MORETON & COMPANY

Q1 BENEFITS NEWSLETTER

Case Law Continues to Evolve

On Title VII's Application to Sexual Orientation Discrimination

Federal courts continue to weigh in on the extent to which Title VII (the federal employment discrimination law) applies to employee claims of sexual orientation discrimination. In the wake of the Supreme Court's ruling on same-sex marriage, the Equal Employment Opportunity Commission (EEOC) has maintained that sexual orientation is inherently a "sex-based consideration," and that an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII. Here are highlights of recent cases:

> "...an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination..."

EEOC v. Scott Medical Health Center. The EEOC sued on behalf of a gay employee, alleging that the employee was harassed and constructively discharged due to his supervisor's frequent anti-gay comments and the employer's refusal to take corrective action. The EEOC asked the court to prohibit future discrimination and to award back pay and damages to the employee, while the employer argued that the case should be dismissed because Title VII does not prohibit discrimination based on sexual orientation. The court allowed the case to proceed, concluding that there is no meaningful difference between sexual orientation discrimination and discrimination "because of sex," which is clearly prohibited under Title VII.

Hively v. Ivy Tech Community College. In this case, a three-judge panel of the 7th Circuit reached a different conclusion. A part-time professor alleged that she had been denied a full-time position because of her sexual orientation. The employer argued that Title VII does not apply to claims of sexual orientation discrimination, and the court agreed, based on current legal precedent in the 7th Circuit. The court, however, presented an extensive legal analysis, acknowledging the contrary opinion of the EEOC and some other federal courts, and expressing its disapproval that employees can be fired or otherwise discriminated against solely based on who they date, love, or marry. The case was reheard by the full 7th Circuit on November 30, 2016.

The EEOC currently takes the position that a benefits plan violates Title VII if it provides benefits to employees' opposite-sex partners or spouses but not to same-sex partners or spouses. In addition to these two new cases, an EEOC press release describes a recent settlement in which an employer agreed to provide the same medical benefits to same-sex spouses as it does to opposite-sex spouses, and to pay $8,000 in damages for its failure to do so in the past. As case law continues to evolve, employers should use caution when considering health plan eligibility or other provisions that treat employees differently on the basis of their sex or sexual orientation.

President Signs Legislation
Authorizing Stand-Alone HRAs for Small Employers

In December 2016, then President Barack Obama signed legislation allowing small employers without a group health plan to offer their employees a stand-alone health reimbursement arrangement (HRA) to help pay for medical care expenses, including Exchange coverage. The legislation also covers a broad range of other health-related topics, including medical research, drug development, mental health care, and Medicare. Here are highlights of the small employer HRA provision and other provisions that may affect employers and their advisors:

