

COMPLIANCE UPDATE

SEPTEMBER 2018

LEGAL FEES UNDER ERISA LITIGATION

No one likes to be involved in a lawsuit except the lawyers. Oftentimes lawyers will take on a case because the statute allows for legal fees. ERISA is one of those laws.

[ERISA allows fees for "some success"](#)

The courts have expanded the circumstances under which lawyers can be awarded fees when the basis of the lawsuit is ERISA. The standard is now that the court may award legal fees if the lawyer wins on some of the merits. That is, the lawyer has to win on some, but not all of, the points. Previously the party had to prevail (i.e. win the lawsuit) before the court would award legal fees.

ORGAN DONOR ELIGIBLE FOR FMLA

I doubt that it comes up very often but the Department of Labor has issued an opinion letter saying an employee who misses work because he or she donated an organ is eligible for FMLA.

[Organ donations qualify for FMLA](#)

According to the government, the surgery requires an overnight stay and the fact the employee is donating the organ does not change that fact. As such, the hospital stay qualifies as a FMLA assuming the employee is otherwise eligible for FMLA.

MEDICARE PART D NOTICE

Medicare Part D is the prescription drug benefits under Medicare. There are two notice requirements under Medicare Part D. One notice goes to the government and must be filed electronically. This notice to the government is due sixty days after the start of the plan year and thirty days after a change in status (i.e. changing from creditable coverage to non-creditable coverage or vice versa) of the coverage.

[Creditable coverage disclosure notice](#)

[Medicare Part D notice to employees](#)

The notice to employees has to be annually. Including the notice in the annual enrollment materials satisfies this requirement.

NEW FMLA FORMS

The government provides sample forms people can use to comply with various statutes. Most forms have an expiration date.

[DOL FMLA forms](#)

The government recently updated various FMLA forms. Although there were no major changes to the forms, you should use the most current version. This is a link to the new forms.

ACA EMPLOYER MANDATE PENALTY

The IRS has been notifying employers that they may be subject to the employer mandate penalty under the Affordable Care Act for 2015. That penalty applies if a large employer did not offer quality/affordable health coverage to full-time employees and at least one full-time employee got a premiums subsidy under the health care exchange or marketplace.

[IRS Letter 5699](#)

[Non-filing fine increases to \\$520 per form](#)

[What to do if you never filed Forms 1094 and 1095](#)

In a new twist, the IRS is starting to contact certain employers who did not file IRS Form 1094 and IRS Form 1095. Large employers (i.e. those with 50 full-time and full-time equivalent employees) and employers sponsoring self-funded health plans are required to file these forms. Failure to file the forms can result in a \$260 penalty per form, which will increase to \$520 per filing. Note that this is a separate and distinct penalty for not filing the forms and can be assessed even if the employer did offer quality/affordable coverage to all full-time employees.

IRS CONFIRMS AFFORDABILITY UNDER SERVICE CONTRACT ACT

One of the requirements under the Affordable Care Act is that large employers offer full-time employees affordable health coverage. Employers with certain federal contracts have to offer employees the option to take fringe benefits or additional compensation.

[Federal contractors and opt-out payments](#)

The IRS has confirmed employers will not be exposed to the penalty under the Affordable Care Act solely by complying with the requirement. That is, the employees' share of the health plan

premiums will not be increased by the amount of cash the employees could elect to receive in lieu of electing to participate in the health plan.

NO NEED TO REFUND SEVERANCE PAY BEFORE FILING LAWSUIT

The Sixth Circuit Court of Appeals (Ohio is in the Sixth Circuit) has ruled an employee is not required to refund severance pay prior to filing a lawsuit alleging Federal discrimination.

[Tender-back doesn't apply to discrimination cases](#)

The Court did say, however, that the severance pay may be deducted from any future awards granted by to the employee.

MEDICARE AND COBRA

Both Medicare and COBRA have been around for a long time but a poorly drafted statute has caused a lot of confusion over the years. This article tries to clear up some of that confusion.

[How Medicare and COBRA interact](#)

Although Medicare entitlement is listed as one of the qualifying events that allows a person to elect COBRA, as a practical matter, Medicare entitlement will rarely be a qualifying event under COBRA.

SHORT-TERM HEALTH POLICIES

The Trump administration continues to whittle away at the Affordable Care Act. The latest move is the final rules governing short-term health policies. These policies are exempt from most of the requirements imposed on group health plans.

[Final rules for short-term policies](#)

Since short-term health policies are exempt from most the Affordable Care Act's requirements, the policies are less expensive. However, there are no free lunches when it comes to health care. Therefore, these less expensive policies provide fewer benefits and have more exclusions than plans that comply with the Affordable Care Act.

TRANSITIONING FROM SEASONAL TO FULL TIME

A number of employers hire seasonal employees for the busy season and a few of those employees may be hired on a full-time basis.

[Benefits considerations with seasonal-to-full time transitions](#)

This article talks about things to consider from a benefits standpoint when converting a seasonal employee to a full time position.

GROUP TERM LIFE INSURANCE

Most employers offer group term life insurance. Many employers do not realize it, but group term life insurance is subject to discrimination rules under the Internal Revenue Code.

[Group term life subject to discrimination rules](#)

The reason the discrimination rules applicable to group life insurance are not an issue in most cases is that most employers offer the same amount of coverage (e.g. \$10,000) to all employees or a uniform percentage of wages (e.g. 2 times salary) to all employees. As a result, the coverage rarely runs afoul of the rules.

COMPREHENSIVE GUIDE ON FEDERAL RULES

Group health plans are subject to a number of Federal rules. This is an extremely comprehensive guide to the Federal rules governing private employer group health plans.

[Federal requirements for private plans](#)

As a practical matter, if you are sponsoring a fully insured health plan chances are the carrier is aware of and is complying with the rules. If you are sponsoring a self-funded health plan the TPA should be monitoring the rules to ensure compliance.

IRS RELEASES NEW FORM 5558 – EXTENSION FOR FORMS 5500

I lose sleep over filing the annual reports (i.e. Forms 5500) for welfare benefit plans. The forms are due seven months after the close of the plan year. So, in the case of a calendar year basis plan year, the forms are due July 31st of the following year.

[Current version of Form 5558](#)

Failure to file the forms on time will result in an automatic penalty. If you are not going to meet the filing deadline, you can request an automatic 2½-month extension by filing IRS Form 5558 before the original due date. The government has just updated the form. It does not look like there were any substantive changes but you should ensure you use the most current version.