Holifield & Associates, PLLC

Legal Update for Employers

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Please make note that as of January 1, 2014, our new mailing address will be:

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As a service to our clients, Holifield & Associates, PLLC periodically issues a newsletter to keep you informed of developments in statutes, regulations, and case law in the field of employee benefits.

If you would like assistance or further information about any of the matters described in this update, please contact us and we will be happy to discuss these issues with you further.

HRAs, FSAs and the ACA: New Guidance from the IRS and DOL

The Internal Revenue Service and the Department of Labor have recently issued guidance affecting health reimbursement accounts (HRAs) and health flexible spending accounts (FSAs).

<u>IRS Notice 2013-54/DOL Technical Release 2013-03:</u> On September 13, 2013, the IRS and the DOL issued new guidance on the effect of the Patient Protection and Affordable Care Act ("ACA") on HRAs and health FSAs. IRS Notice 2013-54 and DOL Technical Release 2013-03 contain important new requirements for HRAs and health FSAs that could require employers to make changes to their existing plans, particularly "stand-alone" HRAs and health FSAs. The guidance also contains new requirements for integration of HRAs and health FSAs with group health plans. The guidance is effective for plan years beginning on or after January 1, 2014.

<u>IRS Notice 2013-71:</u> On October 31, 2013, the IRS issued Notice 2013-71 which modifies the "use-it-or-lose-it" rule for health FSAs. Employers may now allow FSA participants to carry over up to $500 from one plan year to another. This option can be adopted by employers as early as the 2013 plan year by amending their plan documents within specified deadlines.

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Health Reimbursement Arrangements (HRAs)

IRS Notice 2013-54 and DOL Technical Release 2013-03 were released on September 13, 2013, and provide new rules regarding health reimbursement arrangements (HRAs) in light of the ACA. For plan years beginning on or after January 1, 2014, stand-alone HRAs (those not offered in conjunction with a separate group health plan) will no longer be permitted unless they provide benefits to retirees only or provide only excepted benefits, such as dental or vision benefits. For the majority of employers, this means that HRAs must be "integrated" with a group health plan that meets the requirements of the ACA. The guidance provides two methods under which an HRA may be integrated. Which method is used depends on whether the group health plan provides "minimum value" as defined under the ACA.

Minimum Value Not Required:

- The employer must offer a group health plan, other than the HRA, that does not consist solely of excepted benefits. (This group health plan may be offered by a different employer, i.e. a spouse's employer);
- The employees are eligible for the HRA only if they actually enroll in the group health plan;
- Reimbursements under the HRA must be limited to co-pays, co-insurance, deductibles, premiums and medical care that does not constitute essential health benefits; and
- Employees must be allowed to opt out of the HRA at least annually or to permanently opt out and waive all future reimbursements from the HRA.

Minimum Value Required:

- The employer must offer a group health plan, other than the HRA, that provides minimum value under the ACA. (This group health plan may be offered by a different employer, i.e. a spouse's employer);
- The employees are eligible for the HRA only if they are actually enrolled in a group health plan that provides minimum value;
- Reimbursements under the HRA are generally not limited (other than qualifying as a Code Section 213(d) medical expense); and
- Employees must be allowed to opt out of the HRA at least annually or to permanently opt out and waive all future reimbursements from the HRA.

HRAs that are not integrated may continue to exist and pay benefits until existing account balances have been exhausted. However, new amounts may not be added after December 31, 2013. Any amounts added during 2013 must be based on the HRA plan terms in effect on January 1, 2013.

Health Flexible Spending Accounts (FSAs)

Affordable Care Act – new guidance: Beginning January 1, 2014, a health FSA must be offered in conjunction with a group health plan. The IRS and DOL stated in Notice 2013-54 and Technical Release 2013-03 that "stand alone" FSAs (those not offered in conjunction with a group health plan) cannot meet the requirements of the ACA regarding preventive benefits and annual dollar limits. A health FSA that is an "excepted benefit" is exempted from these requirements. In order to be an "excepted benefit" for this purpose two requirements must be met. First, the employer must make other group health coverage available to employees. There is no requirement that the employee actually enroll in the group health plan, just that they be eligible for it. Furthermore, the sponsor of the "other" group health plan does not have to be the same sponsor of the FSA. Therefore, the employee could participate in his employer's FSA and enroll in group health coverage offered by his spouse's employer. The "other" group health plan coverage must meet ACA requirements.

