BottomLine
Information that matters to you
Benefits & Compensation

Is your health plan 'affordable'?

This year, employers with 100 or more full-time employees (including full-time equivalents) should offer health coverage that meets the minimum value requirements, meaning coverage that is designed to pay at least 60 percent of the total cost of medical services for a standard population. The coverage must also be "affordable."

Employers offering such coverage to at least 70 percent of full-time employees will not be subject to a "play or pay" penalty for 2015.

Starting January 1, 2016, employers with 50 or more full-time employees (including full-time equivalents) must offer such coverage or face the penalty. In addition, employers must make the offer to at least 95 percent of their full-time employees.

In This Issue

What is 'affordable'?

But what, exactly, is "affordable" coverage? The term means that an employee's share of the premium is no more than 9.5 percent of the employee's annual household income. If an employer offers multiple coverage options, the affordability test applies to the lowest-cost self-only option.

Since employers probably do not know their employees' household incomes, employers can take advantage of one or more of the safe harbors using information such as the Form W-2 wages or the employee's rate of pay.

If an employer meets any safe harbor, the offer of coverage will be deemed affordable, even if the employee qualifies for a premium tax credit. The three safe harbors outlined in the regulation at 26 CFR §54.4980H–5 are as follows:

1. **Form W-2 wages.** An employer satisfies this safe harbor if the premium cost does not exceed 9.5 percent of the wages reported in Box 1 of an employee's Form W-2.
2. **Rate of pay.** An employer satisfies this safe harbor for a calendar month if the employee's contribution does not exceed 9.5 percent of 130 hours multiplied by: (1) the employee's hourly rate of pay on the first day of the plan year, or (2) the employee's lowest hourly rate during the calendar month. For a non-hourly employee, the employee's contribution may not exceed 9.5 percent of the employee's monthly salary as of the first day of the plan year. Adjustments are not permitted if the rate of pay is increased during the year.
3. **Federal poverty line.** An employer satisfies this safe harbor if the employee contribution for the year does not exceed 9.5 percent of the federal poverty line for the state in which the individual is employed.

An employer may use one or more safe harbors only if it offers minimum essential coverage to full-time employees and their dependents. The offer must provide minimum value for the self-only coverage.

An employer may use different safe harbors for each category of employees, but must be consistent for all employees within a category.

BottomLine

Employers that do not know the household incomes of employees may apply one or more safe harbors to establish that health coverage is affordable.

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Employees working at two or more jobs or pay rates

Employers may pay employees more than one rate of pay. In fact, the practice is quite common. Employees might receive higher pay when performing hazardous work, or may be paid a shift differential for working nights or weekends. In some cases, employers will even establish different hourly rates for different types of work.

For example, an employee who is paid $18 per hour for performing job duties might be paid only the minimum wage for nonproductive tasks such as traveling between job sites, attending training, or being on call. Similarly, an employee might be paid a flat rate rather than an hourly rate if the employee is called in for an emergency.

As long as the employer pays at least the minimum wage for all hours worked, employers may set different rates of pay. Of course, if an employee works more than 40 hours in a workweek, the employer must provide overtime pay.

Different rates

When employees work at two or more rates, overtime is based on the weighted average of all rates, as described in the federal overtime regulation at 29 CFR §778.115 *Employees working at two or more rates*. To illustrate, assume that an employee's weekly hours were as follows:

- 30 hours in regular duties at $18 per hour (earning $540)
- 20 hours in travel time at $10 per hour (earning $200)

The total weekly compensation of $740 would be divided by the 50 hours worked to give an average of $14.80 per hour. The employer would add one-half of this amount ($7.40) for each of the 10 overtime hours, since overtime must be no less than 1.5 times the hourly rate. This adds $74 in overtime pay, so the employee's gross wages would be $814 for the week.

Depending on the number of hours spent in each type of work, the average hourly rate could change from week to week. Employers must track the number of hours spent in each type of work for which a unique hourly rate was established.

