BottomLine
Information that matters to you
Benefits & Compensation

ACA: When a full-time employee becomes part-time

Like many employers, you may be struggling to understand the Affordable Care Act (ACA) requirements and identify which employees must be offered health coverage. The law has provisions for evaluating variable-hour employees, part-time employees, and seasonal employees. In some cases, you might simply expect a new hire to regularly work at least 30 hours per week and offer coverage based on those expectations, since the employee would clearly be full-time (or you may have to offer coverage after no more than a 90-day waiting period).

But what happens if this employee later becomes part-time? In the past, you would probably change the employee's status to part-time starting the first day of the month following the change in status. For example, if an employee changed from full-time to part-time in July, the individual would be treated as part-time as of August 1, whether the employee must start paying a higher share of the premium or simply becomes ineligible for coverage.

Unfortunately, under the ACA, your expectation that the employee will no longer work full-time is not sufficient to change the employee's status to part-time.

Since the employee was hired in a full-time position, you probably didn't have an initial measurement period or subsequent stability period. Now, with the reduction in working hours, when can you reclassify the worker as part-time for health insurance purposes? You might be able to do so on the first day of the fourth month following the change in status.

This situation was addressed in a special final regulation published on February 12, 2014. For the example given previously, you would begin the change to part-time status by first applying a monthly measurement period. Once the employee has three consecutive months of part-time hours (on average, fewer than 30 hours per week), you could reclassify the employee as part-time on the first day of the fourth month following the reduction in hours. The option to use a monthly measurement period applies only if:

1. The employee was offered minimum value coverage from the start of employment (or no later than the first day of the month following three full calendar months of employment) up through the time that the employee's hours were reduced; and
2. During each of the three full calendar months of monthly measurement following the reduction in hours, the employee actually had an average of less than 30 hours of service per week.

Given those conditions, you could apply the monthly measurement method even if you do not normally apply the monthly measurement method to employees in the same category. For example, you could apply the monthly measurement method to an hourly employee, even if you use a look-back measurement method to determine full-time employee status of all other hourly employees.

BottomLine

A special rule allows employers to apply a monthly measurement period to certain employees who were hired as full-time workers, and whose hours were later reduced.

In This Issue

2 **Compensation**
Frequently asked questions regarding final paychecks

3 **Health Care**
Summary of Benefits and Coverage template delayed
Preparing to file ACA information returns

4 **Your news Now**
EEOC proposes rules for incentives in wellness programs

5 **Court Report and State Updates**

6 **Starting a payroll deduction IRA for employees**

7 **Your Questions Answered**
Employers want to know

7 **What Would You Do?**

8 **Retirement**
Tracking hardship distributions and plan loans
Annual investment notice every 14 months

SAMPLE

Frequently asked questions regarding final paychecks

Sooner or later, every employee who works at your company will leave. The employee may retire after years of service, quit for another job, or get fired or laid off. That employee will have to be given a final paycheck, and you may face questions such as when to provide the check, whether deductions can be taken, and whether earned vacation time must be paid out.

When to pay

Federal law does not address final paychecks, but state laws differ as to when a final paycheck must be provided. Often, the timing depends on whether the employee quit or was terminated. In many states, final pay is due on the next regular payday, but some state laws require paying sooner in cases of involuntary termination. For example, in California, a terminated employee must be given the final paycheck on the day of termination. Further, the employee would be owed a usual days' wages for each day that payment is delayed. Check your state laws for any final paycheck requirements.

In some cases, you can't determine the full amount owed on the last day of work, particularly if the employee earns commissions. Under federal law, final commissions are not owed as long as the employee receives at least the minimum wage for all hours worked. However, many states consider commissions to be owed once the conditions for earning the commission have been satisfied. The commission may be "earned" even after the employee left the company, and must be paid to the former employee.

This means that you may have to calculate any commissions earned through the last day of work and include them on the final paycheck. Later, you would have to determine whether any sales made by the now-former employee resulted in additional commissions, then send another check to the former employee. Depending on the commission agreement, these earnings might be determined weeks or even months after the employee's departure.

Deductions

Employees who are issued equipment and quit without notice might fail to return company property, prompting you to wonder whether you can delay the final paycheck until the employee returns that property. The short answer is no.

