

EMPLOYMENT LAWSCENE ALERT: BREAKING NEWS: DOL SETS OVERTIME SALARY EXEMPTION THRESHOLD AT \$35,568

On September 24, 2019, the U.S. Department of Labor announced a final rule to increase the salary threshold necessary to exempt executive, administrative and professional employees from the Fair Labor Standard Act's (FLSA) minimum wage and overtime pay requirements. The final rule raises the annual salary threshold from \$23,660 (or \$455 per week) to \$35,568 (or \$684 per week). The FLSA requires covered employers to pay employees a minimum wage and, for employees who work more than 40 hours in a week, overtime premium pay of at least 1.5 times the regular rate of pay. Section 13(a)(1) of the FLSA, commonly referred to as the "white collar" or "EAP" exemption, exempts from these minimum wage and overtime pay requirements "any employee employed in a bona fide executive, administrative, or professional capacity." Now for an employee to qualify for one of the EAP exemptions, generally, that employee has to be paid on a salary basis and earn at least \$35,568 per year or \$684 per week. The final rule becomes effective January 1, 2020.

The final rule also allows employers to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to ten percent of the standard salary level as long as such payments are paid annually or on a more frequent basis. In addition, if an employee does not earn enough in nondiscretionary bonus or incentive payments in a given year (52-week period) to retain his or her exempt status, the employer may make a "catch-up" payment up to ten percent of the total salary level for the preceding 52-week period. This "catch-up" payment must be paid within one pay period following the end of the 52-week period. In plain terms, each pay period an employer must pay the EAP employee on a salary basis at least 90 percent of the standard salary level and, if at the end of the 52-week period the sum of the salary paid plus the nondiscretionary bonuses and incentive payments (including commissions) paid does not equal the standard salary level for the 52-week period, the employer has one pay period to make up for the shortfall (up to 10 percent of the required salary level). Any such catch-up payment will count only toward the previous 52-week period's salary amount and not toward the salary amount in the 52-week period in which it was paid.

Today's final rule is the product of the Trump administration's efforts to reset the Obama administration's 2016 final rule that had established the salary threshold at \$47,476 per year or \$913 per week. The Obama administration's controversial final rule was struck down on November 22, 2016 by a federal district court in Texas because it "makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties." An appeal of that decision is still pending before the United States Court of Appeals for the Fifth Circuit. However, given the release of today's final rule, the DOL

will rescind the Obama administration's 2016 final rule making the pending appeal moot.

The final rule also raises the total annual compensation requirement for "highly compensated employees" (HCE) from the currently enforced level of \$100,000 per year to \$107,432 per year. The HCE salary level of \$107,432 is set at the 80th percentile of full-time salaried workers nationally using updated 2018/2019 salary data. However, Wisconsin employers should note that Wisconsin law does not recognize the HCE exemption, and, as a result, Wisconsin employers should not rely or utilize this exemption when classifying employees for wage and hour purposes.

Finally, the DOL's proposed rule published on March 7, 2019 rejected the Obama administration's 2016 rule that provided for automatic adjusting every three years of the salary threshold for the EAP exemptions. Instead, the DOL's March, 2019 proposed rule rejected automatic adjusting and favored that the Secretary of Labor review the salary threshold every four years preceded by a period of public comment. The DOL's final rule, however, reaffirmed the DOL's intent to update the standard salary level and HCE total annual compensation threshold more regularly in the future using notice and comment rulemaking, but declined to make a commitment to do so every four years believing that prevailing economic conditions, rather than fixed timelines, should drive future updates.

EMPLOYMENT LAWSCENE ALERT: EIGHTH CIRCUIT HOLDS THAT AN SPD CAN FUNCTION AS A PLAN DOCUMENT

A federal appellate court has ruled, in *MBI Energy Services v. Hoch*, decided in July 2019, that a single document may serve as both the summary plan description (SPD) and the formal plan document for an ERISA welfare benefit plan.

In this case, the plan sponsor of a self-insured group health plan paid benefits on behalf of a participant for medical injuries sustained in an accident. Subsequently, the participant settled a tort claim with a third party who allegedly caused the accident. The settlement amount exceeded the amount of the plan-paid medical expenses and the plan sponsor sought reimbursement.

ERISA Requires a Plan Document

Under ERISA, the requirement that "every employee benefit shall be established and maintained pursuant to a written instrument" is understood to mean that the terms of each

benefit program must be memorialized in a written plan document. ERISA further requires the plan sponsor to provide to each plan participant an SPD that briefly and clearly summarizes the terms of the plan document.

In some cases, plan sponsors do not offer two separate documents (a plan document and an SPD), but rely, instead, on a single combined document that purports to function both as the plan document and as the SPD.

