EXECUTIVE ORDER AFFIRMS COMMITMENT TO REPEAL THE ACA; MAKES NO IMMEDIATE CHANGES FOR EMPLOYERS

Within hours of being sworn in on Friday, January 20, 2017, President Trump signed an executive order (the Order), that affirmed the administration's policy of seeking "the prompt repeal" of the Affordable Care Act (ACA). The Order, however, neither specifically mentions employers nor has any immediate impact on employers' obligations under the ACA.

It is important to note that the one-page Order does not repeal any specific provision of the ACA, much of which is governed by existing law and regulations that cannot be eliminated with the stroke of even the Presidential pen.

Instead, the Order directs the Secretary of the Department of Health and Human Services the heads of other federal agencies "with authorities and responsibilities under" the ACA to "exercise all authority and discretion available to them", "to the maximum extent permitted by law," to:

- "waive, defer, grant exemptions from, or delay the implementation of any provision or requirement" of the ACA that "would impose a fiscal burden on any State or a cost, fee, tax , penalty, or regulation burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchaser of health insurance, or makers of medical devices, products, or medications"; and to

- "provide greater flexibility to States and cooperate with them in implementing healthcare programs."

Each "department or agency with responsibilities relating to healthcare or health insurance" is directed, "to the maximum extent permitted by law," to:

- "encourage the development of a free and open market in interstate commerce for the offering o healthcare services and health insurance, with the goal of achieving and preserving maximum options for patients and consumers."

While some pundits have quipped that the Order is a license for employers to cease complying with the ACA or to cease offering health insurance, no such authority is contained in the Order. What the Order may permit is greater discretion in granting "hardship exemptions" from the individual mandate. Federal officials in the new administration might also be more receptive to state requests for waivers under Medicaid.

We advise employers to continue to observe the ACA status quo, which includes continuing to focus on complying with ACA Employer Reporting obligations (using IRS Form 1095-C) for the 2016 calendar year.

This is because, as the Order specifically states, any revision of existing regulations can only be changed under the rules of the Administrative Procedures Act, which requires the public issuance of proposed rules, followed by a period of public input. Despite the new administration's Order (and the House of Representative's January 13 vote to begin repealing the ACA), there is no specific change currently available for employers in 2017.

Instead, employers should continue to heed ACA requirements. Only agency rulemaking or congressional action could relieve employers of ACA reporting and other obligations, but either type of action would likely take significant time.

We will continue to monitor developments regarding the possible repeal of the ACA and how any subsequent actions may affect employers' obligations.

OSHA NEW ANTI-RETALIATION RULES GOES INTO EFFECT DECEMBER 1, 2016

On November 28, 2016, a Texas federal district court denied a motion for an injunction to block the December 1, 2016 implementation of the anti-retaliation provisions found in OSHA's new injury and reporting rule. Therefore, starting tomorrow, OSHA's new anti-retaliation provisions will limit post-accident and post-injury discipline and drug testing, as well as how accident and injury-related incentive programs can be administered by employers. These new rules will apply to all employers. Accordingly, all employers should review their safety-related policies and practices to determine if their existing policies or post-accident drug testing policies violate the new anti-retaliation rule.

Additionally, starting January 1, 2017, companies with 250 or more employees must electronically submit their OSHA 300, 300A, and 301 Forms, which cover information about workplace injuries and illnesses. Companies with 20-249 employees in certain "high risk" industries such as construction and manufacturing must electronically submit their OSHA 300A Forms. Our other coverage of these new OSHA rules can be found at our previous blogs here and here .

IMPORTANT HIPAA AND ACA BENEFIT UPDATES FROM THE HHS AND IRS

Be Aware: Current Phishing Email is Disguised as Official OCR Audit Communication

As many HIPAA covered entities and their business associates are aware, the Office for Civil Rights ("OCR") division of the United States Department Health and Human Services ("HHS") has begun a second-round of audits to examine compliance with the HIPAA Privacy, Security and Breach Notification Rules. Specifically, the audits are intended to review the policies and procedures adopted and employed by covered entities and business associates to meet selected standards and implementation specifications of the Privacy, Security, and Breach Notification Rules.

In an alert issued today, the HHS announced that it has come to their attention that a phishing email is being circulated on mock HHS Departmental letterhead under the signature of the OCR's Director, Jocelyn Samuels. The email appears to be an official government communication and targets employees of HIPAA covered entities and their business associates. The email prompts recipients to click a link regarding possible inclusion in the HIPAA audit program. The link then directs individuals to a website marketing cybersecurity services. The HHS is taking the unauthorized use of its material very seriously and stresses that the site is in no way associated with the HHS or OCR. Anyone wondering if they have, in fact, received an official HHS or OCR communication may send an email to OSOCRAudit@hhs.gov to seek verification.

