective laws. One of the means that the Secretary uses to carry out this mandate is by engaging in labor and employment audits and investigations.

THE AUTHORITY TO INVESTIGATE:

The first question that comes to mind to an employer subject to an audit is whether the intervention is legal. In general, labor and employment statutes empower the DOL and its administrative bodies with vast, albeit not unrestricted, investigative authority. For example, the Enabling Act of the Puerto Rico DOL authorizes the Secretary of Labor and his/her representatives to investigate employment practices, compel the appearance of witnesses and the production of evidence, including payrolls and employment records. This authority is very similar to that of the U.S. Wage and Hour Administrator.

The refusal to allow an inspection by the local Department of Labor, or to furnish information, or allow the examination of documents constitutes a misdemeanor punishable by fine and/or imprisonment. Likewise, providing false information in connection with information required also constitutes a misdemeanor.

THE COMMENCEMENT OF AN AUDIT:

An audit is usually triggered by a complaint made by one or more employees (i.e. anonymous call or letter). Typically, the Puerto Rico DOL does not disclose the identity of the complaining employees to protect the confidentiality of the source. However, it is common that the audit be the result of the Department's interest in determining whether a particular industry or employer is in compliance with applicable labor and employment laws.

As a result, an investigator may visit and/or contact the employer, provide written notice of the nature and scope of the investigation, and schedule one or more visits for inspection during regular business hours.

Usually, the investigator may request the examination of those records required to be kept by the employer, such as employment records and payrolls, in order to determine, in general, whether employees are misclassified, or the existence of wage and hour violations (overtime, meal periods, work on the day of rest), or whether the employer has kept appropriate employment records. To that extent, the investigator may request for examination payroll journals, punch cards, job descriptions, agreements for reduction of meal periods, and flexitime agreements, among other documents. Vacation and sick leave accrual and enjoyment is another common target for the investigators

in order to verify the following: whether the employer's policy regarding vacation and sick leave accrual is in compliance with local legislation and whether the employer is monitoring the maximum vacation leave accrual allowed in order to make sure that employees enjoy their vacation leave as provided by law.

Employment records include personnel files, another area which the investigators may tap into. They may request to review employees' personnel files at random to verify that all the required documents are on file. For example, whether there are payroll deduction authorizations signed by the employees; whether there are INS I-9 forms (Employment Eligibility Verification Forms compliant with federal legislation) available for each employee; and whether the employer has complied with the Administration for Child Support Enforcement's (more commonly known as ASUME) reporting requirements.

It is also a common practice for auditors to request examination of the Certification of compliance with Act No. 207 of 2006, which regulates and protects against the display of employees' Social Security Numbers, and the Policy and Protocol on Domestic Violence in the Workplace. With respect to the latter, it seems that the DOL, through its division, the Puerto Rico Occupational Safety and Health Office ("OSHO"), the mirror image of OSHA, is imposing monetary penalties for failure to have a written protocol to handle domestic violence in the workplace, and for not providing training to employees regarding such protocol.

Auditors may also verify whether the employer displays the required labor and employment law posters. Additionally, the auditor may request to be allowed to meet in private with employees in order to gather data or determine the veracity or accuracy of the documents and information provided by the employer.

Other areas that may come under scrutiny during audits are the employer's duty to be up to date with the payment and reporting requirements of government-sponsored insurance programs that provide benefits to employees, such as unemployment insurance, non-occupational short term disability and Puerto Rico Chauffeurs' Social Security. A similar audit procedure may be followed by the State Insurance Fund Corporation, with regard to Workers' Accident Compensation Insurance.

THE AFTERMATH:

Upon conclusion of the audit, the DOL may notify its findings, and the type of violation imputed to the employer, if any. Should the violation require the employer to make payments to its employees, the notice would include the amount owed and the time frame in which such payment is due. Failure to comply with this request may prompt the DOL to file a civil suit against the employer.

In the event of wage and hour violations, once a civil complaint is filed, employees are entitled, in general, to receive the amount owed plus an additional equal amount as a penalty. Thereafter, the Department may file a class or a representative action on behalf of the employees.

