Employer Considerations When Offering Health Coverage under the SCA or DBA

Employers that are subject to the McNamara-O'Hara Service Contract Act (SCA), Davis-Bacon Act (DBA), and Davis-Bacon Related Acts (Related Acts), and who are considered an applicable large employer (ALE) under the Patient Protection and Affordable Care Act (ACA) must ensure that they meet the requirements of all three acts, despite the fact that the interplay between them can be confusing and misunderstood. The Department of Labor has provided guidance for these employers based on two U.S. Department of Labor (DOL) documents: its December 28, 2015, Notice 2015-87 (DOL Notice) and its March 30, 2016, All Agency Memorandum Number 220 (DOL Memo).

The DOL Notice and DOL Memo give guidance on the interaction between the SCA's and DBA's fringe benefit requirements and the ACA's employer shared responsibility provisions.

What are the SCA's general wage and fringe benefit requirements?

The SCA generally requires that workers employed on federal service contracts greater than $2,500 be paid prevailing wages and fringe benefits. For some SCA contracts, the required wages and fringe benefits are provided in the predecessor contract's collective bargaining agreement. However, for most SCA contracts, the DOL Wage and Hour Division (WHD) makes area-wide wage determinations regarding wages and fringe benefits based on Bureau of Labor Statistics Employment Cost Index data.

The SCA monetary wage must be paid in cash and cannot be satisfied by fringe benefits. The required SCA health and welfare amount is currently $4.27 per hour; this amount can be paid in benefits, cash equivalent of benefits, or both. Health coverage is one type of fringe benefit that may be provided to satisfy SCA requirements.

What are the DBA's general wage and fringe benefit requirements?

he DBA generally requires that workers employed on federal construction contacts greater than $2,000 be paid prevailing wages. Under laws known as the Davis-Bacon Related Acts, the DBA's requirements also apply to construction projects that are assisted by federal agencies through grants, loans, loan guarantees, insurance, and other methods.

The DBA and the Davis-Bacon Related Acts (collectively, DBRAs) require that covered workers receive a prevailing wage which is both a basic hourly rate of pay and any fringe benefits found to be prevailing.

The WHD makes DBRA wage determinations, including fringe benefit determinations, based on locally prevailing wages. Under the DBRAs, a covered employer can satisfy its basic hourly rate obligation by paying fringe benefits. Health coverage is one type of fringe benefit that may be provided to satisfy DBRA requirements.

What are the employer shared responsibility provisions?

Under the ACA, the employer shared responsibility provisions require an employer with an average of at least 50 full-time employees (including full-time equivalent employees) during the previous year (an applicable large employer or ALE) to:

- offer its full-time employees and their dependents health coverage that is affordable and provides minimum value; or
- pay the Internal Revenue Service (IRS) if the employer does not offer this coverage and at least one full-time employee receives the premium tax credit for purchasing health insurance through the Exchange.

For a calendar month, a full-time employee is defined as a person employed on average at least 30 hours of service per week or 130 hours of service per month. An ALE is not required to offer health coverage to part-time employees to avoid an employer responsibility payment.

An employer may be subject to one of two types of payments, but not both types of payments.

1. An ALE is subject to an annual payment of $2,000 (adjusted for inflation to $2,160 for 2016) for each full-time employee (after excluding the first 30 full-time employees from the calculation) if the ALE does not offer minimum essential coverage to at least 95 percent of its full-time employees and their dependents and at least one full-time employee receives the premium tax credit for purchasing health insurance through the Exchange.
2. An ALE is subject to an annual payment of $3,000 (adjusted for inflation to $3,240 for 2016) for each full-time employee who receives the premium tax credit for purchasing coverage through the Exchange. The amount of this payment can never exceed the potential amount of the employer shared responsibility payment described in item 1 above.

How does an employer meet the ACA and either the SCA or DBRAs requirements?

An employer subject to the ACA and either the SCA or DBRAs must comply with each law. The ACA does not alter or supersede the SCA or DBRAs. Each of the laws is separate and independent.