As an alternative, an employer could choose to pay overtime using the higher rate, without calculating an average. Since overtime must be paid at not less than 1.5 times the hourly rate, calculating overtime on the higher rate will always meet that standard. This would eliminate the need to calculate a weekly average while still reducing total wages during weeks with extensive time spent in nonproductive duties.

Different jobs

Some employees work in more than one position for the same employer, such as two part-time jobs. Under the provisions of §778.419 *Hourly workers employed at two or more jobs*, an employer may pay overtime using whatever rate applies to the work being performed when the overtime occurs.

Note that this option may not be available if the employee is paid different rates for different duties, if the employee does not actually have "two or more jobs." For example, traveling from one work location to another is not the same as having a second job.

To use this method, the employer must have an agreement with the employee prior to the start of the work (and ideally in writing) that overtime will be paid on the rate for whichever job caused the over-

time. An agreement is necessary because overtime might usually occur during the lower-paid job.

For instance, suppose an employee earns $15 per hour for one job and $10 per hour for a second job, but typically works in the second job at the end of the workweek. Paying overtime for the second job at 1.5 times the hourly rate of $10, or $15 per overtime hour, might create an impression that the employer was attempting to avoid paying overtime. It could also confuse the employee, who might initiate legal action. Creating a written agreement to document the hourly rates and manner of calculation can help avoid such confusion.

An employer using this overtime calculation must be able to pinpoint exactly when the employee passes the 40-hour mark. That is when overtime begins, and the overtime rate will depend on which job is being performed at that time. If the employee works both jobs after reaching 40 hours, the employee would get two different overtime rates, as applicable for the job being performed.

BottomLine

Employers may provide different rates of pay, including lower rates for nonproductive duties, but should communicate how overtime will be calculated.

SAMPLE

Wellness program guidance issued under HIPAA

On April 16, the Department of Health and Human Services released guidance on the privacy provisions of the Health Insurance Portability and Accountability Act (HIPAA) as it relates to workplace wellness programs. The HIPAA privacy, security, and breach notification rules (HIPAA rules) protect individuals' identifiable health information held by covered entities and their business associates.

Covered entities are health care clearinghouses, health plans, and most health care providers. Business associates are persons or entities that perform functions or activities on behalf of, or provide certain services to, a covered entity that involve access to protected health information (PHI).

Coverage

The new guidance first addresses whether the HIPAA privacy rules apply to wellness programs. Since the HIPAA rules do not apply to employers in their capacity as employers, the answer depends on the how those programs are structured. Some employers offer a wellness program as part of a group health plan, with incentives or rewards related to group health plan benefits. Other employers offer wellness programs that are not connected to a group health plan.

If a wellness program is offered as part of a group health plan, the individually identifiable health information collected from or created about participants is PHI and protected by HIPAA rules because a group health plan sponsored by the employer is a covered entity. HIPAA also protects PHI held by the employer (as plan sponsor) on the plan's behalf when the plan sponsor is administering aspects of the plan, including wellness program benefits offered through the plan. However, an employee welfare benefit plan that has fewer than 50 participants and is self-administered is not a group health plan and therefore not a covered entity under the HIPAA rules.

If a wellness program is not part of a group health plan, the health information collected from employees is not protected by the HIPAA rules. However, other federal or state laws may apply to the collection and/or use of the information, particularly the Americans with Disabilities Act.

Protections

The new guidance also addressed the question of what protections are in place when an employer (as plan sponsor) has access to individually identifiable health information about the wellness program participants.

The HIPAA privacy and security rules restrict the circumstances under which a group health plan may allow an employer/plan sponsor access to PHI without the written authorization of the individual.