1. **Qualified Small Employer HRAs.** The legislation establishes a new type of HRA called a qualified small employer health reimbursement arrangement (QSEHRA). QSEHRA benefits must be employer-funded (no salary reductions), may not be excluded from income unless the recipient has minimum essential coverage, and can only be used to pay for medical care expenses of eligible employees and their covered family members after the employee has provided proof of coverage. QSEHRAs are generally available for years beginning after 2016.
   - **Qualifying Employers.** QSEHRAs may be offered only by employers that do not offer a group health plan and are not "applicable large employers" (ALEs) under the ACA.
   - **Eligible Employees.** QSEHRA benefits generally must be offered on the same terms to all employees with limited exceptions, including employees with fewer than 90 days of service, those under age 25, and certain part-time and seasonal employees.
   - **Benefit Amount.** Annual benefits cannot exceed an indexed maximum of $4,950 per year ($10,000 if family members are covered).
   - **Notice Requirement.** W-2 Reporting. Employers offering a QSEHRA must give an annual notice to eligible employees at least 90 days before the start of the year or the employee's initial eligibility date, or within 90 days after the legislation's enactment, whichever is latest. The notice must **1)** state the amount of the benefit, **2)** instruct the employee to disclose the benefit amount to the Exchange if the employee seeks a subsidy, and **3)** warn the employee that he/she may be subject to the individual penalty if minimum essential coverage is not maintained for any month. Also, employees' permitted benefits must be reported on Form W-2.
   - **Coordination with Health Care Reform.** QSEHRA benefits that meet the ACA's definition of "affordable coverage" (i.e., does the QSEHRA benefit reduce the employee's cost for the second lowest-cost silver plan in the relevant individual health insurance market below 9.5% of the employee's household income) may prevent covered individuals from receiving premium tax credits. QSEHRA benefits will also be taken into account when determining the tax on high-cost health coverage (the "Cadillac tax").
2. **Mental Health Parity.** Several provisions of the law are aimed at improving compliance with the mental health and substance use disorder parity rules. Federal agencies are directed to issue guidance with regularly updated examples and illustrations, and to provide additional guidance on disclosure methods and non-quantitative treatment limitations. In addition, the new law requires the agencies to audit plans and insurers that have violated the parity rules at least five times, and clarifies that eating disorder benefits, including residential treatment, must be provided consistent with the requirements of the parity rules.
3. **HIPAA Privacy.** There are also provisions relating to health information technology and the privacy and security of health information. A new committee will provide recommendations on several "target areas." In addition, the Department of Health and Human Services (HHS) must issue guidance clarifying when healthcare providers or other covered entities may use or disclose protected health information (PHI) when communicating with family members, caregivers, and others involved in a patient's care in specified circumstances.

The QSEHRA provisions allow small employers that are not subject to health care reform's employer shared responsibility provisions to offer some relief for employees' health care costs without the trouble and expense of providing a group health plan. However, the prospect of fundamental changes to health care reform under the Trump administration creates some uncertainty regarding the ultimate impact of this legislation.

IRS Updates Guidance On Employer Shared Responsibility

& Related Information Reporting

> "...for now, employer shared responsibility and the reporting obligations remain in place..."

The IRS has updated Q&A guidance (provided through three separate webpages) on employer shared responsibility and information reporting requirements for applicable large employers (ALEs) as defined by the Affordable Care Act. Here are some highlights:

1. For purposes of the Employer Shared Responsibility (ESR, or "Pay or Play") requirements, the Q&As add details on determining the number of full-time employees and employee equivalents, which employers should use to assess whether they are ALEs.
2. The updated Q&As provide some added detail on what will and will not qualify as an offer of coverage to full-time employees.
3. Information was added to describe how "affordability" is affected by amounts employees may receive from employers that do not directly affect premium costs, such as HRA contributions, wellness program incentives, and opt-out payments.
4. Updated penalty amounts for 2017 are included: the penalty for failing to offer 95% of all full-time employees coverage will increase to $2,260 per full-time employee, while the penalty for failing to offer affordable or minimum value coverage will increase to $3,390 per full-time employee that obtains a subsidy in the exchange.
5. The IRS expects that notice of 2015 penalties will go out in early 2017.
6. Additional information regarding completion of Forms 1094-C and Forms 1095-C is included.

The ultimate fate of these Code provisions may be uncertain under a Trump presidency, but for now, employer shared responsibility and reporting obligations remain in place. The issuance of these updates suggests that the IRS expects to enforce the requirements at least through 2017. Cautious ALEs will continue their preparations for the 2016 tax year, taking into account the latest guidance.

You can access the updated Q&As here:

Q&A on Employer Shared Responsibility Provisions Under the Affordable Care Act:
www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act

Q&A on Reporting of Offers of Health Insurance Coverage by Employers (Section 6056)**:**
www.irs.gov/affordable-care-act/employers/questions-and-answers-on-reporting-of-offers-of-health-insurance-coverage-by-employers-section-6056

Information Reporting by Employers on Form 1094-C and Form 1095-C:
www.irs.gov/affordable-care-act/employers/questions-and-answers-about-information-reporting-by-employers-on-form-1094-c-and-form-1095-c

