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Changes Coming to the EEO-1 Report: Check Your Payroll Now

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After years of anticipation, the U.S Department of Labor has released the revised regulations affecting certain kinds of employees who may be treated as exempt from the federal Fair Labor Standards Act's overtime and minimum-wage requirements. If you currently consider any of your employees to be exempt "white collar" employees, you might have to make some sweeping changes.

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Employer Exchange Appeals

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ACA Reporting Error Messages: Handling Missing and Incorrect TINs

One of the more troublesome issues for employers filing under the Affordable Care Act electronic returns system has been the "accepted with errors" and "AIRTN500" messages from the IRS, indicating an issue with a Social Security number or Taxpayer Identification Number listed on the Form 1095-C or 1095-B filed by the employer.

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New ACA Reporting Guidance

Just as employers are settling down after a hectic and often frustrating year of Affordable Care Act reporting compliance, the IRS is gearing up for next year, and just released the 2016 draft forms and instructions. Employers should spend a few moments becoming familiar with the proposed changes and clarifications since early preparation is key to successful (and less stressful) reporting.

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Changes Coming to the EEO-1 Report: Check Your Payroll Now

The Equal Employment Opportunity Commission (EEOC), in coordination with the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), has proposed changes to the Employer Information Report (EEO-1) affecting the 2017 reporting cycle. The proposal would require employers to report employee W-2 wage data and number of actual hours worked. The change would impact all employers with 100 or more employees, not just federal contractors. This second proposed revision, issued July 14, 2016, is based on public comments received from the initial proposal earlier in 2016.

Currently, the EEO-1 form requires employers to report employees grouped by job category, race, ethnicity, and sex. The proposal would add a second section to the form requiring employers to report employees by pay band (for example, less than $19,239, $19,240 to $24,439, $24,440 to $30,679, etc., up to $208,000 and over), as well as total hours worked for each of the ten job categories.

Although EEO-1 reports historically have been due no later than September 30, the EEOC proposal would extend the 2017 reporting deadline to March 31, 2018. The additional time would enable employers to use already compiled 2017 W-2 wage data to complete the report.

The EEOC assures employers that it intends to keep the information confidential to the extent permitted by law under the Trade Secrets Act and exceptions to the Freedom of Information Act (FOIA). The information will, however, be used to publish industry-specific aggregate data.

The proposed changes will allow the EEOC to more easily identify pay disparities and potential discrimination. The agency will also easily be able to identify pay outliers based on comparisons from others in the industry.

Employers who need to access multiple systems to complete the proposed EEO-1 form may need to budget for additional costs associated with the new reporting requirements. Likewise, employers should consider whether to change current systems and practices for increased efficiency. Software vendors likely will be preparing new system updates and releases which could cost employers more money.

Finally, employers should begin reviewing compensation data now to identify whether pay disparities exist and whether those disparities can be justified by legitimate non-discriminatory explanations. In the event compensation changes may be needed, employers should carefully consider and plan for an appropriate implementation strategy – likely with the assistance of skilled employment law counsel. Employers should consider including legal counsel to conduct compensation audits to allow for the protections of the attorney-client privilege.

The EEOC will take public comments on this second proposed rule until August 15, 2016. The final rule will be published sometime thereafter.

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Impact of Telemedicine on HSA Eligibility

One of the hottest benefit trends in 2016 is the adoption of free or low cost "telemedicine" programs to provide employees easy and affordable access to medical care. However, employers adopting these programs alongside high deductible health plans (HDHPs) need to be sure that they do not inadvertently disqualify the covered employees from eligibility for a health savings account (HSA).

The term "telemedicine" generally refers to health-related services delivered over the telephone or internet to employees and covers services ranging from non-specific wellness information about health conditions to primary care diagnosis and advice with prescription drug services. The employee's cost for such services also varies and may consist of a charge on a "per-use" basis, or a monthly or annual fee for access. In many cases, employers are subsidizing the cost of the services or offering the services free of charge to encourage usage, which could create issues for employees with HSA coverage.

An HSA allows participants to defer compensation on a pre-tax basis for the purpose of paying eligible medical expenses if the participant is covered under an HDHP. In addition, the HSA participant must not be covered under any "disqualifying coverage." Disqualifying coverage includes any health coverage that provides a benefit before the HDHP deductible is met and is often referred to as "first dollar coverage." The IRS rules allow an exception from the first dollar coverage prohibition for certain types of coverage, including "permitted insurance" (for example, workers' compensation, specified disease or illness insurance, per diem hospital benefits), "excepted benefits" (such as stand-alone dental or vision benefits), preventative care services, certain employee assistance programs (EAPs), and discount card programs allowing employees to receive discounted health services at managed care rates if the employee must pay for the balance until the HDHP deductible is met. Telemedicine programs that fall under one of the above categories will not prevent an individual from contributing to an HSA.

