Compliance Recap | January 2024

Feb. 5, 2024

January was a relatively quiet month on the employee benefits compliance front. The Wage and Hour Division of the Department of Labor (DOL) introduced a new rule laying out the guidelines employers can follow to determine how to classify workers. The DOL also released Part 64 of its FAQs about Affordable Care Act (ACA) Implementation, to address coverage for preventive services and contraceptives and provide guidance on reasonable medical management techniques for contraception. California's Labor Commissioner updated its FAQs to reflect changes to the Healthy Workplaces Healthy Families Act (HWHFA), including the mechanics of accumulation, carry over, and use of benefits. New York Governor Kathy Hochul proposed an expansion of the state's paid family leave to include time for prenatal medical appointments.

New Employee Classification Rule

In January, the Department of Labor (DOL) Wage and Hour Division introduced a rule that changes the way workers are classified under the Fair Labor Standards Act (FLSA). This Final Rule, effective March 11, 2024, offers a more comprehensive test to determine a worker's status, potentially making it more challenging to classify workers as independent contractors for FLSA purposes. The rule is limited to FLSA wage and hour requirements and does not impact rules related to retirement or health and welfare benefits, which are typically governed by ERISA and the Internal Revenue Code. However, this change could lead to confusion and possibly claims for benefits. Under the federal FLSA, employees are entitled to minimum wage, overtime pay and other benefits. Independent contractors are not entitled to such benefits, but generally have more flexibility.

The rule establishes a test examining six key factors:

1. Opportunity for profit or loss
2. Investments by the worker and employer
3. Permanence of the work relationship
4. Degree of control
5. Extent to which work is integral to the employer's business
6. Worker's skill and initiative

These factors guide the assessment but are not exhaustive and none carry greater weight. This broadened definition under the FLSA could lead to more independent contractors being classified as employees for FLSA purposes. The DOL has provided Fact Sheet 13 to assist in the proper classification of workers.

The reclassification of workers as employees under the FLSA could have significant implications, particularly regarding employee benefits. For retirement benefits, this could mean an increase in eligible retirement plan participants, affecting employer obligations under plans like 401(k). Changes in FLSA classification may also influence health benefits, potentially increasing employers' obligations under the employer mandate rules. This highlights the importance of careful planning and potential adjustments to existing plans and policies. Moreover, the new rule might trigger additional reporting requirements for employers, especially if they surpass certain thresholds.

Employer Considerations

Employers and HR professionals should understand and adapt to these changes, particularly in the gig economy, where many workers are currently classified as independent contractors. The rule's emphasis on a totality-of-the-circumstances analysis for worker classification requires careful consideration of various economic factors. Given the potential for ongoing regulatory developments and challenges to the rule, it's essential for employers to stay informed and prepare for possible impact on their operations and worker classifications.

Guidance on Coverage for Contraceptives

The Affordable Care Act (ACA) Implementation FAQs Part 64, issued on January 22, 2024, provide guidance on preventive service coverage. Prepared by the Departments of Labor, Health and Human Services, and the Treasury, they aim to enhance understanding and compliance with the law and specify that non-grandfathered health plans must cover certain preventive services without cost-sharing. These services include recommended immunizations, preventive care for infants to adolescents, and additional preventive care for women. The guidelines allow plans to use reasonable medical management techniques to determine coverage limitations for services not explicitly detailed in recommendations.

The FAQs also detail the coverage of contraceptives and contraceptive care and advocate for comprehensive contraceptive care for adolescent and adult women, including a wide range of FDA-approved contraceptives and family planning practices. Plans and issuers are required to cover contraceptive services and products deemed medically appropriate by a patient's provider. The guidelines also address the use of reasonable medical management techniques within contraception categories.

Despite these clarifications, the FAQs acknowledge ongoing barriers to accessing contraceptive coverage without cost-sharing. They outline examples of potentially unreasonable medical management techniques, such as excessive step therapy protocols, age-related restrictions, and burdensome administrative requirements in exceptions processes. The Departments emphasize the need for an expedient and transparent exceptions process to ensure coverage of medically necessary contraceptive services and products.

Finally, the FAQs introduce guidance on a therapeutic equivalence approach that plans and issuers may adopt. This approach, combined with an accessible and expedient exceptions process, aims to comply with the requirements regarding contraceptive coverage. This approach would support the coverage of contraceptive drugs and devices, facilitating better access to contraception without cost-sharing.

Employer Considerations

Individuals who have concerns about their plan's or issuer's compliance with the contraceptive coverage requirements may contact the Department of Labor (DOL) via its website or toll free at 1-866-444-3272.

California Sick Leave FAQs

California's Labor Commissioner updated its FAQs to reflect changes to the Healthy Workplaces Healthy Families Act (HWHFA) that are effective January 1, 2024. These amendments include an increase in the amount of leave employees can accumulate, carry over, or use. The updates also provide guidance on the accrual-based or frontloading methods for compliance and clarify that employers can ask for documentation to substantiate leave but cannot deny leave solely based on a lack of medical certification.

The new amendment impacts employees covered by collective bargaining agreements (CBAs) in specific ways. Beginning January 2024, these workers can use paid leave for similar reasons as others under the HWHFA, without the need to find a replacement worker. They are also protected under the law's anti-retaliation provisions. However, the FAQs are unclear as to the way the changes align with CBAs' arbitration provisions.

Employer Considerations

California employers must review and revise their paid sick and safe leave policies to comply with these changes and are required to display a poster in an area frequented by employees where it may be easily read during the workday.

The workplace posting must state:

- That an employee is entitled to accrue, request, and use paid sick days
- The amount of sick days provided for and the terms of use of paid sick days
- That retaliation or discrimination against an employee who requests paid sick days or uses paid sick days or both is prohibited
- That an employee has the right under this law to file a complaint with the Labor Commissioner against an employer who retaliates or discriminates against an employee

New York Proposed Paid Family Leave Expansion

New York Governor Kathy Hochul has proposed an expansion of the state's paid family leave law to include 40 hours of paid leave for prenatal medical appointments. This initiative, aimed at improving maternal and neonatal health, would make New York the first state to offer such coverage. The proposal is part of a broader

effort to address rising maternal mortality rates, particularly among Black women, and to reduce unnecessary cesarean section births. New York already offers four months of paid leave; however, those benefits are unavailable until four weeks before birth. The proposed changes reflect a growing recognition of the importance of prenatal care and the need to address disparities in maternal health outcomes.

Employer Considerations

Until this proposed expansion becomes law, employers in New York can ensure their familiarity with current law and required disclosures.

Question of the Month

Q. Should veterans be excluded from the full time equivalent (FTE) count for determining if an employer is considered an applicable large employer (ALE)?

A. If the veteran employees have Tricare or receive health insurance through the Department of Veterans Affairs, they do not count for purposes of determining whether an employer is an applicable large employer.