

Employee Benefit Plan Select Issues

ACA: IRS Confirms Potential Employer Mandate Penalty Regardless of Internal Policies on Hours Worked

In our last newsletter, we highlighted a recent case in which an employer implemented a policy to reduce employees' hours to below full-time status to avoid Employer Mandate liability. The case (still pending) seeks to answer whether such actions violate employees' rights to benefits under ERISA § 510. What it does not answer is whether such a policy provides any protection against Employer Mandate liability for those few employees who may work in excess of the policy. The IRS recently released an Information Letter that (unsurprisingly) confirms that such policies provide no protection. Rather, any employee who in fact works on average more than 30 hours in a given month could be a source of liability under the Employer Mandate. This Information Letter emphasizes the importance of monitoring employees' work hours closely. Also, employers with variable hour employees will want to consider using look-back measurement periods instead of monthly measurement periods to determine employees' entitlement to health coverage under the Employer Mandate.

ACA: Update on ACA Information Returns

Applicable large employers are required to make annual filings to the IRS regarding coverage offered and provided to fulltime employees (with employers sponsoring self-insured plans having additional disclosure obligations). The first round of such 1094-C and 1095-C forms were due to the IRS by June 30th if filed electronically and May 31st for paper filings. Many employers have experienced significant difficulties in making these filings. Therefore, the IRS has clarified that it will still accept the returns past the deadline and not impose penalties so long as the employer has and continues to make diligent efforts to make the filings as soon as possible. It also confirmed that any filings made by the June 30th deadline and rejected by the electronic AIR system will be considered timely so long as replacements are submitted within 60 days of the rejection date. Any filings accepted with errors should be corrected as soon as possible, but there is no set deadline.

The IRS has not indicated whether any leniency will be extended for next year's filings. Rather, applicable large employers should be prepared to file forms 1094-C and 1095-C with the IRS by February 28, 2017, or March 31, 2017, if filing electronically. Additionally, there is no indication that "good faith" penalty relief will apply for incorrect filings next year, so employers will want to review the recently-released proposed instructions

for these forms to be ready to file.

Retirement Plans: Small Employer Sued in Excessive Fee Claim

ERISA provides standards of conduct and personal fiduciary liability for certain parties who manage employee benefit plans. To satisfy ERISA, fiduciaries must act in the best interest of plan participants, which includes paying only reasonable plan expenses. When a fiduciary breaches this responsibility, participants can seek redress under ERISA, and many have in the past years. Historically, such "excessive fee claims" have only involved very large plans. However, a recent case (*Damberg v. LaMettry's Collision, Inc.*) has proven an excessive fee claim can come to any fiduciary's door, as this case involves a closely-held company sponsoring a plan with approximately 110 participants and \$10 million in assets. This case (and the expanded fiduciary regulations recently issued by the DOL) emphasizes the need for plan sponsors to understand the scope of their fiduciary responsibilities, provide appropriate personnel with related training, structure plan oversight to maximize prudent practices, and confirm appropriate insurance is in place.

Health Plans: EEOC Regulations on Wellness Programs

In May of this year the Equal Employment Opportunity Commission (EEOC) issued final regulations regarding compliance measures required of wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). These regulations place limitations on the flexibility previously granted under 2013 HIPAA regulations. Provisions concerning a new ADA notice and incentive limitations apply prospectively to employer wellness programs as of the first day of the first plan year that begins on or after January 1, 2017. Employers sponsoring wellness programs involving medical inquiries or examinations should promptly confirm their programs comply with the EEOC's final regulations and construct next year's wellness programs to comply with the ADA notice and ADA and GINA incentive limitations. The EEOC has provided a sample ADA notice for employers to consider.

Benefit Plans: DOL Increases Penalties

The DOL recently released regulations that increase civil monetary penalties for many benefit-related violations. For example, the maximum penalty for failing to file Form 5500 has been increased from \$1,100 per day to \$2,063 per day. The increases will apply to penalties assessed after August 1, 2016, for violations that occurred after November 2, 2015.

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