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IRS ISSUES INFLATIONARY ADJUSTMENTS TO THE INDIVIDUAL MANDATE PENALTY FOR 2018

On August 16, 2018, the Internal Revenue Service (IRS) released Revenue Procedure 2018-43, which increases the monthly national average premium for a bronze plan offered in the Marketplace/Exchange. Under the Individual Shared Responsibility Payment rules (i.e., Individual Mandate), an individual (or family) that fails to have Minimum Essential Coverage (MEC) would be subject to a penalty. In 2018, that penalty is either the greater of:

- $695 per adult and $347.50 per child, per year, for the tax household (up to a flat dollar amount of $2,085 for the entire household); or
- 2.5% of a family's income in excess of the 2017 income tax filing thresholds.

However, the above penalties are limited to the national average premium cost for a bronze plan. As a reminder, the national average premium cost for a bronze plan is the **maximum amount** an individual may be penalized for failing to have MEC under the Individual Mandate.

The adjustments to the 2018 national average premium cost for a bronze plan (and therefore the maximum penalty an individual could be exposed to) are the following:

- An adjusted cost of $283 per month (increased from $272 in 2017), per individual ($3,396 annually); and
- An adjusted cost of $1,415 (increased from $1,360 in 2017) per month, for a family of five (5) or more members ($16,980 annually).

As a reminder, due to the Tax Cut and Jobs Act, the Individual Mandate penalty **after** December 31, 2018 will be $0.

No Action Required

Employers should be aware that employees may be exposed to greater penalties for failing to be enrolled in Minimum Essential Coverage, in 2018.

For the complete details, see IRS Revenue Procedure 2018-43:

https://www.irs.gov/pub/irs-drop/rp-18-43.pdf

TEXAS COURT OF APPEALS TEMPORARILY HALTS AUSTIN, TEXAS PAID SICK LEAVE ORDINANCE

As MMA reported in our MMA March 2018 Legislative Compliance Monthly Newsletter, on February 16, 2018, the Austin City Council passed an ordinance requiring private employers in Austin, Texas to provide covered employees paid sick leave each year ("Austin Ordinance"). The State of Texas filed a lawsuit challenging the Austin Ordinance claiming it violated the Texas Minimum Wage Act.

On August 17, 2018, the Texas Court of Appeals temporarily blocked implementation of the Austin Ordinance that was set to take effect on October 1, 2018. The Court stated that in an effort to preserve the rights of both parties in the case, it would stop the Austin Ordinance from moving forward while litigation is ongoing.

No Action Required

Employers should continue to monitor the ongoing litigation and depending on the outcome, covered employers should remain ready to implement a compliant paid sick leave policy if necessary.

For the Court's Order, see:

http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=8a3bf8c0-4b7e-4e2b-bc28-b3add81ac6c3&coa=coa03&DT=Order&MediaID=da634912-c9fe-4915-85fa-380cd90e3caa

SAN ANTONIO, TEXAS PASSES PAID SICK TIME ORDINANCE

On August 16, 2018, the San Antonio City Council voted to adopt a paid leave ordinance (SA Ordinance) which will require all employers in San Antonio, Texas to provide paid sick time to their employees. The law takes effect on **August 1, 2019**, for employers with six (6) or more employees. For employers with five (5) or fewer employees, the law becomes effective on **August 1, 2021**.

Although the ordinance is set to become effective for most employers in August 2019, the fate of the Austin, Texas Ordinance will likely dictate whether the San Antonio Ordinance goes into effect as scheduled.

Covered Employers

The Ordinance applies to all employers doing business in the city of San Antonio, Texas.

Covered Employees

Employees who perform at least eighty (80) hours of work for pay in the city of San Antonio in a year, including work performed through the services of a temporary or employment agency, will be entitled to earned paid sick time (EPST).

Permitted Uses of EPST

An employee may use EPST for any one of the following reasons:

- The employee's physical or mental illness, preventative medical or health care, injury or health condition;
- The employee's need to take care of a family member's physical or mental illness, preventative medical or health care, injury or health condition; or

SAN ANTONIO, TEXAS PASSES PAID SICK TIME ORDINANCE (CONTINUED)

- The employee's or their family member's need to seek medical attention, seek relocation, obtain services of a victim services organization or participate in legal or court ordered action related to an incident of victimization from domestic abuse, sexual assault, or stalking involving the employee or the employee's family member.

A "family member" is broadly defined to include an employee's spouse, child, parent or any other individual related by blood or whose close association with the employee is the equivalent of a family relationship.