Experience has shown that not all labor and employment audits are conducted in the same way. On one end of the spectrum you may find smooth and coordinated audits, while at the other, albeit not frequently, the employer may face a totally disruptive and acrimonious intervention. To make the audit experience less unpleasant and to minimize exposure, we recommend the following:

1. Contact your labor and employment law counsel as soon as you are notified of an audit. The attorney may serve as a liaison between the employer and the DOL. Counsel will schedule and coordinate the audit in a timely and orderly fashion to avoid unnecessary conflicts between the employer's representatives and the investigator. Remember, "Hell hath no fury no more than an [auditor] scorned."
2. Do not assume that there is no legal authority for the intervention, and as a result ignore the request to meet and produce documents. On the other hand, do not assume that every request is valid. Again, your timely contact with your counsel may help you determine the reasonableness of the intervention and requests.
3. Do not disregard any demand for payment. Neither is it recommended to have a "knee-jerk reaction" and proceed to pay immediately. Your attorney may evaluate whether there are actionable claims and, in such event, negotiate a lower amount, without the penalty.

Finally, do not wait until you become the target of an audit to find out about the existence of costly violations to labor and employment laws and regulations. Prevention is always the best remedy. Ask your labor and employment counsel to carefully examine your employment practices regularly. In the alternative, you should engage in a self-audit with the assistance of your counsel, who is best qualified to identify problem areas early and provide alternatives to correct them. Only then can you rest assured that you are following the best employment practices and, when faced with an audit, keep Big Brother at bay.

If you have any questions regarding the above or require assistance with these or any regulatory concerns, you may contact any of the attorneys of our Labor & Employment Law Practice Group to assist you.

Landmark victory for the summary judgment motion

by Alfredo M. Hopgood-Jovet

In a case destined to change the landscape of litigation of employment discrimination claims in local court, the Puerto Rico Supreme Court clarified that trial courts may use the summary judgment mechanism to dispose of employment discrimination claims in appropriate cases. On February 3, 2010, the Supreme Court issued its opinion in the case of Ramos Pérez v. Univision, 2010 TSPR 15. In *Ramos Pérez*, the Court departs from its more than a decade-long stance against dismissal of employment discrimination claims by way of a motion for summary judgment.

The facts of the case, in which the defendant-employer was represented by two attorneys from our firm – Radamés (Rudy) A. Torruella and Maralyssa Álvarez-Sánchez - are as follows: the plaintiff-employee, Maria Ramos-Pérez ("Plaintiff" or "Ramos") was a Traffic Manager for Univision's predecessor television station. She was re-trained for this position after Univision acquired the television station where she had worked for ten years. When Univision commenced operations in Puerto Rico, Plaintiff was required to learn, along with the other members of the Traffic Department, how to manage the software application used by the traffic departments of all of Univision's television stations throughout the United States. For that purpose, María Beltrán ("Beltrán"), an employee of Univision, travelled routinely to the station's offices in Puerto Rico to train the Traffic Department employees and supervise the transition to the new software application. Beltrán was older than Ramos and, as Univision admitted, had a demanding management style. Nevertheless, even Ramos admitted that Beltrán treated all employees equally, even those younger than Ramos.

After receiving months of training in the new traffic management software, Plaintiff had failed to grasp the intricacies of the system; she admitted as much in a self-evaluation she filled out upon completion of training. During a particularly stressful incident, when the war in Iraq broke out in March of 2003 and television programming was interrupted to report on those events, Plaintiff had to ask for help for basic program functioning which, as Traffic Manager, Beltrán felt that Ramos should have been able to grasp. Beltrán confronted Ramos with her lack of knowledge. At that point, Ramos went to Univision's Programming Director and stated that she could no longer work with Beltrán because Beltrán was not satisfied with Ramos' performance. Shortly thereafter, Univision terminated Ramos' employment.

