January 4, 2019

In This Edition:

Costly Consequences of Violating Protected Rights

One of the provisions of ERISA is intended to protect the rights of individuals for purposes of participating in employee benefit plans. Specifically, ERISA Section 510 prohibits discrimination against any employee with respect to compensation, terms, conditions, or other privileges of employment, as well as prohibits interfering with attaining any benefit or right the individual is entitled to under an employer-sponsored plan.

A recent lawsuit highlights the impact of violating ERISA Section 510.

In 2017, a class action lawsuit was filed against Dave and Busters as a result of the company's decision to reduce their employee's work hours as a way to avoid the requirement of the need to offer health coverage pursuant to the Affordable Care Act (ACA). The ACA provides that an employer employing 50 or more employees must either offer adequate and affordable health coverage to employees working 30 or more hours or week, or risk the ACA's employer shared responsibility penalties under IRC Section 49080H. The class action argues that ERISA Section 501 rights, which protect against interference of attaining benefits, were violated.

On December 7, 2018, the U.S. District Court for the Southern District of New York approved a proposed $7.4 million settlement with the employees affected by the company's decision to reduce their work hours as a means to avoid offering health insurance.

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Annual Health Plan Reporting Reminders

MEWA Reporting - 2018 Form M-1

If you sponsored a multiple employer welfare arrangement (MEWA) including an association health plan (AHP) in 2018, make certain that you file the **2018 Form M-1 annual report** by March 1, 2019. This form is intended to ensure that such plans are complying with the Affordable Care Act, the Health Insurance Portability and Accountability Act, and other federal related laws. Failure or refusal to file a completed or accurate Form M-1 could result in penalties of up to $1,558 *per day* (indexed for 2018).

With regard to AHPs, the Department of Labor (DOL) issued final rules and standards for establishing AHPs last summer (see our prior *Benefit Beat* and *Health Reform Bulletin* for a summary of these rules). An AHP is a MEWA in that it is comprised of two or more unrelated employers, including self-employed individuals. This means the rules applicable to MEWAs, specifically, the Form M-1 reporting obligation, likewise applies to an AHP. Only MEWAs offering or providing medical care benefits file the Form M-1. If the arrangement only offers or provides non-medical benefits, such as life insurance or disability benefits, then a Form M-1 is not required. The DOL provides a **tip sheet** for AHP/MEWA administrators to assist in filing its Form M-1.

As a reminder, the Form M-1 can only be submitted electronically through the DOL's Online Filing System (http://www.askebsa.dol.gov/mewa). In addition, plans required to file a Form M-1 must also file the Form 5500 regardless of plan size or type of funding.

Annual Reporting Reminder - Medicare Part Disclosure Notice to CMS

All group health plans, whether insured or self-funded, are required to provide notices of creditable or non-creditable coverage to the Centers for Medicare and Medicaid Services (CMS) on an annual basis. The Creditable Coverage Disclosure Form filing must be accomplished electronically, and is due within 60 days of the commencement of the plan year. For calendar year plans, this means the disclosure filing must be accomplished no later than March 2, 2019.

In addition, this disclosure form must be completed within 30 days upon other events such as when the prescription drug benefit is cancelled, or if any material change in the prescription drug benefits that would cause it to change status from creditable to non-creditable, or vice versa. **Guidance and instructions**, as well as the **disclosure form**, are available on the CMS website.

Updated Tax Publications to Assist Employers

Two IRS publications have been updated for use in 2019 that may be of interest to employers. Both of these publications are supplements to **IRS Publication 15**, *Employer's Tax Guide,* and are intended to provide a more detailed description of employment related tax matters.

- **Publication 15-A**, *Employer's Supplemental Tax Guide* provides detailed employment tax information such as determining classification of individuals as employees or independent contractors, determining what constitutes taxable wages or sick pay and how to report such amounts, as well as reporting pension or annuity payments.
- **Publication 15-B**, *Employer's Tax Guide to Fringe Benefits* provides information for employers on the tax treatment of various fringe benefits including health care coverage, health savings accounts, qualified small employer health reimbursement arrangements (QSEHRA), cafeteria plans, dependent care assistance plans, educational assistance plans, qualified transportation benefits, group term life insurance coverage, among other types of benefits.

In addition, the IRS released the 2018 version of the **Form 8889** applicable to health savings accounts (HSAs). This form is generally used by HSA accountholders for purposes of reporting HSA contributions, computing an individual's deduction and reporting distributions. Of particular note, the instructions include several illustrative examples for computing contributions and deductions, especially when employer contributions are made to an individual's HSA.

New Laws in the Great Lakes State

Employers in the state of Michigan should be aware to two new laws. One requires employers to provide a paid sick leave benefit; and the other could impact an employer's self-funded health benefit plan. Following is a summary of these new laws.

Michigan's Paid Medical Leave Law

As mentioned in our October *Benefit Beat*, the state of Michigan was in the throes of enacting a paid sick leave law last year. It began as an earned sick leave ballot initiative, which was superseded by legislation passed in October, and then modified and enacted in December. The Michigan Paid Medical Leave Act (S. B 1175, Act No. 369 of Public Acts of 2018) takes effect on April 1, 2019; the law allows employees to accrue one hour of paid medical leave for every 35 hours worked, up to 40 hours in a benefit year.