Health Flexible Spending Accounts (FSAs) (Continued from Page 2)

The second requirement for an FSA to be an "excepted benefit" is the maximum benefit under the FSA must not exceed two times the participant's salary reduction election OR, if greater, $500 plus the salary reduction election. Under this test the amount of any employer contribution is tied to the participant's salary reduction election. Assume the FSA plan document states that the maximum salary deferral is $2,500 (beginning in the 2013 plan year, salary reduction contributions to FSAs are limited to $2,500). The maximum amount of the employer contribution is calculated based on the participant's salary reduction election:

Salary deferral election	2 Xs salary deferral	Salary deferral + $500	Employer contribution
250	500	750*	500
500	1000*	1000	500
600	1200*	1100	600
1000	2000*	1500	1000
1200	2400*	1700	1200
1500	3000*	2000	1500
2000	4000*	2500	2000
2500	5000*	3000	2500

*=maximum benefit payable under regulations

As you can see from the chart, once the participant's salary deferrals to the FSA reach $500, the maximum employer contribution is basically a dollar-for-dollar match.

USE-IT-OR-LOSE-IT RULE—NEW GUIDANCE:

On October 31, 2013, the Internal Revenue Service issued Notice 2013-71 that modifies the "use-it-or-lose-it" rule for health FSAs. Under the new guidance, an employer may choose to allow participants in a health FSA to carry over up to $500 of unused FSA funds to the following plan year. Previously, participants who did not "use" all of their FSA balance had to "lose" the unused portion at the end of each plan year. The new rule allows participants to carry over up to $500 of their unused FSA balance to pay for expenses incurred in the following plan year. The amount of any carryover will not affect the maximum amount of salary reduction contributions the participant may elect for a plan year ($2,500 or less as determined by the employer). Employers wishing to implement this new carry-over feature have until the last day of the plan year from which amounts may be carried over to amend their cafeteria plans. For a calendar year plan, if the employer wants to add the carry-over option for the 2014 plan year (meaning unused funds from the 2014 plan year can be carried over to the 2015 plan year), the amendment must be adopted by December 31, 2014. The IRS provided a special rule for the 2013 plan year. Employers that wish to add the carry-over option for the 2013 plan year have until the last day of the plan year that begins in 2014 to adopt an amendment. For calendar year plans this means that employers have until December 31, 2014, to adopt the carry-over option for the 2013 plan year.

DOL AUDITS HAVE SEEN A DRAMATIC INCREASE

Audits by the Department of Labor (DOL) have seen a dramatic increase. In fiscal year 2010, the DOL collected more than $1 billion in fines and hired 700 new agents to enhance enforcement and plan audits. Recently the DOL requested an increase in its budget specifically to fund its audit activities.

The primary focus of these DOL audits falls into four categories:

1. Disclosure under ERISA §408(b)(2), specifically the "reasonable belief" standard that a covered service provider has provided full disclosure of fee information;
2. Implementation of ERISA §404(a)(5) participant level fee disclosures;
3. Timely deposit of elective deferrals and loan repayments; and
4. Fiduciary training for employees acting in a fiduciary capacity.

Misclassifying workers as independent contractors is another area of concern for employers. In recent years a few states have increased enforcement of such violations. In the coming months, employers should monitor proposed rules by the DOL to increase federal fines for such violations. In the meantime, the DOL is expected to place a heavy emphasis on the enforcement and investigation into worker misclassification.

The DOL is also expected to remain aggressive in the enforcement of workers' rights and wage and hour laws. In September 2013, a rule extending minimum wage and overtime protections to home health care workers was finalized. Under this rule, home health care workers will no longer be exempt from the protections of the Fair Labor Standards Act.

Under a proposed rule by the DOL, government contractors may be required to hire more military veterans and people with disabilities. If passed, contractors with at least 50 employees and $50,000 or more in government contracts would be subject to a quota requiring seven percent of their workforce to have disabilities and eight percent to be veterans.

While there is no fail safe way to prevent a DOL audit, employers and plan sponsors can take steps to increase a favorable outcome should they be audited. This can be accomplished through periodic internal audits to review policies and procedures and staying informed on changes in the law.

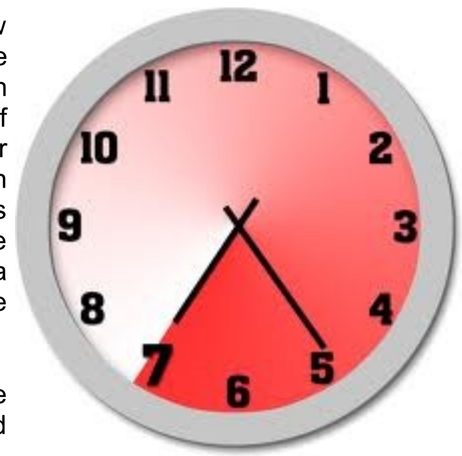
ARE YOU CALCULATING OVERTIME WAGES CORRECTLY?

If you pay your employees regular bonus payments, or other similarly structured payments in addition to the employees' regular pay, please ensure that any overtime wages are calculated in accordance with the information set out below.

