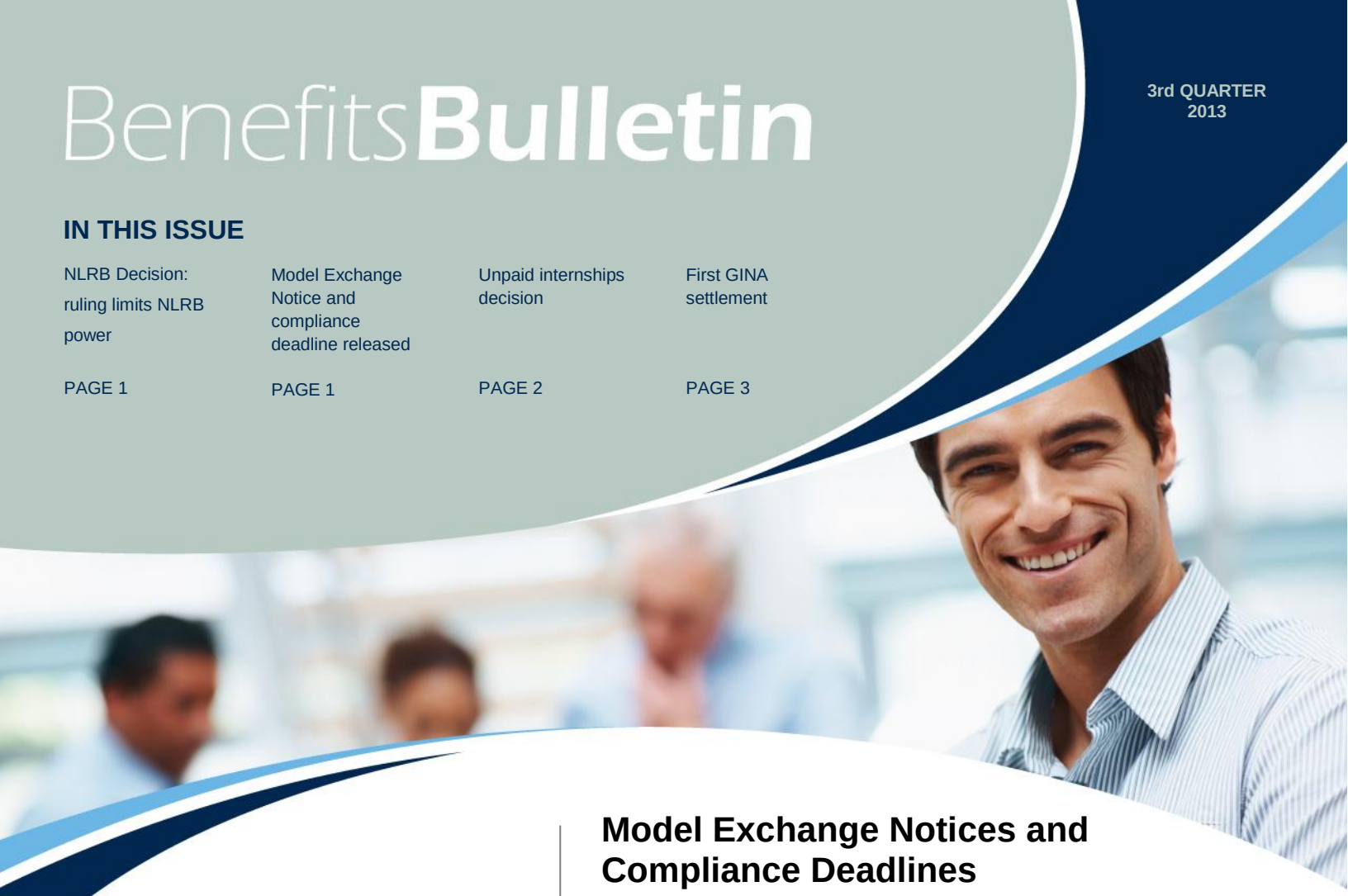
BenefitsBulletin

3rd QUARTER
2013

IN THIS ISSUE



Fourth Circuit Strikes Down NLRB Notice Rule

Another federal court has held that the National Labor Relations Board (NLRB) cannot require employers to post a notice informing employees of their collective bargaining rights.

On June 14, the Fourth Circuit became the second federal appeals court to invalidate the NLRB's requirement for employers to hang posters advising employees of their right to unionize.

The requirement was originally set to take effect on April 30, 2012, but was delayed to allow for the resolution of legal challenges.

This decision is yet another defeat for the NLRB in its attempt to impose notice obligations on employers. The NLRB lost the case for poster requirement in the D.C. Circuit last month.

Model Exchange Notices and Compliance Deadlines

In May, the DOL announced the availability of model Exchange notices for employers to use to satisfy the Exchange notice requirement. Employers must provide an Exchange notice to current employees by Oct. 1, 2013, and to new employees within two weeks of the employment start date beginning on Oct. 1, 2013.

In addition, the DOL's temporary guidance includes a new COBRA model election notice, which has been updated to include information regarding health coverage alternatives offered through the Exchanges.

The ACA's Exchange notice requirement applies to employers that are subject to the FLSA.

