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Employer health insurance mandate takes shape

by Douglas E. Lee

While politicians and pundits can muse about the future of the Patient Protection and Affordable Care Act, employers do not have the luxury of waiting until the last minute to see whether the employer mandate provisions of health care reform actually take effect. Therefore, even though final regulations remain to be written and other aspects of the mandate remain to be interpreted, employers should start planning for how they intend to respond when the mandate takes effect on Jan. 1, 2014.

Does the mandate apply?

For each employer, the threshold question is whether it will be covered by the mandate. Under the Act, the mandate covers "applicable large employers," which are defined as employers that employ, on average, at least 50 full-time employees per business day in the preceding year. Because the first "preceding year" is 2013, employers desiring to avoid the mandate should begin managing the size of their 2013 workforces in the next few months.

When counting employees, employers should be aware of the following rules:

- Part-time employees count, but only to determine whether the 50 full-time employee threshold is met. To count part-time employees, an employer should add those employees' hours and divide that sum by 30 to determine the number of full-time equivalent employees.
- Seasonal employees who work for 120 days or less can be excluded from the calculation.
- If an employer has more than one business, the Internal Revenue Code's business aggregation rules are used to determine whether the employer is a single employer for purposes of the Act. Because these rules look at common ownership rather than the relationship between businesses, those who own multiple businesses need to determine which of their employees must be added together when determining whether and to which businesses the mandate will apply.

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Inside

Banks, title insurance companies await ruling in mortgage requirement appeal

by Douglas E. Lee

A bankruptcy court decision that sent shock waves through the banking and title insurance industries earlier this year has been appealed to the federal district court for the Central District of Illinois.

In *In re Crane*, a bankruptcy court judge held that a bankruptcy trustee could avoid (or, essentially, declare invalid as to other creditors) a mortgage that did not expressly state the secured loan's maturity date and interest rate. In doing so, the court interpreted the Illinois Conveyances Act to require this information. The court reached this conclusion despite the Act's provision that a mortgage satisfies the Act as long as it "substantially" complies with the form set forth in the Act.

While most lenders include the loan's maturity date in a mortgage and cross-reference the underlying note, few set forth the interest rate. Indeed, when loans feature a

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Home sellers face new City of Dixon requirements

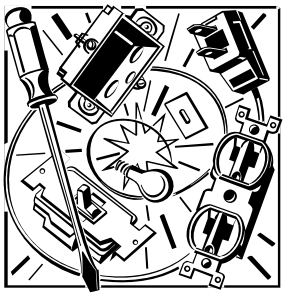
by Emily R. Vivian

Earlier this year, the City of Dixon adopted new requirements for residential electrical systems that will require some owners to upgrade their systems before they can sell their homes.

Under new Section 7-5-1-1(F) of the City of Dixon Code, "All thirty (30) and sixty (60) amp services shall be removed from all residences within the city that are sold, transferred or conveyed" and replaced with complying systems "before the date of sale, transfer or conveyance."

According to Cory Lance of the City of Dixon Building Department, the City will fine owners who violate this provision. Under the City Code, the fine for this offense can be as much as $750.

The City also can require purchasers of homes of non-compliant systems to upgrade their systems, and under many local form contracts those purchasers would be able to recover the cost of the upgrades from the sellers. While sellers selling their homes "as is" might be able to protect themselves from liability to



their buyers, the City has stated that an "as is" clause will not protect a seller from a City fine.

Other requirements contained in new Section 7-5-1-1 are that owners of homes with 30- or 60-amp service must install 100-amp service as part of any remodeling valued at 50 percent or more of the home's fair market value and that all electrical service panels must use circuit breakers and have at least 20-circuit capacity (measured without the use of tandem breakers). However, a residence with less than 20-circuit capacity can be sold as long as the panel has the capacity for at least 12 circuits and at least 25 percent of those circuits are unused when all circuits are terminated on individual breakers.

While the City Code does not provide for exceptions, the City's Building Department considers exceptions for sellers on a case-by-case basis. The Building Department will not grant a seller an exception, however, unless the purchaser acknowledges the upgrade requirement, accepts responsibility for upgrading the system, agrees to apply for a building permit on the date of the sale, agrees to complete the upgrade within 30 days of the sale and agrees not to occupy the property before the upgrade is completed.

In light of these new requirements, sellers and purchasers of homes in Dixon who are unsure about whether their properties comply with the City Code should consider having the Building Department inspect the properties. Because these new requirements are not unique to Dixon, concerned sellers and purchasers in other communities might wish to contact their local building departments for guidance.