Wages earned by an employee are legally owed and must be paid as required by state law. States may have laws on the frequency of paydays and, as noted, on the payment of final wages. The fact that a former employee still has company property does not give you a right to refuse payment of wages earned. In fact, if you did hold the check, the former employee could sue for the final wages, despite the fact that he or she failed to return company property.

In nearly all states, a deduction from wages may be made only after obtaining a signed authorization from the employee. Even if the employee provides an authorization, the employee must receive at least the minimum wage for all hours worked. Therefore, holding an entire paycheck isn't allowed. Since a former employee may not agree to authorize a deduction, you may have to take other legal action to recover missing property, such as taking the employee to small claims court.

Vacation

In most states, the decision to pay out unused vacation hours is entirely up to company policy. Your policy may promise to pay out the unused time, or may stipulate that the payout would be denied in some situations (such as quitting without notice). In either case, you must follow your policy terms.

Even though you cannot make a deduction from wages for unreturned company property in most states, your vacation policy could clarify that payout of unused vacation will be delayed or denied until any company property is returned. However, eleven states require paying out unused vacation, regardless of circumstances. These states are California, Colorado, Illinois, Louisiana, Massachusetts, Montana, Nebraska, North Dakota, Rhode Island, West Virginia, and Wyoming. Three other states allow for denial of vacation pay, but only if the forfeiture provisions are clearly spelled out in your policy. These states are Maryland, New York, and North Carolina. Of course, spelling out any forfeiture provisions in clear terms is a good idea in all states.

BottomLine

State laws usually define when a final paycheck must be provided and what it must include, such as vacation time, as well as obligations for paying out commissions.

SAMPLE

Summary of Benefits and Coverage template delayed

Employers that offer health coverage must provide a Summary of Benefits and Coverage (SBC) to employees. The Departments of Labor, Health and Human Services, and the Treasury (Departments) were expected to offer a sample template for making this disclosure, with the new layout requirement to take effect on September 1, 2015. That release has been delayed, however.

The Affordable Care Act directs the Departments to develop standards for use by group health plans and health insurance issuers offering health insurance coverage in creating and providing an SBC that "accurately describes the benefits and coverage under the applicable plan or coverage." In 2012, the Departments published proposed regulations to implement the disclosure requirements and announced the availability of templates, instructions, and related materials. Subsequently, the Departments released six sets of FAQs regarding the SBC requirements.

After consideration of comments and feedback, the Departments published a notice of proposed rulemaking in December 2014, as well as a new set of proposed SBC templates, instructions, an updated uniform glossary, and other materials. The changes were proposed to apply beginning September 1, 2015, but have not been finalized.

In a statement published March 30, the Departments indicated their intent to finalize the SBC regulations "in the near future" and indicated that the regulations will apply to coverage that renews or begins on the first day of the first plan year that begins on or after January 1, 2016 (including open enrollment periods that occur in the Fall of 2015 for coverage beginning on or after January 1, 2016).

However, the new template and associated documents will not be finalized until January 2016 and will apply to coverage that would renew or begin on the first day of the first plan year that begins on or after January 1, 2017 (including open season periods that occur in the Fall of 2016 for coverage beginning on or after January 1, 2017).

BottomLine

The release of the expected SBC template has been delayed until January 2016.

Preparing to file ACA information returns

Under the Affordable Care Act, large employers must file information returns with the Internal Revenue Service (IRS) and provide statements to full-time employees about health coverage offered, or document that the employer didn't offer coverage. This reporting was voluntary for calendar year 2014, but is mandatory for calendar year 2015. The information must be reported to the IRS and provided to employees in early 2016.

To be prepared to report this information to the IRS and issue the new Form 1095-C to employees, large employers will need to:

- Determine the kind of health insurance coverage offered to full-time employees and their dependents, if any; and
- Identify full-time employees for each month and track health coverage information in 2015 to help complete new IRS forms.

Large employers need to track this information because they could be subject to an employer shared responsibility payment if they:

- Offered coverage to fewer than 70 percent of full-time employees and their dependents (after 2015, this threshold changes to 95 percent) and at least one full-time employee enrolled in coverage through the health insurance marketplace and receives a premium tax credit; or
- Offered coverage to at least 70 percent (after 2015, this threshold changes to 95 percent) of full-time employees and their dependents, but at least one full-time employee receives a premium tax credit because coverage offered was not affordable, did not provide minimum value, or the full-time employee was not offered coverage.