Under the temporary guidance, the Exchange notice must:

- Include information regarding the existence of an Exchange, as well as contact information and a description of the services provided by an Exchange;
- Inform the employee that the employee may be eligible for a premium tax credit if the employee purchases a qualified health plan through the Exchange; and

CONTINUED ON PAGE 2

Brown & Brown Consulting

BenefitsBulletin

3rd QUARTER, 2013

Decision for Employees on Unpaid Internship Case

In June 2013, a federal district court in New York issued a decision regarding unpaid interns that should cause employers across the country to think about whether their interns are paid correctly.

The Department of Labor issued information for employers on this topic as recently as April 2010. While those rules are not new, many employers may not be aware of how they affect hiring unpaid interns.

In this case, Glatt v. Fox Searchlight Pictures Inc., the court ruled that unpaid interns at Fox Searchlight Pictures Inc. (Searchlight) should have been classified and paid as employees. The court ruled that Searchlight violated the Fair Standards Labor Act (FLSA) and New York state labor law when it didn't pay two production interns for work done on the set of the movie "Black Swan."

The court also certified a class action against Fox Entertainment Group, Inc. (FEG), allowing a similar lawsuit to proceed alleging that FEG violated New York state labor law when it didn't pay its interns as employees. The class action will go forward on behalf of all individuals who had unpaid internships between Sept. 28, 2008, and Sept. 1, 2010, with one of several divisions of FEG.

Internship Programs under the Fair Labor Standards Act

The FLSA requires most employees, including interns, to be compensated for their services. Unpaid internships in the public sector and for non-profit charitable organizations are generally permissible. However, interns in the "for-profit" private sector generally must be paid at least the minimum wage and receive overtime compensation. There is a very limited exception to this rule for "trainees" who participate in an internship program for their own educational benefit.

According to the DOL, to qualify for the trainee exception, an unpaid internship must meet all these criteria:

- The internship is similar to training that would be given in an educational environment (even though it includes actual operation of the employer's facilities);
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- The employer that provides the training receives no immediate advantage from the activities of the intern and on occasion its operations may actually be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The court stated that the interns had essentially completed the work of paid employees—organizing filing cabinets, making photocopies, taking lunch orders, answering phones—which "provided an immediate advantage to their employer." Any benefits the interns may have received resulted from having worked like any other employee, not as part of an internship program designed to be uniquely educational to the interns and of more value to them than to the employer.

Model Exchange Notices and Compliance Deadlines (continued)

- Contain a statement informing the employee that, if the employee purchases a qualified

health plan through the Exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.

The DOL provided the following model Exchange notices:

- A model Exchange notice for employers who do not offer a health plan; and
- A model Exchange notice for employers who offer a health plan to some or all employees.

Employers may use one of these models, as applicable, or a modified version, provided the notice meets the content requirements described above.

Who Must Receive a Notice?

Employers must provide the Exchange notice to each employee, regardless of plan enrollment status or of part-time or full-time status. Employers are not required to provide a separate notice to dependents or other individuals who are or may become eligible for coverage under the plan but who are not employees.

What Is the Deadline for Providing the Notice?

The ACA required employers to provide the Exchange notice by March 1, 2013. However, on Jan. 24, 2013, the DOL announced that employers would not be held to the March 1, 2013, deadline and that employers would not have to comply with the Exchange notice requirement until more guidance was issued.

The DOL's temporary guidance sets a compliance deadline for providing the Exchange notices that matches up with the start of the first open enrollment period under the Exchanges.

- New Hires – Employers must provide the notice to each new employee at the time of hiring beginning **Oct. 1, 2013**. For 2014, the DOL will consider a notice to be provided at the time of hiring if the notice is provided within **14 days** of an employee's start date.
- Current Employees – With respect to employees who are current employees before Oct. 1, 2013, employers are required to provide the notice no later than **Oct. 1, 2013**.

Employers that decide to inform their employees about the Exchanges earlier than the Oct. 1, 2013, deadline are permitted to use the model notices and rely on the DOL's temporary guidance.

EEOC Settles First GINA Lawsuit

On May 7, 2013, the U.S. Equal Employment Opportunity Commission (EEOC) settled its first disability and genetic information discrimination lawsuit in a district court case in Oklahoma. While the settlement specifically relates only to the company involved, employers should be aware of the potential consequences for discrimination.

The EEOC found that Fabricut, Inc., one of the world's largest distributors of decorative fabrics, had violated GINA by requiring family medical history from a job applicant.

Under the settlement, Fabricut agreed to a $50,000 payment and to take specified actions designed to prevent future discrimination. These actions include posting an anti-discrimination notice to employees, disseminating anti-discrimination policies to employees and providing anti-discrimination training to employees with hiring responsibilities.

The EEOC has stated that it will focus on addressing illegal discrimination under GINA, the Genetic Information Nondiscrimination Act, which first took effect in 2009. "Employers need to be aware that GINA prohibits requesting family medical history," said David Lopez, general counsel of the EEOC. "When illegal questions are required as part of the hiring process, the EEOC will be vigilant to ensure that no one will be denied a job on a prohibited basis."