Several courts have argued that a combined Plan document and SPD is unacceptable on the grounds that it is not possible for a document to summarize itself. Nonetheless, in the self-insured medical plan context (where coverage exclusions and limitations are difficult to summarize), it is common to have a single document that serves as both the plan document and the SPD.

Where's the Plan?

While the employer in the *MBI Energy Services* case could point to no document clearly identified as the “plan,” there was an administrative services agreement (ASA) between the employer and the plan’s claims administrator indicating that the plan benefits, terms, and conditions were set forth in an attached exhibited – the SPD. Along with the benefit provisions and ERISA-mandated language, the SPD contained sections addressing the rights of subrogation, reimbursement, and assignment. The SPD stated, in part, that if a participant “makes any recovery from a third party . . . whether by judgment, settlement or otherwise,” the participant must reimburse the plan sponsor “to the full extent of any benefits paid” by the plan.

The Arguments

The participant argued that the SPD was not a valid plan document and that the employer therefore had no right to reimbursement. Instead, the participant asserted that the SPD was only a summary of, and in conflict with the terms of, the ASA, which the participant contended was the controlling plan document. The participant’s argument was rooted in the Supreme Court’s reasoning, in its 2011 *CIGNA v. Amara* ruling, that “summary documents, important as they are, provide communication with beneficiaries *about* the plan, but that their statements do not themselves constitute the *terms* of the plan.”

The plan sponsor, on the other hand, argued that the SPD functioned as both the SPD and the plan document and that the SPD’s reimbursement language gave the plan an equitable lien on the participant’s recovery proceeds.

The Ruling

The Eighth Circuit disagreed with the participant’s contention that the SPD was unenforceable because it conflicted with the ASA, pointing out that the ASA was silent as to

reimbursement and expressly incorporated the terms and conditions of the SPD. The court thereby joined other circuits in distinguishing *CIGNA v. Amara* (a retirement plan matter in which both a plan document *and* an SPD were present) and concluding that, absent a formal plan document, the SPD may function as the plan document.

Specifically, the court rejected as “nonsensical” any interpretation that renders no plan document at all under the terms of ERISA and concluded that the label of SPD is not dispositive. Where no other source of benefits exists, the SPD *is* the formal plan document.

The court also pointed out that it would be inequitable to allow the participant to receive benefits according to the SPD but not hold him to the reimbursement responsibilities set forth in that same document. It concluded that, since the SPD was the plan’s written instrument, the participant was bound by its terms and obligated to reimburse the plan.

As a result, the participant was required to reimburse the self-funded employee benefit plan for \$45,474 in medical benefits the plan had paid.

Implications

Since the U.S. Supreme Court’s *CIGNA v. Amara* ruling, plan sponsors of self-insured plans have wondered whether the common practice of using a single document as both the plan and the SPD may permissibly continue. The Eighth Circuit’s *MBI Energy Services* ruling adds to a growing list of cases finding that an SPD can function as an enforceable ERISA welfare plan document in the absence of a separate additional document.

Plan sponsors should take note that identifying the controlling language relevant to a given employee benefit plan is not always clear cut. In some cases (as here), the plans terms may be contained within a single document. In other instances, the terms of an ERISA plan may be inferred from a series of documents, none of which is clearly labeled as a plan.

Do your Plan’s Documents Protect You?

All plan sponsors are advised to review whether their documents for ERISA welfare plans (such as group health, dental, vision, disability, and life plans) not only comply with ERISA, but also whether they reflect the employer-specific disclosure requirements and employer-protective statements, which are typically *not* included in documents prepared by insurers or third-party administrators.

In many cases, it is advisable to streamline multiple separate ERISA benefits into a single so-called Wrap Plan document, which ‘wraps around’ and supplements the other documents to become the SPD. A Wrap Plan can help employers to minimize the risk of financial penalties and lawsuits and streamlines certain reporting and amendment requirements.

The attorneys of the Employment Law Group of O’Neil, Cannon, Hollman, DeJong and Laing can assist in reviewing and providing counsel relating to the documentation and operation of

all employer-sponsored employee benefit and compensation plans.

EMPLOYMENT LAWSCENE ALERT: DOCUMENTATION MATTERS!

If you call your employment lawyer and tell her that you want to terminate an employee for performance issues, one of the first questions will be “What documentation do you have?” Recently, the Seventh Circuit confirmed just how crucial documentation can be when defending an employment lawsuit.