Often, the employer/plan sponsor will be involved in administering certain aspects of the group health plan. Where this is the case and there is no written authorization from the individual, the group health plan may provide the employer with access to the PHI necessary to perform its plan administration functions, but only if the employer amends the plan documents and certifies to the group health plan that it agrees to, among other things:

- Establish adequate separation between employees who perform plan administration functions and those who do not;
- Refrain from using or disclosing PHI for employment-related actions or other purposes that are not permitted by the privacy rule;
- Where electronic PHI is involved, implement reasonable and appropriate safeguards to protect the information; and
- Report to the group health plan any unauthorized use, disclosure, or other security incident of which it becomes aware.

Where the employer/plan sponsor does not perform plan administration functions, its access to PHI without the written authorization of the individual is much more restricted. The privacy rule would permit the group health plan to disclose only:

1. Information on which individuals are participating in the group health plan or enrolled in the health insurance issuer or HMO offered by the plan; and/or
2. A summary of health information for purposes of modifying the plan or obtaining bids for coverage under the plan.

BottomLine

Employers acting as employers are not covered by HIPAA, but their activities as plan sponsors might be covered, including administering a wellness program.

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Maintaining complete payroll records

As an employer, you should be withholding and paying federal income, social security, and Medicare taxes for each employee. As part of this obligation, the Internal Revenue Code requires you to maintain certain records for each employee. Failure to keep proper records can result in penalties if you are unable to provide the required information when requested by the Internal Revenue Service.

You must keep income, social security, and Medicare tax records for at least four years after the due date of the employee's personal income tax return (generally, April 15) for the year in which the payment was made, including:

- The Employer Identification Number (EIN);
- The employee's name, address, occupation, and social security number;
- The total amount and date of each payment and any amount withheld for taxes or otherwise, including reported tips and the fair market value of non-cash payments;
- The amount of compensation subject to withholding for federal income, social security, and Medicare taxes, the amount withheld for each tax, and the date withheld if different than the payment date;
- The pay period covered by each payment of compensation;
- If applicable, the reason(s) why the total compensation and the taxable amount for each tax rate are different;
- The employee's Form W-4 withholding allowance certificate;
- The employee's beginning and ending dates of employment;
- Any statements provided by the employee reporting tips received;
- Fringe benefits provided and any required substantiation to show an exemption from taxes;
- Adjustments or settlements of taxes; and
- Amounts and dates of tax deposits.

In addition, you must retain information regarding payments made to an employee by you or a third party under an accident or health plan. This should include the beginning and ending dates of the absence from work and the amount and weekly rate of each payment. You also need to keep copies of the employee's Form W-4S, *Request for Federal Income Tax Withholding From Sick Pay*. If applicable, you should also retain copies of Form 8922, *Third-Party Sick Pay Recap*. These copies must be kept for four years after the date the employee filed a personal income tax return.

Likewise, copies of returns filed and any Forms W-2 sent to employees but returned as undeliverable must be retained for at least four years after the due date of the tax (or the date the tax is actually paid, if later) for the period to which the records relate. These files may be paper or electronic. If you file a claim for refund, credit, or abatement of withheld income and employment taxes, you must also retain records related to the claim for at least four years after filing.

If you offer a health insurance, cafeteria, educational assistance, adoption assistance, or dependent care assistance plan that provides benefits which are excluded from employees' taxable income, you must keep whatever records are needed to determine whether the plan meets the requirements for excluding the benefit amounts.

The Federal Unemployment Tax Act (FUTA) also requires employers to retain records of compensation earned and unemployment contributions made. Such records must be kept for four years after the due date of the Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return*, or the date the FUTA tax was paid, whichever is later. You must retain records substantiating:

- The total amount of employee compensation paid during the calendar year;
- The amount of compensation subject to FUTA tax;
- State unemployment contributions made, with separate totals for amounts paid by the employer and amounts withheld from employees' wages (Alaska, New Jersey, and Pennsylvania require employee contributions);
- All information shown on Form 940 (with Schedule A and/or R as applicable); and
- If applicable, the reason total compensation and the taxable amounts are different.