IRS Deadline for Providing 2016 ACA Statements to Employees Extended to March 2, 2017

Under the Affordable Care Act's information reporting rules, an "applicable large employer" (meaning an employer with at least 50 full-time, including full-time equivalent employees) must file a Form 1095-C with the IRS for each employee who was a full-time employee for any month of the calendar year. The employer also must provide each full-time employee a completed Form 1095-C (or a satisfactory substitute for such form).

Larger employers must also provide a Form 1095-C (or substitute form) to each of its full-time employees, regardless of whether the employer offered health coverage to all, some, or none of its full-time employees.

In Notice 2016-70, the IRS recently offered a 30-day extension of the (otherwise applicable) January 31, 2017 deadline to furnish the Form 1095-C statements to employees. The new due date for providing the ACA statements to employees is March 2, 2017. This is a hard deadline; no 30-day extension may be obtained.

Note that there is no extension of the deadline to provide the Forms 1095-C to the IRS under cover of transmittal Form 1094-C. The deadline for paper filing is February 28, 2017 and the electronic filing deadline is March 31, 2017. (Electronic filing is required for applicable large employers filing 250 or more employee statements.)

BREAKING: NEW DOL OVERTIME RULE WILL NOT GO INTO EFFECT DECEMBER 1

Yesterday, a federal judge in Texas issued a nationwide injunction (full decision here) blocking the U.S. Department of Labor (DOL) from implementing its updated overtime regulations, which would have required, among other things, that exempt employees be paid a minimum salary of $913 per week. The judge ruled that the twenty-one states and certain business groups that had sued to block the implementation of the regulations were likely to be successful on the merits of their case and that there would be harm to the states and businesses if the rule was implemented on December 1.

The basis for the ruling is that the new salary basis test is a *de facto* salary test that no longer takes an employee's job duties into consideration. The Court found that the type of work actually performed by the employee is what Congress intended the exemption to be based on, and that the updated DOL rule supplanted the duties test with a minimum salary threshold. The Court found that this was outside the intent of Congress and, therefore, outside of the DOL's statutory authority. Additionally, the judge ruled that the DOL did not have statutory authority to implement the automatic increase provision of the rules, which would have automatically readjusted the minimum weekly salary level every three years.

Although this may not be the end of litigation over this matter, the DOL's new overtime rules will not take effect on December 1, 2016, and therefore, employers do not need to implement any changes. For those employers who have already implemented changes in preparation for the updated overtime rules, they have the option to keep those changes in place or reverse those changes and wait to see how this matter ultimately resolves. However, employers must keep in mind that, although the minimum salary level will remain, for now, at $455 per week, to be considered exempt, employees must still meet the job duties tests.

FEDERAL DISTRICT COURT TO RULE NOVEMBER 22, 2016 ON ATTEMPT TO BLOCK NEW OVERTIME RULES

As we have previously reported, the U.S. Department of Labor (DOL) has issued an update to the federal overtime regulations defining the overtime exemption for executive, administrative, and professional employees, known as “white-collar” exemptions. These changes focus primarily on updating the salary level for white-collar employees including increasing the minimum salary threshold from $455 per week to $913 per week, among other changes. The new rule is set to go into effect on December 1, 2016.

The new overtime regulations have been controversial and subject to various challenges. Specifically, twenty-one states and certain business groups have sued the DOL in Texas federal district court in an attempt to block the DOL from implementing the new overtime rules. Yesterday, November 16, 2016, the federal district court held a hearing on a motion to enjoin the DOL from implementing the new overtime rules. During the hearing, the federal district court judge stated that the Court would make a decision on the motion for a preliminary injunction by November 22, 2016. This is welcome news given that the new overtime rules’ effective date is just two weeks away.

During the motion hearing, the business groups and states made various arguments about why the rule should not be implemented, including that the drastic increase in the salary threshold was a “fundamental, radical social policy change.” It was also argued that implementation of the new overtime rules should be at least delayed until it could be reviewed by President-elect Trump’s administration. In response to that argument, the Court stated that what a new administration may do with the new overtime rules is not relevant and too speculative to affect as how the Court would rule. On the other hand, the DOL argued that the agency had reached these new salary levels in a reasonable way through the rulemaking process, and as a result, agency should be entitled to deference from the Court.