In *Rozumalski v. W.F. Baird and Associates*, decided August 22, 2019, the employee had been sexually harassed by her supervisor, who was investigated by the employer and terminated once the investigation confirmed the allegations. However, after her supervisor’s termination, the employee was eventually terminated from her job and filed a federal complaint alleging that she had been retaliated against for her original sexual harassment claim and for other complaints stating that her previous supervisor who had been terminated had negatively influenced her new boss in retaliation. The company testified that the employee was terminated for legitimate, non-discriminatory reasons, namely, performance issues. The company stated that the employee struggled with her business development responsibilities, submitted a report that was grossly below company standards and required significant reworking, and was consistently late to work. These performance issues were documented in her written performance evaluation and listed as “needs improvement.” The employee then continued to receive negative performance evaluations, which provided specific examples to support the company’s concerns about her work, and was eventually placed on an Employee Improvement Plan. When she violated a term of her Employee Improvement Plan, she was terminated.

The Seventh Circuit acknowledged that a prior complaint of harassment could impact a victim long after the incident. However, it found that the employee’s new supervisor was not aware of her original harassment complaints until at least five months after the first negative performance review and, therefore, could not have been motivated by a retaliatory animus. Additionally, the individual who made the ultimate decision to terminate the employee’s employment did not know about the original complaints and was motivated solely by the employee’s violation of the Employee Improvement Plan. Finally, the Seventh Circuit observed that the employee’s complaints that her new supervisor was negatively impacted by her previous supervisor could not have been a basis for retaliation because her documented performance issues predated her complaints.

This case stresses the importance of employers properly documenting employee performance issues and creating honest performance evaluations that accurately describe and document employee performance issues. Performance evaluations should be focused on critical performance issues measured against the employer's legitimate business expectations. When an employee fails to meet a legitimate business expectation, the performance evaluation should reflect that deficiency. Too often, employers want to terminate underperforming employees without supporting documentation. For example, when an employee's most recent performance evaluations are reviewed prior to termination and there is absolutely no indication or evidence of poor or underachieving performance, the company's business records do not match the reality of the employee's performance, and the termination decision becomes more problematic.

The Seventh Circuit's decision could have been much different for this employer if the employee's performance issues had not been documented or had not been documented accurately. As demonstrated, good and accurate documentation is vitally important—it may be the difference for your company in winning or losing a lawsuit.

EMPLOYMENT LAWSCENE ALERT: IRS EXPANDS LIST OF HSA-COMPATIBLE PREVENTIVE CARE SERVICES

The IRS recently issued guidance expanding the types of preventive care services that can be provided by a high-deductible health plan (HDHP), before the deductible is met, without eliminating a covered individual's eligibility to participate in a Health Savings Account (HSA). The new guidance was published on July 17, 2019 and took legal effect on that same day.

Employers who sponsor HDHPs should now consider whether any plan documentation or communication changes are required to implement the expanded preventive care coverage rules. Alternately, employers who have not previously adopted a HDHP should assess whether the new rules may now make the HDHP/HSA model a more attractive way to control health care costs.

Background

An HSA is a tax-favored account that may receive contributions from an employee, an employer, or both. HSAs are subject to various rules that govern the individual account holder's eligibility to make and receive contributions and whether or not withdrawals are taxable.

To be eligible for HSA contributions, an individual must be covered under a HDHP and may generally not have any health coverage other than HDHP coverage. Certain preventive care services, however, are not considered to constitute health coverage so as to disqualify an individual from HSA eligibility.

Previously, preventive care (within the meaning of the HSA and HDHP rules) has not included any service or benefit intended to treat an *existing* illness, injury, or condition.

The IRS is aware, however, that cost barriers for care have resulted in the failure by some individuals who are diagnosed with certain chronic health conditions to seek or to use effective and necessary care that would prevent exacerbation of such conditions. Accordingly, and in consultation with the U.S. Department of Health and Human Services (HHS), the IRS determined that certain medical care services received and items purchased, including prescription drugs, should now be classified as preventive care for someone with the corresponding chronic condition.

Newly Established HSA-Compatible Preventive Care

To address the stated concerns, the expanded list of HSA-Compatible preventive care expenses includes fourteen cost-effective items and services that are likely to prevent the worsening of eleven specified chronic conditions, as follows:

Preventive Care for Specified Conditions	For Individuals Diagnosed with
Angiotensin Converting Enzyme (ACE) inhibitors	Congestive heart failure, diabetes, or coronary artery disease
Anti-resorptive therapy	Osteoporosis or osteopenia
Blood pressure monitor	Congestive heart failure or coronary artery disease
Inhaled corticosteroids	Asthma
Insulin and other glucose-lowering agents	Diabetes
Retinopathy screening	Diabetes
Peak flow meter	Asthma
Glucometer	Diabetes
Hemoglobin A1c testing	Diabetes
International Normalized Ratio (INR) testing	Liver disease or bleeding disorders
Low-density Lipoprotein (LDL) testing	Heart disease
Selective Serotonin Reuptake Inhibitors (SSRIs)	Depression
Statins	Heart disease and diabetes

The IRS and HHS will together review the list approximately every five to ten years to determine whether any items or services should be removed or added.

