The Legislative Update

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July 19, 2017

HR LEGISLATIVE NEWS FROM AROUND TE WEB….

Supreme Court Denies Request to Review Cash-in-Lieu Case

In May, the United States Supreme Court denied a petition to review a Ninth Circuit Court of Appeals ('the Appeals Court") decision that the value of a cash payment in lieu of benefits must be included in an employee's regular rate of pay for the purpose of calculating overtime under the Fair Labor Standards Act ("FLSA"). The Appeals Court's decision applies to employers in Alaska, Arizona, California, Hawaii, Idaho, Montana, Oregon, Nevada, and Washington (also Guam and the Northern Mariana Islands).

Background

A city in California ("City") maintained a flexible benefits plan for its employees. Under the plan, the City provided a specific dollar amount to each employee for the purchase of medical, dental, and vision benefits. All employees were required to purchase dental and vision benefits. However, if an employee had medical coverage through another source, such as a spouse's employer plan, the City employee could waive medical coverage under the City's plan and receive the unused funds as cash. An employee who waived medical coverage would have received a cash payment of $1,304.95 per month (2012 dollar value) in taxable cash.

During the years of 2009 through 2012, these cash payments represented a substantial percentage of the total cost of the City's flexible benefits plan. In 2012, cash payments of $1,213,880.70 represented 45.17% of the total plan contributions. The percentages for previous years were 43.934% for 2011, 42.842% for 2010, and 46.725% in 2009.

The City did not include the value of these cash payments in its employees' regular rate of pay when it calculated overtime compensation. Several employees sued and the district court ruled in favor of the employees finding that the value of cash payments should have been included in the employees' regular rate of pay for the purpose of determining overtime pay. The Appeals Court affirmed the district court's decision that the employer improperly excluded the value of these payments when it calculated overtime pay.

Rate of Pay for Overtime – FLSA Regulations

The FLSA defines an employee's regular rate of pay which must be used for the purpose of determining overtime compensation for non-exempt employees. The regular rate of pay includes more than just an hourly rate - other forms of compensation may also need to be included. However, one type of remuneration that is not required to be included is "contributions irrevocably made by an employer to a trustee or other third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees." Under DOL regulations in order to exclude the value of

benefit plan payments from the employee’s regular rate of pay, five conditions must be satisfied:

The contributions must be made pursuant to a plan adopted by the employer;

The primary purpose of the plan must be to provide for the payment of benefits;

The benefits under the plan must be specified or definitely determinable (there must be definite formulas for determining employer contributions and benefits for each employee) or there must be a formula for determining employer contributions and a provision for determining individual benefits by a method consistent with the plan’s purpose;

The employer’s contribution must be paid irrevocably to a trust or other third person including an insurance arrangement (the employer must not be able to recapture the funds or use the funds for its own benefit); and

The plan must not give an employee the option to receive any part of the employer’s contributions in cash instead of benefits under the plan, unless as an “incidental” part of the plan the employee can receive cash under circumstances specified in the plan that are not inconsistent with the purpose of the plan to provide benefits.

Unless the plan satisfies all of the above requirements, employer contributions to the plan are considered to be part of the employee’s regular rate of pay. Under those circumstances the contributions must be allocated over all of the workweeks and included in the employee’s regular rate (similar to the method used for payment of bonuses).

In July 2003, the Department of Labor (“DOL”) issued an Opinion Letter stating that cash-in-lieu payments are “incidental” if they account for no more than 20% of the employer’s total contribution amount. As stated in the July 2003 Opinion Letter, The DOL had historically applied this 20% rule on an employee-by-employee basis. However, in the Opinion Letter the DOL stated that after further review it believes that the 20% rule should be applied on an overall plan basis rather than employee-by-employee.

The Appeals Court’s Decision

The Appeals Court ruled that the cash payments made to employees for waiving health coverage could not be excluded from the employees’ regular rate of pay for the purpose of calculating overtime pay because they did not satisfy two of the DOL’s requirements. First, the Appeals Court found that the cash payments were paid directly to employees rather than to a “trustee or third person” (the 4th requirement in the DOL regulations). Second, the Appeals Court noted that the cash payments did not qualify as “incidental” (the 5th requirement in the DOL regulations) because they represented more than 40% of the total plan contributions.

The Appeals Court ruled that “[b]ecause the City’s Flexible Benefits Plan is not a ‘bona fide plan’ under §207(e)(4) pursuant to the requirements of §778.215(a)(5), even the City’s payments to trustees or third parties under its Flexible Benefits Plan are not properly

excluded under §207(e)(4).” As such, the City must include the value of all of its contributions to its flexible benefits plan when determining employees’ regular rate of pay for calculating overtime pay.

The Appeals Court also commented on the DOL’s selection of a 20% cap on cash payments as indicative of incidental status. The Appeals Court stated that the DOL failed to explain its reasoning for adopting the 20% threshold and did not provide any rationale for why 20% was chosen as the appropriate percentage. Unfortunately, the Appeals Court did not suggest a different percentage or an alternative method of determining when a cash payment would qualify as “incidental” creating uncertainty over what it would consider an “incidental” benefit that could be excluded.