However, many telemedicine programs go beyond providing preventative care or EAP benefits and do not fall within the permitted insurance or excepted benefits categories. Thus, a telemedicine benefit could count as disqualifying coverage, for example, if the employer pays a portion of the cost of a telemedicine consultation, or the participant pays less than fair market value for access to the consultation, before meeting the HDHP deductible. Any telemedicine program providing primary care or prescription drug services in particular would likely trigger IRS scrutiny unless the employer can establish that the cost passed on to participants is the fair market value for the services. Although the IRS has not yet weighed in on the impact of telemedicine programs on HSA benefits, employers that sponsor HDHPs and telemedicine programs should consider the risks of potential HSA disqualification with legal counsel to ensure employees are not subjected to unintended income and excise taxes for participating in disqualifying coverage.

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New FLSA Exemption Rules: Should You Take Advantage of the New Commission Provision?

After years of anticipation, the U.S Department of Labor (DOL) has finally released the revised regulations affecting certain kinds of employees who may be treated as exempt from the federal Fair Labor Standards Act's (FLSA) overtime and minimum-wage requirements. If you currently consider any of your employees to be exempt "white collar" employees, you might have to make some sweeping changes.

In brief, the following changes will be made in DOL's definitions of executive, administrative, professional, computer-employee, and highly compensated exemptions under the FLSA's Section 13(a)(1):

- The minimum salary threshold is increasing to $913 per week, which annualizes to $47,476 (up from $455 per week, or $23,660 per year).
- This amount will now be "updated" every three years (meaning that it will likely increase with each "update"), beginning on January 1, 2020. The DOL will announce these changes 150 days in advance.
- Employers will be able to satisfy up to 10 percent of this new threshold through nondiscretionary bonuses and other incentive payments, including commissions, provided that the payments are made at least quarterly. This crediting will not be permitted as to the salaries paid to employees treated as exempt "highly compensated" ones. We discuss this in more detail below.
- The total-annual-compensation threshold for the "highly compensated employee" exemption will increase from $100,000 to $134,004 (which will also be "updated" every three years).

These rules will become effective on December 1, 2016, which is considerably later than had been thought. While one or more challenges to the revision may be successful, the prospects of a wholesale clawback before that date is unlikely. Employers should act now.

The Significance of What Has Changed

Essentially, the DOL is doubling the current salary threshold. While this is the change requiring immediate attention, perhaps the more significant change in the long term is the anticipated adjustments in this regard going forward. For the first time, the DOL will publish what amounts to an automatic "update" to the minimum salary threshold for these exemptions.

Another “change” that the DOL has made much of is the “crediting” of some nondiscretionary bonuses and other incentive payments to satisfy up to 10 percent of the new salary threshold amount. While this might be a useful option in some situations, employers must remember that it is not an alternative to meeting the $913 threshold. At least $821.70 per week must be met every pay period and the employer still must ensure that the remaining $91.30 per week is met for each quarter. In other words, the employer is simply paying the 10 percent from another bucket. Moreover, should an employee's qualifying incentive pay fall short, the employer must go back and pay overtime for that quarter, which requires accurate hours worked records.

Many employers have been excited about this new provision. However, an employer looking to meet the new salary threshold without increasing an employee's pay overall would likely be better served by reducing the incentive pay going forward (for example, paying a lower commission percentage) to internally offset the increased salary payment. If an employer instead wants to rely on commissions or other incentive pay to meet the salary-basis amount, it might consider whether a traditional "draw" plan, under which the $913 per week threshold is met each pay period, would meet its needs. Employers should consult with legal counsel to determine which of these options fits best for its particular circumstances, including whether such a pay structure is both (1) designed in compliance with state law requirements and (2) not outweighed by the administrative burden of implementing and monitoring the same. In sum, while taking advantage of the 10 percent commission provision seems enticing, many employers find that the actual mechanics of such a program may be more burdensome than initially imagined.

What Has Not Changed

The DOL had asked for comments directed to whether there should be a strict more-than-50-percent requirement for exempt work. The agency apparently decided that this was not necessary in light of the fact that “the number of workers for whom employers must apply the duties test is reduced” by virtue of the salary increase alone. Accordingly, the DOL did not change any of these exemptions’ requirements as they relate to the kinds or amounts of work necessary to sustain exempt status (commonly known as the “duties test”).