The Court seemed receptive to some, but not all, of the arguments to block implementation of the new rules. The judge questioned whether the new salary basis was a *de facto* salary-only test, why the change was so drastic, and how 4.2 million employees could go from being exempt one day to non-exempt the next, despite having the same job duties. However, he did state that his role was not to get involved in policy making and he would not base his decision on whether he thought the rule was good or bad.

It is premature to state for certain as to how the Court may rule; so, the wise course of action for employers, for now, is to continue to move forward with plans on how to implement the new overtime regulations for their workforces on December 1st. We will, of course, provide you with an update regarding the Court's decision as soon as it is issued.

EMPLOYMENT LAWSCENE ALERT: VOTING LEAVE – WHAT WISCONSIN EMPLOYERS NEED TO KNOW

Tuesday, November 8, 2016 is Election Day. While there is no federal law that requires employers to grant employees leave to vote, Wisconsin law does require voting leave. Wis. Stat. § 6.67. What Wisconsin employers need to know:

- All Wisconsin employers are required to give employees who are eligible to vote up to three consecutive hours of leave to vote while the polls are open. Wisconsin's polls are open from 7:00 AM – 8:00 PM.
- Employers cannot deny this leave on the basis that employees would have adequate time outside of their working hours to vote while the polls are open.
- The law does not require that these hours are paid. However, employers should be cautious about reducing an exempt employee's pay.
- The employee must request the time off to vote prior to the election.
- The employer can specify which three consecutive hours an employee is permitted to utilize as voting leave.
- Employees cannot be penalized for utilizing voting leave.

Two other provisions that Wisconsin employers should be aware of are 1) they may not refuse to let employees serve as election officials under Wis. Stat. § 7.30 or make any threats or inducements to prevent employees from doing so; and 2) they cannot distribute printed materials to employees that contain a threat that if a particular party or candidate is elected that the business will shut down, in whole or in part, or that the salaries or wages of employees will be reduced. Wis. Stat. § 12.07(2)-(3).

EMPLOYMENT LAWSCENE ALERT: IRS ANNOUNCES 2017 EMPLOYEE BENEFIT PLAN LIMITS

The Internal Revenue Service recently published the cost-of-living adjustments to the dollar limits under various employer-sponsored retirement and health plans for 2017. The majority of the dollar limits are either unchanged or will increase only slightly.

Employer-sponsors of benefit plans should update payroll and plan administration systems for the 2017 limits and ensure that any new limits are incorporated into relevant participant communications, enrollment materials and summary plan descriptions, as applicable.

Health FSA Employee Contribution Limit Increasing to $2,600

For 2017, the maximum dollar limitation on employee salary reductions for contribution to health flexible spending arrangements (health FSAs) will increase to $2,600 from the prior limit of $2,550.

2017 Qualified Retirement Plan Limits

For retirement plans beginning on and after January 1, 2017, the following dollar limitations apply for tax-qualified retirement plans:

- The elective deferral limit under Section 402(g) or the Internal Revenue Code (Code) will remain unchanged at $18,000 for employees who participate in:
    - Code Section 401(k) plans;
    - Code Section 403(b) plans; and
    - Most Code Section 457 plans.
- The catch-up contribution limit for those age 50 and over under will remain unchanged at $6,000 for all plans other than SIMPLE 401(k) and SIMPLE IRAs. (For these SIMPLE plans, the catch-up contribution limit for those age 50 and over under will remain unchanged at $3,000).
- The limitation on the annual benefit for a defined benefit plan will increase from $210,000 to $215,000.
- The limitation on annual additions (meaning total employee plus employer contributions) to a participant's defined contribution plan will increase from $53,000 to $54,000.
- The limit on the amount of annual compensation taken into account under a tax-qualified retirement plan will increase from $265,000 to $270,000.
- The limitation used in the definition of a highly compensated employee (HCE) under Code Section 414(q) will remain unchanged at $120,000.
- The limitation used in the definition of a key employee in a top-heavy plan under Code Section 416 will increase from $170,000 to $175,000.
- The dollar amount under Code Section 409(o) for determining the maximum account balance in an employee stock ownership plan (ESOP) subject to a five-year distribution period will increase from $1,070,000 to $1,080,000. The dollar amount used to determine the lengthening of the five-year distribution period will increase from $210,000 to $215,000.

Prior Guidance on Additional 2017 Limits

Social Security Taxable Wage Base

On October 18, the Social Security Administration announced that the Social Security wage base for 2017 will increase significantly (from $118,500) to $127,200. This is the maximum wage base subject to the FICA tax and is also the maximum "integration level" for plans using "permitted disparity."

