

Mid-Year Regulatory Update 2018

Presented By | Adam Jensen, Vice President

PRESENTER



ADAM P. JENSEN

JD, MS-HRM, CEBS, GBA, FLMI

Vice President, Compliance & HR Consulting

ajensen@cottinghambutler.com

608.467.5030

AGENDA

- ACA
- FLSA
- Wellness
- HIPAA
- I-9s
- Paid Leave Tax Credit
- MHPAEA

Repeal going nowhere fast

- Pres. Trump campaigned on the premise of repealing the ACA immediately upon taking office.
- True repeal can only be done by Congress.
- Pres. Trump signed an executive order on his first day in office instructing DOL, Treasury/IRS, and HHS essentially to stop enforcing the ACA.

GOP divided

- To date, all attempts at passing an ACA repeal bill have met unexpected resistance from groups within a fractured GOP and have failed.
- Future Congressional action to repeal/replace the ACA is uncertain.

Limited reform in tax reform bill

- The Tax Cuts and Jobs Act of 2017 passed in late 2017 effectively eliminated the ACA Individual Mandate.
- The penalty assessed against individuals who fail to obtain health insurance was not actually repealed, but rather the penalty was set to \$0 for 2019 and future years.

New legal challenge to ACA

- A new lawsuit was recently filed against the ACA in federal court in Texas.
- The lawsuit argues that the entire ACA is now invalid with the effective repeal of the Individual Mandate.
- The Supreme Court previously upheld the ACA as Constitutional because the Individual Mandate existed as a tax on persons not obtaining health insurance.
- That ruling hinged on the reasoning that, while the government “does not have the power to order people to buy health insurance,” as Chief Justice John G. Roberts Jr. wrote for the majority, it “does have the power to impose a tax on those without health insurance.”

IRS fining employers

- The IRS has been sending out Employer Shared Responsibility Payment (ESRP) notices to alert employers of proposed ACA fines for failure to provide coverage or failure to provide affordable coverage for the 2015 tax year.
- These penalty notices are being sent in the form of an IRS Letter 226J. These letters are formal notices of ACA penalties and have a 30-day response window explicitly listed on the cover page.
- If an employer ignores these letters or misses the response deadline, the IRS will then send them a demand for full payment of the “proposed” fine in the letter.

IRS fining employers

- Most common causes of fines have been improperly coded 1095-C forms or 1094-C coversheets.
- Correction process available.

ACA affordability percentage for 2019 increased

- The IRS recently released Revenue Procedure 2018-34 that increased the ACA affordability percentage from 9.56% to 9.86% for plan years beginning in 2019.
- The affordability percentage is used to determine whether the employee contribution for single employer health coverage is “affordable”.
- If employee contributions for single coverage exceeds the affordability percentage, employees may be eligible for subsidies in the ACA MarketPlace.
- If an employee receives a subsidy payment in the ACA MarketPlace, an employer may be subject to a penalty of over \$3,480 for each employee who gets a subsidy.

ACA affordability percentage for 2019 increased

- Employers must incorporate the increased affordability percentage into their 2019 medical plan employee premium contribution rates for single coverage.
- The employee contribution for single coverage cannot exceed 9.86% of employee household income using one of the three IRS-approved affordability safe harbors.

Affordability Safe Harbors

- Form W-2 safe harbor: employee's cost for self-only coverage under the plan does not exceed 9.86 % the amount required to be reported in Box 1 of Form W-2.
- Rate of pay safe harbor: employee's cost for self-only coverage under the plan does not exceed 9.86 % employee's applicable hourly rate of pay x 130 hours (For salaried employees, monthly salary would be used instead of hourly salary multiplied by 130).
- Federal poverty line safe harbor: employee's cost for self-only coverage under the plan does not exceed 9.86 % of the FPL for a single individual ($\$12,140 \times .0986$)/12= \$99.75/month.

2019 ACA plan limits

- The inflation-adjusted out-of-pocket (OOP) limits have been announced that will apply to non-grandfathered plans for plan years beginning in 2019.
- The OOP limit includes the plan's deductible and cost-sharing amounts for benefits that are considered essential health benefits (EHB).
- The ACA OOP limits differ from the HSA-compatible OOP limits!

ACA

2019 OOP plan limits

	ACA	HSA-Compatible
Self-only	\$7,900	\$6,750
Family (Other than Self-Only)	\$15,800	\$13,500

ACA

2019 HSA limits

	Self-Only	Family
Contributions	\$3,500	\$,7000
Catch Up Contribution (Age 55 and Older)	\$1,000	
Minimum HDHP deductibles	\$1,350	\$2,700
Maximum OOP amount	\$6,750	\$13,500

What's next and what should I do?

