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HR Focus

HUMAN RESOURCES NEWSLETTER FALL 2015

Audit Notice
IRS

When is Less IRS a Bad Thing?

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When the IRS stops issuing determination letters, that's when!

The IRS is making changes in its "determination letter" program for 401(k) and other retirement plans. While this may not be front page news, the IRS' move is going to have important implications for employers who sponsor 401(k) plans, pension plans and other similar programs.

The IRS has historically reviewed individually designed qualified plans and issued a "favorable determination letter" to the employer sponsoring the plan. This favorable determination letter then prevents an IRS auditor from reviewing the plan's language during an audit. An auditor can still review the plan's operation, but the determination letter stops any questions about the plan language in their tracks.

Now, the IRS has announced that it will no longer issue determination letters with respect to certain plans and has hinted that it may stop issuing determination letters for an even larger segment of the plan market in the near future.

The IRS' move is ostensibly due to budget cutbacks affecting its ability to

...When is Less IRS a Bad Thing?

maintain historical service levels, but the IRS has also made the policy decision to shift the burden to employers to maintain a qualified plan and accept the risk of the plan not being qualified.

While at this point we cannot tell exactly how this will play out, we anticipate a number of consequences for our clients.

- First and foremost, you won't be affected at this point if you currently use the Warner Norcross volume submitter plan document, at least until the IRS further restricts the determination letter program.
- IRS audits will likely become longer, more expensive and riskier for the employer. IRS auditors will now be able to second-guess plan language. If you receive notice of an upcoming IRS audit of your plan, contact your attorney immediately. Handling an IRS audit was never a do-it-yourself project, but now it becomes even more imperative to get an expert involved.
- Contact your attorney about potential changes in your plan's operation as far ahead of time as possible.
- The cost of having an individually-designed plan will increase. The "cure" of using a prototype plan may limit your flexibility, and a prototype plan may be inadequate and therefore unavailable to larger employers and governmental entities, which tend to have more complex plans. (See http://www.wnj.com/Publications/Youre-Moving-to-a-Prototype-Say-It-Isnt-So).
- If your plan covers union employees, you should consider adopting collective bargaining agreement language allowing the employer to unilaterally amend the plan to maintain its qualified status (but disavowing any obligation to do so).
- Perhaps most importantly, if you are acquiring another entity, you will likely want significantly stronger representations and warranties regarding the target's qualified plans, along with strong indemnification language in case its plan proves later to have contained disqualifying language. In fact, this development will probably increase the likelihood that the acquiring entity will force the acquired entity to terminate its plans prior to the acquisition. Conversely, if you are acquired, expect heightened scrutiny of your benefit plans, strict representations and warranties regarding their language and qualified status, and associated indemnification demands for problems with plan language.

The IRS' move is ostensibly due to budget cutbacks affecting its ability to maintain historical service levels.

So, unfortunately, this is one situation where less IRS is not a good thing.

Contact any member of our Employee Benefits Practice Group to help you navigate these IRS changes.

Volume Submitter Plan
Covering Union Employees
IRS Plan Audit
Changes in Plan Operation
Acquisitions
Prototype Plan

Employing Retirees Part 2: Take Steps to Avoid Problems with Health & Welfare Plans

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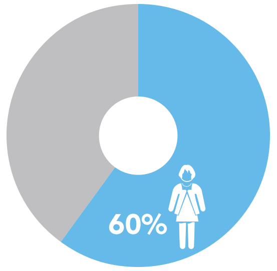
Employers often turn to recent retirees when there are specific employment needs that require quick onboarding and a skillset that may be difficult to find in the local market. As Mary Jo Larson previously reported in the Summer 2015 issue of the HR Focus newsletter, re-hiring former retirees can be problematic under an employer's retirement plans. It is also important to consider the potential administrative complexities that rehiring retirees can have on health and welfare plans.



Sixty percent of workers age 60 and older said they would look for a new job after retiring from their current company, according to a 2012 survey by CareerBuilder.com.