The term "affordable coverage" means that the lowest cost self-only health plan is 9.5 percent or less of any full-time employee's household income. Since employers are unlikely to know their employees' household incomes, they can determine whether they offered affordable coverage under various safe harbors.

The reporting requirements apply to all large employers in 2015, even to those that qualify for transition relief from employer shared responsibility payments for 2015. Certain reporting requirements also apply to employers that sponsor self-insured coverage, even if the employer is not a large employer.

BottomLine

Large employers should begin preparing to report coverage offerings to the IRS and to employees.

SAMPLE

EEOC proposes rules for incentives in wellness programs

On April 20, the Equal Employment Opportunity Commission (EEOC) published proposed rules for using incentives and penalties to encourage employee participation in wellness programs without violating the Americans with Disabilities Act (ADA). Consistent with the Affordable Care Act (ACA) and the Health Insurance Portability and Accountability Act (HIPAA), the proposed rules allow incentives up to 30 percent of the total cost for employee-only coverage, and up to 50 percent for smoking cessation programs.

Reasonably designed

The EEOC warned that when an employer collects medical information or makes medical inquiries of employees, it may not simply claim that the collection or inquiry is part of a wellness program. An employee health program must be reasonably designed to promote health or prevent disease. This means the program has a reasonable chance of improving the health of, or preventing disease in, participating employees.

Conducting a health risk assessment (HRA) and/or a biometric screening for the purpose of alerting employees to health risks would meet this standard, as would using aggregate information from HRAs to design and offer health programs aimed at specific conditions. On the other hand, collecting medical information without providing follow-up information or advice would not be reasonably designed to promote health.

Also, a program is not reasonably designed if it imposes, as a condition to obtaining a reward, an overly burdensome amount of time for participation, requires unreasonably intrusive procedures, or places significant costs related to medical examinations on employees. A program also is not reasonably designed if it exists mainly to shift costs from the employer to targeted employees based on their health.

Participation

Employee participation in a medical examination as part of a wellness program must be voluntary. Participation would be voluntary as long as the employer:

- Does not require employees to participate;
- Does not deny coverage or particular benefits within a group health plan for non-participation, or limit the benefits for employees who do not participate; and
- Does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees who do not participate.

Where a wellness program is part of a group health plan, the employer must provide employees with a notice that:

- Is written so employees are reasonably likely to understand it;
- Describes the type of medical information that will be obtained and the specific purposes for which the medical information will be used; and
- Describes the restrictions on the disclosure of the employee's medical information, the employer representatives or other parties with whom the information will be shared, and the methods that the employer will use to ensure that medical information is not improperly disclosed (including whether it complies with the measures set forth in the HIPAA regulations).

Information regarding medical information or history may be provided to the employer only in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of any employee.

Incentives

Using incentives, whether a reward or penalty, does not make the program involuntary if the maximum incentive does not exceed 30 percent of the total cost of employee-only coverage.

Not all wellness programs require disability-related inquiries or medical examinations. Examples may include attending nutrition, weight loss, or smoking cessation classes. These types of programs are not subject to the ADA incentive rules, but may be subject to HIPAA incentive limits. A smoking cessation program that merely asks employees whether or not they use tobacco (or whether or not they ceased using tobacco upon completion of the program) would not include disability-related inquiries or medical examinations. Therefore, an employer could offer incentives as high as 50 percent of the cost of employee coverage for participation in that program.

BottomLine

The EEOC has published proposed rules for using incentives in wellness programs.

SAMPLE

Court Report

Supreme Court

Pregnancy accommodations

The Supreme Court recently faced the question of whether employers must accommodate pregnant employees to the same extent as any other employee, or whether employers are merely obligated to refrain from discriminating against pregnant employees. The court chose neither interpretation and held that a pregnant worker may attempt to prove discrimination under the *McDonnell Douglas* shifting burden framework.

In the case at issue, an employee became pregnant and her doctor restricted her from lifting more than 20 pounds. The company told her that she could not work, and she eventually sued, claiming that the company unlawfully refused to accommodate her restriction.