Finally, if applicable, you must keep records substantiating any information returns and statements to employees regarding tip allocations for at least three years after the due date of the return or statement to which they relate.

BottomLine

Records of wages and taxes generally must be saved for at least four years after the date the employee filed a personal income tax return.

SAMPLE

Second Circuit

Internal verbal complaint about wages was protected

If an employee's complaints about alleged wage violations are verbal, the employee is still protected from retaliation under the Fair Labor Standards Act (FLSA). The Second Circuit Court of Appeals had previously held that such complaints must be made to an enforcement agency, but recently reversed its position because of a U.S. Supreme Court ruling and found that complaints to the employer are also protected, even if not made in writing.

The FLSA protects employees from retaliation if they have "filed any complaint." In the 2011 case of *Kasten v. Saint-Gobain Performance Plastics Corporation*, the U.S. Supreme Court ruled that off-hand comments may not be protected, but a verbal complaint would be deemed to have been "filed" when a reasonable, objective person would understand that the employee was asserting statutory rights under the FLSA. A complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection.

Years before that Supreme Court decision, the Second Circuit had ruled in 1993 that making an informal verbal complaint to a supervisor did not amount to "filing" a complaint and was not protected. However, in light of the Supreme Court's decision, the Second Circuit recently changed its position and held that a verbal complaint made internally could be considered "filed."

In the case at issue, an employee complained to the company president that he had not been paid in several months. The president allegedly responded by saying, "I'll pay you when I feel like it" and then drew a gun and pointed it at the employee. The court found this to be retaliation, and in the words of the court, the employee "understood that response as ending his employment."

Greathouse v. JHS Security Inc. (No. 12-4521-cv) April 20, 2015

BottomLine

Verbal complaints about FLSA violations may protect an employee from retaliation, even if made internally.

The Second Circuit includes the states of Connecticut, New York, and Vermont.

SAMPLE

State Updates

California: Paying for security screenings — Although the United States Supreme Court ruled that employees did not have to be paid for time spent undergoing post-shift security screenings under the Fair Labor Standards Act, state laws may be more restrictive. A court in California recently held that employees could proceed with a claim under state law for uncompensated time spent undergoing post-shift security screenings. *Miranda v. Coach, Inc.*, Northern District of California

Nebraska: Pregnancy accommodations — Effective July 13, 2015, employers must provide reasonable accommodations for pregnancy, childbirth, and related medical conditions. Such accommodations might include providing equipment for sitting, offering more frequent or longer breaks, granting modified work schedules or time off to recover, temporary transfers to less strenuous work, or break time and appropriate facilities for breast-feeding or expressing breast milk. LB 627

Massachusetts: Wages and deductions — The state minimum wage regulations were revised with a number of changes. An employee may now request to inspect his or her wage records and must be provided a copy within ten business days. Employers may not make deductions for meals or lodging without the voluntary written consent of the employee. Employers must reimburse employees for the cost of a uniform, including the costs of any special care such as dry cleaning. Also, travel time to alternative worksites beyond a usual commute must be compensated, and employees must be reimbursed for travel expenses. 454 CMR 27

Oklahoma: Misconduct definition — Employees terminated for misconduct may be denied unemployment benefits, but state laws do not always provide a clear definition for misconduct. Effective April 20, Oklahoma law defines the term to include "unapproved or excessive absenteeism or tardiness" along with other violations of company policies. Also, a warning from the employer is not necessary to deny unemployment benefits for misconduct as long as the employee knew or should reasonably have known of the rule or policy violation. Employment Security Act

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Income taxes for employees in multiple states

If your company has locations in multiple states, or employees who reside in one state but work in another, you may have employees paying income tax in more than one state. Not every state offers clear guidance on how to handle these situations, but as a default position, you should withhold income tax for the state in which the employee actually performs the work. This will be required even if that is not the employee's state of residence, unless, of course, the state does not require personal income tax (those states are Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming).

