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Benefits and Employment Briefing

A QUARTERLY NEWSLETTER ABOUT EMPLOYEE BENEFITS AND CURRENT ISSUES
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ACA Information Reporting: Collecting Social Security Numbers

During this year, employers will be hearing a lot about the Affordable Care Act's (ACA's) information reporting requirements under Code Section 6055 and 6056. Information gathering will be critical to successful reporting, and there is one aspect of that information gathering you might want to take action on sooner rather than later – collecting Social Security numbers (SSNs), particularly when required to do so from the spouses and dependents of your employees. There are, of course, ACA implications for not taking this step, as well as significant data privacy and security risks.

In general, providers of "minimum essential coverage" must report certain information about that coverage to the Internal Revenue Service (IRS), as well as to persons receiving that minimum essential coverage. This requirement generally applies to insurance companies, as well as to employers that sponsor self-funded group health plans. In addition, certain employers must submit returns to the IRS, and statements to employees, that contain information about the coverage, if any, they provided to those employees. The IRS returns are due February 28, 2016, or March 31, 2016, if filed electronically, and the employee statements for 2015 must be provided by January 31, 2016.

In all of these cases, employers must collect and report *employee* SSNs to the IRS. However, the reporting mandate for employers sponsoring self-funded plans requires those employers to transmit to the IRS both employee *and dependent* SSNs, unless they either (1) exhaust reasonable collection efforts below, (2) or meet certain requirements for limited reporting overall (beyond the scope of this article).

For many employers, collecting SSNs for dependents will be difficult. However, the reporting rules permit employers to use a dependent's date of birth, *only if* the employer was not able to obtain the SSN after "*reasonable efforts*." For this purpose, *reasonable efforts* means the employer was not able to obtain the SSN after an initial attempt, and two subsequent attempts. Employers with self-funded plans that have not collected this information should be planning these efforts during the year, and documenting those efforts.

Obviously, collecting more personal information about individuals enhances the data security risks companies face. Employers also will need to consider whether this information – dependent SSNs or dates of birth – constitutes protected health information under HIPAA, or is within the "employment records" exception to protected health information. Either way, employers need to take steps to safeguard this data. A number of states, such as California, Connecticut, Florida, Maryland, Massachusetts, New York, Oregon, and others require reasonable safeguards be in place to protect such information. Additionally, employers that use vendors to assist them in this process, should be certain to obtain written assurances from those vendors that they will safeguard this information and be prepared to respond in the event of a breach of that data.

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Claiming ACA Premium Tax Credits or Reporting Advance Payment of Credits

Certain taxpayers will be eligible to claim premium tax credits when they file their 2014 tax returns due to enrollment in health insurance through the Health Insurance Marketplace or "Exchange." Other taxpayers received their tax credits in advance of filing their tax returns via discounts applied to their health insurance premiums. The taxpayers in the first situation may receive a credit for a portion of health insurance premiums paid and, consequently, may obtain a tax refund. Taxpayers in the second situation may find, due to a change in their family income or other factor, they were not eligible to receive all the advance of premium tax credits they received. These taxpayers will owe additional income tax when they file their Form 1040 for 2014.

Either way, the new IRS Form 8962 is the mechanism by which the IRS will determine whether a tax credit is owed to the taxpayer or the taxpayer owes back to the United States a portion of the premium discount (or advance premium tax credit) the taxpayer received. The Form 8962 must be filed with any taxpayer's income tax return (i.e., Form 1040, Form 1040A or Form 1040NR) if the taxpayer wants to receive an ACA-related tax credit. The Form 8962 must also be filed by any taxpayer that received an advance payment of premium tax payment in the form of discounted health insurance

premiums paid in connection with health insurance purchased on the Exchange.

How does the taxpayer know whether it is entitled to a tax credit or must declare an advance payment of premium tax? The Exchange must issue a Form 1095-A to each taxpayer who made an application to the Exchange for health insurance coverage for the taxpayer, a spouse or dependent in the 2014 year on or before January 31, 2015. Taxpayers who do not receive Form 1095-A by early February should contact the Exchange where they enrolled for health insurance and request that a Form 1095-A be provided to them.

