What's New in the World of Employment and Benefits?

Updates on FLSA, ACA, Paid Leave, Plan Corrections, and More

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FLSA Update:
Rule Refresher

- Non-exempt employees must receive overtime pay at a rate of 1 ½ times their regular rate of pay for all hours worked over 40 in a workweek
- "White Collar Exemptions" include:
  - Executive Employees
  - Administrative Employees
  - Professional Employees
  - Computer-Related Employees
  - Outside Sales Employees
  - Highly Compensated Employees
- To be exempt, an employee must be paid a minimum salary and perform specific duties associated with each exempt category
- Current salary basis = at least $455/week, or $23,660/year (set in 2004)

FLSA Update: Proposed Rules

- In 2016, the Obama Administration attempted to increase the salary threshold to $970 per week (the 40th percentile of weekly earnings for full-time salaried workers and index to Bureau of Labor Statistics data to be updated annually)
- Days before the new rule was expected to take effect, a Texas judge enjoined the DOL from enforcing the change
- In March 2019, the Trump Administration proposed a revised rule which would increase the salary threshold to $679 per week and subject the threshold to review every 4 years
  - Proposed rule also increases the exemption threshold for highly compensated employees from $100,000 to $147,000 (likely to have little practical impact)
  - Final rule expected to become effective in early to mid-2020

FLSA Update:
What Should Employers Do?

- Employers should start planning for implementation now
  - Complete preliminary assessment of all positions currently treated as exempt to determine if they will be impacted in 2020
- If you have employees who are exempt under the current rule (but not under the proposed rule) who regularly work over 40 hours per week, you have 3 options:
  - Pay the statutory minimum salary (current proposal = $35,308)
    - Makes sense for employees making close to that amount currently
  - Convert salaried employees into hourly employees and pay them the same amount annually
  - Convert salaried employees into hourly employees and pay overtime

FLSA Update:
Converting Employees w/o Increasing Salary

- Example – to figure out the right hourly rate for someone who currently makes $26,000 and normally works 50 hours a week, begin with X*40 + ((X*1.5)*10) = weekly salary. Solve for X

Hours	Wage	Weekly Wage	Overtime Hours	Total Overtime	Total Salary/Week
40	$9.10	$364.00	10	$136.50	$500.50

- X = $9.10
- $500.50 x 52 weeks = $26,026
- BEWARE: the above calculation assumes that the employee will always work 10 hours of OT. But, if an employee does not work 50 hours each week, they will be making less than before

FLSA Update:
Paying Overtime

- Same employee currently making $26,000 per year
  - $26,000/52 weeks = $500 per week
  - $500/40 hours = $12.50 per hour
  - Plus 10 hours of overtime per week:

Hours	Wage	Weekly Wage	Overtime Hours	Total Overtime	Total Salary/Week
40	$12.50	$500.00	10	$187.50	$687.50

  - Results in over $9,000 in increased wages on an annual basis

FLSA Update:
Additional Considerations

- In addition to pay determinations, employers will need to consider the following issues:
  - Time clocks
  - Rules regarding authorized work time (e.g., email and phone calls after regular hours)
  - Unhappy employees
  - Retirement plan definition of "Compensation"
    - If overtime is included, may require recordkeeping system changes
    - Potential for increased employer contributions

Health Care Update

Is the Affordable Care Act dead?

- Effective January 1, 2019, Individual Mandate Penalty reduced to $0
- Texas v. United States
  - Texas and 19 other states sued alleging (1) the $0 penalty makes the Individual Mandate unconstitutional; and (2) if the Individual Mandate is unconstitutional, the whole ACA must be invalidated
  - District Court agreed, holding:
    - The Individual Mandate is no longer fairly readable as an exercise of Congress's tax power (no longer any associated tax); and
    - The Individual Mandate cannot be severed from the rest of the ACA, invalidating all other provisions (e.g., Employer Mandate)
      - "Once, twice, three times and plainly" Congress made clear its intent that the Individual Mandate is "essential" to the ACA (You read that correctly – the Court made a Lionel Richie joke in this very serious legal opinion)

ACA Status continued

- Appeal pending in the 5th Circuit
  - District Court ruling stayed (not being enforced) until appeals are exhausted
  - Supreme Court appeal expected
- ACA remains the law of the land
  - Large employers are required to continue offering full-time employees health insurance and annually reporting that offer to the IRS
- Employers continue to receive penalty assessment letters for failure to comply with the Employer Mandate