Ramos filed a complaint before the Puerto Rico Court of First Instance alleging unjust dismissal and age discrimination. Upon conclusion of discovery, Univision filed a motion for partial summary judgment averring that, in light of the evidence on record, including Ramos' own admissions during her deposition, there was no evidence that Ramos' termination was discriminatory because of her age. After the Plaintiff had an opportunity to oppose such a motion, the Court of First Instance agreed with Univision that Ramos could not present sufficient evidence to defeat Univision's motion for summary judgment and dismissed Ramos' age discrimination claim.

Plaintiff subsequently appealed the trial court's dismissal of her age discrimination claim to the Puerto Court of Appeals. In turn, the Court of Appeals revoked the Court of First Instance's judgment and held that, in dismissing the age discrimination claim, the trial court had ignored a "clear directive" from the Puerto Rico Supreme Court which did not favor dismissal of employment claims through summary judgment.

Univision then requested review before the Puerto Rico Supreme Court; it argued that the summary judgment mechanism was appropriate in employment discrimination cases where the uncontroverted facts reveal that the adverse employment action was not discriminatory. Univision argued that this was such a case since the facts reflected, among other things, that Ramos' (older) supervisor was not satisfied with her performance and treated all employees equally.

In an opinion where only one justice dissented, the Supreme Court reversed the Court of Appeal's judgment and confirmed the dismissal of the age discrimination claim. The Supreme Court held that Ramos lacked sufficient evidence to create a controversy of fact with regards to the lack of discriminatory animus on Univision's part. Specifically, the Supreme Court held that Ramos' conclusory and argumentative statements in her sworn affidavit weren't sufficient to defeat Univision's motion for summary judgment.

More importantly, the Supreme Court held that, even though employment discrimination claims may involve subjec-

tive or intentional elements, summary judgment is a procedural mechanism that may be used in employment claims when there is no controversy of material facts with regard to essential elements of the claims. Citing numerous cases from federal case law, the Supreme Court went on to state that summary judgment is an important tool that permits judges to dismiss frivolous claims and decongest judicial calendars.

Each case must be analyzed to determine whether a request for dismissal by way of a motion for summary judgment is appropriate in light of the facts of the case. Nevertheless, the Supreme Court's opinion in the Ramos Pérez v. Univision case paves the way for trial courts to use the summary judgment mechanism to dismiss claims without the need to expend the judicial branch's limited resources with a trial or hearing.

The Puerto Rico Supreme Court clarified that trial courts may use the summary judgment mechanism to dispose of employment discrimination claims in appropriate cases

The 2010 HIRE Act could mean savings for Puerto Rico employers

by Dalina Sumner

Although health care took center stage over the past several months as the most pressing issue at hand in Washington D.C., on March 18, 2010 Congress and President Obama also managed to enact the 2010 HIRE Act. The name of the bill is really an acronym for Hiring Incentives to Restore Employment Act, and is also commonly referred to as the Jobs Bill.

As either moniker makes clear, employment, or lack thereof, is a driving concern behind the measure. Despite having such a descriptive title, however, employment is really only one of several issues addressed by the HIRE Act. The Act also includes an extensive series of provisions regarding appropriations and extensions of federal programs and initiatives related to highways and transportation, including: the Federal-Aid for Highways program, the National Highway Traffic Safety Administration (NHTSA), the Federal Motor Carrier Safety Administration (FMCSA), the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), and the Highway Trust Fund Mass Transit Account, to name only a few. The Act specifically mentions that its provisions extending the allocation of certain transportation funds will apply to Puerto Rico. Finally, the HIRE Act contains important provisions regarding the tax implications of income from foreign sources including foreign assets and trusts.

Regardless of the many provisions in the HIRE Act seemingly unrelated to the issue of employment, this remains the defining impetus behind the Act which could represent a harbinger of composite federal initiatives to come in the government's attempts to lower unemployment and steer the U.S. economy towards recovery.

