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Important Changes to Cafeteria Plans Effective January 1, 2011

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As employers continue to grapple with the seemingly unlimited number of changes resulting from the health care reform law, this article serves as a reminder about two upcoming changes involving cafeteria plans.

Flexible Spending Account (FSA) Changes

Beginning January 1, 2011, the cost incurred for over-the-counter medication and drugs may no longer be reimbursed through a flexible spending account, health reimbursement arrangement, or health savings account. If the individual obtains the over-the-counter medication with a prescription, the medication will be reimbursable. This change does not affect medical supplies (i.e. bandages), medical equipment, prescription drugs, insulin (even if purchased without a prescription), diagnostic devices such as blood sugar test kits, contact lenses, eye glasses, medical devices, co-payments or deductibles. In addition, for plans that issue a debit or credit card to pay for over-the-counter medications or drugs, the cards must be reprogrammed so the card can no longer be used to purchase over-the-counter medications.

Simple Cafeteria Plans for Small Employers

Beginning after December 31, 2010, small employers that provide simple cafeteria plans meet the nondiscrimination testing rules so long as the employer is required to make certain contributions to the plan. Generally, for these purposes a "small employer" is one that had an average of 100 employees or less during the last two years. Once a qualified employer establishes a simple cafeteria plan, it continues to meet the nondiscrimination requirements (and therefore avoids testing in subsequent years) until the employer has an average of 200 or more employees during a year. Under a classic cafeteria plan's nondiscrimination rules, if the plan fails the nondiscrimination testing, any benefits received by highly compensated employees lose their tax exempt status.

An employer can stay at the forefront of these changes and maintain the tax benefits for employees by simply amending its cafeteria plan(s). If you need help amending your plans to meet these new requirements or would like further information, please contact the author of this Law Fax or any Seaton, Beck & Peters attorney.

Lame-Duck Democrats Make Last Minute Attempt to Pass Employer Damaging Bill

By Attorney Jon S. Olson

Senate Majority Leader Harry Reid (D-NV) and Congressional Democrats are attempting to push a new version of the Paycheck Fairness Act bill (S. 3772) through the current lame-duck Congress, before newly elected Republicans can take office in January. Reid has said he wants a Senate vote on the bill as early as November 17.

This bill, which would amend the Fair Labor Standards Act (FLSA), would largely restrict the bases on which employers make employee compensation decisions. It would also authorize the Equal Employment Opportunity Commission and the Department of Labor to collect wage information from any employer, and prohibit employers from retaliating against employees who publicize other employees' wages.

Specifically, the bill would require that employers equally pay all employees who hold the same job position, at the same establishment, under similar working conditions, unless differences are based on seniority, merit, production, or "a bona fide factor other than sex." However, the bill prevents an employer from relying on "a bona fide factor other than sex" unless the employer can affirmatively prove that the factor is (1) not based upon or derived from a sex-based differential, (2) is related to the specific job in question, and (3) is based on business necessity. These requirements will be difficult, if not impossible, for employers to prove in most situations. The bill, if passed, would therefore restrict the factors an employer can consider in making compensation decisions to only seniority, merit or production.

Factors employers now commonly consider when making wage rate decisions, such as professional experience, education and training, the labor market, or even a company's profitability, would become largely off-limits. For example, if an employer pays both male and female employees in a particular job \$25 per hour, but discovers it cannot recruit new employees for less than \$30 per hour, the bill would likely prevent an employer from offering applicants that higher rate unless the wage rates of current employees of the opposite sex are also raised to that rate.

The bill also protects employees who disseminate and publicize other employees' compensation information, thereby encouraging employees to do so. This effectively destroys any expectation of privacy that employees may have over their pay information.

The bill further provides the EEOC and the Department of Labor with authority to collect an employer's wage information, even absent any complaints about pay rates, and increases liability for employers who are found to have violated the FLSA.

Given the complexity of employee compensation decisions, as well as the myriad of factors that affect them, giving bureaucrats additional authority to further second guess employers in this area can only undermine already overburdened private sector employers. Employers who are opposed to this bill should let Harry Reid, and their senators and representatives, know they oppose this last minute over-reaching by the lame-duck Congress

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