

# EMPLOYMENT LAWSCENE ALERT: ACTION REQUIRED BY AUGUST 31, 2020 FOR CERTAIN RETIREMENT-RELATED CARES ACT RELIEF

An August 31, 2020 deadline applies both to individual retirement account participants who want to repay a required minimum distribution received in 2020 and to employer plan sponsors who wish to reduce or suspend certain 401(k) or 403(b) safe harbor employer contributions. Details on each of these special tax relief provisions are summarized below.

Employers and individuals who wish to avail themselves of these special tax relief provisions should take prompt action.

## **Deadline for Repayment of Certain Waived 2020 Required Minimum Distributions**

As we've described [previously](#), tax law generally requires a 401(k), 403(b), or 457(b) retirement plan participant, or IRA owner, to take required minimum distributions (RMDs) annually once the owner reaches age 72 (or 70 ½ under the SECURE Act).

In late March 2020, the CARES Act waived the requirement to take an RMD from a retirement plan or IRA in 2020. For retirement account owners who had already taken 2020 RMDs and did not need them, the CARES Act provided a way to return them. Although RMDs are not usually eligible for rollover treatment, the CARES Act repayment mechanism is to treat the waived RMDs as if they are distributions eligible for rollover. Instead of actually rolling the amount over to a different plan, however, the CARES Act permits a 2020 waived RMD amount to be repaid only to the same account that paid it out. Any repayment, as described in the CARES Act, was required to take place within the standard 60-day window for making a rollover from one tax-favored account into another.

Because the CARES Act was passed in late March, the 60-day repayment period had by then already expired for those who had taken an RMD in early January 2020. The more recent IRS Notice 2020-51 extends the 60-day window period, so that any waived RMDs received on or after January 1, 2020 may now be repaid, provided that such repayment occurs by August 31, 2020.

Employer plan sponsors may also wish to review whether their plan document should be amended by the deadline to accept RMD repayments if their participant population desires to repay previously-distributed 2020 RMDs to the plan.

## **Employer Deadline to Reduce or Suspend 401(k) or 403(b) Safe Harbor Contributions**

In a separate announcement, Notice 2020-52, the IRS has provided special relief to employer plan sponsors of 401(k) and 403(b) retirement plans who wish to make a mid-year reduction or suspension of safe harbor nonelective employer contributions. The ability to take such action expires on August 31, 2020 and should be properly documented as of that date.

## **Background**

More and more employer sponsors of workplace retirement plans, in recent years, have chosen to adopt a “safe harbor” employer contribution feature. The key advantage of safe harbor status for a tax-qualified retirement plan is that the plan is deemed to treat highly and non-highly compensated employees fairly, with respect to one another. It is therefore exempt from the otherwise applicable annual nondiscrimination testing.

In exchange for safe harbor status and the perk of avoiding complex and sometimes costly nondiscrimination testing, a safe harbor plan must meet certain requirements, including committing to provide a minimum employer contribution or formula, immediate vesting of the contributions, and the provision of an informational notice regarding the contributions before the beginning of the plan year (a safe harbor notice).

## **The Safe Harbor 12-Month Rule**

Typically, once a safe harbor provision is adopted for a retirement plan, it must be in effect for all 12 months of the plan year. This requirement is intended to prevent employers from avoiding nondiscrimination testing if they do not honor the corresponding requirement to contribute to the plan for the benefit of participants.

Generally, there are two exceptions to the 12-month rule that permit a mid-year suspension or reduction of the safe harbor contribution:

1. The first applies if the employer is operating at an economic loss for the plan year.
2. The second applies if the safe harbor notice explicitly reserves to the employer the right to amend, reduce, or suspend the safe harbor contribution during the year.

Under either exception, an additional notice of amendment, reduction, or suspension must be provided to all participants at least 30 days in advance of the effective date of such action. As a result of any mid-year change to a safe harbor contribution, a plan is required to pass nondiscrimination testing in lieu of relying on the safe harbor testing exemption for the year.