Failure to Furnish Copy of 401(k) Plan's Custodial Agreement to Participant

Leads to Imposition of Penalty

In *Askew v. R.L. Reppert, Inc., 2016 WL 447060 (E.D. Pa. 2016)*, a court has found that a 401(k) plan administrator violated the Employee Retirement Income Security Act (ERISA) by failing to furnish certain plan documents in response to a participant's request. As background, ERISA § 104(b) requires plan administrators to furnish participants and beneficiaries with specified documents upon request, including the plan's trust agreement, its most recent Summary Plan Description (SPD) and Form 5500, as well as documents in a catch-all category that includes "other instruments under which the plan is established or operated." Courts have generally agreed that the catch-all provision refers only to formal documents governing the plan, not to all documents under which the plan operates.

In *Askew*, the plan participant requested a copy of the custodial agreement between the plan sponsor and the trust company, but the plan administrator did not provide it, deciding the agreement was not the type of document that must be provided. The court disagreed and imposed penalties totaling $15,959 for the failure to provide the document. The statute allows a maximum penalty of up to $110 per day, but courts have discretion to impose lower penalties.

The obligation under ERISA to provide plan documents in response to a participant's request applies equally to health plans subject to ERISA. Not realizing the importance of responding to such requests, plan administrators (usually the employer sponsoring the group health plan) sometimes ignore such requests or fail to recognize the importance of responding promptly. Employers should respond promptly to any participant request for documents related to operation of the company's group health plan. An employer that is unsure whether a response is necessary should consult with legal counsel in determining how to respond. Failure to do so may subject the employer, as plan administrator, to significant penalties.

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What Is The Form 1094/1095 Filing Obligation

Of Affiliated Employers in an Aggregated ALE Group?

QUESTION: We are a wholly owned subsidiary of a corporation with several hundred full-time employees, but we employ only 10 full-time employees. Since we have fewer than 50 full-time employees, are we obligated to file Forms 1094 and 1095? If we have to file, can our parent company file on our behalf?

ANSWER: Since you are part of a group of employers with more than 50 full-time employees, you are obligated to file Forms 1095-C for your full-time employees even though you employ fewer than 50 full-time employees. You will use Form 1094-C to transmit those forms to the IRS. As explained below, there is no such concept as consolidated reporting by the parent company for purposes of this filing.

> "Since you are part of a group of employers with more than 50 full-time employees, you are obligated to file Forms 1095-C for your full-time employees even though you employ fewer than 50 full-time employees."

The reporting obligation is tied to the definition of "applicable large employer" (ALE) for purposes of employer shared responsibility under the Affordable Care Act. Code § 4980H applies the IRS Code's controlled group rules when determining whether an employer is an ALE. If the employers in the controlled group employ at least 50 full-time and full-time equivalent employees on a combined basis during the preceding calendar year, then each employer is treated as an ALE member within an aggregated ALE group for the current calendar year.

Although the number of employees is combined to determine whether there is an aggregated ALE group, once that determination is made, each separate legal entity (i.e., each ALE member) has an independent reporting obligation. This obligation extends to each employer within the aggregated ALE group, including those with fewer than 50 full-time and full-time equivalent employees. Thus, each ALE member within the aggregated ALE group (including both the parent corporation and the subsidiary corporation in your case) is generally required to file a Form 1095-C for each of its employees who was a full-time employee for at least one month during the calendar year. Each ALE member is also generally required to transmit Forms 1095-C for its full-time employees by filing an authoritative transmittal with the IRS on Form 1094-C, using its own employer identification number (EIN) (Part II, line 21 on the authoritative transmittal is used to indicate that the ALE member is part of an aggregated ALE group).

There is no provision under health care reform for aggregated or consolidated reporting on Forms 1094 and 1095 for employers within an aggregated ALE group. Your parent corporation may agree to prepare the necessary forms for you to file, but the forms must reflect your company's information, and your company will not be relieved of liability for any errors in the forms prepared by your parent corporation.

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