A cursory look at the Incentives for Hiring and Retaining Unemployed Workers reveals that the HIRE Act does not promote hiring in general, but instead provides employers with specific incentives aimed at encouraging them to hire people who have been out of work for a significant period of time. The good news for our readers is that a variety of these incentives are available to employers in Puerto Rico.

In essence, the Act hopes to encourage employers to hire unemployed individuals through a combination of tax exemptions and tax credits. By hiring a "Qualified Individual" after February 3, 2010 and before January 1, 2011, employers will not be required to pay the 6.2% Social Security tax on wages normally required of employers in Puerto Rico under federal law.

In order to meet the criteria of a "Qualified Individual" for the tax exemptions under the HIRE Act to go into effect, employers must hire workers who have not been employed for more than 40 hours within the 60 days that precede

continues on page 9

EEOC issues notice of proposed rulemaking on the definition ot the "Reasonable Factors Other than Age" defense under the ADEA

by Reinaldo L. Figueroa

The Age Discrimination in Employment Act of 1967 ("ADEA") prohibits employers from discriminating on the basis of age against individuals who are 40 years or older. Specifically, the ADEA makes it unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, at any point of the employment process such as hiring, training or firing, among others.

On February 18, 2010, the U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission"), the federal agency in charge of enforcing the ADEA, issued a Notice of Proposed Rulemaking to address the scope of the "reasonable factors other than age" ("RFOA") defense under the statute. This proposed rule seeks to provide guidance in ascertaining what constitutes a "reasonable factor other than age" in defending against a disparate impact claim under the ADEA.

The RFOA defense shields employers from liability in disparate impact age discrimination cases where employers establish that the challenged practice, even though found to have a disparate impact on protected older workers under the ADEA, was neutral from its face and predicated on "reasonable factors other than age."

The proposed rule is based on the Commission's analysis of two relatively recent decisions by the U.S. Supreme Court concerning claims of disparate impact under the ADEA. In Smith v. City of Jackson, 544 U.S. 228 (2005), the Court validated the RFOA defense by holding that an employment practice that has a disparate impact on older workers is discriminatory, except if it is justified by a "reasonable factor other than age." That is, as explained by the Commission, the RFOA test is the appropriate standard for determining the lawfulness of a practice that disproportionately affects older individuals.

Subsequently, in Meacham v. Knolls Atomic Power Laboratory, 128 S. Ct. 2395 (2008), the U.S. Supreme Court held that the employer bears both the burdens of production and persuasion on the RFOA defense. That is, the burden falls on the defendant of a disparate impact claim to prove the affirmative defense of a "reasonable factor other than age."

Neither of these two cases, which opened the door for claims of disparate impact under the ADEA, specifically articulated what factors are "reasonable" or elaborated on the meaning of such term.

The proposed rule explains that a "reasonable factor" is one that is objectively reasonable when viewed from the position of a reasonable employer under similar circumstances, both in its design and in the way it is administered. In its proposed rule, the EEOC refers to tort law's interpretation of the term "reasonable." Thus, a "reasonable factor" is one that would be used in like manner by a prudent employer watchful of its duties under the ADEA.

Also, the proposed rule provides an illustrative (not exhaustive) list of six factors that may be potentially relevant in determining whether an employment practice is "reasonable."

These factors are: (1) whether the employment practice and the manner of its implementation are common business practices; (2) the extent to which the factor is related to the employer's stated business goal; (3) the extent to which the employer took steps to define the factor accurately and to apply the factor fairly and accurately; (4) the extent to which the employer took steps to asses the adverse impact of its employment practice on older workers; (5) the severity of the harm to individuals within the protected age group, in terms of both the degree of injury and the numbers of persons adversely affected, and the extent to which the employer took preventive or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps; and (6) whether other options were available and the reasons the employer selected the option it did.

The Commission notes that it is not necessary that all factors be present in every case. Rather, the proposed rule calls attention to the need for an individualized, case-by-case approach in determining reasonableness. Thus, an employer may present other factors rel-

evant to whether an employment practice is reasonable.