As a practical matter, an employer subject to each of these laws must satisfy all the requirements of each applicable law. For instance, an employer who is in compliance with the ACA's employer shared responsibility provisions may not necessarily be in compliance with the SCA's or DBRA's provisions, and vice versa.

To help employers meet their responsibilities under the ACA, SCA, and DBRAs, the DOL provides the following answers.

Employers' contributions toward health coverage can be credited toward the payment of fringe benefits under the SCA and DBRAs.

Under the law, employers may not receive credit toward their SCA or DBRA obligations for any benefits that they are already required to provide under any federal, state, or local law. Prior to the recent DOL Notice and DOL Memo, it was unclear whether health coverage provided by an ALE would be considered a benefit required by law and not creditable toward the employer's obligations under the SCA or DBRAs.

According to the WHD, health benefits provided by employers who are subject to the employer shared responsibility provisions are **not** benefits required by law within the meaning of the SCA and DBRAs.

Here is the WHD's reasoning: Because no employer is required to purchase or pay its employees' health coverage under the employer shared responsibility provisions of the ACA, health coverage purchased or paid for by ALEs is not a benefit required by law. Thus, the WHD will permit ALEs to credit their contributions to bona fide health coverage plans toward the satisfaction of SCA or DBRA fringe benefit obligations.

Employer shared responsibility payments to the IRS may not be credited toward SCA and DBRA obligations.

Under the SCA, fringe benefits must either be provided in cash, through a plan whose primary purpose is "to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement illness, medical expenses, hospitalization, supplemental unemployment benefits, and the like," or under some circumstances, through an enforceable commitment by the employer to provide such benefits to its employees. Under the DBRAs, fringe benefit contributions must provide a direct, specific benefit to the employee in question.

Because an employer's shared responsibility payment to the IRS does not meet the fringe benefit requirements above under the SCA or DBRAs, the payment cannot be credited toward SCA or DBRA fringe benefit requirements.

An employer must furnish fringe benefits under the SCA or DBRAs to employees who decline an employer's offer of employer health coverage.

Under the SCA and DBRAs, the employer may choose how it satisfies its fringe benefit obligations pursuant to the applicable wage determination. The employer may choose the fringe benefits to provide and is not required to obtain an employee's concurrence before contributing to a fringe benefit plan, such as a health plan, on the employee's behalf.

Similarly, under the employer shared responsibility provisions, an ALE is not required to provide its employees with an opportunity to decline health coverage if the coverage provides minimum value and costs no more than 9.5 percent (adjusted annually) of the federal poverty level (determined on a monthly basis). However, if the coverage does not provide minimum value or is not affordable, then the ALE is not treated as having made an offer of coverage unless the employee has an opportunity to decline to enroll.

The SCA and DBRAs require that wage and fringe benefits be furnished to employees, not merely offered to employees. Practically speaking, for an employer covered by the SCA or DBRAs, if some employees decline the employer's offer of health coverage and the employer does not purchase or cover the cost of health coverage for those employees, then the employer must still satisfy its SCA or DBRA obligations through some other means, either in cash or by providing some other bona fide fringe benefit.

Employer fringe benefit payments will be treated as reducing the employee's required contribution for participation in that eligible employer-sponsored plan for purposes of the employer shared responsibility payment.

Employer fringe benefit payments (including flex credits or flex contributions) under the SCA or DBRAs that are available to employees covered by the SCA or DBRAs to pay for coverage under an eligible employer-sponsored plan (even if alternatively available to the employee in other benefits or cash) will be treated as reducing the employee's required contribution for participation in that eligible employer-sponsored plan for purposes of the employer's shared responsibility provisions under section 4980H(b), but only to the extent the amount of the payment does not exceed the amount required to satisfy the requirement to provide fringe benefit payments under the SCA or DBRA.