If you have a business presence (called a nexus) in a state, even if only an employee making sales in that state, your company will be subject to the income tax laws of that state. Therefore, any employee who resides in that state will normally be subject to withholding, even if that employee doesn't actually work in that state. Your business presence subjects all of your employees who reside in that state to the state's tax laws.

If you do not have business presence in an employee's state of residence, but there is a reciprocal tax agreement between the two states, you must honor the agreement. This usually means that you won't withhold income tax in the state where the employee works. However, you are not obligated to withhold taxes for the state in which the employee resides, if you have no business presence there. The employee may have to estimate his or her state taxes and make payments without any payroll withholding.

If the states do not have a reciprocal agreement, the employee may have to pay income tax in both the state of residence and the state of employment. Some states give a credit for taxes paid in another state. For example, if an employee paid $1,200 of income tax in the state of employment, but owed $1,400 in the state of residence, the employee may have to pay only the difference ($200) in the state of residence.

If the default position is not clearly applicable, you have three other options to evaluate.

Residence

First, determine the employee's state of residence. To identify your tax obligations, you need to know which state(s) claim the employee as a resident. An employee may claim to be a resident of the state in which he or she maintains a home. However, if the employee relocated to another state in order to work for your company, the state to which the employee relocated may claim jurisdiction over the employee.

Most states define a resident as either someone domiciled in the state, or someone who resides more than a specified number of days in the state, often with exclusions for temporary residence due to military service.

Reciprocity

If an employee works outside his or her state of residence, determine whether the states have a reciprocal agreement. If so, the employee would have to file only one state income tax return, and you would withhold only for the state of residence (and then only if you have a business presence there). Without reciprocity, you may have to withhold for all states based on the amount of time worked in each state. Note that a reciprocal agreement may impact your obligations if the employee moves to another state, even if the employee does not work there.

Nonresident

If an employee resides in one state but works in another, and there is no reciprocal agreement, you must consider the laws in the state of residence as well as the laws of the state of employment.

The state in which the employee works will almost always require withholding from nonresidents, although only from wages for services performed in that state. A few states may exempt an employee who works in the state for a short time or earns less than a specified amount of money. However, you as the employer are always subject to the laws of any state in which you have employees performing work, since you then have a business presence in that state.

As noted, the state of residence may be relevant even if the employee doesn't work there, if you have a business presence there. You would be subject to the state tax laws and may have to withhold that state's income tax in addition to the tax for the state in which the employee is working.

BottomLine

When employees live and work in different states, income tax obligations depend on your business presence, reciprocity agreements, and which states claim the employee as a resident.

SAMPLE

Employers want to know

***Question:* An exempt salaried employee is serving in the National Guard and misses one Friday per month for duty. Can this day be unpaid? Can we make him use vacation?**

Answer: You may not make deductions from the salary of an exempt employee for absences due to temporary military leave, including National Guard duty. Making such a deduction would violate the federal salary basis regulation (29 CFR 541.602) even if the employee agreed to an unpaid day off. Employees cannot agree to let the employer violate the federal requirements. However, you may reduce the amount of salary paid for that week by the amount of military pay that the employee receives.

In addition, you may not make him use vacation for that day. He could request to use vacation or other paid leave, but if he does not make the request, you still have to pay the full salary for that week (minus any military pay).

The regulations for military leave under the Uniformed Services Employment and Reemployment Rights Act (USERRA) state, "The employer may not require the employee to use accrued vacation, annual, or similar leave during a period of service in the uniformed services" (20 CFR §1002.153). Service members must be permitted to use vacation instead of taking unpaid leave, if they make the request, but may not be required to use vacation for military service.

BottomLine

You may not require employees to use paid leave during military service absences, nor take a salary deduction from exempt employees for absences of less than a full workweek.

What Would You Do?

You would like to offer a retention bonus to a nonexempt employee after he completes one year of service. Will this payment affect overtime?