Changes Arose from Executive Order and Policy Advocacy

The immediate impetus of the change is Section 6 of Executive Order 13877, “Improving Price and Quality Transparently in American Healthcare to Put Patients First,” which was signed by President Trump on June 24, 2019, and which mandated the issuance of guidance permitting HSAs to cover low-cost preventive care to help “maintain health status for individuals with chronic conditions.”

The change also reflects the efforts of various health-policy advisors and advocates, who have long called for allowing first-dollar HDHP coverage for targeted, evidence-based, preventive services that prevent chronic disease progression and related complications.

Key HDHP Sponsor Issues and Next Steps

- In preparation for the 2020 open enrollment season, employer-sponsors of HDHPs should work to educate employees and dependents to assist them in understanding and benefitting from the new pre-deductible preventive care services.
- Sponsors of HDHPs should review whether or not existing plan documentation should be amended to encompass the expanded categories of covered care (or whether the current definitions remain legally sufficient).
- Because the out-of-pocket costs for some types of chronic care will now shift to the employer, sponsors of HDHPs should analyze whether the current deductible and premium levels are sufficient to meet the increased benefit expenses, or whether adjustments are warranted.
- Employers who offer both HDHPs/HSAs and on-site health clinics may provide only preventive care services in the on-site clinic in order to avoid jeopardizing employee HSA eligibility. Affected employers may now reconsider and expand the types of pre-deductible services to be provided to employees in the on-site clinic.
- Increased coverage of chronic condition expenses may increase the attractiveness of HDHP coverage to participants who are managing chronic conditions. The new rules may provide an opportunity to either increase future employee participation in, or to newly adopt, HDHP/HSA coverage.

EMPLOYMENT LAWSCENE ALERT: THE EEOC HAS STARTED COLLECTING REQUIRED PAY DATA: DO YOU NEED TO REPORT AND ARE YOU

READY?

On July 15, 2019, after a protracted legal battle, the EEOC began collecting employers' EEO-1 2017 and 2018 payroll data, which may be referred to as Component 2 data. The reporting requirement was originally announced by the Obama administration in 2016, but in 2017, the Trump administration stayed the collection of Component 2 data, citing the burden it imposed on employers. However, in March 2019, the U.S. District Court for the District of Columbia issued an order reinstating the requirement.

Therefore, between now and the deadline of September 30, 2019, all employers with 100 or more employees (both full-time and part-time) must submit the requisite information from calendar years 2017 and 2018 for all employees employed during the relevant "workforce snapshot period," which is an employer-selected payroll period between October 1 and December 31 of the reporting year. Employers, including federal contractors, that have less than 100 employees are not subject to these reporting requirements. Subject employers must provide the EEOC with the following data for employees in the workforce snapshot period: the employees' race/ethnicity and sex; the employee's EEO-1 job classification; the actual hours worked by non-exempt employees; actual hours worked by or proxy hours worked (e.g., 40 hours per week for full-time employees) for exempt employees; and Form W-2 payroll information. Such information does not have to be submitted for each individual employee but can be submitted by identifying, based on race/ethnicity and sex, the number of employees in each EEO-1 job category that fall into each of 12 EEO-1 compensation bands and the aggregate number of hours worked by all employees in each EEO-1 compensation band. The EEOC's stated purpose for collecting such information is to identify and remediate unlawful pay disparities in pay that are based on race/ethnicity and/or sex. Therefore, providing complete and accurate information in all categories is essential.

Employers subject to this requirement should have received correspondence via the U.S. mail and an email from NORC, the research group that is conducting the survey on behalf of the EEOC, notifying them of this obligation. Reminders are also scheduled to be sent in August and September. The EEOC has provided resources for filers at <https://eeocomp2.norc.org>.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS SHOULD CONFIRM THAT THEIR I-9S ARE IN ORDER

Recently, President Trump announced that a new round of workplace immigration raids would be postponed until after July 4. Regardless of when or if these raids happen, all employers should take this time to ensure that they are in compliance with federal law by having proper work authorizations for all of their employees. Workplace authorization is governed by the Immigration and Reform Control Act, which allows U.S. companies to hire and employ only U.S. citizens, non-citizen nationals, lawful permanent residents, and aliens authorized to work in the U.S. Employers must have a Form I-9 on file for every current employee hired on or after November 6, 1986. I-9 forms for former employees must be kept until the later of three years from the employee's hire date or one year after their final date of employment. Such forms can be retained on paper or electronically.

