



Compliance Update

February 15, 2016

Sample Employee Communication for IRS Form 1095

We have included a number of articles about the employer's responsibilities with respect to IRS Form 1095. The form is complicated and will probably confuse a number of employees. Although not required, it may make sense to include a cover letter explaining the forms.

<http://bit.ly/1SbQ1VH>

This article has sample communications you may want to send to employees with IRS Form 1095. This article lists some common questions to expect once the forms are sent out to the employees.

<http://bit.ly/1o7xNrK>

A lot of people get outside help to prepare their taxes but a substantial number of people do their own taxes. One thing to note is that IRS Form 1095 **DOES NOT** get attached to the person's individual tax return.

IRS Allows Employer to Modify VEBA

A VEBA (i.e. a voluntary employee beneficiary association) is a tax-exempt trust used to hold the assets associated with welfare benefit plans (e.g. medical benefits). As a general proposition, once the money is deposited into the VEBA that employer cannot take the money back and the funds have to be used to pay benefits for the plan participants. The IRS recently released two private letter rulings that allowed the employers to use the money in the VEBA to provide benefits to a new class of plan participants. The VEBAs had been established to pay for retiree medical benefits but the IRS allowed the employers to amend the VEBA so that the money could also be used to pay benefits for active employees.

<http://bit.ly/20Y7pyo>

Most employers do not establish VEBAs and, instead, pay plan benefits out of the employer's general assets. Also, only the employer listed in the private letter ruling can

rely on the private letter ruling. Nevertheless, a private letter ruling does indicate the government's position. If you are maintaining a VEBA you should be aware of this recent development.

U.S. Supreme Court Allows Employer to Pick Court's Location

I generally do not like to include court cases in the newsletter because each case is decided on its own facts. However, this was a case where the employer was sponsoring an ERISA plan and the plan document designated which court participants had to file lawsuits.

<http://bit.ly/1PPRaQ6>

The Sixth Circuit Appellate Court (Ohio is in the Sixth Circuit) said that provision was enforceable and the U.S. Supreme Court agreed. This case is important if you are sponsoring self-funded plans and have employees in different states.

Employer Mandate and Service Contract Act & Davis Bacon Act

If you have federal contracts you are familiar with these laws. Basically, the Service Contract Act and Davis Bacon Act requires the employer to set aside a certain amount to be used to provide the employees with fringe benefits or that amount can be taken in cash. The IRS issued a notice in December 2015 saying how those amounts are treated under the employer mandate or play or pay rules.

<http://bit.ly/1U0hTsT>

The IRS said that for plan years beginning before January 1, 2017, employers can treat the amounts as reducing the employees' cost of health coverage. This, in turn, will make the coverage more affordable, which may help employers avoid the penalty.

HIPAA and Firearm Background Checks

Due to the political pressure associated with gun violence, HIPAA was recently modified to permit covered entities (e.g. health plans) to disclose protected health information or PHI to the National Instant Criminal Background Check System (NICS) without the individual's prior authorization.

<http://bit.ly/1TVgqpV>

Gun dealers use NICS to ensure anyone trying to purchase a firearm is permitted to own a firearm. The covered entity is permitted, but not required, to disclose a person's PHI regarding mental illness to NICS. Individuals who have been involuntarily committed to a mental health facility; individuals found incompetent to stand trial or not guilty by reason of insanity; and individuals determined by a lawful authority, such as a court, to be a

danger to themselves or others or unable to manage their own affairs due to mental illness, incompetency, condition, disease or marked subnormal intelligence are not allowed to own a gun.

IRS Issues Updated Guidance re: IRS Form 1095

We have included numerous articles on the new health care reform reporting requirements (i.e. IRS Form 1094 and IRS Form 1095). These are links to the IRS's webpages explaining the forms.

<http://1.usa.gov/1UP4Pqq>

<http://1.usa.gov/1LxPrIm>

The deadlines for providing the forms to the employees and submitting the forms to the government have been extended. However, you should be pretty far down the road and you should not wait until the last minute to prepare the forms.

Year-End Health Care Reform Guidance

We included a couple of articles in last month's newsletter regarding some year-end guidance. Here are a few more articles on the topic.

<http://bit.ly/23ZyyDy>

<http://bit.ly/1RA0zxc>

<http://bit.ly/1RA0zxc>

These are good recaps of the information and were prepared by excellent law firms. It is certainly worth your time to read the material.

COBRA and Health FSAs

COBRA and Health FSAs have been around for a long time. Many people believe that fewer people will elect COBRA coverage because of the health care exchanges or marketplace. However, COBRA is still on the books and employers have to comply. Health FSAs have been subject to the "use it or lose it" rules since the beginning of time. However, the law was recently changed where employers can allow participants to carry forward up to \$500 per year under a Health FSA.

<http://bit.ly/1Sk15zN>

This article talks about how COBRA applies to a Health FSA that allows the participants to carry forward unused funds.

HRAs and IRS Form 1095

Employers are adopting health plans with higher deductibles and copayments to try to reduce the premiums. Some of those employers are adopting health reimbursement accounts or HRAs to lessen the impact to employees. That is, the HRA is used to fill the gap between what the employee has to pay before the group health plan starts to cover the bills.

<http://bit.ly/1Qnbs48>

This article talks about how the employer should complete IRS Form 1095 if the employer is sponsoring a group health plan and HRA.

U.S. Supreme Court Limits Employer's Subrogation Rights

A recent U.S. Supreme Court decision limits the employer's ability to seek subrogation under a self-funded health plan. The typical scenario is when a plan participant is injured by a third party, and the self-funded health plan pays the medical bills. The plan participants sued the person that caused the injury and receives money. The self-funded health plan then tried to recover the amount it paid in medical bills.

