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DOL ISSUES MEMORANDUM ON ACA AND ITS INTERACTION WITH FRINGE BENEFIT EMPLOYEES

Background

The McNamara O-Hara Service Contract Act (SCA) and Davis-Bacon Act and/or Related Acts (collectively DBRA) generally require that employees on federal service contracts over $2,500, and construction contracts over $2,000, be paid prevailing wages and fringe benefits.

Under the SCA, covered employees must receive **both** minimum monetary wages and fringe benefits (e.g., health coverage), which may be subject to a predecessor contract's collective bargaining agreement. However, most wage and fringe benefit rules under SCA contracts are subject to the Department of Labor's Wage and Hour requirements. The SCA divides compensation into two categories:

- Fringe benefits; and
- Monetary wages

Currently, the required SCA health and welfare contribution (i.e., fringe benefit) amount by an employer is $4.27 per hour. This amount may be paid in benefits, cash equivalents of benefits, or a combination of the two. However, the SCA monetary wage must be paid in cash, and cannot be satisfied through fringe benefit (e.g., health coverage) contributions by an employer.

Under the DBRA, however, an employee is compensated through a prevailing wage which is comprised of both a basic hourly rate of pay, and any fringe benefits found to be prevailing (i.e., if fringe benefits are typically offered in that locality). Under both the SCA and the DBRA, fringe benefit obligations may be satisfied through the cash equivalent of the amount of fringe benefits. However, under the DBRA, a covered employer may satisfy its basic hourly rate obligation by paying for fringe benefits.

Under the Employer Mandate (i.e., Employer Shared Responsibility Provisions), an Applicable Large Employer (ALE) is subject to a penalty if the employer fails to offer:

- Substantially all of its full-time employees Minimum Essential Coverage (MEC) and one employee receives a subsidy in the Exchange (i.e., Marketplace); or
- If the employer fails to offer Minimum Value (MV) or Affordable coverage to a full-time employee, and that employee receives a subsidy in the Exchange.

The SCA and DBRA regulations previously caused a lot of confusion among employers as to how they interacted with the Affordable Care Act (ACA), especially as they related to the Employer Mandate provisions.

Memorandum from U.S. Department of Labor

To resolve these potential conflicts, the U.S. Department of Labor issued the "All Agency Memorandum Number 220" (Memorandum) to address these concerns. Details of the Memorandum can be found below.

Interaction of SCA, DBRA, and Employer Mandate

Employers who are subject to each of these regulations are required to comply with each. The Employer Mandate provisions do not alter any requirements under the SCA or the DBRA.

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DOL Issues Memorandum on ACA and Its Interaction with Fringe Benefit Employees (Continued)

Employer Mandate Contributions Under ACA Do Not Interfere with SCA/DBRA Contributions

Numerous benefit offerings will qualify as fringe benefits under the SCA or DBRA, but employers may not receive credit toward SCA or DBRA obligations for benefits that are already required to be provided to employees under any Federal, state, or local law. The Memorandum clarifies that benefits offered under the ACA are not considered benefits as required by Federal law, and therefore, employers who are subject to the ACA may continue to receive SCA/DBRA credit for contributions to bona fide health plans. This is due to the ACA not imposing a requirement to provide coverage, but only imposing a penalty if an employer fails to offer coverage to substantially all of its employees, or fails to offer MV/Affordable coverage, and an employee receives a subsidy in the Exchange.

However, if an employer is subject to penalties under the ACA for failing to offer coverage (including failing to offer MV/Affordable coverage), then those payments made to the Federal government will **not** be credited as SCA or DBRA fringe benefit contributions by the employer.

Employees Who Decline Employer Health Coverage

Employers may choose how they satisfy the fringe benefit requirement under the SCA/DBRA. An employer, therefore, could require that all employees elect its health coverage, even if some employees would have preferred to decline the coverage to receive an equivalent cash payment or some other fringe benefit.