ACA Employer Mandate Update

- Employer reporting timeline for 2019:
  - 1095-Cs must be provided to Employees by January 31, 2020
  - 1094-Cs and 1095-Cs must be filed with the IRS by February 28, 2020 (April 1, 2020 if filing electronically)
- DOUBLE CHECK YOUR FILINGS
- 2019 Employer Mandate Penalties:
  - 4980H(a): $2,500 x all full-time employees (minus 30)
  - 4980H(b): $3,750 for each full-time employee receiving a premium credit
- Affordability threshold for 2019: 9.86% (increased from 9.56% in 2018)

Association Health Plan Expansion (or not)

- October 2017 – Trump ordered HHS and Treasury to propose regulations expanding access to Association Health Plans
  - Permit individuals and small employers to join together for health insurance purposes and avoid certain health insurance mandates
- Final regulations published in June 2018 following that order and 11 states sued
- Court struck down the new regulations, stating that they were simply "an end-run around the ACA"
- Would have allowed AHPs to avoid (1) requirement to offer essential health benefits; and (2) compliance with the Employer Mandate
- Court remanded to see if the rule can be "fixed"

National Labor Relations Board Update: Social Media Policies

NLRB Guidance: Social Media Policies

- Three categories of rules: lawful, unlawful and iffy
- Lawful provisions:
  - Prohibitions on employees making statements on behalf of the employer without prior written approval
  - Prohibitions on employees making negative or disparaging statements about other employees or posting photos or videos that could be viewed as such
  - Prohibitions on use of Company's logo, graphics or trademark or disclosure of the employer's confidential information without prior written approval
  - Prohibitions on employee misrepresentations of the employer's products, services or employees
  - Extension of other employer policies banning inappropriate behavior to the social media realm (e.g., anti-harassment)

NLRB Guidance: Social Media Policies continued

- Unlawful (and iffy) provisions:
  - Prohibitions on disparaging remarks about or criticisms of the employer
  - Prohibitions on employees sharing wage, benefit or working conditions with one another or any third party
  - Prohibitions on employees making false or inaccurate (as opposed to defamatory) statements
  - Vague or ambiguous provisions
- Savings clause will not actually save you (but you should still have one)
  - For example: "This policy shall not be interpreted or enforced in a way that would interfere with an employee's rights under Section 7 of the NLRA."

Paid Family Leave

Paid Family Leave Boom

- 25 years ago, the FMLA was passed, requiring "large" employers to offer employees up to 12 weeks of unpaid leave to care fore a new baby or sick family member
- Today, employers face a growing patchwork of state paid-leave laws
- 6 states (and D.C.) have passed paid family leave laws to date: California, New Jersey, New York, Washington, Massachusetts and Rhode Island
  - Funded through payroll taxes (either employee only or employee/employer split)
  - Wage replacement rates range from 50% to 90%
  - Length of leave varies from 4 to 12 weeks
- Multi-state employers are in the weeds
- Additional state mandates expected
  - At the end of 2018, 21 states were considering legislation
  - Federal rule could be on the horizon

Plan Corrections under the Employee Plans Compliance Resolution System (EPCRS)

Voluntary Correction Procedure Change

- As of April 1, 2019, all Voluntary Correction Program applications must be submitted online through the www.pay.gov website
- Form 8950, Application for Voluntary Correction Program (VCP) Submission, is completed and signed online
- All other forms and supporting documents must be uploaded as a **single** PDF
- If an attorney or representative is preparing the application on behalf of a client, an officer of the client must sign a separate penalty of perjury statement, as well as complete Form 2848, power of attorney, authorizing the representative to file the application on the client's behalf
- Payments must be made via an ACH transfer from a bank account or by credit or debit card
  - Payments by check will not be accepted
  - May create some difficulties for businesses or governments that do not use credit cards

VCP User Fees

- VCP fee schedule changed effective January 2, 2018
- No longer any reduced fees for loan failures, required minimum distribution issues, failure to adopt interim amendments, etc.
- Fee is "flat fee" based on amount of plan assets:
  - $1,500 for plans with assets of $500,000 or less;
  - $3,000 for plans with assets of over $500,000 to $10 million; and
  - $3,500 for plans with assets of over $10 million.
- Can be considerable increase and burden on small plans