There are several other exemptions that have not changed, including the outside-salesperson exemption (from minimum wage and overtime) and the exemptions from overtime only. For example, the widely relied-upon exemptions commonly referred to as the 7(i) commissioned retail-employee exemption, the 13(b)(10) exemption applicable to certain dealership employees, and the 13(b)(1) exemption for certain motor carrier employees, all remain intact. Although these exemptions have not changed, please keep in mind that they are from overtime only (minimum wage and timekeeping requirements still apply) and each has its own nuances.

What Should You Do Now?

Right now, you should be:

- analyzing whether the requirements for the “white collar” exemptions you have been relying upon are met;
- evaluating what might be changed about one or more jobs so that the incumbents may be treated as exempt in the future;
- even if the incumbents meet the duties requirements of an exemption, considering whether a salary increase will be necessary and, if so, whether that approach would be undesirable in the long run as the FLSA’s salary threshold continues to increase;
- considering the possible application of alternative FLSA exemptions; and
- developing FLSA-compliant pay plans for employees who have been treated as exempt but who no longer will be.

In particular, employers should conduct this analysis now so that it has time to announce, and possibly even implement, its changes in advance of December 1. For example, some states require a specific amount of advance notice before changing pay terms. Moreover, for many employees Thursday, December 1, will fall in the middle of a workweek and pay period. Accordingly, some consideration should be given to making the change itself well in advance of December 1 to eliminate the burden of running payroll for an employee being paid at two different rates or with two different pay structures. At the same time, making the changes in November might require an employer to evaluate how this will affect an employee's schedule or pay for the Thanksgiving timeframe. How these and similar factors affecting the transition should be addressed will vary by employer, and likely even by position and state.

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Employer Exchange Appeals

Over the last few months, employers have been receiving notices from the Federal Health Insurance Marketplace/Exchange regarding employees who applied for Exchange coverage and were determined eligible for a tax subsidy to defray part of the cost. These notices offer employers a first line of defense against penalties under the Affordable Care Act's employer mandate. Employers receiving an Exchange Notice should act immediately to determine whether an appeal is appropriate as the deadline for appealing notices issued in July is quickly approaching.

As background, the Affordable Care Act (ACA) imposes penalties on applicable large employers (ALEs) who do not offer affordable and minimum value coverage to employees. Generally, if an ALE has made an offer of affordable, minimum value coverage to an employee, the employee should not be eligible for a tax credit or subsidy. If an employee, mistakenly or not, applies for a tax credit or subsidy, an employer who did make an offer of coverage to the employee may receive an Exchange Notice. While only the Internal Revenue Service (IRS) can actually assess a penalty for failing to offer affordable, minimum value coverage, appealing an Exchange Notice may be an opportunity for an employer to avoid an IRS inquiry or penalty assessment down the road if it is determined the federal assistance was awarded in error based on the employer's appeal.

The deadline for appealing the Exchange Notice is 90 days after the date of the notice. If an employer receives a notice for a part-time employee who was not offered coverage, it is important to confirm the hours the employee actually worked using the guidance provided by ACA regulations. Any ALE who receives a notice for a full-time employee who was offered coverage should proceed with an appeal as soon as possible.

Employers should take into account all ACA guidance when preparing an appeal, including guidance on how to determine affordability taking into account wellness programs and opt-out payments. Because the employee will have a compelling financial incentive to avoid paying back the subsidy, it is critical to prepare a comprehensive appeal supported by strong evidence, including evidence that the employee was actually offered coverage. Examples of the documentation needed include pay stubs from an employee electing the lowest cost minimum value coverage offered to the employee to establish affordability, the Summary of Benefits and Coverage stating the plan provides minimum value (or attestations of minimum value from the carrier, third-party administrator or a CPA), open enrollment materials, election forms and a written waiver of coverage showing the offer was made and rejected, and copies of the employee's most recent paystub and W-2 to establish affordability.

In some cases, an appeal is not necessary. For example, if the employer did not make an offer of affordable, minimum value coverage to an employee, no appeal is required. In addition, an appeal is optional if the employer is not subject to penalties with respect to an employee that obtained a premium subsidy, either because the employee is part-time or the employer is a non-ALE. Whether to appeal in this case is a business decision and employers may want to discuss their options with legal counsel. In all cases, however, employers should remember that it is a violation of the ACA to take any adverse action against an employee who applies for and receives a premium subsidy on the Exchange.