However, employers should take caution in requiring employees to enroll in a health plan because:

- If an employer requires an employee to enroll in its health plan, the coverage must be both an Affordable **and** MV plan to the employee to constitute an **offer** of coverage to that employee; and
- If employees pay for health benefits by payroll deductions, an employer would need written permission for such deductions from an employee's paycheck.

In addition, employers should be aware that under SCA/DBRA, if employees have the choice of electing or waiving coverage, any employee who declines medical coverage will still be entitled to receive cash or other bona fide fringe benefits for the amount the employer would have to provide under the SCA/DBRA for fringe benefits.

Finally, employers should also be cautioned that fringe benefit obligations are treated differently under the SCA verses under the DBRA. As a reminder, the DBRA allows "wages" to include **both** the basic hourly rate of that employee **and** fringe benefit contributions (however, in no way can the fringe benefit contribution reduce the employees basic hourly wage to below applicable minimum wage rates), which is in contrast to the SCA, whereby monetary wages are treated as two separate and independent requirements and categories for wages and fringe benefits.

Bona Fide Fringe Benefits May Not Protect Employers against ACA Penalties

Employers should be cautious when offering bona fide fringe benefits to employees under the SCA or DBRA, as those fringe benefits may not meet the qualifications as MEC or MV/Affordable coverage under the ACA. Therefore, it is important for employers who are ALEs to separately analyze the Employer Mandate provisions from the SCA/DBRA requirements. ALEs should also ensure that when offering fringe benefits in compliance with SCA/DBRA, they are also offering MEC to substantially all of their full-time employees, and offering MV/Affordable benefits to their full-time employees, or potentially be subject to penalties under the Employer Shared Responsibility Provisions.

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DOL Issues Memorandum on ACA and Its Interaction with Fringe Benefit Employees (Continued)

Employer contributions to an employee's fringe benefits under the SCA/DBRA must reflect the actual cost to the employer of the benefit(s), for whom the contribution is made. Employers may only take credit for the amount of premiums charged to the employer by the carrier for each employee at issue. An employer may not aggregate these individual premiums and charge an aggregate amount spread out among all employees to satisfy the fringe benefit requirements under the SCA/DBRA. Therefore, employers should ensure that each employee does not exceed the cost of that employee's insurance as charged by the carrier.

Action Required

Employers who have employees subject to SCA and the DBRA should ensure that they are also compliant with the ACA. Although this is merely a memorandum, and not actual regulations, employers should pay close attention to the above rules as they relate to their employees.

For the complete details, see:

All Agency Memorandum Number 220: http://www.dol.gov/whd/programs/dbra/Survey/AAM220.pdf

IRS RELEASES INDEX AND COST OF LIVING ADJUSTMENTS FOR 2017 (REVENUE PROCEDURE 2016-24)

The Internal Revenue Service (IRS) recently released Revenue Procedure 2016-24. The following are highlights from this update.

Health Care Reform Related Indexing Adjustments (Revenue Procedure 2016-24)

For tax year 2017, the affordability threshold for the cost of coverage to an employee to receive subsidies within the public Marketplace (i.e., Exchange) is **9.69%** of an employee's household income. The threshold for an employee to receive an exemption from the Individual Mandate Penalty (i.e., Individual Shared Responsibility Payment), has increased to when applicable coverage costs more than **8.16%** of an employee's household income.

Action Required

Note: This Revenue Procedure will be effective for tax years and plan years beginning after December 31, 2016. Applicable Large Employers should ensure offers of coverage are affordable based on the adjusted index. This cost of living adjustment will also increase the affordability safe harbors under The Affordable Care Act in 2017.