It is worth mentioning that the proposed rule does more than simply address reasonableness; it also addresses whether a factor is "other than age." The Commission explains that the RFOA defense applies only when an employment practice is not predicated on age.

This section of the proposed rule provides three factors that may be pertinent to the inquiry of whether the reasons considered by the employer were age related: (1) the extent to which the employer gave supervisors unchecked discretion to assess employees subjectively; (2) the extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes; and (3) the extent to which supervisors were given guidance or training about how to apply the factors and avoid discrimination.

The public comment period for the proposed rules expired on April 19, 2010. Assuming that the proposed rule becomes final, it will provide guidance to facilitate business decisions consistent with the ADEA, particularly in these trying economic times in which many employers are making reductions in personnel.

For more information regarding this matter, or any other employment matter, you may contact any of the attorneys in the Labor & Employment Practice Law Group.

continues from page 7

... The 2010 HIRE Act could mean savings for Puerto Rico employers

their date of hire. The Act requires that employees certify their qualifying status by signing a statement under penalty of perjury to this effect. For this purpose the IRS recently issued Form W-11, entitled the HIRE Act Employee Affidavit which does not need to be notarized and can be accessed at http://www.irs.gov/pub/irs-pdf/fw11.pdf.

In addition, the new hire cannot replace a current employee, unless this employee engaged in a voluntary termination or was discharged with cause. Finally, the new hire cannot own more than 50% of the hiring employer's business, nor can (s)he be related or affiliated to any person or entity owning more than 50% of the employer's business.

It is important to note that the Social Security tax exemption described above applies exclusively to employers who hire Qualified Individuals. Employees hired under the HIRE Act will still be responsible for their portion of the 6.2% Social Security tax. Also, both the employer and the qualifying employee will be responsible for their respective portions of the 1.45% Medicare tax on wages and salaries.

The HIRE Act provides an additional incentive for employers who retain Qualified Individuals as employees for at least a year (52 consecutive weeks). This incentive comes in the form of an income tax credit of up to $1,000 for each Qualified Individual retained by the employer for this length of time. As of the date of this publication the Puerto Rico Treasury Department has yet to issue any guidelines on how this income tax credit will apply to employers in Puerto Rico but further information on this topic is expected in the near future.

In early March President Obama stated that his most important domestic job as president was to see to it that "every American who wants to work, and is able to work, can find a job…that is my focus this year." With the battle to pass the Health Care Reform Bill behind him, the President and Congress will be able to return their attention to the U.S. economy. The 2010 HIRE Act, therefore, is most like a preview of coming attractions which will most likely entail further federal legislation to create attractive hiring incentives for employers and much needed job opportunities for employees.

If you have any questions regarding these matters or require assistance with these or any regulatory concerns, you may contact any of the attorneys of our Labor & Employment Law Practice Group to assist you.

As either moniker makes clear, employment, or lack thereof, is a driving concern behind the measure. Despite having such a descriptive title, however, employment is really only one of several issues addressed by the HIRE Act

Practice group news

by María Antongiorgi

The all-day seminar was held at the San Juan Marriott Hotel and Stellaris Casino in San Juan, and around 140 clients and friends of the firm were in attendance

The Labor & Employment Law Practice Group hosted its annual Labor and Employment Law Update Seminar on April 16, 2010. The all-day seminar was held at the San Juan Marriott Hotel and Stellaris Casino in San Juan, and around 140 clients and friends of the firm were in attendance. The seminar covered all significant labor and employment law developments during 2009 and the first trimester of 2010 in the areas of welfare benefits/health reform, the Employee's Free Choice Act (EFCA), disability discrimination, immigration law, closing law/approved legislation, pending legislation, recent jurisprudence, electronic evidence, and recent tendencies in other jurisdictions. The speakers, who are all members of the practice group, were: Sandra Negrón, Francisco Chévere, Anita Montaner, Agustín Fortuño, Iraida Diez, María Antongiorgi, Miguel Rivera Arce, Radamés "Rudy" Torruella, Rafael Rodríguez, Jessica Figueroa, Jorge Antongiorgi and Maralyssa Álvarez. Juan Luis Alonso, Vice-Chair of the firm's Tax Practice Group, also served as a speaker. After the seminar, participants and members of the practice group gathered for a friendly cocktail.