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ACA Reporting Error Messages: Handling Missing or Incorrect TINs

Beginning in 2015, it first became mandatory for applicable large employers (ALEs) and self-insured employers of any size to comply with the Affordable Care Act (ACA) reporting requirements in Internal Revenue Code (IRC) Sections 6055 and 6056. For ALEs with more than 250 employees, the reporting is required electronically through the Affordable Care Act information returns (AIR) system, though many smaller employers relying on third parties for reporting also used AIR. One of the more troublesome issues for employers filing under the AIR system has been the "accepted with errors" and "AIRTN500" messages from the IRS, indicating an issue with a Social Security number (SSN) or Taxpayer Identification Number (TIN) listed on the Form 1095-C or 1095-B filed by the employer.

There are many reasons why an employer may receive this error notice with respect to an employee or dependent. First and foremost, the employer may have left off a digit or incorrectly entered the information, and confirmation that the form is properly completed should be the first step in addressing the error message. Of course, many employers are concerned with the possibility that a TIN may be invalid even though the employer has filed Form W-2s for an employee for years with the same TIN and never received an error message. However, an error message could be generated simply due to the way the AIR system matches TINs with the first four letters of an employee's or dependent's name, which appears to be particularly problematic with Hispanic names that may be hyphenated or are preceded with "de la," which the AIR reportedly assumes are the first four letters of the last name.

Employers who are required to file IRS Form 1095-C or Form 1095-B are subject to penalties for failure to promptly correct information on returns and for failure to furnish correct statements to individuals in a timely manner. This correction is required even though the error message indicates that the filing was "accepted." Although the IRS has stated that the "AIRTN500" error messages are not formal notices of penalties or proposed penalties, this does not mean the IRS will not later assess penalties – as much as $260 per incorrect or incomplete form – if the employer does not follow the proper solicitation procedures and establish that the failure was due to reasonable cause and not willful neglect.

Mismatched TIN

Assuming an employer has a TIN for its employee that has been used previously for tax reporting purposes, the employer has generally satisfied the first solicitation requirement under the proposed regulations. Note that the proposed regulations instruct reporting entities filing a "mismatched" TIN to use a modified version of the general TIN solicitation procedures which were previously released in Notice 2015-68. These rules require employers to conduct an advance solicitation during the initial plan enrollment, or if the individual is already enrolled as of September 17, 2015, during the next open enrollment season. It then calls for a second solicitation at a "reasonable time" thereafter, and a third solicitation by December 31 of the year following the first solicitation.

One area of confusion generated from the proposed regulations is that the filer is not required to make an initial solicitation if the filer has the TIN of the employee and has used that TIN for other information returns. The regulations then provide that no further solicitation is required with respect to such individual unless the employer is notified by the IRS or, in some cases, by a broker, that the TIN is incorrect. Hopefully, the final regulations will clarify whether the AIRTN500 message is considered notice that the TIN is incorrect for purposes of the solicitation requirement. A contrary interpretation of the regulations is that additional solicitation is only required for a mismatched TIN if the employer receives a specific penalty notice from the IRS (Notice 972CG, for example) regarding the TIN.

However, because penalties for failures to report correct information increase as time goes on, employers should consider proceeding with the solicitation process outlined above for mismatched TINs based on the AIR error message to establish reasonable cause and ensure success in having penalties waived. Further guidance from the IRS on this issue would be welcome.

The IRS also established a transitional rule for handling returns with missing TINs that treats individuals who were enrolled in coverage prior to July 29, 2016, as if their accounts were opened (that is, as if the individual submitted a substantially complete application for coverage) on July 29, 2016. According to the rule, the initial solicitation is recognized as long as it was requested as part of an application for coverage or at any point before July 29, 2016. A first annual solicitation should occur after a "reasonable time," which is now defined as within 75 days from July 29, 2016. A second annual solicitation should occur by December 31 of the year following the initial solicitation. This means that if you reported no TINs for employees or dependents on ACA forms, you should make the first annual solicitation by October 12, 2016. If you do not receive a TIN after that solicitation, you must solicit the TIN again by December 31, 2017, to show reasonable cause.

When approaching employees in the solicitation process, remember that the ACA is not the only law to consider. Care should be taken to ensure that you are satisfying immigration laws and, in particular, the Information Reform and Control Act, which imposes restrictions on asking employees for specific documents. Any solicitation process should be done in consultation with both your immigration and benefits counsel. If you happen to receive an admission from an employee that he or she is not legally using the provided TIN, you should consult with your attorney regarding the obligation to correct not only the Form 1095-C or 1095-B, but other tax filings such as historic Forms W-2 for that individual. Hopefully, future guidance from the IRS will clarify some of the confusion surrounding correction of the TIN error messages, and employers should stay tuned for updates on this issue.