- Congressional repeal action uncertain.
- Texas legal challenge a possibility.
- Continue to comply with ACA and offer coverage that is affordable and meets minimum value requirements.
- Review 2016 and 2017 1095-C and 1094-C data for errors.
- Make sure employee contribution for single coverage meets 9.86% affordability requirement for 2019 plan year.
- Make sure OOP limits comply with ACA/HSA guidelines.

FLSA

Obama administration proposed changes to overtime rules

- FLSA had not been updated since 2004.
- Pres. Obama instructed DOL to update FLSA and especially the exempt salary test amount.
- Proposed and later final rules released that called for numerous important changes:
 - Increased Salary Level Test
 - Use of Bonus Compensation
 - Automatic Increases
 - Increased HCE Exemption

FLSA

Increased salary test amount

- Proposed new minimum annual test amount at \$47,476 (up from the current annual minimum of \$23,660).

Use of Bonus Compensation

- For the first time, employers would be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard salary level.

Automatic Increases

- To ensure that they remain meaningful tests for distinguishing between bona fide executive, administrative, and professional workers who are not entitled to overtime and overtime-protected white collar workers, DOL proposed automatic updates to the salary test amount.

Increased HCE Exemption

- The total annual compensation requirement for highly compensated employees (HCE) will be set at the annual equivalent of the 90th percentile of full-time salaried workers nationally, which is \$134,004 (up from \$100,000 currently).

Actions under Trump administration

- Upon taking office Pres. Trump signed an executive order mandating a 60-day freeze on regulations that had not yet taken effect.
- 5th Circuit Ct of Appeals struck down FLSA overtime rules.
- New DOL Secretary Acosta acts is widely expected to support modest increase in salary test amounts. Secretary Acosta testified before Congress stating he believed a proper a test amount would be around \$33,000.
- Trump administration began the rulemaking process for new rules by issuing a Request for Information (RFI) in July, 2017.
- Employers may see a new overtime rule proposal in October 2018, the U.S. Department of Labor announced in its fall regulatory agenda.

FLSA

What's next and what should I do?

- Proposed rules are anticipated by DOL in late 2018.
- Final rules may not come until mid-2019.
- Employers should continue to monitor FLSA changes in the coming months.
- Include likelihood of increased Salaried exemption of \$32,000 - \$35,000 in business plans for 2019.

WELLNESS

No major changes under Trump administration

- Despite expectations, Trump administration has not rescinded wellness rules under ADA or GINA
- EEOC has continued to enforce both ADA and GINA.
- EEOC lost in lawsuit brought by AARP in August, 2017 and will have to re-write wellness rules for 2019.
- Old ADA/GINA wellness rules in place until new rules are issued.

WELLNESS

What's next and what should I do?

- EEOC is expected to continue to enforce wellness rules under ADA and GINA.
- HIPAA wellness rules with existing incentive structure of up to 50% of cost of coverage are expected to continue.
- Employers who sponsor wellness programs should continue to comply with HIPAA, ADA, and GINA.

HIPAA

HIPAA Privacy and Security audits continue

- HHS/CMS developed a “desk audit” process to audit Covered Entities in 2016.
- Audits continue, with the focus on medical providers.
- Widely expected that all Covered Entities will eventually be audited.
- CMS position is that failure to conduct a HIPAA Security risk assessment is “willful neglect” under the regulations and subject to penalties of at least \$50,000.

HIPAA

What's next and what should I do?

- Review HIPAA Privacy and Security compliance.
- Update PHI flow to document:
 - The persons or classes of persons with PHI access
 - The PHI to which they have access
 - The conditions under which they have PHI access
- Conduct a HIPAA Security audit and continue to audit on a regular basis.
- Make sure that any employees with PHI access have been trained in PHI handling and that the training is documented.

ICE I-9 surge expected

- US Immigrations and Customs (ICE) is planning an audit surge this summer of employer I-9 documentation.
- All U.S. employers must have a Form I-9 on file for all current employees.
- The form establishes employee identity and authorization to work in the U.S.
- Incorrect or missing forms can subject employers to civil fines and even criminal prosecution.