On May 6, 2010, Radamés "Rudy" Torruella and Maralyssa Álvarez were speakers at the Association of Labor Relations Practitioner's seminar on recent Puerto Rico Supreme Court case law regarding the use of the summary judgment mechanism in employment discrimination litigation.

Welfare Benefits and ERISA litigation developments

by Sandra Negrón

- On April 15, 2010, President Obama signed into law the Continuing Extension Act of 2010, which extended the ARRA/COBRA subsidy eligibility period from April 1, 2010 through May 31, 2010. This Act also clarified that individuals who experience a reduction in hours between September 1, 2008, and May 31, 2010, that is followed by an involuntary termination of employment on or after March 2, 2010 and by May 31, 2010, will be eligible for the premium subsidy.
- On May 5, 2010, the U.S. Department of Health and Human Services ("HHS") issued Interim Final Rules addressing the Retiree Reinsurance Provisions of the Health Care Reform.
- On May 13, 2010, HHS, the Internal Revenue Service and the U.S. Department of Labor jointly issued Interim Final Rules implementing the requirement included in the Health Care Reform that group health plans which offer dependent coverage to continue making such coverage available for an adult child until age 26.

Labor & Employment Law Practice Group

Maralyssa Alvarez-Sánchez
(787) 250-5682
max@mcvpr.com

Luis R. Amadeo
(787) 250-5680
lra@mcvpr.com

Jorge Antongiorgi
(787) 250-5659
jab@mcvpr.com

María Antongiorgi
(787) 250-2624
maj@mcvpr.com

Jan Carlos Bonilla Silva
(787) 250-5607
jbs@mcvpr.com

Francisco Chévere
(787) 250-5615
fc@mcvpr.com

Maggie Correa Avilés
(787) 250-5621
mc@mcvpr.com

Iraida Diez
(787) 250-5817
id@mcvpr.com

Jessica Figueroa Arce
(787) 250-2633
jafa@mcvpr.com

Reinaldo Figueroa Matos
(787) 250-5811
rlf@mcvpr.com

Agustín Fortuño-Fas
(787) 250-5631
aff@mcvpr.com

Anne Michelle Galanes
(787) 250-5619
amgv@mcvpr.com

Alfredo M. Hopgood-Jovet
(787) 250-5689
ah@mcvpr.com

Aníbal Irizarry
(787) 250-5646
ai@mcvpr.com

Héctor M. Laffitte
(787) 250-5618
hml@mcvpr.com

Luis F. Llach Zúñiga
(787) 250-5643
lfl@mcvpr.com

Rica López de Alós
(787) 250-2632
rla@mcvpr.com

Patricia M. Marvez Valiente
(787) 250-2636
pm@mcvpr.com

Anita Montaner
(787) 250-5652
ams@mcvpr.com

Karen Morales
(787) 250-2607
kmr@mcvpr.com

Sandra L. Negrón Monge
(787) 250-2638
sln@mcvpr.com

James D. Noël III
(787) 250-5673
jdn@mcvpr.com

Rebecca Páez Rodríguez
(787) 250-5648
rpr@mcvpr.com

Miguel Palou Sabater
(787) 250-5686
mps@mcvpr.com

Miguel A. Rivera-Arce
(787) 250-5634
mar@mcvpr.com

Rafael I. Rodríguez Nevares
(787) 250-5610
rr@mcvpr.com

Dalina Sumner
(787) 250-5622
ds@mcvpr.com

Radamés (Rudy) A.Torruella
(787) 250-5679
rat@mcvpr.com

Francisco A. Vargas López
(787) 250-2639
fv@mcvpr.com

Editor in Chief: *Maralyssa Álvarez Sánchez* ***Contributing Editors:*** *Radamés (Rudy) A. Torruella and Francisco Chévere*