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New ACA Reporting Guidance

Just as employers are settling down after a hectic and often frustrating year of Affordable Care Act (ACA) reporting compliance, the IRS is gearing up for next year, and just released the 2016 draft forms and instructions. Employers should spend a few moments becoming familiar with the proposed changes and clarifications since early preparation is key to successful (and less stressful) reporting.

As background, applicable large employers (ALEs) must self-report information relevant to IRS assessment of employer shared responsibility penalties on Forms 1094-C and 1095-C, including whether full-time employees were offered (or not offered) minimum value and affordable health coverage. Small employers who offer self-insured plans are considered coverage providers and must also report coverage information for employees and dependents relevant to assessing the individual shared responsibility mandate by filing Forms 1094-B and 1095-B. An ALE that is self-insured is also considered a coverage provider, but reports information relevant to the individual mandate for employees and dependents on Part III of Forms 1094-C and 1095-C. (Note: Health reimbursement arrangements (HRAs) are considered minimum essential coverage for reporting purposes and may require an employer sponsoring an HRA integrated with an insured plan to report coverage as a self-insured employer.)

The more notable updates for employers relate to Forms 1094-C and 1095-C. ALEs reporting on those forms should note the following changes and clarifications.

- **Transition Relief.** In 2015, the IRS provided various transition relief from the Section 4980H requirements to provide affordable and minimum value coverage (ALEs with 50 to 99 full-time equivalent employees (FTEs) were generally exempt, and ALEs with 100 or more FTEs were afforded reduced compliance obligations and penalties). The 2016 Form 1095-C and instructions reflect the expiration of this relief for plan years beginning on or after January 1, 2016, but cautions those employers with non-calendar year plans that may rely on the transition through the last day of the plan year ending in 2016 that reporting is still required for all 12 months. Presumably, this is aimed at small ALEs that mistakenly assumed the transition relief from penalties included transition relief from reporting. The IRS also eliminated the “Qualifying Offer Method Transition Relief” for 2016 reporting, and ALEs may use the Qualifying Offer Method for simplified 1095-C compliance if an employee received a “qualifying offer” for all 12 calendar months.

- **Authoritative Transmittal Clarification.** When an ALE submits more than one transmittal of Forms 1095-C to the IRS, the ALE must file an “authoritative transmittal” that includes data on all of the Forms 1095-C filed for that ALE. This requirement generated a lot of confusion in 2015 for employers that are part of an aggregated ALE (a group of employers under common control) – especially when the ALE members all participated in a common plan with a single ALE member responsible for the reporting. The draft instructions clarify that the “authoritative transmittal” requirement applies on an Employer Identification Number (EIN) basis and should not be used for submitting Forms 1095-C on behalf of more than one ALE member of a controlled group of employers. Thus, each employer with a separate EIN should have a separate Form 1094-C designated as the authoritative transmittal for submitting Forms 1095-C to the IRS. The instructions also clarify how to report employees that transfer between or are shared by ALE members in an aggregated group.

- **Full-Time Employee Definition.** The draft instructions emphasize to employers that when reporting "full-time employees," employers must use the definition of full-time employees in Section 4980H and related regulations regardless, of the employer's classifications of employees under its personnel policies or plan eligibility. Remember that the ACA definition of "full-time" is not always consistent with an employer's eligibility policies for full-time employee benefits.

- **Form 1095-C Coding Changes.** Clarifications and changes to the codes on Form 1095-C have been made, including the addition of Codes 1J and 1K for Line 14 to reflect "conditional offers of spousal coverage," which are offers subject to one or more reasonable, objective conditions such as an offer to make spousal coverage available only if the spouse is not eligible for other coverage.

- **Employee Required Contribution.** A new term, "employee required contribution," is added for Line 15 affordability reporting and generally means the employee's share of the monthly cost for the lowest-cost, self-only minimum essential coverage providing minimum value that is offered to the employee by the ALE member. In determining the employee required contribution, employers need to incorporate IRS guidance regarding the impact of flex credits and opt-out payments that may increase the employee required contribution for affordability purposes.

- **Continuation Coverage.** New COBRA reporting instructions are included for employees who terminated employment. In addition, the instructions clarify that offers of post-employment coverage other than COBRA to a former employee should not be reported as an offer of coverage.

Stay tuned for future updates and issuance of the final forms and instructions for 2016. In the meantime, copies of the proposed 2016 Forms and Instructions are available from the IRS website.

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