The federal Pregnancy Discrimination Act requires employers to treat pregnant women the same as "other persons" who are not pregnant, but who are "similar in their ability or inability to work." The employee pointed to company policies for accommodating workers who were injured on the job, had disabilities under the Americans with Disabilities, or had lost Department of Transportation certifications. She argued that these policies discriminated against pregnant employees.

The company asserted it had not discriminated against her, but treated pregnant employees the same as "other persons" who did not fall into one of the three defined categories of employees who were eligible for accommodations.

The Supreme Court found that the employee created a genuine dispute as to whether the company "provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from hers."

Under the *McDonnell Douglas* shifting burden framework, the employee must establish the basics of a claim. The employer may then offer legitimate, nondiscriminatory reasons for its actions. Then, the employee may attempt to show that those reasons were a pretext for discrimination. The Supreme Court found that the employee met the initial burden, so the lower courts must now determine if the employer offered a legitimate, nondiscriminatory reason.

The Supreme Court also created a new standard by stating that a case could reach a jury by showing that the employer's policies impose a "significant burden on pregnant workers." The court held that employees may raise the significant burden issue by providing evidence that the employer "accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."

Young v. United Parcel Service, Inc. (No. 12–1226) March 25, 2015

BottomLine

If employers provide accommodations for non-disabled employees with medical restrictions, they may have to provide similar accommodations for pregnant employees.

SAMPLE

State Updates

Arkansas: Third-party administrator — The state modified the definition of a third-party administrator to include a pharmacy benefits manager, defined as an entity that administers or manages a pharmacy benefits plan or program, as well as a "pharmacy benefits plan or program," defined as a plan or program that pays for, reimburses, covers the cost of, or otherwise provides pharmacist services to individuals who reside in or are employed in Arkansas. The new definitions apply to any health coverage provided by a self-insured plan, a multiple employer trust, or a multiple employer welfare arrangement. Arkansas Code § 23-92-201

California: CFRA revisions — Effective July 1, 2015, revisions to the California Family Rights Act (CFRA) regulations will take effect. Many of the changes make the law similar to the federal Family and Medical Leave Act, addressing the employer's obligation to recognize a request for leave, handling abuse of CFRA leave, and allowing salary deductions for partial days. Employees will also have greater rights to reinstatement, and employers have a greater burden to meet when requesting second opinions, among other changes. California Code of Regulations, Title 2, Division 4.1, Chapter 5, Subchapter 2, Article 11 Family Care and Medical Leave Act

Michigan: Wage garnishments — Effective September 30, wage garnishment orders will remain in effect until satisfied rather than renewing every six months. The amount that creditors must pay employers will also increase from $6 to $35. Also, orders must be served as a court document, and employers will not be immediately liable for the full debt in the event of errors but may seek administrative relief. Finally, if an employer does pay any part of the employee's debt under a default judgment, the employer may deduct that amount from the employee's wages without obtaining a written consent from the employee. HB4119, HB4120

Starting a payroll deduction IRA for employees

Helping employees contribute to an individual retirement account (IRA) through payroll deductions could be a low-cost option to help them save for retirement. You may set up a payroll deduction IRA program with a bank, an insurance company, or another financial institution.

Advantages to establishing a payroll deduction IRA include the following:

- The employee makes all of the contributions and chooses how much to deposit. There are no employer contributions.
- There is no minimum number of employees to set up a program.
- The program is not subject to federal reporting and fiduciary responsibilities as long as the employer keeps its involvement to a minimum.
- Providing a payroll deduction IRA for employees may help attract and retain quality employees.

Once you set up the program, the employee establishes either a traditional or a Roth IRA (based on the employee's eligibility and personal choice) and authorizes the payroll deductions. You then withhold the amounts authorized and transmit the funds to the financial institution. The employee and the financial institution are responsible for the amounts contributed. You should be clear that your involvement in the program is limited to collecting employee contributions and sending them to the IRA provider.

You can limit the number of IRA providers to which you will remit contributions, or you could designate a single IRA provider. You have to disclose any limitations or costs associated with an employee's ability to transfer contributions to another IRA provider before the employee begins to participate. In addition, you need to remain neutral about the IRA provider. You cannot negotiate to obtain special terms for employees, exercise influence over the investments, or receive any compensation except reimbursement for the actual cost of forwarding the payroll deductions.