The Patient Protection and Affordable Care Act (Health Care Reform) has a number of stringent requirements, such as limits on lifetime or annual maximums, first dollar preventive care reimbursement, pre-existing condition limitations, plan claims and appeals, etc. However, none of those requirements apply to retiree-only plans. A "retiree-only" plan is any group health plan with fewer than two participants who are current employees. Employers should be extremely cautious when rehiring retirees to avoid running afoul of this extremely limited exception under the statute for retiree-only plans.

Many employers carve out independent contractors from eligibility under health and welfare plans. However, a rehired retiree often fails to be a true independent contractor under IRS rules, leaving the employer potentially vulnerable to a claim that they were wrongfully excluded from coverage. In a medical plan, that type of claim can result in an employer having to retroactively pay for any medical claims that arose during the time that the individual should have been eligible under the terms of the Plan. And those claims that an employer's insurance company or stop-loss carrier will refuse to pay are left to the employer to pay.

We recommend that you take these five additional steps in determining whether to rehire retirees:

1. **Ensure retiree benefits are immediately suspended upon rehire to avoid jeopardizing the retiree plan's exclusion from Health Care Reform.** If former retirees are allowed to continue participating in the retiree plan upon rehire, the plan will lose its exemption not just for those individuals, but for every individual covered under the plan.
2. **Coordinate plan eligibility to prevent double dipping.** You should draft your welfare plans to prevent a claim being simultaneously paid under both the active and retiree medical benefit programs.
3. **Review retiree medical and retirement plan eligibility.** Under the terms of some plans, to enroll in active benefits a former employee must also suspend his or her retirement plan income. Also review the impact that a temporary employment may have on future retiree medical plan eligibility and potential benefits, such as employer subsidies.
4. **Review cafeteria plan eligibility provisions.** Most plans are structured so that if an individual is rehired within 30 days of the initial termination of employment, welfare benefit enrollment is limited to previous plans and coverage. If an individual is rehired following a longer break in service, his or her enrollment is treated as a newly eligible employee – which means any applicable waiting period applies. However, some plans are written with different terms, so you will need to carefully review your own plan document.
5. **Evaluate plan coordination with Medicare.** If a former employee returns to work, the Medicare Secondary Payer Rules mandate that if the services performed by the rehired retiree are sufficient to qualify that individual for benefits as an employee, Medicare no longer pays as the individual's primary insurance. This means that the rehired employee will have to either suspend retiree medical insurance and enroll in active coverage or waive all employer-sponsored coverage and have Medicare only. If the former employee was receiving Medicare Part B subsidies, those will also need to cease.

The attorneys in the Warner Norcross & Judd Employee Benefits/Executive Compensation Practice Group can help you properly handle the hiring of retirees.

Negotiating the Labyrinth of Employee Privacy

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Privacy. Ask anyone if we have a right to it and the universal answer is a resounding "Yes." Ask where that "right" comes from and the likely answer will be, "I don't really know."

This is because privacy rights come from many different sources. The most obvious is our Constitution (although if you read it, you wouldn't find the actual word there). Privacy rights also come from federal and state laws. But there simply isn't one all-encompassing right of privacy. Whether someone has a right to privacy at all depends in large part on the circumstances. This article discusses the most important privacy laws affecting employment.

FEDERAL LAWS

The Electronic Communications Privacy Act (ECPA) significantly impacts privacy rights in the workplace. It contains two important provisions. The first is the Wiretap Act. This deals with the unauthorized interception of electronic communications. (For example, think about listening in on someone else's phone call.) Generally, the Wiretap Act prohibits the intentional interception, use and disclosure of any oral, wire or electronic communication. Courts generally have required that communications be seized at the time they are being made to be considered "intercepted." (Reading someone's e-mail after it was already received is not interception.)

There are important exceptions to the Wiretap Act. The most relevant is called the "consent exception." As long as one party consents to the interception, it is permitted. While this sounds simple, it is not without its complexity. Although consent may be express or implied, it is best to get express consent through a consistent policy or agreement whenever possible. When you call a service and you are told that your call may be recorded for quality control purposes, you are giving consent to the interception by continuing the call.