Affected Employers and Employees
Employers subject to the law include any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company, government entity, or other entity who employs 50 or more individuals. The law does not apply to the federal government nor to any other state or a political subdivision of another state.

Generally, employees *eligible* for the benefit are nonexempt employees as defined by the Fair Labor Standards Act. Employees *ineligible* for the benefit include exempt employees, those who do not work primarily in Michigan, temporary, seasonal, part-time, and variable hour workers, and private sector employees covered by a collective bargaining agreement, among others.

Accrual, Frontloading, and Carryover
An employee begins to accrue one hour of paid medical leave for every 35 hours worked on April 1, 2019, or his/her date of hire, whichever is later. An employee cannot accrue more than one hour of paid medical leave in a calendar week. Alternatively, an employer is permitted to frontload a minimum of 40 hours of paid medical leave to an eligible employee at the beginning of a benefit year (defined as any consecutive 12-month period used by an employer to calculate an eligible employee's benefits). Paid medical leave can be prorated for employees hired during a benefit year.

Employers can limit an employee's accrual and use of paid medical leave to 40 hours per benefit year. Employees are entitled to carryover up to 40 hours of paid medical leave to the next benefit year; however, frontloaded paid medical leave is not eligible for carryover.

Upon separation from employment, an employer is not required to provide compensation to an employee for accrued, unused paid medical leave. Following a separation from employment, if the employee is rehired by the same employer, then any unused paid medical leave that was previously accumulated need not be reinstated.

Use of leave
An employee can begin using accrued paid medical leave following his/her 90th calendar day of employment.

Paid medical leave can be taken for one's own needs, or to attend to the needs of a family member's illness, injury, medical diagnosis or treatment, including preventative medical care. In addition, paid medical leave may be taken to obtain services or care as a result of domestic violence or sexual assault, or to care for a family member due to the closure of a school or business for public health or safety reasons. For purposes of this law, *family member* includes:

- A biological, adopted or foster child, stepchild or legal ward, or a child to whom the eligible employee stands in loco parentis;
- A biological parent, foster parent, stepparent, or adoptive parent or a legal guardian of an eligible employee or an eligible employee's spouse or an individual who stood in loco parentis when the eligible employee was a minor child;
- An individual to whom the eligible employee is legally married under the laws of any state;
- A grandparent;
- A grandchild; and
- A biological, foster, or adopted sibling.

Coordination with employer's existing policy
An employer is deemed in compliance with this law if it provides a minimum of 40 hours of paid leave to an eligible employee each benefit year.

Employee and Employer Notice Obligations
When requesting leave, an employee must comply with the employer's usual and customary procedures relating to notification and documentation requirements for requesting a leave of absence. Employees must be given at least 3 days to provide documentation supporting the need for leave.

Affected employers are required to display a poster at its place of business, in a conspicuous place that is accessible to eligible employees, containing the following information:

1. The amount of paid medical leave required to be provided to eligible employees;
2. The terms under which paid medical leave may be used; and
3. The employee's right to file a complaint.

Record keeping requirement
An employer is required to retain records documenting the hours worked and paid medical leave taken by eligible employees for at least one year.

Enforcement
The Michigan Department of Licensing and Regulatory Affairs (http://www.michigan.gov/lara) enforces the provisions of this law, including complaints of violations and developing a model poster that could be used by employers. Potential penalties range from a maximum $1,000 administrative fine for failure to provide the leave, to $100 for failure to display the workplace poster.

Repeal of Michigan's Health Insurance Claims Assessment

In 2011, Michigan enacted a law intended to augment funds available for Medicaid expenditures by imposing the Health Insurance Claims Assessment (HICA) assessment against insurers, third party administrators, excess stop loss insurers, as well as employers who self-administer its self-funded health plan. This assessment equaling one percent of paid health claims is collected by the state's Department of Treasury (DOT). Affected entities are required to file returns and pay the required assessment for the preceding calendar quarter on April 30, July 30, October 30, and January 30 of each year.

During the 2018 legislative session, a new law was enacted to repeal the HICA, and replace it with a new health care related tax levied on insurance providers. The Insurance Provider Assessment Act ("IPAA", Public Act 175 of 2018) was signed into law on June 11, 2018. The effective date of this law was conditioned upon the Centers for Medicare and Medicaid Services (CMS) approving a waiver from certain federal provisions applicable to health care-related taxes. CMS approved this waiver on December 10, 2018. As a result, the IPAA took effect on October 1, 2018, and, likewise, the HICA is repealed as of that same date.

The DOT is currently developing guidance and notifying all impacted entities. The DOT indicates that affected insurance providers will be subject to prorated assessment in 2 quarters of 2019, based on the number of member months reported in 2017. The assessment will be payable in two equal installments due January 31, 2019, and April 30, 2019. Beginning in 2019, the DOT plans to notify taxpayers of annual assessment amounts by June 15, which will then be payable in quarterly installments beginning July 30.

With regard to HICA liability for 2018, assessments will be computed on all "paid claims" prior to October 1, 2018. While the final quarterly returns were due on October 31, 2018, the annual return filing is due on February 28, 2019.

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