## **Temporary Relief Related to Mid-Year Safe Harbor Nonelective Contribution Changes and Notices**

IRS Notice 2020-52 provides special relief under which employers may make a prospective mid-year suspension or reduction of safe harbor nonelective contributions to 401(k) and

403(b) plans after March 13, 2020, for the balance of the year, regardless of whether the employer has satisfied either the requirement of incurring an economic loss or of previously providing a safe harbor notice reserving the right to change contributions.

Additionally, for safe harbor nonelective contribution plans, rather than providing the revised safe harbor notice at least 30 days before the effective date of the suspension or reduction, the notice must be provided by August 31, 2020.

This relief is time-limited, however. To take advantage of these special rules, a plan amendment suspending or reducing the safe harbor contribution must be adopted by August 31, 2020.

Note that the relief provided in IRS Notice 2020-52 does not apply to a mid-year reduction of 401(k) safe harbor *matching* contributions. This is because of the IRS's view that matching contribution levels as communicated to employees directly affect employee decisions regarding elective contributions and should therefore not be changed.

Note also that this article does not address the implications of certain SECURE Act changes to the safe harbor notice requirement, of the impact of IRS Notice 2020-52 thereon.

## **Conclusion**

The temporary relief provided in IRS Notices 2020-51 and 2020-52 will respectively assist individual taxpayers seeking to avoid taking RMDs in 2020, and employer plan sponsors seeking 2020 cost reductions. In either case, action to take advantage of the relief must be taken by August 31, 2020.

The attorneys of the Labor and Employment Group of O'Neil Cannon are actively monitoring COVID-19 developments and are available to assist employers with related employment law and employee benefit plan compliance matters. Please contact us if you need assistance in amending your employer-sponsored retirement plan to accommodate mid-year safe harbor changes or the return of 2020 RMDs.

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## **EMPLOYMENT LAWSCENE ALERT: CARES ACT PROVIDES EMPLOYERS A TEMPORARY WINDOW TO ASSIST EMPLOYEES BY MAKING TAX-FREE**

# STUDENT LOAN PAYMENTS

For the period from March 27, 2020 through December 31, 2020, the CARES Act permits employers to pay directly, or to reimburse employees for, up to \$5,250 of qualifying employee student loan payments.

Like many CARES Act provisions, this new opportunity results from an expansion of an existing law or program. In this case, the ability for an employer to assist employees with student loan payments arises from an amendment to Internal Revenue Code Section 127, which governs Educational Assistance Programs (EAPs). Qualifying payments made as a fringe benefit under an EAP are excluded from the employee's income and are deductible to the employer.

The \$5,250 limit is the amount that employers are currently permitted to contribute, tax-free, for tuition assistance under an EAP. Through the end of this calendar year, it is also the combined limit for student loan repayment assistance and any other education-assistance payments that an employee may receive.

Essential business employers seeking ways to reward or retain employees during the pandemic should consider whether tax-free payment of student loan debts would meet payroll and employee-acknowledgment objectives. If your company currently sponsors an EAP, student loan payments may now be made under the current EAP document. Companies wishing to newly implement an EAP in order to take advantage of this tax-favored student loan repayment assistance opportunity can do so by properly adopting a written plan document satisfying IRS content requirements.

## Existing Educational Assistance Program Requirements

The existing tax code EAP rules remain in effect. To qualify for tax (and payroll tax) exclusion under Internal Revenue Code Section 127, an EAP must:

- provide benefits exclusively to employees of the employer;
- provide only qualified educational assistance benefits (and only up to \$5,250 per employee);
- be documented as a separate written program established by the employer and disclosed to employees;
- be funded solely by the employer;
- not allow employees a choice between educational assistance benefits and cash (or other taxable remuneration); and
- not discriminate in favor of highly compensated employees (\$130,000 in 2020) or provide more than 5% of total benefits in any year to 5%-or-more owners.

## Additional Detail

The student loan payments made under an EAP must relate to education of the employee, not of their child or spouse. Employer payments may be for principal or interest, but employees are not permitted to deduct any interest payment made by employers. Where appropriate, employers making student loan payments under an EAP may, therefore, wish for such payments to be allocated only to principal so as to maximize the tax benefit to employees.