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Spotlight: Pregnancy Discrimination Act

Late last year, in a controversial move, the Equal Employment Opportunity Commission (EEOC) issued its Enforcement Guidance on Pregnancy Discrimination and Related Issues (Guidance), along with a "Q&A" document about the Guidance and a Fact Sheet for Small Businesses. The Guidance is a huge departure from the EEOC's previous guidance on the Pregnancy Discrimination Act (PDA) and is the first comprehensive update of the EEOC's position on discrimination against pregnant workers since 1983. The Guidance supersedes earlier guidance and addresses the application to pregnant employees of various employment laws passed in the past 30 years, including the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and the ADA Amendments Act (ADAAA).

At the time the EEOC issued its Guidance, two Commissioners – Constance S. Barker and Victoria A. Lipnic – filed statements expressing their dissent from the adoption of the Guidance. Both noted that the substance overstepped existing legal precedents and was a dramatic departure from existing law and prior EEOC guidance, and criticized the agency for not making it available for public review and comment in a move that signaled a lack of transparency.

The Guidance has four parts: Part One discusses the prohibitions of the PDA; Part Two discusses the application of the ADAAA's accommodation and non-discrimination requirements and the definition of disability to pregnancy-related impairments; Part Three discusses other legal requirements affecting pregnant workers, including the FMLA; and Part Four describes "Best Practices" for employers. The more controversial provisions include the EEOC's position that (1) an employer policy of providing light duty only to employees with on the job injuries violates the PDA (a position which dissenting Commissioner Lipnic noted has not been adopted by any federal circuit court); (2) an employer health insurance plan must cover prescription contraceptives on the same basis as prescription medications that prevent medical conditions other than pregnancy; (3) an employer must provide accommodations to an employee with a normal and otherwise healthy pregnancy; and (4) certain employer related inquiries related to employer comments or discussions regarding an employee's pregnancy or potential pregnancy are indicative of discrimination.

In Part Four, the Guidance provides a litany of "Best Practices" which the EEOC concedes "*go beyond* federal non-discrimination requirements," but are suggestions to potentially "decrease complaints of unlawful discrimination and enhance employee productivity." These suggestions include implementing a strong policy against pregnancy discrimination, training managers, responding to complaints promptly and effectively, evaluating restrictive leave policies for any disproportionate impact on pregnant workers, consulting with pregnant workers to develop a plan for covering job duties during anticipated absences, and explicitly stating that reasonable accommodation procedures are available to employees with pregnancy-related impairments. As the dissenters noted, much of the Guidance seems to impose requirements on employers that are not supported by the language of the PDA and/or the ADAAA, and, in some cases, contradict court decisions.

More recently on December 3, 2013, the Supreme Court heard oral argument in *Young v. United Parcel Services, Inc.*, a case that may ultimately address the validity of the recently issued Guidance. The parties argued the question, whether, and in what circumstances, the PDA requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are similar in their ability or inability to work. Questions

from the bench couched the treatment required of employers toward pregnant employees as a "least favored nation" versus a "most favored nation" approach. A decision has not yet been issued and experts indicate that this is a hard one to predict.

In the meantime, employers should still opt to be proactive in light of the Guidance and review their pregnancy, discrimination, leave and disability accommodation-related policies in their handbooks and determine if they adequately address the issues raised in the Guidance. Employers should also similarly review their employment practices. Many times employers are not aware of the various accommodations that are being made at the department level by managers and the danger this can have for setting precedent in light of the Guidance. Employers should also be alert to a decision from the Supreme Court in *Young*, which is anticipated later this year.

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Security Screening Not Compensable Work Time under FLSA

In a unanimous decision reversing the Ninth Circuit, the U.S. Supreme Court held that time spent by warehouse workers undergoing security screenings is not compensable under the Fair Labor Standards Act (FLSA). The Court found the time did not constitute a "principal activity" and was not "integral and indispensable" to the employees' principal work activities. *Integrity Staffing Solutions, Inc. v. Busk*, No. 13-433 (Dec. 9, 2014).

Under the FLSA, an employer does not have to pay an employee for "preliminary" or "postliminary" activities to an employee's "principal activity". Principal activity means all activities that are an "integral and indispensable part of" the employee's job, meaning it is an "intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."

