NFP

HR & BENEFITS UPDATE

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HR Legislative Updates Impacting Companies in 2016

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HUMAN RESOURCES

U.S. companies in several states would be wise to pay attention to a number of new or recently amended regulations impacting employers and employees. Below are the highlights of a very active season of federal, state and local government activity that may affect business.

FLSA Administrative Exemption – Minimum Salary Increase to $970/Week

By now, most business managers and HR professionals have heard of the proposed federal Fair Labor Standards Act (FLSA) changes under the U.S. Department of Labor (DOL) and President Obama's vision to increase the number of overtime-eligible workers and the compensation of exempt employees. The period for public comment on the proposed regulations has closed, and the new regulations are expected to be finalized within the next few months. If enacted, the FLSA will raise the minimum weekly salary for exempt employees under the administrative exemption to $970 per week, or $50,440 annually. Employers of administrative professionals who are paid less than that amount will have to either adjust salaries or classify those employees as non-exempt once the regulations take effect.

EEO-1 Changes to Include Hours and Earnings Reporting

The EEOC has proposed changes to the EEO-1 form that would require employers with 100+ employees (50+ if a federal contractor or subcontractor) to report hours worked and earnings along with the typical sex, race and ethnicity data that are currently required. These regulations are currently open for public comment and, if adopted, would take effect in 2017. Employers who currently complete the EEO-1 filing are encouraged to take note and prepare for this potential additional requirement.

Federal Contractors Now Required to Provide Paid Sick and Other Leave

The DOL issued proposed regulations to implement President Obama's executive order requiring federal contractors to provide up to 56 hours of paid sick leave to employees each year. The proposed rules also delineate who's entitled to leave, when leave can be used, how it's carried over and how employees are to request the leave. In addition to the employee's own health care needs, the proposal allows for the use of the paid leave for other purposes, including caring for an employee's child, parent, spouse, domestic partner or an individual with whom the employee has a close, familial-like relationship, and for purposes related to domestic violence, sexual assault or stalking.

Vermont Enacts Statewide Paid Sick Leave Law

Vermont joins the multitude of states that have a paid sick leave law. The new state law is effective Jan. 1, 2017, although transitional relief is provided for smaller employers. Generally, employees will accrue at least one hour of earned sick time for every 52 hours worked. However, an employer that has five or fewer employees who are employed for an average of at least 30 hours per week won't be subject to the paid sick leave provisions until Jan. 1, 2018.

NYC Amends Sick Leave Rules

New York City employers are probably familiar with the Sick Leave Law enacted several years ago. However, the NYC Department of Consumer Affairs recently adopted rules clarifying parts of the NYC Sick Leave Law and establishing requirements to carry out the law. The rules went into effect March 4, 2016.

The amended rules provide additional guidance on calculating the number of employees in a business, addressing temporary employees, model handbook policies and the records that employers must keep. NYC employers are advised to take note of the newly revised regulations.

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California Updates Nondiscrimination Regulations Concerning Pregnancy and Sexual Harassment

The California Department of Fair Employment and Housing released new regulations that address pregnancy and sexual harassment under the state Fair Employment and Housing Act (FEHA). These regulations took effect April 1, 2016.

The FEHA prohibits harassment and discrimination in employment on the basis of certain protected classes, such as race, color, religion, disability and sex (including pregnancy, childbirth, breastfeeding and related medical conditions). The law generally applies to employers with five or more employees; however, the provisions regarding harassment apply to all employers.

The new regulations include requirements that California employers add additional employee handbook policies and develop additional programs, procedures and training to prevent this type of discrimination or harassment. Also, covered employers must maintain and pay for group health coverage for an eligible female employee who takes pregnancy disability leave for the duration of the leave – not to exceed four months over the course of a 12-month period per pregnancy – beginning on the date the pregnancy disability leave begins, at the same level and under the same conditions that coverage would have been provided if the employee hadn't taken pregnancy disability leave.

Washington, D.C. Enacts Pregnant Workers Fairness Amendment

The District of Columbia has amended its Pregnant Workers Fairness Act to require an employer to make a reasonable accommodation for an employee whose ability to perform the functions of her job is affected by a pre-birth complication. This amendment is effective Feb. 18, 2016.

Under the amended law, a reasonable accommodation includes time off due to pre-birth complications. Employers are prohibited from taking adverse action against an employee who's been absent from work as a result of a pregnancy-related condition, which now includes a pre-birth complication.

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- Succession planning

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Pass or Fail? Corrective Actions to Remedy Current Test Results … and Planning to Prevent Future Fails

RETIREMENT

Addressing Testing Failure

Each year you receive a "pass" or "fail" from your service provider regarding required non-discrimination testing — the Actual Deferral Percentage (ADP) test and the Actual Contribution Percentage (ACP) test. These tests govern the amounts of deferrals and/or matching contributions that highly compensated employees (HCEs) are allowed to make or receive in relation to those of non-highly compensated employees (NHCEs).

If your plan "failed," don't panic. As long as an IRS-prescribed corrective action is undertaken, the plan's health is not in jeopardy. Correction can be made in any of the following ways:

- Refund excess contributions (plus earnings thereon) to HCEs
- Contribute qualified non-elective contributions (QNECs) or qualified matching contributions (QMACs) to NHCEs under the plan
- Recharacterize excess contributions

The most common corrective method is refunding excess contributions to HCEs, following IRS procedures.

Refunds must be distributed within two and a half months (or six months, if the plan has an EACA design) following the end of the plan's test year (March 15 for calendar year plans) in order to avoid an excise tax. Contact your plan consultant for more information.