For these same periods, an employer may treat these employer fringe benefit payments as reducing the employee's required contribution for purposes of reporting under section 6056 (Form 1095-C), subject to the same limitations that apply for purposes of the employer shared responsibility penalty under section 4980H(b).

The U.S. Department of the Treasury and the IRS encourage employers to treat these fringe benefit payments as not reducing the employee's required contribution for purposes of reporting offers of health insurance coverage under section 6056.

If an employee's required contribution is reported without reduction for the amount of the fringe benefit payment and the employer is contacted by the IRS concerning a potential assessable payment relating to the employee's receipt of a premium tax credit, the employer will have an opportunity to respond and show that it is entitled to the relief to the extent that the employee would not have been eligible for the premium tax credit if the required employee contribution had been reduced by the amount of the fringe benefit payment or to the extent that the employer would have qualified for an affordability safe harbor if the required employee contribution had been reduced by the amount of the fringe benefit payment.

For purposes of premium credit assistance and the requirement to maintain minimum essential coverage, individual taxpayers are not required to take these amounts into account as reducing the employee's required contribution.

Because employers are permitted to report a lower amount as the employee's required contribution, employees who enrolled in coverage through the Marketplace, who did not receive the benefit of advance payments of the premium tax credit, but whose household income is in the range for premium tax credit eligibility, may need additional information from their employers regarding their required employee contribution to determine whether they may claim the premium tax credit.

The Treasury and the IRS encourage employers using the section 6056 relief described above to notify employees that they may obtain accurate information about their required contribution using the employer contact telephone number provided to the employee on Form 1095-C. Without regard to how the employee obtains that information, if the modified required contribution is not affordable for purposes of section 36B and the employee is otherwise entitled to the premium tax credit, the employee may claim it on Form 8692, Premium Tax Credit, which is filed with the employee's annual income tax return (regardless of the required contribution or qualifying offer information reported on that employee's Form 1095-C).

The Treasury and the IRS continue to consider other methods for reporting the amount of the required contribution for employees who are subject to the SCA or DBRAs, including the possible use of indicator codes; however, no such other reporting methods, if ultimately adopted, will be required to be implemented for reporting on plan years beginning before January 1, 2017.

To explain the guidance above, the DOL Notice provides the following illustration.

> **Example.** Facts: Employer offers employees subject to the SCA or DBRA coverage under a group health plan through a section 125 cafeteria plan, which the employees may choose to accept or reject. Under the terms of the offer, an employee may elect to receive self-only coverage under the plan at no cost, or may alternatively decline coverage under the health plan and receive a taxable payment of $700 per month. For the employee, $700 per month does not exceed the amount required to satisfy the fringe benefit requirements under the SCA or DBRA.
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> Conclusion: Until the applicability date of any further guidance (and in any event for plan years beginning before January 1, 2017), for purposes of sections 4980H(b) [employer shared responsibility penalty], and 6056 [employers' reporting of offers of health insurance coverage], the required employee contribution for the group health plan for an employee who is subject to the SCA or DBRA is $0. However, for purposes of sections 36B [premium assistance credit] and 5000A [requirement to maintain minimum essential coverage], that employee's required contribution for the group health plan is $700 per month.
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> (Information in brackets is added for clarity.)

An employer's offer of a health plan that is a bona fide fringe benefit plan under the SCA and DBRAs does not guarantee that the employer will avoid an employer shared responsibility payment under the ACA.

Under the SCA, a fringe benefit is bona fide if it has basic elements such as a written plan, written communication to employees, contributions are made to the plan, the plan's primary purpose is to systematically provide employee benefits payments, the plan has a definite formula for determining contributions and benefits, and contributions must be made irrevocably to a trustee or third party with fiduciary responsibilities.

Under the DBA, a bona fide plan's requirements are not listed; however, benefits funded under a trust or insurance program would usually be bona fide. Further, the bona fide requirement excludes fringe benefits that are illusory or not genuine.