Accrual, Caps, and Carryover of EPST

Covered employees will be eligible to accrue one (1) hour of EPST for every thirty (30) hours worked.

Employers with sixteen (16) or more employees may establish a yearly accrual cap of sixty-four (64) hours, while employers with fifteen (15) or fewer employees may establish a yearly accrual cap of forty-eight (48) hours. In all cases, an employer is not required to allow an employee to use EPST on more than eight (8) days in a given year. Accrued but unused sick leave (up to the yearly accrual cap) must be carried over to the following year.

Alternatively, employers may simply "frontload" the applicable cap of EPST to employees at the beginning of each calendar year. Employer's using the "frontload" method will avoid the need to calculate accrual and also need not allow for carryover of unused time into the following year.

Verification

Employers will be allowed to impose reasonable verification procedures on employees who are absent for covered EPST reasons for more than three (3) consecutive workdays.

Reinstatement of Employment

If an employee separates from his/her employer, but is then rehired within six (6) months, all of the employee's unused and accrued EPST must be reinstated.

Notice Requirement

Employers must maintain records documenting hours worked and EPST used by employees. Employers will also be required, on no less than a monthly basis, to provide employees with a statement (either electronically or in writing) showing the amount of the employee's available EPST.

Employers that maintain an employee handbook will be required to include in the handbook a notice to employees regarding their rights and remedies available under the SA Ordinance. If the Director of the San Antonio Metropolitan Health District creates a workplace poster, it will be publicly available on the Department's website. An employer will be required to display such sign in the workplace, describing the requirements of the SA Ordinance.

Action Required

Employers must review their current leave policies to determine whether revisions are required. Payroll systems will need to be reviewed to ensure that the system can account for the accrual, usage and carry over of EPST.

For the SA Ordinance text, see:

https://sanantonio.legistar.com/View.ashx?M=F&ID=6464067&GUID=D2B306D3-1859-446C-9360-D86C141C96DF

MICHIGAN PASSES PAID SICK LEAVE LAW

On September 5, 2018, the Michigan legislature passed the Michigan Earned Sick Time Act (the Act), which generally requires covered employers to offer Michigan employees paid sick leave each year. The Act is effective ninety (90) days after the current legislative session ends, which is projected to be April 1, 2019. Although amendments to the Act are expected, highlights of the Act as passed are detailed below.

Covered Employer

The Act applies to an employer that employs at least one (1) employee. The Act does not apply to the Federal government.

The Act defines a "small business" as an employer with less than ten (10) employees working for compensation during a given week. A "large business" is defined as an employer with ten (10) or more employees on its payroll during twenty (20) or more calendar workweeks in either the current or preceding calendar year. In determining the size of the business, the employer must include full-time, part-time, and temporary employees in the employee count.

Covered Employee

The Act applies to employees of the employer who work in the state of Michigan. An employee of the Federal government is not covered by this Act.

If an employee is covered by a collective bargaining agreement (CBA), this Act is not applicable to that employee until the CBA expires.

Accrual of Sick Leave

An employee of either a small or large business begins to accrue paid sick leave either on April 1, 2019 or the employee's date of hire, whichever date is later.

Small Business

Employees of a small business accrue a minimum of one (1) hour of paid sick leave for every thirty (30) hours worked. Employees may carry over earned but unused paid sick leave to the following year. However, an employee of a small business may only *use* up to forty (40) hours of paid sick leave per year[1], unless the employer sets a higher limit.

If an employee of a small business *accrues* more than forty (40) hours of paid sick leave in a year, he/she may *use* an additional thirty-two (32) hours of **unpaid** sick leave during that year, unless the employer sets a higher limit. An employee of a small business must be permitted to use **paid** sick leave before being required to take **unpaid** sick leave.

Large Business

Employees of a large business also accrue a minimum of one (1) hour of paid sick leave for every thirty (30) hours worked. Employees may carry over earned but unused paid sick leave to the following year. However, an employee of a large business may only *use* up to seventy-two (72) hours of **paid** sick leave per calendar year, unless the employer sets a higher limit.

If an employer offers paid leave (e.g., paid vacation, personal days, and paid time off) of the same or greater amount as the leave required by the Act, and with similar use requirements, the employer is not required to offer additional paid sick leave.

An employer is not required to pay an employee for unused paid sick leave upon an employee's termination, resignation, or other separation from the employer.

[1] The Act uses the term "calendar year," but the Act also states that an employer can either use calendar year or a consecutive 12-month period of the employer's choosing.