You can, however, provide general information about the program, including the advantages of contributing to an IRA. You can also answer employees' questions about the program, refer inquiries to the IRA provider, and provide informational materials from the IRA provider, as long as the materials do not suggest that you endorse that provider.

Operating the plan

Generally, any employee can be eligible to participate. Employees should understand that they could contribute to an IRA outside the payroll deduction program and that you are not providing any additional benefit to employees who participate. Benefits and limitations for employees include:

- Employees are always 100 percent vested in (have ownership in) all of the funds in their IRAs.
- Plan loans are not permitted. Withdrawals are permitted anytime, but they are subject to income taxes (except certain distributions from nondeductible IRAs and Roth IRAs). If the employee is under age 59½, there may be a 10 percent additional tax.
- Employees' contributions are limited to $5,500 for 2015. Additional "catch-up" contributions of $1,000 per year are permitted for employees age 50 or over.
- Employees control where their money is invested and bear the risk. The financial institution holding the IRA manages the funds. Employees should be aware that you do not guarantee any rate of return, but you are merely acting as a conduit.

Your operating costs should be low because the program is not subject to the government filing, administrative, or fiduciary requirements of employer retirement plans such as 401(k) plans. You may incur fees charged by the IRA provider for services in connection with establishing and operating the payroll deduction process, and you may have internal costs (such as bookkeeping and overhead) for setting up and operating the program. However, the employee must pay any fees related to setting up and maintaining the IRA.

Terminating the plan

A payroll deduction IRA program can be terminated at any time. If you decide that the program no longer suits your business needs, you simply notify your payroll department and your employees that the program is being terminated. You may also need to notify the IRA provider that you will no longer be making deposits. No termination notice is required for the Internal Revenue Service (IRS). Although your involvement will end, the employees could continue to save by working directly with the IRA provider.

BottomLine

Offering a payroll deduction IRA can be a low-cost option to encourage retirement savings.

SAMPLE

Employers want to know

***Question:* Our employees can elect a payroll deduction for contributions to a health savings account (HSA). One employee contributed more than the maximum annual amount. If she takes a withdrawal or applies the excess to a different year, should we issue a revised W-2 to show this?**

Answer: You are not required to correct the Form W-2, and in fact you should not do so. Rather, the employee will report any rolled over or withdrawn amounts on Line 14 of IRS Form 8889 when she files her taxes. The full contribution would still appear on her W-2, but the correction will be reflected on the employee's Form 8889.

IRS Publication 969 for HSAs discusses excess contributions and W-2 reporting. According to that guidance, the employee would report taxes owed for any excess contributions on Form 5329, and the instructions for this form state that employees should "include the withdrawn contributions and related earnings on Form 8889, lines 14a and 14b."

Basically, the excess contribution still has to be reported on the W-2 (it cannot be simply retracted) and the employee would either pay taxes on the excess or report a rollover or withdrawal of that excess on another form when filing taxes.

BottomLine

If an employee over-contributes to an HSA, the employee should file any corrections; the employer should not revise the W-2 to reflect such changes.

What Would You Do?

An employee was recently divorced. Her former husband has a Qualified Domestic Relations Order (QDRO) for part of her 401(k) plan. Can she withdraw funds from the plan right away, and if so, does the 10 percent penalty apply?

1. She may not take a distribution before she is eligible.
2. She may take a withdrawal only upon leaving the job or retiring.
3. She may take the withdrawal, but would owe a 10 percent tax penalty.
4. She may take the withdrawal now, and would not owe a tax penalty.

Answer: The correct answer is Number 4, she may take the withdrawal now under the QDRO and would not owe a penalty. When a couple has a joint investment in a retirement plan such as a 401(k) and subsequently divorces, the plan can be divided to give each spouse their fair share. Funds can be withdrawn under a QDRO without either spouse incurring a penalty for early withdrawal. A QDRO is basically a legal order that splits ownership of a retirement plan to give each ex-spouse a share of the assets. With most QDROs, the person known as the alternate payee (not the account holder) is taxed when the funds are withdrawn from the account, but the 10 percent early distribution penalty does not apply. Also, if the former spouse who receives the assets completes a rollover to an individual retirement account (IRA) rollover within 60 days, income tax on the distribution can be deferred. This is the case only for a former spouse, not a dependent.