To determine compliance with federal immigration laws for lawful work authorization, employers should conduct an audit of their I-9s to confirm, among other things, that each individual who should have an I-9 on file in fact has one on file; that any and all employment authorization documents are current; that all sections of the I-9 form have been fully filled out; and that any changes, such as a name change, have been properly documented. Corrections to I-9 forms must be handled carefully and in compliance with federal law. We have attorneys experienced in assisting employers with I-9 audits. Failure to properly follow the law regarding the maintenance of I-9 forms, including making corrections, can subject an employer to civil and criminal penalties.

EMPLOYMENT LAWSCENE ALERT: NEW RULE WILL PERMIT EMPLOYER REIMBURSEMENT OF EMPLOYEES' INDIVIDUAL ACA COVERAGE PREMIUMS

Beginning January 1, 2020, employers will have the option to reimburse employees' individual ACA Exchange (or Marketplace) health insurance premiums under an employer-sponsored Health Reimbursement Arrangement (HRA).

This is a significant change from current rules, which generally permit an HRA to reimburse only group (not individual) health insurance coverage, and which prohibit employer reimbursement of any health insurance coverage provided through the ACA Exchange.

HRA Overview

An HRA is a type of account-based plan that an employer may use to provide pre-tax reimbursement, up to employer-determined annual limits, of certain employee medical care

expenses. Under applicable law, an HRA is a self-funded health care plan, which may be funded only by employer (not employee) dollars. An HRA is subject to ERISA, HIPAA, and certain IRS rules, including the nondiscrimination requirements that prohibit discrimination in favor of highly compensated employees.

What's Old is New Again

Under final regulations issued jointly, last week, by the United States Departments of Treasury, Labor, and Health and Human Services (the Departments), Employers can once again reimburse certain individual employee health insurance expenses on a pre-tax basis. This practice was broadly permitted under IRS rules in effect from 1961 through January of 2014, when the IRS put a sudden halt to the practice on the grounds that it violated the Affordable Care Act.

With Some Twists

Prior to 2014, employers could directly reimburse an employee for the cost of that employee's individual insurance coverage premiums. No additional benefit plan or plan document was required. Under the new rules, employer reimbursements of individual insurance premiums may not be made directly, but must instead flow through a documented HRA program. The HRA must conform in form and operation with applicable Department rules.

Under the law in effect over the last few years, an HRA could reimburse group health plan insurance premiums only if it were "integrated with" an ACA-compliant employer-sponsored group health plan. Under the rules that will take effect January 1, 2020, HRA "integration" with ACA-compliant individual coverage will be available for the first time.

Why are the HRA Rules Changing?

The final regulations issued jointly by the three Departments last week ultimately result from an October 2017 Presidential Executive Order intended to expand "healthcare choice" and flexibility. HRAs were one of three priorities identified in President Trump's Executive Order 13813, which directed the Departments to consider proposing regulations or revising guidance as needed "to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with non-group coverage."

Key Requirements

The final regulations exceed 200 pages and provide extensive detail on the requirements applicable to the new individual coverage HRAs (ICHRAs). Among these are the following six key conditions, which must be satisfied in order to successfully integrate an HRA with individual health insurance coverage:

- All individuals covered by an ICHRA must be enrolled in individual coverage through the Exchange.
- The employer may not offer an ICHRA to the same class of employees to whom it offers group health plan coverage. This means that an employee in a particular classification

may not be given a choice between a traditional group health plan and an ICHRA. Under a related rule, employers are prohibited from steering participants with adverse health factors into individual, rather than into group, coverage.

- An ICHRA must be offered in both the same amount and under the same terms and conditions to all employees. The HRA may not be more generous or less generous to some individuals based on an adverse health factor.
- The ICHRA must offer an opt-out provision so that an employee may choose to waive ICHRA HRA coverage. This condition is intended to preserve an individual's eligibility for a premium tax credit for coverage obtained on the Exchange under certain circumstances, such as when the ICHRA offered is either unaffordable or does not provide minimum value in accordance with ACA standards.
- Claims for reimbursement under an ICHRA must be substantiated and confirmed to relate to the cost of individual Exchange health insurance premiums. An employer may rely on an employee's attestation to this effect, and model attestation forms have been provided by the Departments. If an ICHRA sponsor learns of an incorrect or false attestation, future reimbursements relating to the relevant period may be denied.
- Participants potentially eligible to participate in an ICHRA must be provided with a written notice at least 90 days before the beginning of each plan year (with some exceptions for a shorter notice period in for an initial year of eligibility). The final regulations specify the content that must be provided in the notice.