For the complete details, see:

IRS Revenue Procedure: https://www.irs.gov/pub/irs-drop/rp-16-24.pdf

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SAN FRANCISCO ENACTS PAID PARENTAL LEAVE ORDINANCE

Paid Parental Leave Basics

On April 5, 2016, the San Francisco Board of Supervisors passed the Paid Parental Leave for Bonding with New Child Ordinance (hereinafter referred to as the "Paid Parental Leave Ordinance"), which would require San Francisco Covered Employers to provide paid parental leave to employees who have a newborn child, a newly adopted child, or a new foster child. Currently, California law provides a 55% wage replacement benefit (subject to limits) under California's Paid Family Leave (PFL) law. Under the San Francisco Ordinance, Covered Employers would be required to pay the other 45% of wages to Covered Employees (limited to a maximum weekly amount), to ensure that a Covered Employee would receive their **full wages** for the duration of the six week parental leave.

Effective Date

The Ordinance would become effective on the following dates for the following size employers:

- January 1, 2017, for employers with 50 or more employees
- July 1, 2017, for employers with 35 or more employees
- January 1, 2018, for employers with 20 or more employees

Covered Employee

Only Covered Employees are entitled to receive supplemental wages under the San Francisco Paid Parental Leave Ordinance. In order for an employee to be considered a Covered Employee, the employee must meet the following criteria:

- Worked for a Covered Employer for at least 90 days prior to the start of the leave period;
- The employee performs at least 8 hours of work per week for the Covered Employer, within the geographic boundaries of the City of San Francisco;
- At least 40% of total weekly hours are worked (roughly, calculated from the three most recent months) for the Covered Employer within the geographic boundaries of the City; and
- The employee must be eligible to receive compensation from the State of California under the PFL law, for purposes of bonding with a new child.

Covered Employer

Only Covered Employers are subject to the Paid Parental Leave Ordinance. A Covered Employer is defined as:

- An employer that regularly employees 20 or more employees, regardless of the location of those employees

Employers who are **exempt** from the Paid Parental Leave Ordinance include the City of San Francisco, in addition to any other governmental entities.

Covered Leave

Paid Parental Leave may extend up to six weeks of paid time off to bond with a new child. A Covered Employee may take this time to bond with their minor child during the first year after birth or after placement with the employee (through adoption or foster care).

Details of Wage Replacement

Compensation

Wage Replacement Compensation by an employer must be provided to a Covered Employee which equates to 100% (but no greater) of that employee's gross weekly wages when combined with PFL compensation (55% of wages). Currently the Wage Replacement Compensation would be 45%, but may be adjusted if PFL increases in the future.

Maximum Wage Replacement Compensation

Currently, PFL limits the 55% weekly benefit for higher earning workers at $1,129 per week. The San Francisco Paid Parental Leave Ordinance limits the employer compensation contribution to an additional $924 per week.

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San Francisco Enacts Paid Parental Leave Ordinance (Continued)

Use of Accrued, Unused Vacation Time

Covered Employers may require Covered Employees to use up to two weeks of unused, accrued vacation time to help satisfy the employer's obligation under the Paid Parental Leave Ordinance. The Ordinance contemplates that under PFL, an employee may be required to take up to two weeks of accrued, unused vacation time, prior to the employee's initial receipt of the PFL compensation benefits. If this occurs, an employee could potentially receive eight weeks of total leave, at 100% of their wages.

Employers who already have Fully-Paid Parental Leaves

Employers who have a policy of providing six weeks or more of fully-paid parental leave within any twelve-month period to bond with a new child are in compliance with this Ordinance.

Employee Termination

If an employer terminates an employee during the covered leave period, the employer must pay to the former employee the Wage Replacement Compensation for the remaining leave period.

Notice and Recordkeeping

Employers must post a Workplace Notice (**not yet available**), which will be created by San Francisco's Office of Labor Standards and Enforcement (OLSE) before January 1, 2017, which will also be provided for in multiple languages. Employers should retain records of any Wage Replacement Compensation for a period of four years and make records available to OLSE upon request.

