Compliance Recap

May 2016

After a quiet few months, federal agencies were quite busy during the month of May, issuing four important final rules that impact employers. Specifically, the Department of Labor (DOL) issued the long-awaited revisions to the white collar exemptions of the Fair Labor Standards Act; the Department of Health and Human Services (HHS) released its final rule relating to nondiscrimination on the basis of sex, gender, age, and other factors; and finally, the Equal Employment Opportunity Commission (EEOC) issued two final rules implementing Title I of the Americans with Disabilities Act and Title II of the Genetic Information Nondiscrimination Act as they relate to employer wellness programs.

UBA Updates

UBA released one new guide to assist employers: IRS-SSA-CMS Data Match Program

UBA also updated existing guidance:

- PCORI Fee FAQ
- Small Employer Definitions and Methodology

Overtime Exemption

The DOL has released the revisions to the white collar overtime exemption rules in the Fair Labor Standards Act. The new rule becomes effective on December 1, 2016. The "white collar" or "EAP" exemption covers executive, administrative, professional, outside sales, and computer employees. The white collar exemption salary level was last set in 2004 at $455 a week or $23,660 a year. That salary level is now below the federal poverty level for a family of four. The new standard is $913 a week or $47,476 annually.

With the new regulations, in order to qualify for an overtime exemption, a white collar employee must:

1. Be salaried, meaning that they are paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test");
2. Be paid at least a specific salary threshold, which is now $913 per week (the equivalent of $47,476 annually for a full-year employee), known as the "salary level test"; and

3. Primarily perform executive, administrative, or professional duties, as provided in the Department's regulations (the "duties test").

The long-standing rules regarding the standard duties test have not been changed. However, because many employers misinterpret the duties test, any employer that believes it has an employee or employees who qualify as exempt should consider going back through the test with their attorney.

Read more about the overtime rules.

Nondiscrimination Rules

On May 13, 2016, HHS issued a final rule implementing Section 1557 of the Patient Protection and Affordable Care Act (ACA), which will take effect on July 18, 2016. If entities need to make changes to health insurance or group health plan benefit design as a result of this final rule, such provisions have an applicability date of the first day of the first plan year beginning on or after January 1, 2017.

ACA Section 1557 provides that individuals shall not be excluded from participation, denied the benefits of, or be subjected to discrimination under any health program or activity which receives federal financial assistance from HHS on the basis of race, color, national origin, sex, age, or disability. The final regulations are aimed primarily at preventing discrimination by health care providers and insurers, as well as employee benefits programs of an employer that is principally or primarily engaged in providing or administering health services or health insurance coverage, or employers who receive federal financial assistance to fund their employee health benefit program or health services. Employee benefits programs include fully insured and self-funded plans, employer-provided or sponsored wellness programs, employer-provided health clinics, and longer-term care coverage provided or administered by an employer, group health plan, third party administrator, or health insurer.

Read more about the nondiscrimination rule.

Wellness Programs

The EEOC issued two final rules relating to employer wellness programs – one amends regulations and provides guidance on implementing Title I of the Americans with Disabilities Act, and the other amends the regulations implementing Title II of the Genetic Information Nondiscrimination Act. These rules have a broad and substantial impact on employer wellness programs that make any sort of disability-related inquiry, which includes health risk assessments, and medical examinations or screenings, including biometric screenings.

Both rules go into effect on July 18, 2016, and employers must comply as of the first day of their plan year beginning on or after January 1, 2017.

Read more about the wellness program regulations.

IRS-SSA-CMS Data Match

Many employers have likely received a letter from the IRS-SSA-CMS Data Match Program in the past few months, due to increased funding for the program. Congress enacted a law in 1989 to provide the Centers for Medicare & Medicaid Services (CMS) with better information about Medicare beneficiaries' group health plan coverage. The law requires the Internal Revenue Service (IRS), the Social Security Administration (SSA), and CMS to share information that each agency has about

whether Medicare beneficiaries or their spouses are working. The process for sharing this information is called the IRS-SSA-CMS Data Match. The purpose of the Data Match is to identify situations where another payer may be primary to Medicare.

Employers are required to provide CMS with information regarding health coverage of their Medicare-eligible workers and spouses of Medicare-eligible individuals whenever CMS identifies those individuals to the employer.

Read more about the IRS-SSA-CMS Data Match program.

Question of the Month

Q. How does an ALE determine whether or not a newly hired variable hour employee should be offered benefits?

A. The answer depends on how the applicable large employer (ALE) is measuring its regular or ongoing workforce. If the employer uses the monthly method to track its ongoing employees, it would offer a variable hour employee benefits within 90 days and by the first of the fourth month after an employee averaged 30 hours a week or more, and for every month after that the employee was full time.

If the ALE uses the measurement and look-back method for its ongoing employees, it can use the special "initial measurement period" option for newly hired variable hour employees.

To use the variable-hour look-back option:

- An "initial measurement period" of three to 12 months must be chosen
- The stability period must be the same length as the stability period for ongoing employees
  - For new employees determined to be full-time, it must:
    - be at least as long as the initial measurement period
    - be at least six months long
  - For new employees determined not to be full-time, it must **not**:
    - be more than one month longer than the initial measurement period
    - exceed the remainder of the standard measurement period, plus any associated administrative period, in which the initial measurement period ends

Example: Because XYZ Company uses a 12-month stability period for ongoing employees, it must use a 12-month stability period for new hires. XYZ chooses an initial measurement period of 12 months for new variable hours and seasonal employees. Sally is hired May 10, 2015. Sally works in the after-school program, so she will work a few hours a day during the school year and as many as 50 hours per week during school vacations. She is on-call if the school closes due to bad weather. XYZ tracks Sally's hours from May 10, 2015, to May 9, 2016, and determines she averaged 32 hours per week during that time. Sally is offered coverage as of June 1, 2016. XYZ does not owe a penalty for Sally during the entire 12-month initial measurement period, even though it was more than the three-month period generally allowed and she actually averaged more than 30 hours per week because of this special option for variable employees.

Note: If an employer uses a three-month measurement period and needs to use a six-month stability period because the employee is full-time, the next measurement period (plus administrative period) must be adjacent to the end of the stability period.

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