BottomLine

An early 401(k) withdrawal under a QDRO may be exempt from the 10 percent tax penalty.

SAMPLE

Copyright 2015 J. J. Keller & Associates, Inc.

Neither the *BottomLine Benefits & Compensation* nor any part thereof may be reproduced without the written permission of J. J. Keller. Government regulations change constantly, therefore, J. J. Keller cannot assume responsibility or be held liable for any losses associated with omissions, errors, or misprintings in this publication. This publication is designed to provide reasonably accurate information and is sold with the understanding that J. J. Keller is not engaged in rendering legal, accounting, or other professional services. If legal or other expert advice is required, the services of a competent professional should be sought.

DIRECTOR OF EDITORIAL RESOURCES: Paul V. Arnold

EDITOR: Ed Zalewski, PHR

CONTRIBUTING EDITORS: Dolly Clabault, PHR; Michael Henckel; Katie Loehrke

ISSN 1940-8323 GST R123-317687 (41051)

Since 1953

Printed on Recycled Paper (30% Post Consumer)

Tracking hardship distributions and plan loans

Even if you use a third party administrator (TPA) to handle participant transactions, you're still responsible for the proper administration of your retirement plan. This means that you need to make sure you're keeping up with the recordkeeping and documentation requirements for any employee hardship distributions or plan loans.

Hardship distributions

The plan sponsor must obtain and keep hardship distribution records and should retain the following records in paper or electronic format:

- Documentation of the hardship request, review, and approval;
- Financial information and documentation that substantiates the employee's immediate and heavy financial need;
- Documentation to support that the hardship distribution was made in accordance with the applicable plan provisions and the Internal Revenue Code; and
- Proof of the actual distribution made and related Forms 1099-R.

Participants may (or may not) retain their own records of hardship distributions. Even if they keep records, they may leave employment, making their records inaccessible during an IRS audit.

The IRS also warns that electronic self-certification is not sufficient documentation of a participant's hardship. IRS audits show that some TPAs allow participants to electronically self-certify that they satisfy the criteria to receive a hardship distribution. While self-certification is permitted to show that a distribution was the sole way to alleviate a hardship, it is not allowed to show the nature of a hardship. You must request and retain additional documentation to show the nature of the hardship.

Plan loans

A plan sponsor should retain the following records in either paper or electronic format for each plan loan granted to a participant:

- Evidence of the loan application, review, and approval process;
- An executed plan loan note;
- If applicable, documentation verifying that the loan proceeds were used to purchase or construct a primary residence;
- Evidence of loan repayments; and
- Evidence of collection activities associated with loans in default and the related Forms 1099-R, if applicable.

If a participant requests a loan with a repayment period in excess of five years to purchase or construct a primary residence, the plan sponsor must obtain documentation of the home purchase before approving the loan. IRS audits have found that some administrators allowed participants to self-certify their eligibility for these loans.

BottomLine

If the IRS audits your retirement plan, you will need to provide the required documentation for plan loans and hardship distributions.

SAMPLE

Annual investment notice every 14 months

The Department of Labor's Employee Benefits Security Administration (EBSA) published a final rule that provides a two-month grace period for participant-directed individual account plans such as 401(k) plans to provide annual investment and plan-related information to participants.

The rule changed the requirement that annual disclosures be made at least once in any 12-month period to at least once in any 14-month period. The additional two months were provided in response to comments that plan administrators needed more flexibility for these annual disclosures to avoid potentially unnecessary costs and burdens. The information that is required to be disclosed to help workers make informed plan and investment decisions about their retirement savings remains unchanged.

The rule is effective on June 17, 2015, but the EBSA announced that until the rule takes effect, the agency will treat a plan administrator as satisfying the current 12-month rule if annual disclosures are made within the new 14-month deadline, as long as the plan administrator reasonably determines that doing so benefits the plan's participants and beneficiaries.

BottomLine

The annual investment notice is required once every 14 months, not once every 12 months.

(41051)

 Copyright J. J. Keller & Associates, Inc.