Impact on Employers

The Appeals Court’s decision has a direct impact on employers that have employees located in the Ninth Circuit – the jurisdictions identified above. Most employers that offer cash in lieu of benefits do so through a cafeteria plan and provide relatively modest amounts of cash such as $1,000-$3,000 for a full year. Cafeteria plans with substantial opt-out bonuses similar to those offered by this City are not common. Based on the Appeals Court’s decision, it appears that employers with cash-in lieu plans that are similar to this City’s plan will not be able to exclude the value of their benefit plan contributions when calculating overtime pay. Unfortunately, the status of plans that offer more modest cash payments is uncertain, as it is unclear how the Appeals Court would have viewed a plan that does satisfy the DOL’s requirements, including the 20% threshold.

Employers with plans that include a cash payment in exchange for waiving coverage – particularly those with significant cash payments - will want to discuss this case with a tax attorney with appropriate experience to determine how they should be calculating an employee’s regular rate of pay for overtime purposes. Alternatively, they may also want to review their existing plan design to determine if changes, such as eliminating the cash opt-out payment would be appropriate. If the employer is subject to one or more collective bargaining agreements, then changes are likely to require negotiations with the union(s) involved.

Moreover, while this ruling does not directly affect employers in other areas of the country, all employers that have (or are considering) offering a cash-in-lieu of benefits arrangement will want to review the DOL’s guidance to determine if their plan will satisfy the DOL’s requirements.

Source: Arthur J. Gallagher & Co.

IRS Adjusts Affordability Percentage Downward

The Internal Revenue Service (“IRS”) recently announced that the affordability percentage for 2018 will be 9.56 percent. This marks the first decrease in the annually indexed percentage

and poses a potential pitfall for applicable large employers who may need to adjust the employee contribution for self-only medical coverage downward in order to meet the requirement to offer affordable coverage to avoid triggering an Employer Shared Responsibility penalty. Revenue Procedure 2017-36 (where the change in the affordability percentage was announced) also adjusted the affordability percentage used to determine whether an individual is eligible for an exemption from the Individual Mandate (discussed in another article in this issue of Healthcare Reform Update).

Study shows number of employers using social media to screen candidates at all-time high

According to a new study, 70 percent of employers use social media to screen candidates before hiring, up significantly from 60 percent last year and 11 percent in 2006. The national survey was conducted online on behalf of CareerBuilder by Harris Poll between February 16 and March 9, 2017. It included a representative sample of more than 2,300 hiring managers and human resource professionals across industries and company sizes in the private sector.

"Most workers have some sort of online presence today– and more than half of employers won't hire those without one," said Rosemary Haefner, chief human resources officer at CareerBuilder. "This shows the importance of cultivating a positive online persona."

What are employers looking for? Social recruiting is becoming a key part of HR departments—3 in 10 employers (30 percent) have someone dedicated to the task. When researching candidates for a job, employers who use social networking sites are looking for information that supports their qualifications for the job (61 percent), if the candidate has a professional online persona (50 percent), what other people are posting about the candidates (37 percent) and for a reason not to hire a candidate (24 percent).

Employers aren't just looking at social media—69 percent are using online search engines such as Google, Yahoo and Bing to research candidates as well, compared to 59 percent last year.

More than half of employers (54 percent) have found content on social media that caused them not to hire a candidate for an open role. Of those who decided not to hire a candidate based on their social media profiles, the reasons included:

- Candidate posted provocative or inappropriate photographs, videos or information: 39 percent;
- Candidate posted information about them drinking or using drugs: 38 percent;
- Candidate had discriminatory comments related to race, gender, religion: 32 percent;
- Candidate bad-mouthed their previous company or fellow employee: 30 percent;
- Candidate lied about qualifications: 27 percent;
- Candidate had poor communication skills: 27 percent;
- Candidate was linked to criminal behavior: 26 percent;
- Candidate shared confidential information from previous employers: 23 percent;
- Candidate's screen name was unprofessional: 22 percent;
- Candidate lied about an absence: 17 percent; and

- Candidate posted too frequently: 17 percent.

On the other hand, more than 4 in 10 employers (44 percent) have found content on a social networking site that caused them to hire the candidate. Among the primary reasons employers hired a candidate based on their social media profiles were candidate's background information supported their professional qualifications (38 percent), great communication skills (37 percent), a professional image (36 percent), and creativity (35 percent).

Necessity of online presence. Fifty-seven percent of employers are less likely to call someone in for an interview if they can't find a job candidate online. Of that group, 36 percent like to gather more information before calling in a candidate for an interview, and 25 percent expect candidates to have an online presence.

Researching current employees. More than half of employers (51 percent) use social media sites to research current employees. Thirty-four percent of employers have found content online that caused them to reprimand or fire an employee.

Source: CareerBuilder.