Employers interested in providing tax-free student loan payment assistance to employees should consider doing so, either by amending the operation of an existing, or by adopting a new, EAP. Employers who may already be providing post-tax student loan payment assistance to employees can now temporarily convert this form of compensation into a pre-tax benefit, which will permissibly reduce both employee income taxes and employer payroll tax expenses.

O'Neil Cannon remains open during this time and is here to help. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to employee benefits and fringe benefits as impacted by COVID-19-related business changes or legislation.

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## **EMPLOYMENT LAWSCENE ALERT: IRS SAYS REDUCED-COST OR FREE COVID-19 TESTING OR TREATMENT WON'T PREVENT INDIVIDUALS FROM MAKING OR RECEIVING HSA CONTRIBUTIONS**

In recent guidance, the IRS noted the “unprecedented public health emergency posed by COVID-19” (the disease that results from the 2019 Novel Coronavirus), and the need to remove potential administrative and financial barriers to COVID-19 testing and treatment under the health savings account (HSA) rules.

Issued on March 11, 2020, IRS Notice 2020-15 responds to employer uncertainty as to whether a health plan providing for reduced-cost COVID-19 testing—for individuals who have not yet met their annual deductibles—remains an HSA-compatible high-deductible health plan (HDHP).

That uncertainty arose from the recent wave of insurer and state announcements of the

waiver of out-of-pocket costs for COVID-19 testing (and, in some cases, for treatment). Cost-sharing waivers apply, as of this writing, in at least 32 states, including for most, but not all, insurers in Wisconsin. Insurers have agreed to waive cost sharing due, variously, to voluntary agreements by major insurers, state mandates, or state-insurer agreements.

No-cost COVID-19 testing will be required by all private health plans now that President Trump has signed the Families First Coronavirus Response Act.

### **HSA-Compatible Coverage, Generally**

As we described in a prior [post](#), an HSA is a tax-favored account established to receive contributions from an employee, an employer, or both.

To be eligible to make (or receive) HSA contributions, an individual must be covered only under the HDHP and may not have any other coverage (including reduced-cost services), unless such other coverage is expressly permitted by the IRS.

Certain “preventive care” services are specifically permitted and are not considered to constitute “other” health coverage that would disqualify an individual from HSA eligibility. In July of 2019, the IRS expanded the list of “preventive care” to include fourteen additional items and services intended to prevent the worsening of certain chronic medical conditions.

### **HSA-Compatible Coverage Now Includes Coronavirus-related Services**

The result of the newly-issued IRS Notice 2020-15 is that an individual who is covered by an HDHP will not lose eligibility to make (or receive) tax-favored HSA contributions merely because the HDHP permits pre-deductible COVID-19 testing and treatment with reduced (or no) employee cost-sharing. HSA-eligible individuals may continue to contribute to an HSA regardless of whether the HDHP offers, or the individual receives, a reduced-cost or no-cost COVID-19 test or treatment.

### **Be Aware That:**

- As in the past, any vaccination costs continue to count as preventive care and can be paid for by the plan at any time during the year, without regard to whether the deductible has been met.
- As recently confirmed by the Centers for Medicare and Medicaid, the costs of certain COVID-19 treatments and services, including testing, isolation, quarantine, and vaccination, are generally covered as essential healthcare benefits under Affordable Care Act rules for individual and small group health plans.
- Self-funded group health plans are not required to waive COVID-19 cost-sharing under the state mandates or insurer agreements (but are impacted under the federal Families First Coronavirus Response Act).

The text of the IRS Notice is available [here](#).

The attorneys of the Labor and Employment Group of O’Neil, Cannon, Hollman, DeJong and Laing are actively monitoring COVID-19 developments and are available to assist employers with related employment law and employee benefit plan compliance matters.