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If the mandate applies, what does it require?

Generally, the Act requires that covered employers either provide affordable minimum essential coverage to their full-time employees or pay a penalty. Minimum essential coverage must pay at least 60 percent of the overall cost of the benefits covered by the plan. Coverage is "affordable" if the amount the employee must pay to obtain the coverage is less than 9.5 percent of the employee's household income.

What are the penalties for noncompliance?

If an employer does not offer minimum essential coverage to its full-time employees and their dependents, the employer must pay a penalty of $2,000 for each full-time employee the employer has in excess of 30.

As the definition of "affordable" suggests, whether an employer has complied with the mandate is determined on an employee-by-employee basis. Therefore, even if an employer offers minimum essential coverage to its full-time employees and their dependents, the employer can be penalized for employees who turn down the employer's coverage and instead purchase coverage personally. That penalty is the lesser of:

- $3,000 times the number of full-time employees who receive a premium tax credit or cost-sharing reduction for purchasing coverage through a health insurance exchange or
- $2,000 times the number of full-time employees the employer has in excess of 30, but taking into account all of the employer's full-time employees and not just those who purchased insurance elsewhere.

Conclusion

Undoubtedly, much more will be learned about the Act and the employer mandate in upcoming months. We will strive to keep our clients informed about these changes as and when they occur.

New Illinois Medicaid statute restricts eligibiliy

by Emily R. Vivian

In June, Illinois Gov. Pat Quinn signed legislation closing several avenues that had been available for persons hoping to both preserve their assets and receive Medicaid assistance.

The Save Medicaid Access and Resources Together ("SMART") Act, which took effect June 14, 2012, reversed a legislative compromise reached only last year and was clearly intended to address a $2.7 billion Medicaid funding gap. The techniques affected by the SMART Act include:

- Under the SMART Act, a home transferred into a trust on or after the effective date is no longer considered homestead property and thus is not an exempt asset. Therefore, if an owner transfers a home to a revocable living trust, the owner will be ineligible for Medicaid. If an owner transferred a home into a trust before the effective date, the owner will not be eligible if the owner's equity interest in the home exceeds the minimum home equity as allowed and increased annually under federal law (currently $500,000).

- Persons 65 and older no longer can use pooled trusts without penalty. Under the SMART Act, any transfer made by a person age 65 or over to a pooled trust will be considered a non-allowable transfer resulting in a penalty period. However, this new rule does not apply to a person if he or she is a ward of a county public guardian or the State guardian.

- Spouses no longer may refuse to disclose assets. In the past, this most often occurred when a couple married later in life and one spouse had significantly more assets than the other. If the poorer of the spouses entered a nursing home, the wealthier spouse could refuse to disclose his or her assets as long as the wealthier spouse did not need income from the poorer spouse and as long as no transfers were made by the poorer spouse to the wealthier spouse within the look-back period. Because the wealthier spouse's assets then were not considered, the poorer spouse could be eligible for Medicaid. After passage of the SMART Act, an applicant can be denied eligibility if his or her spouse refuses to disclose assets.

Under the SMART Act, many persons will find it harder to satisfy Medicaid's eligibility rules. Persons who previously transferred property to enhance potential Medicaid eligibility might wish to have those transfers reviewed to determine the SMART Act's effect on those transfers.

Employers may not require blanket confidentiality during investigations

by Douglas E. Lee

In a decision that applies both to union and non-union employers, the National Labor Relations Board in July ruled that employers may not adopt across-the-board policies prohibiting employees from discussing ongoing internal investigations.

Such policies, the Board said in *Banner Estrella Medical Center*, infringe on employee rights. Employers may require confidentiality in some circumstances, the Board held, but must do so on a case-by-case basis and only when the employer can show that it has "a legitimate business justification that outweighs employees' rights."

In *Banner*, the employer routinely requested confidentiality from employees filing internal complaints, contending that its broad prohibition was necessary to maintain the integrity of its investigations. The Board criticized the employer's "blanket approach," saying the employer's generalized concern was insufficient to outweigh the right of employees to engage in protected concerted activity.

After *Banner*, an employer at the outset of every investigation must determine if a legitimate business reason justifies employee confidentiality. In *Banner*, the Board said that legitimate reasons include the needs to protect witnesses, preserve evidence, avoid the fabrication of testimony and prevent cover-ups.