The second important provision in the ECPA is the Stored Communications Act (SCA). The SCA protects stored electronic information such as e-mail or computer files on a hard drive. It also contains a broad exception to allow an employer to gain access to stored information as long as it is authorized by the entity that provides the electronic communication service. This exception would generally allow an employer to access e-mail or files stored on computers provided by the employer to employees.

The SCA generally allows you to obtain an e-mail message or monitor an employee's actions from your own system. If a communication is directly intercepted, however, that will likely violate the ECPA. It is best to have a comprehensive computer-use policy, making it clear that employee activities may be monitored at any time.

Although the ECPA is a criminal statute, it also allows employees to sue employers for a violation.

STATE LAWS

In addition to federal law, each state has its own scheme of statutory and common law that impact employee privacy rights. Most states have laws that are at least as restrictive as the ECPA. In addition, state common law may provide an employee with a claim depending on what is done with that information.

Most states agree that the following acts will violate an individual's common law privacy rights:

> The right policies and practices can keep an employer "in the know" without getting into trouble.

Voicemail
Email
Security
Personal Information
Privacy
Policies
Payroll
HIPAA
Computer Usage

- Intrusion upon the individual's seclusion or solitude or into private affairs;
- Public disclosure of embarrassing private facts; and
- Publicity that places the individual in a false light in the public eye.

While each of these types of claims is slightly different, they all share common elements. The employee must generally show an intrusion into, or public disclosure of, private facts where the disclosure is either unreasonable or false and damages the employee. Thus, even though information about an employee may have been gathered for a legitimate purpose, an employer cannot publicize it to everyone or place the employee in a false light. Accordingly, employers need to control who has access to information about employees. The best way for an employer to protect itself is to prevent disclosure to people who do not need the information.

PRACTICAL TIPS

The law imposes many obligations on employers when dealing with employee privacy issues. However, there are several practical things an employer can do to limit any potential liability:

- Do not create expectations of privacy that you cannot ensure.
- Your privacy policies should inform employees what is not considered "private." For example, it is critical that policies on computer usage and e-mail communications inform employees that the employer may monitor the communications. This, in essence, destroys any expectation of privacy.
- Establish a protocol for all information requests received regarding an individual. For example, does your receptionist know what to do if someone calls and asks for personal information about an employee? Does the payroll coordinator know what to do with a third-party e-mail request for information about an employee's compensation?
- Establish emergency and computer trespasser procedures.
- Consistently enforce all privacy policies that are in place. A policy is only as good as its enforcement.

Privacy rights are tricky. But employers do have a legitimate need to know certain things. The right policies and practices can keep an employer "in the know" without getting into trouble.

Complying with the DOL's Proposed White Collar Exemption Rules

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When this Article goes to press, the notice and comment period for the Department of Labor's (DOL) proposed revisions to the "white collar" exemption rules will have closed. Barring an extension, we will be on our way to doing business under a significantly different set of rules.

The DOL has proposed only to raise the minimum salary threshold for a white collar employee to be considered exempt under the FLSA. The increase is substantial. The current salary threshold is $23,660 per year. The DOL is proposing to raise it to more than $51,000 annually. Many employers have expressed concern that it will not be feasible to raise the salary for some of their currently exempt employees high enough to meet the new threshold. Assuming that remains the case after the rules are finalized, those employers will need to decide how to deal with these employees who will then be non-exempt and entitled to overtime compensation. In theory, this does not sound that difficult, but in reality, there are many considerations that need to be taken into account. Some of those considerations include:

- Keep paying the employee the same salary or divide that salary by 2,080 and then pay overtime for hours over 40. This may be the simplest approach. Although easy to implement, it does create a possibility that the employee could earn substantially more money if s/he works a considerable amount of overtime. Accordingly, the employer's ability to control the number of hours worked is critical.