Jesse Busk and Laurie Castro were former employees of Integrity Staffing Solutions, Inc., which provides warehouse space and staffing to its customers. Busk and Castro both worked in warehouses in Nevada picking orders placed by the third party customers. At the end of each day, all employees were required to pass through a security checkpoint and submit to a search, including removal of their keys, wallets, and belts, before passing through a metal detector. This process could take up to 25 minutes. Similarly, up to 10 minutes of the workers' 30-minute lunch period could also be spent in a security check if they left the building.

Busk and Castro filed suit claiming that the time spent in the security checks was work time for which they should be paid. The Court held that the time spent undergoing security screenings was not an intrinsic element of the workers' principal work activities, i.e. retrieving products from warehouse shelves and packing them for shipment. The Supreme Court rejected the 9th Circuit's decision finding it improperly focused only on whether the duty was required and performed for the benefit of the company. The Court noted that the security screenings were not "indispensable" to employees' work because the company could have eliminated the security screenings without impairing the employees' ability to accomplish their work, citing a 1951 Department of Labor Opinion Letter which addressed both pre-shift safety screenings and post-shift anti-theft screenings, in which the Department of Labor "drew no distinction between the searches conducted for the safety of the employees and those conducted for the purpose of preventing theft—neither were compensable."

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Presumption of Lifetime, Vested Benefits?

The Supreme Court recently held in *M&G Polymers USA, LLC v. Tackett* that courts should apply ordinary contract principles to determine whether retiree health-care benefits survive the expiration of a collective bargaining agreement. Specifically, the Court rejected the presumption that the parties intended retiree insurance benefits provided pursuant to a collective bargaining agreement to be vested, lifetime benefits.

In 2000, M & G Polymers entered into a collective bargaining agreement, which contained a pension and insurance provision, with its union represented employees. The agreement stated that employees who retired after a certain date and were eligible for a pension based on number of years of service

would "receive a full Company contribution towards the cost of [health care] benefits" described in the agreement, including hospital, medical, surgical, and prescription drug benefits for retirees and their dependents. This language provided health benefits to qualified retirees and their dependents at no cost. The agreement contained a three-year term but was silent on whether health benefits for retirees would vest for life. In 2006, M & G Polymers announced that retirees would be required to contribute toward the cost of their health care. Retirees sued in federal court, alleging that the 2000 agreement promised to provide lifetime, contribution-free health care benefits to them and their dependents.

The Supreme Court held that ordinary contract interpretation principles did not support the retirees' claim. It noted that ERISA, which governs pension and insurance plans, permits employers to adopt, modify, or terminate plans at any time and the courts should look to the contract or agreement itself to determine the terms agreed to by the parties. The court also criticized the lower court's approach, which it stated "plac[es] a thumb on the scale in favor of vested retiree benefits in all collective- bargaining agreements. That rule has no basis in ordinary principles of contract law. And it distorts the attempt to ascertain the intention of the parties." The Supreme Court noted the lower court did not make its decision on record evidence, but on its "own suppositions about the intentions of employees, unions, and employers negotiating retiree benefits," failing to apply the durational clause, misapplying the illusory promises doctrine, and "fail[ing] to even consider the traditional principle that courts should not construe ambiguous writings to create lifetime promises." The Supreme Court remanded the case back to the lower court for review of the agreement in light of its holding.

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Multiemployer Pension Reform Becomes Law

In December 2014, President Obama signed in to law the Multiemployer Pension Reform Act of 2014 (the "Act"). The Act is extensive legislation affecting multiemployer pension plans by attempting to improve the finances of the Pension Benefit Guarantee Corporation (the "PBGC") and by making numerous changes for underfunded multiemployer pension plans. The Act immediately affects employer decisions regarding withdrawing from multiemployer pension plans, accepting or declining multiemployer pension plan hybrid or rehabilitation programs and negotiating collective bargaining agreements (CBAs).

The Act's changes generally took effect December 31, 2014. Therefore, employers contributing to multiemployer plans should be analyzing the Act's implications now.