MICHIGAN PASSES PAID SICK LEAVE LAW (CONTINUED)

Permitted Uses of Sick Leave

Generally, an employee can use paid sick leave as it is accrued. If an employee is hired after April 1, 2019, an employer may impose a ninety (90) day waiting period from the date of hire before an employee can *use* accrued paid sick leave.

An employee may use paid sick leave for the following reasons:

- time needed for the diagnosis, care, treatment, or recovery from an employee's mental or physical illness, injury, or other health condition, or for the preventive medical care of the employee
- time needed for the employee to care for a family member needing diagnosis, care, treatment, or recovery from the family member's mental or physical illness, injury, or other health condition, or requiring preventive medical care for the family member
- an absence due to domestic abuse or sexual assault of the employee or employee's family member, including the need for psychological care or other counseling, to obtain services from a victim services organization, to relocate, to obtain legal services, or to participate in any civil or criminal proceedings related to the domestic violence or sexual assault
- time needed to attend meetings at a child's school or place of care related to the child's health or disability, or effects of domestic violence or sexual assault on the child; or
- closure of the employee's place of business or child's school or place of care by order of a public official due to a public health emergency, or if the health authorities or a health care provider determine the employee's or a family member's presence in the community would jeopardize the health of others due to a communicable disease.

The Act defines a family member as an employee's:

- biological, adopted, or foster child, stepchild, or legal ward, a domestic partner's child, or a child for which the employee stands in loco parentis
- a biological parent, foster parent, stepparent, or adoptive parent or a legal guardian of the employee or an employee's spouse or domestic partner, or a person who stood in loco parentis to the employee
- a spouse or domestic partner
- a grandparent or grandchild
- a biological, adopted, or foster sibling; or
- an individual "related by blood or affinity whose close association with the employee is the equivalent of a family relationship."

An employer may not require an employee to find a replacement worker as a condition of taking paid sick leave.

If an employee uses paid sick leave for more than three (3) consecutive days, an employer may require the employee to provide reasonable documentation in a timely manner to confirm the leave was used for a permitted reason.

Notice by the Employee

If an employee's use of sick leave is foreseeable, the employer may require the employee to provide up to seven (7) days advance notice of his/her intent to use sick leave. If the use of sick leave is not foreseeable, the employer may require the employee to give such notice as soon as practicable. However, an employer may not require an employee to provide details of a domestic violence or sexual assault incident or an employee's or family member's medical condition, as a condition of the employee using sick leave.

Notices by the Employer

An employee must provide employees a notice at the time of hire or by April 1, 2019, whichever is later, that includes the following information:

- the amount of accrued sick time required to be provided by an employer under the Act
- how the employer defines a "year"
- the terms under which an employee may use sick leave
- that retaliatory action by an employer against an employee for exercising his/her rights under the Act is prohibited; and
- the employee's right to bring a civil action or file a complaint with the Department of Licensing and Regulatory Affairs (the Department) for any violation of the Act.

MICHIGAN PASSES PAID SICK LEAVE LAW (CONTINUED)

An employer must display a poster in a conspicuous location in the workplace that contains the same information as the required notice described above. The required notice and poster must be provided in English, Spanish, and any other language that is the first language of at least 10% of employees, as long as the Department offers a notice in that language.

Retention of Records

An employer must maintain records documenting an employee's hours worked and accrued sick time, for a period of not less than three (3) years. An employer must allow the Department to access these records when requested.

Prohibited Employer Actions

An employer may not restrict or deny an employee's rights under the Act, nor can an employer discriminate or retaliate against an employee for exercising his/her right to take leave that is protected under the Act.

Employer Penalties for Violations

An employer who violates any provision of the Act is subject to penalties including, but not limited to, payment of sick leave and wages improperly withheld, rehiring or reinstatement of the employee, and additional monetary penalties.

Action Required

Michigan employers should review their paid leave policies and ensure they comply with the requirements of the Act.

For details of the Act, please see:

https://www.michamber.com/paid-sick-leave-2018-ballot-proposal

IRS RELEASES FAQ ON EMPLOYER SHARED RESPONSIBILITY PROVISIONS (EMPLOYER MANDATE) AND ASSOCIATION HEALTH PLANS

In August of 2018, the Department of Treasury released a Frequently Asked Question (FAQ) regarding employers who are not considered Applicable Large Employers, and whether those non-ALE members would be considered an Applicable Large Employer (ALE) if they took part in an Association Health Plan.