Civil Fines and Criminal Penalties for Form I-9 and Immigration-Related Employment Discrimination Violations

Civil Violations	First Offense		Second Offense		Third or Subsequent Offense	
	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum
Failing to comply with Form I-9 employment verification requirements	\$216 for each form	\$2,156 for each form	\$216 for each form	\$2,156 for each form	\$216 for each form	\$2,156 for each form

Criminal Violations	First Offense	Second Offense	Third Offense
Engaging in a pattern or practice of hiring, recruiting or referring for a fee unauthorized aliens	Up to \$3,000 for each unauthorized alien		
	Up to 6 months in prison for the entire pattern or practice		

Correcting Mistakes

If you discover a mistake on Form I-9, correct the existing form.

OR prepare a new Form I-9:

- If you choose to correct the existing Form I-9, line out the incorrect portions, enter the correct information, and initial and date the correction.
- If you do a new Form I-9, retain the old form. You should also attach a short memo to both the new and old Form I-9 stating the reason for your action.
- Make sure that if the correction needed is in a section the employee is responsible for that THEY make those corrections. In the event the employee's eligibility to work comes into question they can say that those changes were made by someone else and have a discrimination suit.

Missing Forms

If you discover you are missing the Form I-9 for an employee:

- Immediately provide the employee with a Form I-9
- Allow employees 3 business days to provide acceptable documents
- DO NOT backdate the Form I-9
- What about if we get audited and the auditors see that Mike was working for pay 4 years prior to having the I-9 Completed? You will still get in trouble because the completion of the I-9 was more than 3 business days, but significantly less trouble than backdating a form.

What's next and what should I do?

- Conduct a self-audit of your I-9 forms and documentation.

PAID LEAVE TAX CREDIT

New paid leave tax credit

- Tax Cuts and Jobs Act of 2018 created a tax credit to employers on the wages that they pay to eligible employees during family and medical leave.
- Only paid leave amounts solely due to the taking of an FMLA leave will qualify.

PAID LEAVE TAX CREDIT

Types of leave qualifying for the tax credit

- Birth of the employee's child
- Placement of a child with the employee for adoption or foster care
- Care of a spouse, child, or parent with a serious health condition
- A serious health condition which prevents the employee from performing the functions of their position
- A spouse, child, or parent on covered, active duty in the Armed Forces
- Care for a service member who is the employee's spouse, child, or next-of-kin

PAID LEAVE TAX CREDIT

Types of leave qualifying for the tax credit

- The paid leave must be due to taking an FMLA leave.
- Pay during the leave due to vacation, personal leave, or a medical leave is not considered for credit purposes.
- Self-funded short-term disability benefit wage replacement is disregarded.
- Any paid leave required under state or local law is disregarded for purposes of the federal tax credit.
- Only paid leave amounts solely due to the taking of an FMLA leave will qualify

PAID LEAVE TAX CREDIT

Requirements to claim the tax credit

- The employer must have a written policy, allowing for at least two weeks of annual paid family and medical leave for full-time employees, or a prorated amount for part-time employees;
- The employee must have been employed by the business for at least one year;
- The employer must pay at least 50% of an employee's normal wages while the employee is on leave; and
- For the prior year, the employee must not have earned more than 60% of the dollar threshold for being considered a highly compensated employee for 401(k).

PAID LEAVE TAX CREDIT

What's next and what should I do?

- Consider whether your business can afford paid FMLA leave or if it aligns with your corporate objectives.

MHPAEA

New proposed rules

- On April 23, 2018, the DOL issued proposed FAQ guidance addressing compliance issues under the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA).

The new guidance includes

- An updated form for use by individuals in requesting documentation from a health plan or insurer concerning treatment limits under the MHPAEA.
- A self-compliance tool for evaluating MHPAEA compliance by plans.
- A 2018 DOL Report to Congress addressing MHPAEA implementation.
- A fact sheet that reviews MHPAEA enforcement in 2017.
- An HHS action plan for enhanced enforcement of the mental health parity requirements and related provisions of the 21st Century Cures Act (Cures Act).

Proposed disclosure requirement

- Part 39 of the new FAQ contains proposed requirement for disclosing healthcare provider network in plan's SPD which is potentially burdensome.
- Q&A 12 of the new FAQ permits SPDs to direct participants to the network administrator's website only if the DOL electronic disclosure requirements are satisfied, including employee access to the internet at work.

What's next and what should I do?

- Monitor agency guidance for final rules.
- Be prepared to update plan SPDs to comply with new disclosure requirements.

THANK YOU FOR VIEWING!



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