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## **EMPLOYMENT LAWSCENE ALERT: REVIEW YOUR COMPANY’S “TOP-HAT FILING” STATUS NOW TO AVOID INCREASED FORM 5500 PENALTIES**

Companies that have entered into arrangements (1) to pay deferred compensation to key employees (including owners), or (2) to provide employee benefits specifically for apprentices or trainees should immediately determine whether a “top-hat filing” is required, and, if so, whether it has been properly filed with the Department of Labor. Two very recent legal developments—increased penalties and a new filing search tool—indicate that enforcement activity on top-hat filing compliance is increasing. Penalties for not filing can be extremely costly, and the penalties have been increased, effective January 15, 2020. Fortunately, a low-cost correction option is available for corrections made prior to a DOL assessment of penalties.

### **Top-Hat Overview**

A top-hat filing is a short informational submission to the DOL that describes the company’s contact information and the nature of the sponsored plan. It is legally required to be submitted with respect to any compensation arrangement for key management and owner employees (or employee benefit plans provided only to apprentices or trainees) that constitutes a top-hat plan. So named in apparent reference to gentility as evoked by Lincoln-era fashion standards, a top-hat plan is an agreement or plan maintained by an employer primarily for the purpose of providing deferred compensation to a select group of key employees, apprentices, or trainees.

The term “select group of management or highly compensated employees” is not clearly defined, but must, instead, be determined in the context of the particular facts and circumstances that apply to the employer. Neither the IRS definition of “highly-compensated employee” or of “key employee” applies in determining whether a compensation arrangement is a top-hat plan. Instead, relevant factors include the duties and responsibilities of the employee and the level of the employee’s compensation as compared to the

compensation of the employer's work force, in general.

## Top-Hat Filing – Required within 120 Days of Plan Effective Date

In general, all employer-provided benefits are subject to ERISA's requirements, unless an exception applies. In the case of top-hat payment arrangements, DOL guidance has expressed that "certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and therefore would not need [all of] the substantive rights and protections of" ERISA. The DOL also permits this lower-protection status for arrangements that provide employee benefits (including health benefits) only to apprentices or trainees, or both.

In light of the reduced need for ERISA protections for these plans, the DOL authorizes an exemption from the otherwise-applicable ERISA mandates regarding participation, vesting, funding, and fiduciary rules. Importantly, an additional exemption from ERISA's reporting and disclosure rules is also available, but *only if* a "top-hat filing" is submitted to the DOL within 120 days of the initial effective date of such plan.

Because ERISA's reporting and disclosure rules include the requirement to file an annual Form 5500 to the DOL, this annual Form 5500 filing requirement continues to apply to a top-hat plan unless a top-hat filing has been timely submitted. Alternately, an initial failure to submit a top-hat filing can generally be corrected, retroactively, for a relatively small compliance fee.

## Form 5500 Penalties at an All-Time High

An employer that fails to timely file a Form 5500 may be subject to a DOL penalty of \$2,233 per day (as adjusted annually for inflation). This new penalty amount of \$2,233 per day is effective January 15, 2020. (For the prior year, the penalty amount had been \$2,194 per day). This is not a typographical error. The law applies these penalty amounts *per day* for each day past the required filing date(s). The penalties are cumulative and become exponentially large for failures stretching over multiple years. While an aggregate penalty assessment could likely be negotiated downward by experienced ERISA legal counsel, an assessed DOL penalty for a late Form 5500 is guaranteed to be large.

The IRS imposes separate penalties for the failure to timely file a Form 5500, unless a showing of reasonable cause is made. Until recently, the IRS penalty was \$25 for each day of the failure up to a maximum penalty of \$15,000 per year. Under the Setting Every Community Up for Retirement Enhancement (SECURE Act) enacted on December 20, 2019, however, the IRS penalties for a late Form 5500 have increased tenfold to \$250 per day, up

to an annual maximum of \$150,000. These increased IRS penalties apply for any Form 5500 due to be filed on and after January 1, 2020.

## New DOL Top-Hat Filing Search Tool

Earlier this week, the DOL published a new online search tool to enable the public to search for top-hat filings. The search tool is available [here](#). Results can be printed or downloaded to Excel.

Prior to the DOL making the search tool available, generally only benefits professionals and practitioners ever searched for top-hat filings, and then only via a website maintained by a private company that regularly obtained the information from the DOL through Freedom of Information Act Requests.