<http://bit.ly/1Q9VWnw>

The Court said self-funded health plans can only recover funds related to the settlement. Therefore, the plan cannot recover the money if the plan participant spends or commingles the money with the plan participant's other assets.

Medicare Part D Notice

If your group health plan is on a calendar year basis, the electronic Medicare Part D Creditable Coverage notices to the government are due the end of this month.

<http://xerox.bz/1ovja1r>

Remember, there are actually two notices. One notice goes to the plan participants; and this notice, which goes to the Federal government.

Government Clarifies Health Care Exchange Special Enrollment Periods

As a general proposition a person can only sign up for health coverage under the health care exchanges or marketplaces during the annual open enrollment periods (November 1 through January 31). However, just like the rules governing group health plans, a person can enroll mid-year if there is a "special enrollment period."

<http://1.usa.gov/20Y7H8p>

<http://bit.ly/1JYzwJf>

The Centers for Medicare & Medicaid Services (CMS) issued a notice clarifying what constitutes a special enrollment period, which allows an individual to enroll in coverage under the health care exchanges outside the annual open enrollment period.

Employee vs. Independent Contractor

Health care reform requires large employers (i.e. those with 50 or more full-time and full-time equivalent employees) to offer quality/affordable health coverage to full-time employees (i.e. those that work at least 30 hours per week) or face a potential penalty. However, employers need not offer coverage to independent contractors.

<http://bit.ly/1Sk1qCp>

Therefore, it is imperative the employer properly classify the person as an employee or independent contractor. It is more involved than simply slapping a label on the person. This article talks about the factors to consider when making the determination.

ACA and Staffing Agencies

The previous article talks about how important it is to properly classify an individual as either an employee or independent contractor. A similar issue arises in the context of staffing agencies. Here the question becomes whether the person is an employee of the entity using the individual or staffing agency. There are special rules addressing staffing agencies.

<http://bit.ly/1o7yGR5>

If you are using a staffing agency it is important to address these issues upfront to avoid any misunderstandings and potential penalties.

COBRA and Form 1095-C

There has been some confusion about completing IRS Form 1095 when the person is on COBRA coverage. This article tells you how to complete the form for someone on COBRA.

<http://bit.ly/1QuyTUT>

Note the codes change if the person is on COBRA because of a termination of employment vs. a reduction of hours.

Size Matters

The employer mandate or play or pay rules under health care reform only applies to applicable large employers or ALEs. An applicable large employer is an employer that had 50 or more full-time and full-time equivalents during the previous calendar year. Therefore, it is imperative you accurately count employees and determine your status under health care reform if you are close to the 50-employee number.

<http://1.usa.gov/23Zz0Sl>

This IRS webpage explains the rules and has links you can use to accurately determine whether or not your organization is an applicable large employer or ALE.

Tobacco Surcharge Affidavits

Employers are adopting smoker surcharges as a way to encourage individuals to stop using tobacco, which in turn may reduce health care costs. Those programs usually require the individual to disclose whether or not they are using tobacco products. Oftentimes the affidavit contains a statement that providing false information may result in the health coverage being rescinded (i.e. retroactively terminated). The government recently confirmed that providing inaccurate information regarding tobacco use DOES NOT permit the employer to rescind health coverage.

<http://bit.ly/1j3x3R6>

The only remedy available to the employer is to retroactively increase the premiums for the current plan year. For example, if the tobacco surcharge is an additional \$100 per month and the employee provided false information regarding her status as a tobacco user, the employer can go back to the first day of the current plan year and charge the employee the additional \$100 per month. The employer could not rescind (i.e. retroactively) terminate the coverage. It is a labor issue (and not a benefits issues) as to whether the employer can terminate the employee for providing false information.

IRS Form 1095 and Bad Address

The rules require you to send out IRS Form 1095 to the employees. But what happens if the form comes back undelivered? Are you off the hook?

<http://bit.ly/1Sk1D8I>

There is no clear answer but, in the case of undeliverable IRS Form W2, the IRS says to keep the copy for four years. So, until further guidance, you may want to follow the same advice for the undeliverable IRS Form 1095s.

Cash-Out Plans

In the last newsletter we included an article on the IRS's position on cash-out plans and how they can impact the affordability calculation under the employer mandate or play or pay rules. Here are a couple more articles on the topic.

<http://bit.ly/1Kefvii>

<http://bit.ly/1RtNkNT>

The second article is from one of my favorite law firms and touches on a number of topics. So I strongly suggest you spend a couple of minutes and at least read the second article.

Individual's Right to PHI

Everyone knows that HIPAA requires covered entities and business associates to safeguard protected health information or PHI. This article talks about disclosing PHI to the individual.

<http://bit.ly/20ZcHd0>

How is the entity supposed to respond when someone asks for his or her own PHI? The government has recently issued guidance on this topic.

Special Rules for Student Health Plans

The government continues to issue rules and delay the effective dates of various provisions under health care reform. The IRS issued rules earlier this month allowing educational institutions to continue premium reduction arrangements for student health plans.

<http://bit.ly/1KefH15>

<http://bit.ly/105iSCS>

Many colleges and universities utilize these arrangements for student/employees. The delayed effective dates are good until plan years beginning on or after January 1, 2017.

Year-End Review

Here is an article providing a high-level year-end review of 2015 with respect to both health care and retirement issues.

<http://bit.ly/1RtNFQx>

The bulk of the article is devoted to health care issues so I included it in the newsletter. This article reminds us that fully insured health plans will be subject to discrimination rules but only after the IRS issues the regulations. We have no timeline as to when that might happen.