Limited Time to Prepare

In order for employers to reimburse employees' purchase of individual ACA-regulated health insurance by January 1, 2020, there is much work to do in relatively little time. Before the November 1 start date of the open enrollment period for 2020 ACA coverage:

- Employers must adopt (or amend existing) HRA Plan documents to comply with the new requirements;
- Employers, as well as Exchanges will need to work to communicate the changes to eligible individuals; and
- All separate State-facilitated Exchanges, as well as the Federal Exchanges must implement any required website coding and enrollment procedures.

The State-facilitated Exchanges have been concerned about a possible 2020 rollout since that date was initially mentioned in proposed rules issued late last year. This April, the administrators of all 12 State Exchanges asked the Departments to postpone the effective date. In response, the Departments have promised to provide technical assistance to the Exchanges to facilitate timely implementation of the new rules. Nonetheless, the final regulations are extremely detailed and complex. Whether, and to what extent, employers (and Exchanges) are able to embrace ICHRA reimbursement of individual health insurance premiums remains to be seen.

The attorneys of the Employment Law team of O'Neil, Cannon, Hollman, DeJong and Laing are closely following these new developments and are prepared to discuss how the change in HRA rules may impact your strategy regarding employee benefits offerings, ACA compliance, or how to amend an existing HRA or MERP (medical expense reimbursement plan) or to adopt

a new HRA document to prepare for the reimbursement of individual coverage.

EMPLOYMENT LAWSCENE ALERT: CREATION OF NEW TASK FORCE SIGNALS INCREASED STATE SCRUTINY OF WISCONSIN WORKER CLASSIFICATION

April 15, 2019 marked not only the end of the 2018 personal income tax season, but also the beginning of a new era of enforcement of Wisconsin employment practices. On that date, Governor Tony Evers issued an Executive Order creating a Joint Task Force on Payroll Fraud and Worker Misclassification (the “Task Force”). This Task Force will focus on workers who should be classified as employees but are misclassified as independent contractors.

The Task Force will be chaired by the Secretary of the Department of Workforce Development (“DWD”) and will be staffed by representatives from the DWD, including its Worker’s Compensation and Unemployment Insurance divisions, the Department of Revenue, and the offices of the Attorney General and the Commissioner of Insurance.

Background

Similar task forces have been implemented in recent years in Connecticut and Massachusetts (2008), New York (2016), Colorado, New Jersey, Tennessee, and Virginia (2018), and Michigan (2019).

One of the catalysts for the Wisconsin Task Force creation was the finding, under DWD audits from January 2016 through April 2019, of 5,841 misclassified employees and the related under-reporting of nearly \$70 million in gross wages and \$1.8 million in unemployment insurance taxes. Misclassification of employees also results in the underpayment of Social Security and Medicare-related employment law taxes.

Another impetus for the new interagency coordination is the concern that employers who misclassify workers as independent contractors gain an unlawful competitive advantage that allows them to under-bid or out-compete law-abiding employers.

Prior reviews of employer practices reported by the National Employment Law Project posit that audits of Wisconsin employers have typically revealed worker misclassification in 44% of investigated cases.

Task Force Mandates

The new Task Force is required to report annually to the Governor by March to describe its accomplishments and recommendation for the prior year. Specifically, the Task Force report must include the amount of wages, premiums, taxes, and other payments or penalties collected as a result of coordinated agency activities, as well as the number of employers cited for misclassification and the approximate number of affected workers. The Task Force must also identify administrative or legal barriers impeding more effective agency coordination. After consultation with representatives of business, organized labor, members of the legislature, and other agencies, the Task Force will also propose changes to administrative practices, laws, or regulations appropriate to:

- reduce agency coordination barriers;
- prevent worker misclassification from occurring;
- investigate potential violations of laws governing worker classifications;
- improve enforcement where such violations are found to have occurred; and
- identify successful mechanisms for preventing worker misclassification.

Key Take-Away

The Wisconsin Task Force is being implemented at a time when recent federal decisions by the National Labor Relations Board and the United States Supreme Court appear to be permitting some gig economy companies to more easily classify workers as independent contractors, rather than as employees.

As a result of the creation of the Task Force, however, Wisconsin employers should expect increased scrutiny from the DWD and Department of Revenue regarding independent contractor relationships.

The Employment Law team of O'Neil, Cannon, Hollman, DeJong and Laing recently presented client [seminars](#) in Pewaukee and Green Bay on the many aspects of worker classification and are well-positioned to assist Wisconsin employers in reviewing current arrangements or discussing how the law applies under various circumstances.