Planning to Pass Future Testing

Executives and HCEs typically don't like receiving these refunds, because they reduce their ability to save for retirement. Ask your consultant how a nonqualified plan can complement your existing qualified plan and help prevent failing future non-discrimination tests by allowing HCEs to contribute excess contributions to an NQDC plan. This has the added benefit of creating a way to reward and retain your most critical employees. Many options are available, and your plan consultant can help custom-design a program that fits your company's unique situation and needs.

It's All About the Data — The First Year of ACA IRS Reporting

TECHNOLOGY

Ever since the Affordable Care Act (ACA) became law, employers and their benefit advisors have dreaded the administrative aspects of complying with the law. One of the key administrative requirements of the ACA is IRS Employer Reporting — in particular, Forms 1094-B/1095-B, which detail employer coverage information provided during the previous year, and Forms 1094-C/1095-C, which specify whether applicable large employers (ALEs) offered coverage to their full-time employees. Not surprisingly, many third-party vendors saw an opportunity to provide software solutions to not only comply with but also automate the ACA IRS employer reporting process. These third-party vendors range from new entrants into the space to well-known payroll providers. Many of these vendors claim to have software solutions that are the greatest things since sliced bread. But what employers are actually finding in this first year of ACA IRS Employer Reporting is that data accuracy and integrity – or lack thereof – have resulted in many sleepless nights.

The many vendors that offer software solutions to make employer reporting easier have different qualities. Some have a better system interface, stronger training or a higher quality of customer service. But no level of system automation can compensate for bad or missing data. Many employers have been caught off guard by the amount of time required by their benefits and HR professionals to fix the integrity level of their employee data. Remember, the systems that generate the ACA IRS forms can only ensure accuracy if the data fed from an employer's source system(s), typically HRIS or payroll, are accurate as well.

Employers have a couple of options to increase the likelihood of data accuracy in preparation for next year's ACA IRS Reporting process:

- Review your source system(s) data throughout the year.
- Select an ACA IRS Reporting vendor that can receive automated data feeds from your source system(s).

Reviewing your source system(s) data might be laborious and time-consuming, especially throughout the year, but an ounce of prevention goes a long way. No employer wants to face IRS ACA reporting deadlines and have to correct or update large amounts of employee data at the last minute. While many vendors offer the ability for employers to populate Excel template spreadsheets with employee data from the source system(s), a better alternative would be to leverage automated data feeds such as electronic data interfaces (EDIs). EDIs are the more expensive option, but removing the human element of copying, pasting and manually editing data within Excel more than offsets the additional cost. Proactively developing a game plan to identify and rectify system source data integrity in the ACA IRS Reporting process will make next year easier and less stressful.

Compliance FAQ

We have an employee who elected the full health FSA salary reduction amount, used it entirely in January and February, and then terminated employment in March. Can we collect the outstanding salary reduction amount that hadn't been deducted when the employee terminated? If not, can we add the amount as W-2 wages? What are the COBRA implications for this health FSA?

The employer can't recoup health FSA salary reduction amounts that haven't been payroll-deducted yet from the terminating employee.

Section 125 (the section of the IRC that governs pretax elections) requires the employer as plan sponsor/administrator to operate the plan according to the terms of the plan document, and the plan document must be consistent with the requirements of Section 125. The uniform coverage rule requires that the maximum amount of reimbursement from a health FSA must be available at all times during the period of coverage. Under the uniform coverage rule, the employer must reimburse expenses up to the full amount of a participant's annual coverage, even if such reimbursements exceed the participant's year-to-date contributions. That creates the risk that employers may lose money in situations where the employee is reimbursed all of their election amount early in the year and leaves the company shortly thereafter. On the other end, there's also the risk to the employee — if the employee isn't reimbursed all of their annual election amount by the end of the year (and any associated grace period), the employee loses the money, unless there's a carryover provision.

Plan designs structured to reduce the employer's risk of loss aren't permissible. According to the IRS, health FSAs must exhibit the risk-shifting and risk-distribution characteristics of insurance. Losses are expected.

Employers have an obligation to follow Section 125 rules and the plan document, and failure to do so could result in the disqualification of the Section 125 plan's tax-advantaged status. That would mean all participants in the plan would lose the tax advantages that Section 125 allows. All health FSA distributions would be taxable. That's a large risk! In addition, since a health FSA is also subject to ERISA, failure to comply with Section 125 could lead to associated ERISA fiduciary violations, participant lawsuits and potential DOL fines.

FSAs are vehicles by which employees are allowed to elect an amount of coverage (amount to pay for medical expenses) and can salary-reduce, on a pretax basis, the amount of coverage over the coverage period. The employee who terminates employment doesn't change the election. Therefore, attempting to recoup the remaining salary reduction amounts isn't allowed. Reporting the uncollected amount as W 2 income would also be improper.

Health FSAs are group health plans and thus are generally subject to COBRA, unless the employer isn't subject to COBRA (i.e., small employer, church, etc.). Health FSAs that are subject to COBRA must offer COBRA coverage to qualified beneficiaries who lose coverage as the result of a qualifying event, unless a special limited COBRA obligation applies. If a health FSA meets certain conditions prescribed in the IRS COBRA regulations (most will since non-excepted FSAs are no longer permitted), the obligation to offer COBRA coverage is limited. The special limited COBRA obligation can be summarized as follows:

- COBRA coverage need not be offered to qualified beneficiaries who have "overspent" their accounts as of the date of the qualifying event.
- For those with underspent accounts, COBRA must be offered, but may be terminated at the end of the plan year in which the qualifying event occurs.

So, COBRA need not be offered to a terminating employee for a health FSA in which the expenses exceed the deductions (an overspent account). However, if the deductions exceed the expenses, COBRA should be offered for the health FSA for the remainder of the plan year.

Need more information?

For information on any of the articles in this newsletter, please contact your benefits advisor.

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