Significant Issue Update
Western Pension & Benefits Council, Portland Chapter
Legal and Compliance Updates – October 21, 2015

New Oregon Sick Leave Law. Oregon has enacted Senate Bill 454 ("SB 454"), which provides for statewide paid sick leave effective January 1, 2016. SB 454 closely mirrors the City of Portland's sick leave law, but it is not identical. Key aspects of SB 454 include:

- The law generally mandates all employers in Oregon provide sick leave. An "employer" is generally defined to include any person that employs one or more employees working anywhere in Oregon.
  - Employers that employ at least 10 employees working in Oregon must provide paid sick leave.
  - Employers that employ fewer than 10 employees in Oregon must provide unpaid sick leave.
  - In either case, sick leave must accrue at a rate of at least one hour for every 30 hours worked (1-1/3 hours for every 40 hours worked), unless the employer chooses to front-load employees with at least 40 hours of sick leave at the beginning of each year.
- Employees may carry over up to 40 hours of sick leave to a subsequent year, but may be limited to:
  - A maximum accrual of 80 hours of sick leave; and
  - A maximum use of 40 hours of sick leave in any one year.
- Carryovers of sick leave are not required if the employer and employees agree that:
  - For covered employers with at least 10 employees working in Oregon, employees will be cashed out for unused paid sick time at year end and immediately credited with 40 hours of paid sick leave at the beginning of the following year.
  - For covered employers with fewer than 10 employees working in Oregon, employees must be immediately credited with 40 hours of unpaid sick leave at the beginning of the following year.
- SB 454 grandfathers Portland's sick leave law for employers with six or more employees that maintains any office, store, restaurant, or establishment in a city with a population exceeding 500,000 (only Portland qualifies). Portland employers with fewer than six employees must still provide unpaid sick leave. SB 454 preempts any other local or city sick leave law.
- SB 454 provides that paid sick leave may be used for any purpose provided for under Oregon's family and medical leave law, including parental and bereavement leave.
- SB 454 contains notice and posting requirements similar the City of Portland's sick leave law.
- SB 454 will be overseen and enforced by the Oregon Bureau of Labor and Industries (BOLI).

One bit of good news for Oregon employers is that, except for employers with between six and nine employees in Portland, the enactment of SB 454 means that Oregon's sick leave law will be the same everywhere in the state, and will not be a patchwork of local sick leave laws.

To obtain a copy of SB 454, visit:
https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB454/Enrolled

Revised IRS Determination Letter Program for Individually Designed Plans. In Announcement 2015-19, the IRS announced that it will eliminate its determination letter program for reviewing individually designed qualified retirement plans, which now must be reviewed on a staggered 5-year cycle of remedial amendment periods. The change is the result of limited IRS resources and is effective as of January 1, 2017.

Under Announcement 2015-19:

- The deadline for the current determination letter period, Cycle E, is January 31, 2016. The next group, Cycle A, may submit determination letter applications during the period beginning February 1, 2016, and ending Jan. 31, 2017.
- Any open remedial amendment periods for individually designed plans will remain open until December 31, 2017.
- Effective immediately, the IRS will no longer accept requests for "off-cycle" determination letters for individually designed plans, except for new plans and terminating plans.
- Effective January 1, 2017, the IRS will only accept determination letter requests for individually designed plans with respect to initial qualification, qualification upon termination and a few other limited circumstances. (The IRS expects to provide further guidance on such other circumstances at a later time.)

The public comment period relating to foregoing changes closed on October 1. The IRS sought comments on what modifications to the remedial and interim amendment periods and the Employee Plans Compliance Resolution System (EPCRS) program to help plans adjust to the changes after determination letters are curtailed. It intends provide model amendments to assist with compliance.

IRS appears to believe the changes will lead more plan sponsors to adopt simpler pre-approved plans; however, generic pre-approved plans often do not meet many plan sponsors' need for highly individualized plan design. Stay tuned for more!

To obtain a copy of Announcement 2015-19, visit: https://www.irs.gov/pub/irs-drop/a-15-19.pdf.

IRS Notice 2015-52 re "Cadillac Tax" Guidance. The IRS issued a second notice requesting comments and proposals on the IRC Section 4980I "Cadillac tax." Notice 2015-52 is intended to supplement Notice 2015-16, issued earlier this year, by addressing additional issues under IRC Section 4980I, including:

- Identifying who may be liable for the excise tax;
- Employer aggregation;
- Cost of applicable coverage;
- Age and gender adjustments to the dollar limit; and
- Notice and payment issues.

The IRS is considering a number of potential approaches which could be incorporated into future proposed regulations, including different approaches to determining who actually administers the benefits. The IRS notes that one approach would be to designate the person performing the day-to-day functions of the plan (e.g., a third-party administrator for self-insured plans) as that person. Alternatively, the person with the ultimate authority and responsibility under the plan (and likely identified in the plan document) would be that person.

The public comment period closed October 1. After considering the comments on both notices, IRS intends to issue proposed regulations which will provide further opportunity for public comment, including an opportunity to comment on the issues addressed in these two notices.

To obtain a copy of Notice 2015-25, visit: https://www.irs.gov/pub/irs-drop/n-15-52.pdf.

New Law Creates Exceptions to Employer Penalties and Health Savings Account Eligibility for Veterans' Health Coverage. The recently enacted highway funding legislation, the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Public Law 114-41, includes provisions that change how veterans' health coverage is accounted for under the ACA's employer shared responsibility rules under IRC Section 4980H and for HSA eligibility.

