COMPLIANCE CORNER

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Your Compliance Guide for Employee Benefits

Review of Employee Benefit Files Should Include Tax Cuts and Job Act Provisions

At this time of year it is less hectic in the Human Resource and Employee Benefit departments with the end of the year reports filed and open enrollment out of the way. It's the perfect time of year for employers to pull out benefit records for review, confirmation and updating. Here are several tasks that employee benefit professionals should consider to help with their review.

Many employers use benefit confirmation statements once employees have completed their open enrollment elections. Although these statements are generally utilized for electronic enrollments, some employers provide them for paper elections also. During this "winter lull", an employer should compare any confirmation statements to what the employer has on record for an employee's benefit choices and dependents enrolled. Furthermore, an employer should ensure that payroll records reflect any premium changes because of the employee's elections. This is especially important when an employee's premium insurance elections are done on a pre-tax basis through an employer's Section 125 plan. Section 125 rules provide that an election is irrevocable for the 12-month plan year unless there is an IRS permissible reason for a mid-year election change. There are some events not in the 125 rules that could allow an individual to make a mid-year election change, such as a mistake by the employer or employee, or needing to change elections to pass nondiscrimination tests. To make a change due to a mistake, there must be clear and convincing evidence that the mistake has been made. For instance, an individual might accidentally sign up for family coverage when they are single with no children.

Two popular benefits that employers provide their employees are group term life insurance and disability (both short and long term). Life insurance premiums are usually based on the age of the employee, while disability premiums are based on an employee's wages. An employer should take advantage of "spring cleaning" to ensure that its records (payroll and invoices) reflect the age changes of employees as well as any pay increases that may have occurred at the beginning of the new year. Also, the employer should double-check these benefits for issues such as the removal of terminated employees, employee classification change which affects the amount of a benefit, and proper taxation. Depending on the employer's policies, an employee may be able to have the premiums for disability insurance paid on a post-tax basis (instead of pre-tax) which enables an employee to avoid taxation *upon receipt* of a disability benefit.

Now is also a good time for employers to have employees review, and update if necessary, their beneficiary forms. Beneficiary designations are frequently used in retirement and life insurance plans to determine entitlement to benefits payable upon death of the participant. In the case of certain benefits subject to spousal protections, federal law imposes requirements on both the form and timing of beneficiary designations. Other types of beneficiary designations are a matter of plan design. A beneficiary designation which does not accurately reflect an employee's intent can result in disputes following the death of a participant. There are a multitude of life situations that if a proper beneficiary designation is not on file, could be costly to an employer (think divorce, simultaneous death of the participant and beneficiary, or lost forms as examples). An employer may be required to defend a lawsuit, correct improper payments or find the proper beneficiary.

The passage of the Tax Cuts and Jobs Act (TCJA) in December 2017 includes several significant changes relevant to employers for payroll and employee benefits purposes. The new tax act was effective as of January 1, 2018. In IRS Notice 1036 the Internal Revenue Service (IRS) published the income-tax withholding tables for 2018 reflecting changes made by the new tax law. The updated tables, which are to be used no later than February 15, 2018, reflect the new rates for employers.

Additionally in the Notice, the IRS noted it is working on revising the Form W-4 to reflect the changes in the new law. The new Form W-4 can be used by employees who wish to update their withholding in response to the new law or changes in their personal circumstances in 2018, and by workers starting a new job. Until a new Form W-4 is issued, employees and employers should continue to use the 2017 Form W-4. Employers should visit the IRS website as to the release of 2018 W-4s.

During this review time, and due to the TCJA, besides employee benefit records, employers should take the time to review any of its policies which may be affected. Previously, employers were able to offer qualified transportation fringe benefits, including qualified parking, on a tax-favored basis (meaning not included in an employee's gross taxable income). In 2017, the maximum monthly exclusion was $255. This benefit was seen as a "perk" to employees and employers could generally deduct these expenses. However, the TCJA repealed the employer deduction for qualified transportation fringe benefits. This repeal in no way affects a Qualified Transportation Plan an employer may have established under IRC Section 132. This type of plan allows for an employee to have contributions deducted on a pre-tax basis for qualified parking and transit passes.

In conclusion, during mid-winter there usually is some time for HR and Employee Benefit professionals to do a review of employee files. An employer should ensure that employee benefit elections are properly reflected in payroll deductions. Any premium increases due to wage increases or age increases of employees should be considered. Finally, the new tax act makes some changes that affect employer benefit policies and taxes.

Final Disability Claims Regulations Effective April 1, 2018

In January 2017, it was reported that the Department of Labor (DOL) published final regulations governing the ERISA claims and appeals process that will apply to all claims for disability benefits. The effective date of the rule has been delayed from January 1, 2018 to April 1, 2018. These regulations mirror amendments to the claims procedures for group health plans added under the Affordable Care Act. The amendments require plans to satisfy additional procedural and notice requirements for disability claims. The Department determined the need to revise regulations to provide greater transparency and accountability, since disability cases dominate the ERISA litigation field.