EMPLOYMENT LAWSCENE ALERT: IRS ISSUES A SECOND SET OF APRIL 2019 CHANGES TO RETIREMENT PLAN CORRECTION PROGRAM

The IRS Employee Plans division on Friday, April 19, released an updated version of its comprehensive retirement plan correction protocol. Although touted as a "limited update" to

the Employee Plan Compliance Resolution System, or EPCRS, the changes contained in this new Revenue Procedure 2019-19 nonetheless offer substantial savings opportunities for certain employer sponsors of 401(k), 403(b), and profit-sharing plans, and employee stock ownership plans (ESOPs).

The update is effective immediately, and is notable for being the second change in the EPCRS rules to take effect in April 2019. Under a previously-issued update to the program, a new online-only submission requirement took effect on April 1, 2019. As of that date, plan sponsors are no longer permitted to submit EPCRS correction applications or payments by mail.

Bottom Line

The effect of the April 19 update is to expand the circumstances under which a plan sponsor is permitted to correct a self-identified error under the self-correction program (SCP), rather than having to submit a formal application, and accompanying fee, to the IRS.

This expansion of the opportunities for self-correction is a welcome opportunity for plan sponsors who become aware of certain plan compliance failures involving the language of the plan document as well as particular types of errors in the operation of participant loan programs. Correction of the specified errors may now be made on a less formal basis. Provided that the proper correction protocol is followed and documented, a correction can now be completed without having to pay the usual IRS submission fee, which ranges from \$1,500 to \$3,500.

EPCRS Background

The purpose of the IRS EPCRS program, generally, is to provide a system of correction programs and procedures for sponsors of tax-qualified retirement plans that have fallen outside of the qualification requirements either because of errors in the language of the plan document or because of mistakes in how the plan is operated. The EPCRS correction program permits plan sponsors to correct these errors and thereby to continue to offer retirement benefits to their employees on a tax-favored basis.

Depending on the nature and severity of a retirement plan compliance error, three different EPCRS programs exist, each with slightly different rules:

- **SCP.** For the least significant errors, the Self Correction Program (SCP) permits a plan sponsor to self-correct the error without paying any fee or sanction and without submitting any documentation to the IRS. Even though no documents are submitted to the IRS under the SCP program, it is important that the proper self-correction protocols described by the IRS are followed. An improper or undocumented self-correction provides no future IRS audit protection. A proper retirement plan self-correction,

however, will protect a plan sponsor from future fees or penalties related to the properly-corrected error.

- **VCP.** For more significant compliance failures, or for failures not corrected within a specified time period, the only way to receive approval of a correction is to participate in the Voluntary Compliance Program (VCP). This program requires that a description of the error, and of its correction, be submitted to the IRS for formal approval. To use this program, a plan sponsor must pay a fee to the IRS. Under the recently-amended fee structure, the amount of the fee depends solely on the amount of plan assets and ranges from \$1,500 (for plans with less than \$500,000 in assets) to \$3,500 (for plans with more than \$10,000,000 in assets).
- **Audit CAP.** If it is the IRS, rather than the plan sponsor, who identifies a compliance error, then the only permitted correction program is the more expensive Audit CAP program. Errors can be corrected under Audit CAP if the IRS identifies an error during an audit. Under Audit CAP, the penalties imposed in order to retain the retirement plan's tax-qualification will be larger than under the VCP program, and will vary, based upon the nature and extent of the compliance error, the severity of the error.

Potential Opportunity to Make Key Corrections at a Lower Cost

The Treasury Department and IRS expect to continue to update the EPCRS program, in whole or in part, from time to time. Given the ever-changing and highly fact-specific nature of the IRS correction program, the severely adverse threat of plan tax-disqualification, and the need to determine the most effective correction strategy, plan sponsors who suspect or know that a retirement plan has a compliance error are advised to work confidentially with legal counsel specifically experienced in this area of practice. Because an error cannot be corrected under either the SCP or VCP programs after an IRS audit has begun, it is always best to respond to a compliance error quickly and proactively.

Now that the opportunities for self-correction have been expanded, there is no time like the present for plan sponsors to review their tax-qualified plan documentation and operations. Because more types of compliance errors can now be self-corrected, the cost of bringing an employer-sponsored retirement plan back into good standing may now be reduced.

EMPLOYMENT LAWSCENE ALERT: H-1B SEASON IS IN FULL SWING

As Wisconsin slowly awakes from the deep freeze of the polar vortex, employers are busy preparing applications for the H-1B filing season. Wisconsin employers seeking non-immigrant foreign workers in specialty occupations that require theoretical or technical expertise should consider contacting legal counsel to begin preparation of their visa petitions. All paperwork must be submitted during the application period, which begins on **April 1, 2019** and typically runs only until **April 5, 2019**.