1. No, because it's a discretionary payment.
2. Yes, because it's a payment for services.
3. No, if the payment is a percentage of wages.
4. Yes, because every payment affects overtime.

Answer: The correct answers are Numbers 2 and 3. The bonus will affect overtime because it's a payment for services provided, but it may not be necessary to calculate the impact if the payment is a percentage of the employee's wages for the covered period. Once the employee has completed the requisite period of service, it should be reasonable to assume that the bonus was earned during that period. The payment would affect a nonexempt employee's average hourly rate for that period, and you would owe additional overtime based on that increase. However, a bonus that is a percentage of the employee's total wages for the covered period would already include a percentage of the overtime wages. Note that a signing bonus offered to new hires would become a retention bonus if payment was delayed until the employee completed the first several months of work.

BottomLine

Some bonuses can be exempt from overtime, but a retention bonus will affect the employee's hourly rate unless it is a percentage of wages already earned.

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Issues to consider before offering early retirement

Employers may offer early retirement to reduce headcount or to reduce payroll costs. Essentially, this option falls between imposing layoffs and using attrition (not rehiring after normal turnover). To fully evaluate the pros and cons of offering early retirement, it helps to understand the pros and cons of layoffs and attrition.

A layoff usually has a negative impact on employee morale, but does allow the employer to select which employees or positions will be eliminated. Employers commonly select the less-critical positions and/or the lowest-performing employees for elimination. The employer also controls the number of positions or employees to be removed in order to achieve the desired cost-savings goals.

Using attrition has less impact on morale, but the employer cannot control which employees leave and may need to backfill critical positions. Before using this option, employers should identify which positions are critical, consider their turnover rates, and evaluate whether this option will result in the necessary cost reductions within a reasonable time frame.

As noted, early retirement falls between these options. It tends to have little impact on morale. Also, critical open positions can be filled with internal candidates, creating upward mobility and potentially increasing retention. However, the organization must be able to withstand the simultaneous loss of multiple senior employees who probably have a lot of experience.

An employer considering an early retirement offering should identify the ideal number of employees to be removed and estimate how many will accept the offer. This depends on the size of the eligible group and the value of the offer.

Group size

The eligibility criteria will affect the size of the group. Offering early retirement to employees 55 and older should result in a larger group compared to offering the incentive to those 59 and older.

Not all eligible employees will accept the offer, but employers typically plan for around 50 to 75 percent to accept. Some employees may choose to keep working, no matter how generous the offer.

Value

The next consideration is how much to offer. The more attractive the offer, the more employees will accept — and the more it will cost. Since a common reason for offering early retirement is to reduce costs, employers need to evaluate the potential savings compared to the anticipated costs of paying out the incentives.

For example, the plan might offer two weeks' severance pay per year of service, plus fully funding the retiring employees' health insurance until they become eligible for Medicare. If the company has to replace some employees who accept the offer, the costs of training replacements and paying their salaries, combined with the severance pay and insurance premiums, can become expensive.

Risks

One risk inherent to early retirement offers is that too few employees will accept, which may fail to generate the anticipated cost savings. This may happen if the incentive was not sufficiently attractive, and the company may still need to take additional steps such as layoffs or attrition.

The opposite risk is that too many employees will accept, leaving the company short-staffed after a significant loss of experienced employees. In addition, this can substantially increase the program costs, and paying out so much in early retirement benefits may negate any savings that the company hoped to realize.

Another potential risk is that the higher-performing employees will accept the offer, and may later accept job offers from competitors, while the lower-performing employees decline the offer and remain at the company until normal retirement age.

Finally, offering early retirement has potential implications under the age discrimination laws, particularly when the offer includes a waiver of claims. Eligible employees should also understand that accepting the offer is completely voluntary. Some employees may otherwise believe that they will be terminated if they refuse the offer.

BottomLine

Offering early retirement can result in cost savings, but does come with a number of potential risks.

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