The Act's Provisions

The Act's most significant changes relate to underfunded multiemployer pension plans, including the following:

- Multiemployer pension plans in Red Zone/critical status ("Red Zone") that are in "declining status" may reduce or suspend benefits, even benefits currently being paid. This is a major law change since previously plans could not reduce benefits that had already accrued. Several requirements must be met, including approval from the U.S. Treasury. The suspension or reduction of benefits must be made to allow the plan to remain solvent. In addition, all reasonable measures to avoid insolvency must have already been taken. The plan sponsor (not contributing employers) may apply to reduce or suspend benefits.
- A plan not in critical status may elect to be in critical status if the plan's actuary projects the plan to be in critical status in the next five plan years.
- Plans in Red Zone/critical status or Yellow Zone/endangered status will have more flexibility in making annual funding determinations under the PPA.
- The PBGC authority to facilitate the merger or partition of multiemployer plans is increased by the Act.
- Certain contribution surcharges may not be considered by multiemployer pension plans in computing an employer's withdrawal liability. A potentially very significant change for employers who are paying surcharges under rehabilitation plans.

- The sunset of many of the PPA provisions scheduled for December 31, 2014, were repealed.
- The PBGC multiemployer pension plan rate doubles to $26 per participant for 2015. After 2015, the rate will be indexed based on national wage growth.

Actions by Employers Contributing to Multiemployer Pension Plans

Employers contributing should consider taking the following actions in the near future due to the potential impact the Act will have on many multiemployer pension plans, especially plans in critical or endangered status:

- Request an updated withdrawal liability estimate for underfunded multiemployer pension plans and analyze the funded status and plan financial condition.
- Review CBAs with respect to required minimum benefit levels and re-opener provisions related to multiemployer pension plans and law changes.
- Consider contacting the fund to determine the possibility of reduction in accrued benefits or partial suspension of benefits in pay status.
- Evaluate company exposure remaining in the plan.
- Analyze any potential hybrid/rehabilitation plan alternatives or any negotiations to reduce withdrawal liability taking into account changes due to the Act.

The Act in no way solves the solvency and withdrawal liability of multiemployer pension plans. However, the Act does provide more methods for significantly underfunded plans to deal with their solvency issues. Of great interest will be to see if highly underfunded plans are willing to reduce accrued benefits and/or suspend a portion of benefits in pay status.

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New Guidance on IRS Medical and Dental Expense Reporting

The Internal Revenue Service (IRS) recently published guidance to assist taxpayers preparing Form 1040 tax returns as to medical and dental, and child and dependent care, expenses. Certain information in the two publications (Pub. 502, Medical and Dental Expenses; Pub. 503, Child and Dependent Care Expenses) is new. Other information is not new, but is important for taxpayers to know.

Taxpayers may deduct certain medical and dental expenses on their Form 1040 tax return (Schedule A), if such expenses exceed 10% of their adjusted gross income (AGI). Taxpayers born before January 2, 1950, may deduct such expenses if they exceed 7.5% of their AGI. Some interesting facts regarding medical and expense deductions for both taxpayers and employers are:

- Taxpayers that are persons with disabilities and that purchase goods or services that allow them to satisfactorily perform their job may deduct the cost of such goods or services as business expenses. The deduction as a business expense for these items is not subject to the 10% or 7.5% of AGI limit imposed upon medical and dental expenses.
- Individuals that are blind may include as a medical expense deduction the cost of books and magazines in Braille; to the extent such publications are more expensive than non-Braille publications.
- For lactating mothers, breast pumps and supplies are medical expenses that may be deducted, subject to the applicable 10% or 7.5% of AGI limitation.
- Required modifications to a home or car for individuals with impairments or disabilities are deductible medical expenses, subject to the applicable AGI limitation.
- Employer paid premiums for qualified long-term care insurance or services must be included in income.

- Medical expense reimbursed by a health reimbursement arrangement (which is always funded by an employer) is not deductible on the Form 1040 return.
- Monthly fees paid to a retirement home as part of a life-care fee are deductible as medical expenses under certain circumstance.

Publication 503 contains the following points of interest with respect to child and dependent care expenses:

- Certain taxpayers who pay for a caretaker to come to the home and care for a dependent or spouse are considered a "household employer" that must pay employment taxes for the caretaker.
- Certain employer-provided dependent care benefits are excludible from income. IRS Form 2441 allows a taxpayer to report such benefits on Form 1040 (in its various forms) and determine the amount of tax credit that may be due.
- Child and dependent care expenses must be work-related in order to qualify for a tax credit.
- Expenses for food, lodging, clothing, education, and entertainment are not considered for the "care" of a qualified person sufficient to qualify for a tax credit.

Employers and taxpayers that desire to find out more about medical and dental and child and dependent care expenses can find Publications 502 and 503 at www.irs.gov.

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