Under the Fair Labor Standards Act ("FLSA"), an employer may not employ any employee who works more than 40 hours in any workweek, unless such employee receives compensation for the excess hours worked at a rate not less than one and one-half times the "regular rate" at which he is employed. The "regular rate" at which an employee is employed is defined to include "*all remuneration* for employment paid to, or on behalf of, the employee."

The FLSA does make a few exceptions to what is included in "all remuneration." A few of these exceptions include sums paid as gifts (e.g. Christmas gifts or other special occasions) and payments for vacation, holiday, illness, or other periods of time when no actual work is performed by the employee. However, this exception does not cover payments made pursuant to any contract, agreement, or promise that would cause the employee to expect such payments regularly, regardless of whether the employee knows how much he will actually receive. Furthermore, it does not cover amounts paid that have been determined based on hours of work, production, or efficiency. Therefore, if your employees receive a lump-sum production bonus payment, it will be categorized as general compensation rather than additional hourly compensation.

ARE YOU CALCULATING OVERTIME WAGES CORRECTLY? (Continued from Page 4)



When calculating an employee’s regular hourly rate of pay, federal law requires the *total remuneration for employment* in any workweek be divided by the *total number of hours actually worked* by him or her in the workweek for which such compensation was paid. Even if employees are paid on a piece-rate, salary, commission, or other basis, the overtime compensation due to them must be computed on the basis of the hourly rate derived therefrom. Thus, if your employees are employed solely on the basis of a single hourly rate, the hourly rate is the regular rate. However, if an hourly employee receives a production bonus, the employee’s regular hourly rate must be adjusted.

The following example is used to demonstrate the regular rate calculation used for employees who work overtime hours and are paid at an hourly rate plus a bonus payment.

> Employee X has worked 80 regular hours at $12.00 per hour plus 50 overtime hours. He additionally received a bonus payment of $600.00 at the end of the month based on high production and customer satisfaction. How much overtime pay is Employee X owed? If you calculated his overtime payment to equal $900 ([$12.00 * 1.5] * 50 hours), you have underpaid your employee and will owe him back wages.

To calculate Employee X’s “regular hourly rate,” the Department of Labor mandates you use the following formula:

Calculate the total amount of hours worked:
80 regular hours + 50 overtime hours = 130 total hours

Multiply the total hours worked by Employee X’s hourly rate:
130 total hours * $12.00 per hour = $1,560.00

Add this amount to Employee X’s bonus pay:
$1,560.00 + $600 = $2,160.00

Divide this amount by total hours worked:
$2,160.00 / 130 total hours = $16.62

Employee X’s regular hourly rate is $16.62 per hour. Thus, for 80 regular hours he is entitled to $1,336.80 (80 hours * $16.62 per hour = $1,329.60). In addition, Employee X is entitled to 50 overtime hours calculated at a rate of $24.93 per hour ($16.62 * 1.5), which totals $1,246.50 ($24.93 * 50 overtime hours = $1,246.50). His total pay thus comes to $2,576.10.

We advise all employers to review their payroll practices annually to ensure compliance with applicable wage and hour laws.

Business Law Update

The end of the fiscal year for most businesses is upon us, which brings a time of reflection, organization and revision. In line with the end of the fiscal year, business leaders should review meeting minutes drafted throughout the year to ensure all major decisions and actions taken by the business are appropriately documented. Also, the annual meetings of the shareholders, directors, members, managers and/or governors must be held by year end, or, if no meeting is held, actions taken by written consent must be signed by each shareholder, director, member, manager and/or governor by year end. The annual meetings or actions taken by written consent should include nomination, election or confirmation of board members, directors and other business leaders. Whether your company is private or publicly traded, disclosure requirements, regulations and legal requirements must be strictly followed by directors and business leaders to ensure high fiduciary duties are upheld.

In addition to reflecting on and documenting the major actions of the business for the year, the end of the fiscal year is a time to revisit the structure of the business leadership. Below you will find a few questions to consider in this analysis:

Is there clarity around the roles, responsibilities, and required contributions of directors and leaders within the overall corporate/business structure?

Are board structures and processes in place that help the board and leaders fulfill their responsibilities and reflect the expectations and perspectives of stakeholders?

Does the board appropriately establish—and ensure compliance with—board operating principles and governance policies?

Does the corporate/business governance infrastructure (board and committee structure, leadership responsibilities, practices, governance policies, etc.) allow the board and leaders to operate efficiently?

Is the role of each committee or leader clearly articulated in planning tools to avoid duplication of efforts and support appropriate knowledge-sharing?

Are more routine, compliance-oriented activities given too much time in meetings? Can these be streamlined to allow for more efficient execution of responsibilities?

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