2017 Health Savings Account Limits

The combined annual contributions to an HSA must not exceed the maximum annual deductible HSA contribution, which for 2017, is $3,400 for single coverage and $6,750 for family coverage. The catch-up contribution for eligible individuals age 55 or older by year end remains at $1,000.

EMPLOYMENT LAWSCENE ALERT: OSHA DELAYS ENFORCEMENT OF ANTI-RETALIATION PROVISIONS

On October 12, 2016, the Occupational Health and Safety Administration ("OSHA") agreed to further delay the enforcement of the anti-retaliation provisions of the injury and illness tracking rule until December 1, 2016. Enforcement was originally scheduled to begin August 10, 2016 and then delayed until November 10, 2016. OSHA's agreement to once again delay enforcement of its new anti-retaliations provisions is in response to a request from the U.S. District Court for the Northern District of Texas, which is currently considering a motion challenging OSHA's new rules.

Despite its self-imposed delay in enforcement of its anti-retaliation provisions, last week, OSHA released a memo with examples discussing in more detail how the new anti-retaliation amendments will be interpreted and implemented by OSHA. *See* OSHA Memorandum for Regional Administrators (10/19/2016).

OSHA explained that its purpose in including the new anti-retaliation provisions is to address workplace retaliation in three specific areas: (1) Disciplinary Policies; (2) Post-accident Drug Testing Programs; and (3) Employee Incentive Programs. Although neither employee disciplinary policies, post-accident drug testing programs, or employee incentive programs are expressly prohibited by the new rules, employers will need to be careful about how their policies or programs are drafted and enforced so as to not, in the eyes of OSHA, discourage or deter employees from reporting work-related injuries or illnesses.

EMPLOYMENT LAWSCENE ALERT: NEW FLSA OVERTIME RULES MAY HAVE EMPLOYEE BENEFIT PLAN IMPLICATIONS

The Department of Labor's (DOL's) final overtime rule (the Final Rule) takes effect December 1, 2016. As described in our prior post, the cumulative effect of the Final Rule will be to significantly expand the categories of employees eligible for overtime protection. As part of preparing to comply with the new wage and hour law, employers must also consider whether and how any changes to compensation practices will affect employee benefit plans. This post describes the tax-qualified retirement plan issues that employers should take into account as the December 1 Final Rule deadline approaches.

Classification Changes

To the extent that benefit plan documents condition eligibility on an employee's classification (such as salaried, hourly, exempt, or non-exempt), compensation structures revised to comply with the Final Rule could cause large cohorts of employees to either lose or gain benefits. As an example, if a specific employee is reclassified from hourly to salaried status (or vice versa) in response to the Final Rule, that individual might gain (or lose) the right to participate in an employee benefit plan. Corresponding modifications to the terms of those plans may be necessary to continue to provide current benefit levels and, or, to ensure that retirement plans will continue to satisfy underlying participation requirements in light of resulting eligibility changes.

Compensation Changes

By the same token, FLSA-related compensation adjustments may result in unanticipated changes to overall benefit contribution obligations. This is particularly true for 401(k)s, and similar tax-qualified retirement plans, under which employer contributions are calculated in accordance with a specific plan definition of "compensation." The impact of pay changes on employer retirement plan contributions will vary case by case, but in general, may fluctuate not only to the extent that employee base pay is increased or decreased, but also by whether a given plan's "compensation" definition includes or excludes overtime pay.

Tax-Qualification Compliance Issues

In some cases, plan compensation definitions should be amended as required to attain a result in line with overall benefits and compensation objectives. Although a tax-qualified retirement plan may exclude (or be amended to exclude) overtime pay from its compensation definition, such exclusion is permissible only if the compensation taken into account after the exclusion satisfies annual nondiscrimination testing requirements. Employers that expect a significant increase in overtime wages as a result of compliance with the Final Rule, as well as employers with plans already excluding overtime pay, should determine now whether projected increases in overtime wages could affect their plans' ability to continue to satisfy tax nondiscrimination requirements in light of existing or revised plan terms.

Employers choosing to amend a retirement plan's compensation definition to exclude overtime pay will need to consider other legal and operational issues in addition to nondiscrimination testing. For example, in the case of a "safe harbor" 401(k) plan, the modification may need to be coordinated with the start of a plan year. In addition, time may be needed to update payroll systems and plan administrative processes to properly capture the new pay exclusion.

Proceed with Caution before Reducing Benefits to Offset New Overtime Costs

Some employers may be facing higher compensation costs as part of a strategy for maximizing the available exemption from the overtime rules. While it may be tempting to offset some of these costs by reducing employee benefits spending, it is crucial to consider underlying benefit-related legal requirements as they proceed. In some cases, benefit reductions are limited by law, while in others, unintended consequences may result.