The issuance of the public DOL search tool is a positive development that will assist employers in confirming their top-hat filing compliance status. Of course, this increased access likely also signals increased DOL interest in enforcing late Form 5500 penalties for those employers that have not timely filed a top-hat statement. In light of the ease of searching, it will now be harder for employers to reasonably contend that they were unaware that a top-hat filing had not been submitted. Similarly, it is conceivable that plaintiffs' attorneys or disgruntled employees could use the tool themselves to determine whether a company is likely out of compliance with the top-hat filing, and therefore, the Form 5500 filing, rules. If this knowledge were used to inform the DOL, which, in turn, could trigger a penalty assessment, the penalty amounts could be devastating.

## Correction Option

If you determine or suspect that your company has inadvertently failed to submit a top-hat filing for a covered top-hat plan, take steps right away to amend this oversight by submitting a delinquent filer voluntary compliance application. If you catch the error before the DOL has assessed a penalty, then you can retroactively correct the issue for a fee of only \$750 for a single year (or a maximum of \$1,500 for multiple years). The IRS generally accepts this same correction method as sufficient to avoid the separate IRS Form 5500 penalties, as well. Indeed, this DOL correction method often works to abate the IRS penalties after these have already been assessed.

## Conclusion

It is common for companies that implement deferred compensation arrangements to consider the tax implications of such arrangement, including, for example, the application of Internal Revenue Code Section 409A. Equally important, however, is consideration of the other federal law that may govern such arrangements—ERISA. It is simply not true that all

compensation agreements for key employees are exempt from ERISA's requirements. Failure to anticipate this reality—and to submit a top-hat filing when required—exposes the employer to significant Form 5500 penalties.

To avoid these penalties, check on your company's top-hat filing compliance now. The attorneys of the OCDHL Employment Law Team can assist you with assessing whether your company's key employee compensation agreements constitute top-hat plans within the meaning of ERISA, or whether an exemption may apply. If you maintain a top-hat plan for which no top-hat filing was ever submitted, we can assist in correcting the inadvertently missed prior filings, thereby potentially eliminating the existing exposure to thousands of dollars.

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## **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 plan's 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.

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## **IRS UNVEILS SIGNIFICANT VIRTUAL CURRENCY**

# TAXATION ENFORCEMENT INITIATIVE

The Internal Revenue Service (IRS) recently announced that, by the end of August 2019, more than 10,000 taxpayers would receive mailed letters relating to virtual currency. The IRS is sending the letters to taxpayers who may have failed to report income, pay taxes, or properly report virtual currency transactions. For this purpose, virtual currency includes cryptocurrency and non-crypto virtual currency, including Bitcoin, Ether and JPM Coin.

There are three different types of letters being sent to taxpayers. Each of the three versions are intended to provide information to help taxpayers understand their tax and filing obligations and how to correct previous errors. However, the letters differ from one another in tone and in the response required by the recipient taxpayer.

Two of the letters invite taxpayers to voluntarily report and pay previously unreported virtual currency income, penalties, and interest. The other letter alleges likely noncompliance in stronger terms and requires specific action by a stated deadline. The text of this final letter indicates that the recipient should expect significant IRS scrutiny, as well as potential examination or enforcement action.

## Three Letter Versions

- **Letter 6174** (available [here](#)) notifies a taxpayer that the IRS has information regarding a potential failure to report income from a virtual currency transaction. The letter provides information regarding the taxation and reporting rules which apply regardless of whether the taxpayer received a payee statement (such as a Form W-2 or Form 1999) for a virtual currency transaction. Taxpayers need not respond to the letter, but are advised to file amended tax returns or delinquent tax returns if a virtual currency transaction was not previously accurately reported on a federal income tax return.
- **Letter 6174-A** (available [here](#)) is worded nearly identically to Letter 6174. A key difference is that this letter informs the recipient taxpayer that the IRS is likely to send additional correspondence about potential virtual currency tax enforcement in the future.
- **Letter 6173** (available [here](#)) asserts that federal tax filing and reporting requirements appear to have been unmet by the recipient taxpayer for one or more of the tax years 2013 through 2017. The letter then directs the taxpayer to file amended tax returns. If the taxpayer believes that all tax reporting requirements have already been properly met, the taxpayer must formally respond to the IRS to attest to that position. Supporting detail and documentation must also be submitted. The taxpayer is required to sign the attestation under penalties of perjury that the submission, including all attachments, are true, correct, and complete. Any taxpayer-submitted information will be checked for accuracy against information received by the IRS from banks, financial advisors, and other sources. If a taxpayer does not respond to this letter within 30 days of the date on which the letter was mailed, the IRS will refer the account for audit.