Self-Correction Procedure
Revenue Procedure 2019-19

- The IRS has expanded its Self Correction Procedure (SCP) effective April 19, 2019, to make it easier to correct certain errors without having to file a Voluntary Correction Program (VCP) application
- Expanded SCP addresses:
  - Loan failures
  - Certain Document failures
  - Retroactive Amendments to conform the terms of the Plan to actual operations

Self-Correction Generally

- Requirements to Self-Correct
  - Must have practices and procedures in place "reasonably designed to promote and facilitate overall compliance in form and operation with applicable Code requirements."
  - If failure is significant:
    - Must correct by end of second plan year after year of failure
    - Must have favorable determination letter for individually designed plan or opinion or advisory letter for preapproved plan

Self-Correction of Defaulted Loan

- Old Rules required all loan issues to be corrected through VCP or Audit Cap
- May now self-correct defaulted loans by:
  - Making lump sum payment to bring loan up to date;
  - Reamortizing loan and accrued interest over remaining loan terms; or
  - A combination of the above
- May also issue 1099-R for year of correction rather than year of failure
- May ***not*** self correct (must use VCP or Audit Cap):
  - Loans in excess of loan limits (generally lesser of $50,000 or ½ vested account balance); or
  - Loan terms in excess of maximum repayment period (generally 5 years, unless home loan)

Self-Correction of Document Failures

- Old Rules required all "document failures" to be corrected through VCP or Audit Cap
- A "document failure" is a plan provision or the absence of a plan provision that, on its face, disqualifies a plan
  - Includes the failure to timely adopt a required interim amendment
  - Does not include the failure to adopt a discretionary amendment (is considered an "operational failure")
- May now self-correct document failures by adoption of retroactive amendment if:
  - Amendment is adopted by end of second plan year after adoption deadline
  - Plan has a "favorable letter"
  - Plan has practices and procedures reasonably designed to promote and facilitate compliance
- May ***not*** self-correct the failure to timely adopt a written plan

Self-Correction by Retroactive Amendment to Conform to Plan Operations

- If Operation of Plan does not match Plan terms, may self-correct by retroactive amendment if:
  - Amendment results in increase of a benefit, right, or feature
  - The increase in the benefit, right, or feature is available to all eligible employees; and
  - Providing the increase in the benefit, right or feature is permitted by the Code and satisfies the correction principles of EPCRS.
- For example, if Plan has been allowing hardship distributions, but plan document does not permit them, may self-correct by retroactively amending Plan to add hardship distributions

A Little About Your Presenters

Bill Mason received his law degree from Harvard Law School in 1974, and has been practicing more than 40 years, most of that time in employment and employee benefits for employers. Bill joined Kennerly Montgomery in 2009. He serves on the Board of Directors for the Legacy Parks Foundation and the Education Subcommittee for the United Way of Greater Knoxville. He is the past Chair of the Hillcrest Healthcare Board of Directors. In 2016, the US Treasury Department appointed him as the IRS Taxpayer Advocacy Panel (TAP) representative for Tennessee.

As a leader of Kennerly Montgomery's employee benefits practice, **Kathy Aslinger** assists clients in maneuvering through the complex world of employee benefit plan design and implementation, benefit considerations in mergers and acquisitions, audits, fiduciary liability issues, DOL and IRS compliance, HIPAA, COBRA, ERISA and state law obligations, and Affordable Care Act compliance. Kathy has been practicing law for almost 20 years and has been with Kennerly Montgomery since 2010. She is a shareholder of the Firm and serves on the Firm's management committee.

As a member of the Firms' employee benefits practice, **Ashley Trotto** aims to condense and simplify the complicated and ultra-technical world of employee benefits into understandable, plain English advice for her clients. Ashley is dedicated to building long-standing, trusted relationships with her clients and understands that a single point of contact for timely resolution of employment-related issues is key. To that end, Ashley also spends her time helping clients navigate the prickly, and often unforgiving, landscape of the FLSA, HIPAA, COBRA, FMLA, ADA, and other employment-related legislation as well as everyday employment issues, like creation and application of employer policies and employee training. Ashley serves on the Board of Directors for the Smoky Mountain Animal Care Foundation and is the energy behind the Firm's on-going kindergarten book project at Christenberry Elementary.

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