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.)

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: 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.