Action Required

Note: This Ordinance has not yet been approved by the Mayor of San Francisco, but most likely will be passed in the near future. San Francisco employers should ensure that they are in compliance with this new ordinance by the effective date applicable to their company size.

For the complete details, see:

Paid Parental Leave for Bonding with New Child Ordinance:
https://sfgov.legistar.com/View.ashx?M=F&ID=4223414&GUID=78887622-568E-4ADA-93D0-C367F11CC1CF

STATE OF NEW YORK ENACTS PAID FAMILY LEAVE LAW

New York state lawmakers finalized a budget deal on March 31, 2016 which included: 1) a Paid Family Leave Law; and 2) a statewide, incremental minimum wage increase to $15 per hour. State Governor Andrew Cuomo signed the legislation into law on April 4, 2016. The focus of this article is on the Paid Family Leave Law portion of the legislation.

New York Paid Family Leave Law

New York's Paid Family Leave Law, effective January 1, 2018, requires employers provide paid family leave benefits to eligible employees. The benefits program (which will be phased in from 2018 to 2020), is funded entirely through employee payroll deductions, and is an extension of the state's current temporary disability benefits insurance program.

Below are highlights of this law:

- Eligible employees may use paid family leave to:
  - Provide physical or psychological care to family members with a serious health condition
  - Bond with biological, adopted, or foster children during the first 12 months after birth, adoption, or foster placement; and
  - Relieve family pressures when the employee's spouse, domestic partner, child, or parent is on active military duty.
- Both part-time and full-time employees are eligible for paid family leave benefits after six months of service, without a waiting period
- Eligible employees can take their paid leave time in increments of one full day, or one fifth of the weekly benefit

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State of New York Enacts Paid Family Leave Law (Continued)

- Employees should provide employers with at least 30 days of notice to the employer prior to taking leave
- Employers may limit family leave to one employee per time period for the same family (e.g., an employer that employs both spouses need not allow both individuals to take time off at the same time to care for a newborn)
- Once effective, benefits cannot drop below $100 per week—unless the employee's wages at the time are less than $100 per week, in which case, the employee will receive benefits in the amount of his or her full wages
- After an employee returns from paid family leave, employers must reinstate the employee to his or her position before the leave, or a comparable position with comparable benefits
- Employees cannot collect full disability and paid family leave benefits at the same time, but may collect benefits under the Family Leave Medical Act with paid state family leave benefits
- Penalties for employer noncompliance include fines ranging from $100-$2,000 and imprisonment

Paid Family Leave Benefits Phase-In Schedule

The following is a schedule of the effective phase-in dates of the legislation, including the duration, amount, and maximum allowance provided to employees over the next five years.

Effective Date	Amount of Paid Family Leave Per 52 Week Calendar Period	Amount of Benefit	Cap
January 1, 2018	8 weeks	50% of the employee's average weekly wage	50% of the state average weekly wage
January 1, 2019	10 weeks	55% of the employee's average weekly wage	55% of the state average weekly wage
January 1, 2020	10 weeks	60% of the employee's average weekly wage	60% of the state average weekly wage
January 1, 2021	12 weeks	67% of the employee's average weekly wage	70% of the state average weekly wage

Action Required

Employers with employees in New York should review the new paid family leave law and revise their policies to ensure compliance.

For the complete details, see:

Text of A.3870: http://hr.cch.com/ELD/BILLASPASSEDTHEHOUSEANDSENATE-030916.pdf

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NEW YORK CITY AMENDS PAID SICK LEAVE ORDINANCE

Background

The New York City Earned Sick Time Act (ESTA), originally adopted on June 26, 2013 and amended in April 2014, requires most private-sector employers with five or more employees to provide up to 40 hours of paid sick time to employees who work in New York City. Employees who are eligible for paid sick leave must work more than 80 hours in a calendar year.

In January of 2015, the ESTA was again amended. This time, New York City sought to clarify some of the existing provisions within it, and also added some new rules to the ordinance. These amendments became effective on March 4, 2016.