- Lower the employee's salary or set a lower hourly rate to account for overtime hours worked. Neither the current nor the proposed regulations prohibit an employer from reducing an employee's pay. Under this approach, when overtime at time and one-half is taken into account, the employee would earn the same overall pay at the end of the week or the end of the year as s/he did before the rules change. The biggest challenge with this approach is whether the employer is able to accurately estimate the hours and the overtime that will be worked weekly, monthly or annually such that the employee neither earns significantly less nor significantly more than s/he did before. These differences will be magnified if there are several employees doing the same job. Also from a cash-flow perspective, it is important to know if the overtime is spread out evenly throughout the year or whether there are peaks and valleys. With time left before the new rules take effect, now may be a good time to begin tracking the hours the potentially affected employees will work.

- Be sure to take other forms of compensation into account. If your newly non-exempt employees receive other forms of compensation (like commissions or non-discretionary bonuses), those also must be factored into the overtime calculation. Under DOL requirements, such payments must be allocated back over hours worked during the period in question. That incremental hourly amount must be included in the employee's regular rate of pay for overtime purposes. While this sounds complicated, it really is just a math exercise. Employers who pay their current non-exempt employees things like safety bonuses, attendance bonuses or productivity bonuses have been (or should be) doing this. One way to avoid the after-the-fact math exercise is to pay bonuses as a percentage of the employee's overall earnings (as that implicitly includes overtime pay).

The DOL left open the possibility that, in its final rules, the Agency might also modify the duties test for the exemptions. More than a few experts think that the Agency will do just that. If that happens, employers will have very little time (maybe only 60 days) to then evaluate whether employees who earn more than the minimum salary threshold do the right types of work to continue to fall within the exemptions.

Employers are well-advised to use the time between now and when the final rules take effect to evaluate their exempt jobs and update job descriptions. By doing so, employers will be ready to make the correct classification decisions and adjustments when the regulations are finalized.

News Digests:

NLRB Rejects Union of College Football Players

On August 17, the NLRB unanimously decided not to assert jurisdiction over the representation petition filed by Northwestern University football players. The primary basis for the decision was the nature of sports leagues, particularly where most members of the league (such as the Big Ten) are public entities over which the Board does not have jurisdiction. Asserting jurisdiction over a single school in such a league would not promote stability in labor relations, which is what the National Labor Relations Act is intended to do.

Workers' Compensation Reminder

The Michigan Workers' Disability Compensation Act provides employees injured on the job with three types of benefits: wage loss, reasonable and necessary medical treatment, and vocational rehabilitation. The employer (and its workers' compensation insurance carrier) has the right to control medical treatment for twenty-eight days following the work incident. The goal is to provide quality care so the employee returns to maximum health and resumes employment. An employer should select clinics and specialists familiar with the workplace to assist with light-duty work programs.

Online Pilot Program for EEOC

The Detroit Field Office of the EEOC is participating in a new pilot program for online submissions in response to a Notice of Charge. The online system allows employers (or their lawyers) to elect mediation, request extensions of time, and file position statements. If you receive a Notice of Charge of Discrimination from the EEOC indicating that you are part of the pilot program, we encourage you to talk to your attorney before taking action.

Reducing the Risk of OSHA Complaints

Complaint inspections (usually triggered by an unhappy employee) conducted by the OSHA increased by three percent in FY 2014, with most of these inspections being in General Industry. Complaint inspections now account for over one-quarter of all inspections conducted by OSHA. Here are some measures an employer can take to reduce the risk of an employee contacting OSHA: (1) ensure safety concerns reported to the employee's supervisor are promptly addressed, (2) have an internal reporting procedure for employees to report safety concerns that are not resolved to the employee's satisfaction, (3) have an active safety committee that includes representatives from all levels within the organization and (4) conduct safety audits that include discussions with employees.

New Guide for Compliance with Disability Discrimination Laws

The White House has published a guide listing various resources and best practices for employers complying with disability protection laws. According to the guide, "It is designed to answer common questions raised by employers and to identify relevant resources for employers who want additional information on specific topics. The goal of this guide is to help employers implement commonsense solutions to ensure that people with disabilities, like all Americans, have the opportunity to obtain and succeed in good jobs and careers." https://www.whitehouse.gov/sites/default/files/docs/employing_people_with_disabilities_toolkit_february_3_2015_v4.pdf.

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