In most instances, employers will be able to articulate one or more reasons for requiring employee confidentiality. In light of the Board's rejection of across-the-board prohibitions, however, employers should consider revising harassment and other policies that contain blanket confidentiality requirements.

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variable interest rate, it often would be extremely difficult to restate all of the interest-related terms in the mortgage. Lenders and title insurance companies therefore shuddered when the court's decision suggested that creditors could maintain that many mortages could be set aside.

In April, the bank in *Crane* appealed the bankruptcy judge's ruling. A legislative fix of the judge's decision also is being considered. The good news for local lenders is that, so far, the U.S. Bankruptcy Court for the Northern District of Illinois has not adopted the ruling in *Crane*. The full impact, if any, of the decision in *Crane* therefore remains to be seen.

Illinois adopts version of 'Caylee's Law' to protect minors

by Darla A. Foulker

More than a year has passed since an Orlando, Fla., jury found Casey Anthony not guilty of murdering her two-year-old daughter Caylee. As many will recall, Anthony failed to report Caylee missing for 31 days and then provided false information to law enforcement officers during the investigation of Caylee's disappearance. However, regardless of the lies Anthony told to investigators, her failure to report her daughter missing did not violate Florida law. Nor would it have violated Illinois law, until now.

Inspired by the Anthony case, Illinois has made it a crime to fail to report the death or disappearance of a child under 13. Effective Jan. 1, 2013, "a parent, legal guardian, or caretaker of a child under 13 years of age commits failure to report the death or disappearance of a child under 13 years of age when he or she knows or should know and fails to report the child as missing or deceased to a law enforcement agency within 24 hours if the parent, legal guardian, or caretaker reasonably believes that the child is missing or deceased." If the child is under two years of age, the reporting requirement is reduced from 24 hours to one hour.

Similarly, Illinois has amended its laws governing obstruction of justice to include parents, legal guardians and caretakers of children under 13 who knowingly report materially false information to a law enforcement agency, medical examiner, coroner, state's attorney or other governmental agency during an investigation of the disappearance or death of the child. Violations of this law, as well as the violations of the new reporting requirements, are Class 4 felonies and are punishable by up to three years in prison.

In Print and At the Podium

Mrs. Considine has been appointed a member of the Board of Directors of the Dixon Area Chamber of Commerce & Industry . . . **Mr. Lee** recently was quoted in an article in the *El Paso Times* regarding court secrecy issues . . . **Mr. Gehlbach** has an article appearing in the October issue of the *Illinois Bar Journal* on retirement planning for attorneys . . . A commentary **Mr. Lee** wrote for the First Amendment Center concerning employment issues related to social media speech was quoted in an article posted on UPI.com . . . **Mr. Gehlbach** presented a program on estate administration to the Northwest Illinois Association of Circuit Court Clerks. . . **Mr. Lee** recently was re-elected President of Board of Directors of Open Sesame Children's Learning Centers . . . In **Mr. Lee**'s most recent commentary for the web site of the First Amendment Center, www.firstamendmentcenter.org, he analyzed a Pennsylvania court's decision to allow a former Philadelphia councilwoman to sue a small newspaper for portraying her in a false light.

Deals and Decisions

Mr. Badger recently has worked with business clients to develop Internet banking protocols and procedures to minimize risks associated with online banking . . . **Mrs. Considine** assisted a client with completing an application with the Illinois Gaming Board for video gaming . . . **Mr. Lee** is representing a defendant in two class action lawsuits . . . **Mr. Gehlbach** represented a company that recently acquired the former Johnson Controls facility in Dixon, which will result in the relocation of a major business to Dixon . . . **Mr. Badger** continues to represent farm, commercial and residential clients in purchase and sale transactions . . . To resolve many legal issues involved in a trust created almost 70 years ago, **Mr. Gehlbach** crafted a settlement agreement that has now been approved by the court, which will result in the sale of almost 1,300 acres of farmland in Bureau County . . . **Mr. Lee** successfully represented a client in negotiating resolutions to consumer fraud claims filed by the Federal Trade Commission and the Illinois Attorney General . . . **Mrs. Considine** assisted a municipality in completing its electrical aggregation process . . . **Messrs. Badger** and **Gehlbach** have been exploring estate planning strategies with clients in light of pending tax law changes . . . **Mr. Badger** recently has worked with a number of clients on drainage law matters . . . On behalf of a local municipality, **Mrs. Considine** is preparing an intergovernmental agreement through which the municipality will combine its resources with a nearby township . . **Mrs. Considine** completed a cable franchise agreement for a local municipality.