## Second Round of Additional Letters

In addition to the more than 10,000-letter initiative that the IRS publicly announced, as

described above, some taxpayers are also reporting receipt of an apparent second group of letters in the form of a CP2000 Notice. The CP2000 Notice states that the IRS has received information from a third party that doesn't match information on the taxpayer's submitted tax return. The notices acknowledge that a virtual currency trading exchange, rather than the taxpayer, may have made the error. In any event, receipt of a CP2000 Notice indicates that the IRS is aware of a reporting discrepancy. A response to the letter is imperative and additional detail on responding is available [here](#)).

### IRS Regards Virtual Currency as Property

The current IRS Virtual Currency enforcement initiatives conform to IRS guidance previously published in Notice 2014-21, which provides that virtual currency is treated as property for federal tax purposes. As is the case with any property, tax law requires reporting and taxation of amounts that are transferred for services or sold. Among other things, this means that:

- A payment made (or received) in virtual currency is subject to information reporting to the same extent as any other payment made (or received) in property.
- Payments using virtual currency made to independent contractors and other service providers are taxable, and self-employment tax rules generally apply. Typically, payers must issue Form 1099-MISC.
- Wages paid to employees using virtual currency are taxable to the employee, must be reported by an employer on a Form W-2 and are subject to federal income tax withholding and payroll taxes.
- Certain third parties who settle payments made in virtual currency on behalf of merchants that accept virtual currency from their customers are required to report payments to those merchants on Form 1099-K, Payment Card and Third-Party Network Transactions.
- A taxpayer that successfully "mines" virtual currency (for example, uses computer resources to validate Bitcoin transactions and maintain the public Bitcoin transaction ledger) realizes gross income upon receipt of the virtual currency resulting from those activities.
- The character of gain or loss from the sale or exchange of virtual currency depends on whether the virtual currency is a capital asset in the hands of the taxpayer.

### Expect Additional IRS Enforcement Efforts

The IRS has stated its awareness that because transactions conducted using the more than 1,500 known virtual currencies can be difficult to trace and have an inherently pseudo-anonymous aspect, some taxpayers may be tempted not to report virtual currency-related income to the IRS. The mailing of the more than 10,000 letters and the CP2000 Notices, to taxpayers believed to have engaged in unreported virtual currency transactions, is therefore likely to be only the first of many virtual currency enforcement actions. Additional IRS guidance is expected to be published on virtual currency reporting and taxation rules soon, updating the last official guidance issued in 2014

In the meantime, even taxpayers who do not receive a letter or notice should be aware that a

failure to properly report the income tax consequences of virtual currency transactions could result in liability for tax, penalties, interest, and in some cases, exposure to criminal prosecution. Criminal charges could include tax evasion and filing a false tax return. Anyone convicted of tax evasion is subject to a prison term of up to five years and a fine of up to \$250,000. Anyone convicted of filing a false return is subject to a prison term of up to three years and a fine of up to \$250,000.

The attorneys of O'Neil Cannon can assist in reviewing, or responding to any of the three types of IRS Virtual Currency letters, the CP2000 Notices, and other tax-related notice or assessment letters received from the IRS.

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## **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:

| <b>Preventive Care for Specified Conditions</b> | <b>For Individuals Diagnosed with</b>                          |
|-------------------------------------------------|----------------------------------------------------------------|
| 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.

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## **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.

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## **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.

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# 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.