What is an H-1B Visa

An H-1B visa allows U.S. employers to temporarily employ foreign workers in specialty occupations that require specialized knowledge or an advanced degree. H-1B visas are typically approved for positions in finance, engineering, mathematics, science, computer programming, or medicine. However, many positions requiring a bachelor's degree or higher will qualify.

H-1B visa holders allow the foreign worker to remain in the United States for a maximum of six years. While the application period starts on **April 1**, the visa is valid for the 2020 fiscal year, meaning that recipients of the visa may not begin working before October 1, 2019.

There is a cap on how many H-1B visas may be issued for each financial year: the government will issue 65,000 regular H-1B visas, which require specialized knowledge or a bachelor's degree, as well as another 20,000 visas for applicants with a U.S. master's degree or higher. Typically, however, the government receives two to three applications for every available quota position. Although application numbers have decreased in recent years, the 2019 H-1B fiscal year saw 190,098 H-1B applications during the first five days of the application period. Consequently, it is essential that employers are prepared to submit their petitions within the application period to avoid missing an opportunity to have the petition adjudicated.

This quota does not apply to certain institutions of higher education, related or affiliated nonprofit entities, nonprofit research organizations, or government research organizations.

Who is Eligible for an H-1B Visa?

Any foreign worker who meets the required educational requirements may have an employer petition on her behalf for an H-1B visa. Non-immigrants who are already in the United States on other valid visas may also qualify for the H-1B visa. These applications generally come from F-1 Student Visa holders who have completed their studies at an American university

and are seeking to enter the workplace. Other visa-holders, such as L-1 Intracompany Transferee Visa holders and, in some cases, B-1/B-2 Visitor Visa holders, may also qualify.

Once a foreign worker has obtained an H-1B visa, she may be eligible to adjust her status to a Legal Permanent Resident through an employment based green card adjustment.^[1] Additionally, H-1B visa holders are eligible to bring their spouse and children under 21 years old with them to the United States under the H-4 dependent visa.

H-1B Visa Application Process

It is important to note that the U.S. employer is charged with submitting the H-1B petition on behalf of the foreign worker. There is a two-step process to this petition:

First, the employer must apply for a Labor Certification Application (LCA) with the U.S. Department of Labor. The LCA is an attestation by the employer that it adheres to certain labor requirements regarding wages, working conditions, and, if applicable, labor unions. The LCA is filed using the Department of Labor's online iCERT system and can take between one to two weeks to receive approval.

Second, the employer will submit the approved LCA along with the USCIS form I-129 and other accompanying documents for H-1B consideration. Because the number of H-1B applications greatly outnumbers the statutory quota, USCIS uses a lottery system to randomly select applications for adjudication. Applications that have not been selected will be returned to the employer with the appropriate filing fees.

Practical Tips

Whether you are an employer looking to sponsor an employee or an employee seeking to adjust to an H-1B, there are several practical steps you can take to facilitate the burdensome H-1B application process.

- Initiate the dialog early. Because the H-1B application is driven by the employer and not the employee, it is important that both sides communicate early and often regarding the capacity and willingness of the employer to petition.
- Check the prevailing wage requirement. The LCA application requires information on the prevailing wage for the open position. This process can be extremely time consuming and complex. However, if the prevailing wage is found to be Level 1 (e.g., an entry level wage), more information, such as an expert opinion letter may be necessary. Because any additional steps to show eligibility may delay the application, it is best to understand what needs to be done early.
- Understand what documents will be needed for the petition. These likely include degree certificates, transcripts, a job description, and other corporate documents. Remember, if any documents are in a foreign language, you must provide a copy of the original as well as a certified translation.

- Update the employer's *Validation Instrument for Business Enterprises* (VIBE) entry with USCIS. VIBE is a program that allows USCIS to retrieve commercially available information about the employer. Although not required, employers are permitted to update the VIBE entry to facilitate the H-1B adjudication process.

With the H-1B visa, early planning is essential to identify any potential issues. For example, additional time may be needed to translate documents, independently assess foreign credentials, or to determine whether the applicant may be eligible for a more efficient path to employment, such as through an O-1 visa, an L-1 visa, or other investment-based applications.

If you are interested in utilizing the H-1B process to strengthen your workforce, please contact O'Neil Cannon to discuss how we are able to assist you in your immigration needs.

[\[1\]](#) Employment based green card adjustments require extensive documentation and may take months or years to finalize. Please contact the attorneys at O'Neil Cannon to determine whether such a step is viable.