For example, the Affordable Care Act requires large employers (generally 50 employees and above) to either offer "affordable" and "minimum value" health care coverage to certain employees or risk exposure to significant tax penalties. A large employer may incur penalties, without regard to whether an employee is exempt or non-exempt under the Final Rule, if he or she works more than 30 hours per week but is not offered ACA-compliant coverage. A reduction or elimination of an employer premium contribution (or an increase in employee cost sharing) must therefore be carefully analyzed to assess the extent to which it could affect a group health plan's "minimum value" and "affordability" metrics, thereby increasing employer exposure to ACA penalties.

Conclusion

It is no surprise that the Final Rule requires many employers to make extensive changes to their compensation and employee classification practices. What may be more surprising is the extent to which FLSA-related changes promise to impact employee benefit plans, as well. To avoid any benefits cost or compliance surprises, employers should carefully review whether and how sponsored employee benefit plans will be affected by other changes made to comply with the Final Rule.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN COURT OF APPEALS FINDS NONSOLICITATION OF EMPLOYEES PROVISION UNENFORCEABLE UNDER RESTRICTIVE COVENANT STATUTE

In *Manitowoc Co. v. Lanning*, 2015AP1530 (Aug. 17, 2016), the Wisconsin Court of Appeals ruled—for the first time—that Wisconsin Statute § 103.465, which governs the enforceability of restrictive covenants in employment relationships, applies to employee non-solicitation provisions.

In 2008, John Lanning, an employee at The Manitowoc Co., entered into an agreement that prohibited him, for a period of two years after his employment ended, from either directly or indirectly soliciting, inducing, or encouraging "any employee to terminate their employment with Manitowoc" or to "accept employment with any competitor, supplier or customer of Manitowoc." The Manitowoc Co. claimed that, after leaving the company in 2010 to work for a direct competitor, Lanning communicated with at least nine employees in connection with possible employment opportunities at his new employer. The Manitowoc Co. claimed this was a violation of the employee non-solicitation provision and filed suit against Lanning. The Circuit Court granted summary judgment in The Manitowoc Co.'s favor, awarding damages and attorneys' fees. Subsequently, Lanning appealed to the Wisconsin Court of Appeals, which ultimately reversed the lower court's ruling.

On appeal, The Manitowoc Co. argued that § 103.465 should not apply to employee non-solicitation provisions but, rather, only to covenants not to compete The Court quickly dismissed that argument, stating that any covenant between an employer and employee that "seeks to restrain competition" or operates as a "trade restraint" clearly falls within the confines of § 103.465. The Court noted that the employee non-solicitation provision limited how Lanning could compete with The Manitowoc Co. and "did not allow for the ordinary sort of competition attendant to a free market, which includes recruiting employees from competitors." Therefore, the Court determined that the employee non-solicitation provision had to comply with § 103.465.

With the applicability of § 103.465 to employee non-solicitations decided, the Court then embarked to determine whether the provision The Manitowoc Co. sought to enforce was reasonably necessary to protect the Company's legitimate business interests from unfair competition from a former employee. The Manitowoc Co. argued that it had a legitimate interest in preventing Lanning from "systematically poaching" its employees, and it believed the provision was narrowly tailored to protect it from such a threat.

The Court disagreed, however, determining that the actual terms of the agreement, as written, were far too broad and, therefore, unenforceable. As drafted, the non-solicitation provision prevented Lanning from soliciting *any* employee, whether entry level or a key employee, to leave The Manitowoc Co. for *any* reason, whether to retire to spend more time with family or work for a competitor. Because the Court found that the provision restricted "an incredible breadth of competitive and noncompetitive activity," it concluded that the employee non-solicitation provision, as drafted, did not protect a legitimate business interest and, as such, the provision could not pass the strict scrutiny that § 103.465 required and, accordingly, found the covenant unenforceable.

In light of this decision, employers should review their current agreements that contain employee non-solicitation agreements. Although employers have the right to require employees to enter into agreements with employee non-solicitation provisions, the provisions must be crafted narrowly and carefully—just like covenants not to compete—to meet the strict scrutiny analysis required by § 103.465. To be enforceable, employee non-solicitation provisions must focus on protectable interests, such as restricting former employees from soliciting current employees with whom the former employee had a direct business relationship with from ending their employment in order to engage in direct competitive activity adverse to the employer. An experienced management-side employment attorney can assist employers with drafting such provisions in order to meet the enforceability standards required by the Wisconsin restrictive covenant statute.