As background, an ALE is any employer who averages 50 or more Full-Time and/or Full-Time equivalent employees in the previous year. An Association Health Plan consists of multiple non-commonly owned employers of various sizes that create a combined health plan with one another. The below FAQ discusses whether a non-ALE employer that joins an Association Health Plan with other employers is converted to an ALE, due to the employees of other employers who are participating in the Association Health Plan. As detailed in the FAQ below, the Department of Treasury states that an employer that joins an Association Health Plan is **not** impacted by the number of employees that another non-commonly owned employer within the Association Health Plan employs.

For example, assume that three separate entities (i.e., not commonly owned entities) named Employer X, Employer Y, and Employer Z each have 25 Full-Time and Full-Time Equivalent common law employees and are not ALEs under the ACA regulations. If Employer X joins an Association Health Plan along with Employers Y and Z, the Association Health Plan would have a total of 75 Full-Time and Full-Time Equivalent employees participating within it. However, pursuant to the below FAQ, Employer X would still not be considered an ALE member even though it joined an Association Health Plan with greater than 50 Full-Time and Full-Time Equivalent employees within it. This is because Employer X need not include the number of Full-Time and Full-Time Equivalent employees of either Employer Y or Z when calculating its number of Full-Time and Full-Time Equivalent employees in the current year.

Below is the FAQ referred to, above.

18. Do the employer shared responsibility provisions apply if an employer that is not otherwise an ALE offers coverage through an Association Health Plan (AHP)?

No. Whether an employer member of an association that offers coverage through an AHP is an ALE that is subject to the employer shared responsibility provisions depends on the number of full-time employees (and full-time equivalent employees) the member employer employed in the prior calendar year and is unrelated to whether the employer offers coverage through an AHP. An employer that is not an ALE under the employer shared responsibility provisions does not become an ALE due to participation in an AHP, and an employer that is an ALE under the employer shared responsibility provisions continues to be an ALE subject to the employer shared responsibility provisions regardless of its participation in an AHP. (The only circumstances in which multiple employers are treated as a single employer for purposes of determining whether the employer is an ALE is if the employers have a certain level of common or related ownership.)

No Action Required

Employers should be relieved to know that joining an Association Health Plan will not impact their status as an Applicable Large Employer and/or Non-Applicable Large Employer.

For the FAQ, see:

https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act

QUESTION OF THE MONTH

Must Employees Stop Making HSA Contributions When They Become Medicare-Eligible?

QUESTION: Our company offers a high-deductible health plan and allows employees in that plan to make pre-tax HSA contributions. Some of our employees are approaching age 65 and will soon become eligible for age-based Medicare Part A. Must they stop making HSA contributions when they attain age 65?

ANSWER: Not necessarily. Medicare Part A eligibility alone does not disqualify an individual from contributing to an HSA. However, individuals cannot make HSA contributions for any month in which they are both eligible for and enrolled in Medicare (i.e., actually "entitled" to Medicare benefits). For those months, their monthly HSA contribution limit drops to zero. Medicare entitlement based on age may occur automatically if an individual begins receiving Social Security benefits (i.e., a separate application is not required). Other individuals must file an application in order to be entitled to Medicare (e.g., working individuals who are eligible for Social Security benefits but have not applied for them). Thus, Medicare entitlement may be delayed if the receipt of Social Security benefits is delayed.

IRS guidance regarding HSA eligibility does not make employers responsible for determining whether their employees are entitled to Medicare and thus ineligible for HSA contributions. Nevertheless, it seems prudent for the employer to ascertain whether an employee is entitled to Medicare as part of the enrollment process for its HSA program. If an HSA is newly created for an employee who is not eligible to make HSA contributions, the HSA will be disregarded for tax purposes, and any pre-tax contributions will be treated as taxable income. (Because the HSA is disregarded, HSA-specific excise taxes will not apply.) But if contributions are made into a preexisting, valid HSA, correction will be more complicated and excise taxes may be incurred if the contributions are not timely distributed. (This situation could occur when rehiring former employees.)

One especially tricky aspect of Medicare's interaction with HSA eligibility comes into play if an employee delays applying for Social Security, continues working past age 65 (or has a spouse that is still working), and is covered by an employer-provided group health plan. In that situation, the employee may receive up to six months of retroactive Medicare coverage for the period prior to the month in which application for benefits is eventually made. That period of retroactive coverage will be a period of Medicare entitlement that precludes HSA contributions for those months. So, for example, an employee who turned 68 in July and signed up for Medicare at that time would not be eligible to make any HSA contributions for the preceding six months, effectively precluding any HSA contributions for the calendar year. If contributions were already made for that period, they would need to be timely distributed to avoid the excise tax on excess contributions.

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