According to the DOL Notice, the WHD anticipates that eligible employer-sponsored plans, as defined by the ACA, will be considered bona fide fringe benefit plans under the SCA or DBRAs.

However, SCA and DBRAs employers who are ALEs must separately determine whether the offer of their bona fide health plans is sufficient to avoid either or both of the potential employer shared responsibility payments, including whether the coverage is affordable and provides minimum value within the meaning of the employer shared responsibility provisions.

There are different rules for crediting the cost of health coverage toward SCA obligations and DBRAs obligations.

Under the SCA, fringe benefits may not be used to offset an employer's monetary wage obligations under any circumstances because the SCA treats wages and fringe benefits as independent requirements. Any health coverage costs (or additional optional coverage costs) that exceed the health and welfare amount listed in an SCA wage determination cannot be credited toward the employer's SCA independent monetary wage obligation. (The only exception is if the employer obtains an employee's consent for payroll deductions from the employee's monetary wage pursuant to employee authorization or collective bargaining agreement.)

Under the DBRAs, the basic hourly wage and fringe benefit components of a wage determination are interchangeable. A DBRAs employer that purchases health insurance for its employees may credit the cost of that insurance toward either of those obligations, or a combination of the two; further, it is permissible for an employer to offset its hourly wage obligation by furnishing fringe benefits.

Employers who offset a portion of the DBRAs hourly wage by furnishing fringe benefits must ensure that the amount of the basic hourly wage paid in cash is not lower than applicable minimum wage rates.

The Fair Labor Standards Act (FLSA) requires that covered employees be paid a minimum wage of $7.25 per hour, and DBA and SCA contracts resulting from solicitations issued on or after January 1, 2015, or awarded outside the solicitation process on or after January 1, 2015, are subject to Executive Order 13658, which establishes a minimum wage of $10.10 per hour, subject to annual increases (for example, an increase to $10.15 per hour effective January 1, 2016). These minimum wage obligations may not be satisfied using fringe benefits.

To explain the guidance above, the DOL Memo provides the following illustration.

> For example, if a DBRA wage determination includes a basic hourly rate of $15.00 and a fringe benefit amount of $2.00 per hour, and the cost of the health insurance plan selected by the employer is $3.00 per hour, then contractor may satisfy its DBRA obligations by paying $14.00 in cash and spending $3.00 on the health coverage plan.
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> Assuming that the employer pays the worker exactly the $17.00 total from the wage determination, it can pay not more than $9.75 ($17.00 - $7.25) total in fringe benefits in order to remain compliant with the FLSA minimum wage, and if the contract is covered by Executive Order 13658, it can pay no more than $6.85 ($17.00 - $10.15) in fringe benefits to remain compliant with the Executive Order.

All employers subject to the SCA and DBRAs may take credit only for the amount of the premium that the insurance issuer charges the employer for each employee.

Under the DBRAs and, in most cases, the SCA, fringe benefit contribution amounts must reflect the actual cost to the employer of the benefits for the employee on whose behalf the contribution is made.

Because the DBRAs require that employers make payments or incur costs in the amount specified by the applicable wage determination with respect to each individual employee, the amount contributed for each employee must be determined, and credit taken, separately toward the prevailing wage requirement for each covered worker. Similarly, most SCA contracts are subject to a requirement that fringe benefits must be tracked on an individual basis.

An employer may not take credit based on the average premium paid or average contribution made per employee.

While many employees may be charged identical amounts due to composite premiums (or composite rating in the large group market), under many circumstances the premiums charges for different employees will vary (for example, individuals age 21 or older and individuals under age 21, tobacco use, etc.).

The amount of SCA or DBRA credit taken for each employee should not exceed the cost of that employee's insurance as charged by the issuer.

In conclusion, an employer who is covered by the ACA and either the SCA or DBRAs must apply each law to determine if the employer meets its fringe benefit requirements and employer shared responsibility provisions. Each law has separate and independent requirements. Compliance with one statute does not mean compliance with the other statute.

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