Overview of Final Rules

The new regulations apply to all ERISA-governed plans that provide disability benefits, if the plan conditions its availability to the claimant upon showing of disability. This not only includes short-term and long-term disability plans, but it can also include other plans that condition the availability of benefits upon the plan's determination that a disability exists, such as 401(k) plans and pension plans. If the determination of a disability is made by a person or entity other than the plan, then the disability claim is not subject to the final rule.

The new regulations include the following improvements for the processing of claims and appeals for disability benefits:

- **Avoiding Conflicts of Interest**. Plans must ensure that disability claims and appeals must be decided independently and impartially, meaning claim decision makers should not be incentivized to deny claims.
- **Disclosure Requirements**. Benefit denial notices must contain a complete discussion on a decision, including:
    - Why the plan agreed/disagreed with views of health care and vocational professionals, or with disability determinations made by the Social Security Administration.
    - Statement that the claimant is entitled to access relevant documents and their claim file.
    - The plan's internal rules, guidelines, protocols or standards used in deciding the claim. If none exist, the letter must state that fact.
    - Benefit denial letters have to be provided in a culturally and linguistically appropriate manner.

- **Right to Review and Respond to New Information Before Final Decision.** Claimants must be given notice and a fair opportunity to respond if the appeal denial is based on new or additional rationales or evidence that were not included when the benefit was denied at the claims stage.
- **Exhaustion of Claims and Appeals Processes.** Claimants are not barred from suing due to failure to exhaust the administrative remedies under the plan when the plan itself failed to comply with its claims procedures (except for certain minor failures).
- **Coverage Rescissions are Adverse Benefit Determinations.** Retroactive rescissions of coverage are considered benefit denials that trigger the plan's appeals procedures.

What Employers Need to Consider

- The final regulations apply to claims for disability benefits filed on or after April 1, 2018.
- Know which plans (besides short or long term disability) have disability triggers which require compliance with the final rules.
- Review whether the terms of the plan should be amended to rely on the disability determination by another party (such as the Social Security Administration) to avoid compliance with the final rule.
- Ensure that your Plan Document, Summary Plan Description and any communication materials are in compliance with the rule.
- Reach out to any vendors administering disability benefits as to their denial letter, including right to access a claim file and a fair opportunity to respond to any new or additional evidence relating to the claim.

Conclusion

The enhanced claims procedures for disability benefits affect plan administrators, participants, beneficiaries and third party administrators of disability benefit plans. The details of the final regulations need to be studied and new procedures implemented before the applicability date of April 1, 2018. Thus, employers should begin to review their disability benefit programs to ensure compliance with these final rules.

EEOC Wellness Rules Have Short Shelf Life

It seemed like it had taken the EEOC forever to issue regulations as to whether employers could provide employees an incentive to participate in a wellness program and still have the program be voluntary. The issue of "voluntary" is important because under the American with Disabilities Act (ADA) any wellness program that includes a disability-related inquiry and/or medical exam, participation must be voluntary. The same rule is applicable to any information that is protected under the Genetic Information Nondiscrimination Act (GINA).

In July 2016, the EEOC issued long awaited rules under the ADA and GINA relating to wellness plans. The rule provided that employers could implement penalties or incentives, limited to 30 percent of the cost of self-only coverage, to encourage employees to disclose ADA protected information and certain genetic information without causing the disclosure to be involuntary. These rules were applicable to plans beginning on or after January 1, 2017.

Since then, the EEOC rules have been challenged by AARP. The AARP's claim is that the 30 percent incentive or penalty still renders participation involuntary, since there could be some employees unable to pay the penalty and in effect forced to provide the protected information. The court agreed with AARP finding that the EEOC was arbitrary and did not provide enough evidence in its rulemaking to justify the 30 percent rule.

The court sent the rules back to the EEOC for further review and analysis. In the meantime, after the court's decision was issued, AARP requested the court to reconsider its decision and vacate (render void) the EEOC's regulations, to which the court agreed.

Vacating of the rules is not effective until January 1, 2019. Therefore, the current rules permitting the 30 percent incentive/penalty remain in place during 2018. The EEOC has not indicated a time frame for the provision of new rules. Therefore employers will want to stay on top of this issue as to the future operations or offering of any wellness programs.

In conclusion, employers may stay the course for its wellness program in 2018. However, due to the vacating of the EEOC incentive rules, 2019 will bring new rules. As it relates to wellness programs, employers should remember that there are separate applicable rules under the Health Insurance Portability and Accountability Act (HIPAA). The HIPAA wellness rules are not affected by the vacating of the EEOC rules.

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