The law's other provisions change the due dates for filing a number of federal tax returns, including corporate and partnership income tax returns and Form 5500s. These returns will be allowed a maximum extension of 3-1/2 months (rather than the current 2-1/2 month extension period).

Highlights of the veterans' health coverage provisions, contained in Section 4007 of the law, include:

- ***Employer Shared Responsibility.*** A requirement that certain individuals (primarily veterans) be disregarded solely for the purpose of determining whether an employer is an applicable large employer (ALE) subject to the ACA's employer shared responsibility provisions. Specifically, an employee is not taken into account for the ALE determination for any month after December 31, 2013, in which the employee's medical coverage provided by certain Veterans' Affairs (VA) health care programs.
- ***Health Savings Account (HSA) Eligibility.*** A provision that, after 2015, receipt of VA hospital care or medical services "for a service-connected disability" will not affect an individual's ability to make HSA contributions. Thus, starting in 2016, an individual may receive VA medical benefits and still be eligible to contribute to an HSA. This is a change from prior IRS guidance that provided an individual was ineligible to make HSA contributions for any month if he or she had received VA medical benefits at any time during the previous three months.
    - Note: This change also only applies to coverage under programs administered by the VA. TRICARE is administered by the Department of Defense, and receipt of TRICARE benefits continues to cause HSA ineligibility.

These seemingly straight-forward changes may create some challenges for employers. One challenge will be determining which workers are affected. For example, employers whose ALE status might change will need to identify the employees that can be disregarded. Employers that make or facilitate pre-tax HSA contributions will also need to determine whether their employees' VA hospital care or medical services can be disregarded because they were "for a service-connected disability."

For a copy of the law, go to: http://www.gpo.gov/fdsys/pkg/PLAW-114publ41/content-detail.html.

IRS Notice 2015-17: "This Time We Really Mean It" re "Employer Payment Plans" (and Other Useful Guidance). As noted in several prior Legal and Compliance Updates, through a series of notices and FAQs, the IRS has been putting employers on notice that certain "employer payment plans"—i.e., arrangements where the employer pays or reimburses employees for their individual health insurance premiums—are non-compliant with the ACA's market reform provisions and can lead to penalties of $100 per employee per day. In Notice 2015-17, the IRS provided one last bit of "transition relief" and supplemental guidance with respect to employer payment plans for small employers (i.e., non-ALEs), arrangements for 2-percent shareholders of S corporations, Medicare premium reimbursement arrangements and TRICARE-related HRAs.

Under this guidance:

- Small employers offering employer payment plans were granted relief from the penalty until June 30, 2015, due to the slow implementation of Small Business Health Options Program (SHOP) Marketplace, which is intended to provide small employers with better health plan alternatives. Notice 2015-17 specifically states that employers will be liable for penalties after July 1, 2015, and this relief does not extend to stand-alone HRAs or other arrangements to reimburse employees for medical expenses other than insurance premiums.
- The IRS also specifically noted that employers may increase an employee's compensation for the purpose of assisting the employee with purchasing individual health care insurance so long as it does not condition payment of the additional compensation on the purchase of health insurance or otherwise endorse a particular policy, issuer or form of coverage. Thus, the IRS endorsed this approach as a "way out" for employers—just give everyone additional taxable compensation.
- The IRS stated that it intends to publish additional guidance in the future on how employers should handle reimbursements for 2–percent S corporation shareholders and that, until such guidance is issued, such arrangements will not be subject to the aforementioned penalties.

- Medicare premium reimbursement arrangements under which an employer pays or reimburses Medicare Part B or Part D premiums for employees constitutes an employer payment plan and is a group health plan subject to the ACA's market reforms if such an arrangement covers two or more active employees. An employer payment plan may not be integrated with Medicare coverage to satisfy the market reforms because Medicare coverage is not a group health plan. The notice provides that, an employer payment plan of this nature may be integrated with another employer group health plan for purposes of satisfying the ACA's market reforms if:
    - The employer offers another group health plan that provides minimum value and more than just excepted benefits;
    - The employer payment plan is offered only to employees enrolled in Medicare Parts A and B or D;
    - The employee participating in the employer payment plan is actually enrolled in Medicare Parts A and B; and
    - Reimbursements are limited to Medicare Part B or D premiums and excepted benefits, including Medigap premiums.
- Similarly, an HRA under which an employer pays or reimburses medical expenses for employees covered by TRICARE constitutes an employer payment plan and is a group health plan subject to the ACA's market reforms if such an arrangement covers two or more active employees. An HRA may not be integrated with TRICARE to satisfy the market reforms because TRICARE coverage is not a group health plan. However, the notice provides that a TRICARE HRA of this nature may be integrated with another employer group health plan for purposes of satisfying the ACA's market reforms if:
    - The employer offers another group health plan that provides minimum value and more than just excepted benefits;
    - The HRA is offered only to employees enrolled in TRICARE;
    - The employee participating in the employer payment plan is actually enrolled in TRICARE; and
    - Reimbursements are limited to cost sharing and excepted benefits, including TRICARE supplemental premiums.
- The IRS also noted that any such Medicare-reimbursement arrangements and TRICARE HRAs may be subject to other laws including Medicare Secondary Payer rules and rules prohibiting offering incentives to TRICARE-eligible employees to decline employer-provided group health coverage.

To obtain a copy of Notice 2015-17, visit: https://www.irs.gov/pub/irs-drop/n-15-17.pdf.

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