Highlights of these clarifications and substantive changes to the ESTA are outlined below:

2016 Revisions to New York City's Earned Sick Time Act

Temporary Help Firms

The amended rules define a *temporary help firm* as an organization that recruits and hires its own employees and assigns those employees to perform work for another organization in order to (1) support or supplement the other organization's workforce; (2) assist in special work situations; or (3) perform special assignments or projects. A temporary help firm is solely responsible for complying with the provisions of the ESTA for each temporary employee it places, regardless of the size of the organization where the employee is placed.

The amended rules also define *joint employer* as two or more employers that have some control over the work or working conditions of an employee. To help interpret the ESTA's broad definition of joint employer, the DCA website contains FAQs that provide a non-exhaustive list of factors used to determine joint employer status for purposes of the ESTA.

When determining whether an employer employs the requisite number of employees to be subject to ESTA's obligations to provide paid sick leave, each joint employer must count an employee that it jointly employs as part of its business size. Further, each joint employer is individually and jointly responsible for complying with all ESTA provisions. However, an employee does not accrue separate paid sick time balances for each employer if jointly employed. Rather, when determining the accrual and use of sick time, an employee that is jointly employed must consider its work for all joint employers as a single employment.

Calculating the Number of Employees

The amended rules clarify how a new employer (i.e., employer in business for less than one year) should address fluctuating numbers of employees when determining whether it employs the minimum number of employees to be subject to ESTA obligations. If the number of employees fluctuates between less than five employees and five or more employees per week, a new employer may determine its number of employees for the current calendar year based on the average number of employees per week during the 80 days immediately preceding the date the employee used his/her sick time.

The amended rules also state that employers operating for one year or more should determine their business size by calculating the number of employees working per week at the time the employee uses sick time. If the number of employees fluctuates between less than five employees and during a separate period five or more employees at least three times in the most recent calendar quarter, then the employer may determine its business size by averaging the number of employees per week during the previous calendar year.

Minimum Increments and Fixed Intervals

The ESTA allows employers to set four-hour minimum daily increments for an employee's use of sick time. The amended rules also now allow employers to set fixed intervals of 30 minutes or less for use of accrued sick time that exceeds the four-hour minimum daily use increment.

Written Sick Time Policy Requirements

The amended rules now require employers to maintain and post a written sick time policy that meets or exceeds all the requirements detailed in the ESTA. At a minimum, the policy must state: (1) the method of calculating paid sick time (i.e., accrual or frontloading); (2) how sick time may be used, including any limitations on the use; and (3) the carryover policy for unused sick time at the end of the year. This written sick time policy is an **additional obligation** to the ESTA's requirement that employers distribute the "Notice of Rights" document.

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New York City Amends Paid Sick Leave Ordinance (Continued)

Recordkeeping

Under the amended rules, an employer must keep records documenting its compliance with the ESTA requirements, including its written policies, for a period of three years. For each employee, the employer must keep records of the following:

(1) Employee's name, address, phone number, start and end date of employment, rate of pay, and if employee is exempt from overtime
(2) Hours employee worked each week, unless employee is exempt from overtime requirement and has a regular 40 hour or more workweek
(3) Date and time of each instance of sick time used by employee and amount paid
(4) Any change in material terms of employment specific to the employee; and
(5) Date the Notice of Rights was provided to employee with proof of receipt of notice.

Accrual of Sick Time for Certain Employee Categories

The amended rules set forth the following requirements for accrual and use of sick time hours for certain categories of employees.

On-Call Employees
Scheduled shifts for on-call employees who are compensated whether they work or not count as worked hours when calculating accrued sick time.

Piecework and Commission
Employees paid on a piecework or commission basis accrue sick time based on the actual length of time spent performing work.

Indeterminate Shift Lengths
Hours of sick time used by an employee with indeterminate shift lengths is determined based on the hours worked by the replacement employee for the same shift, if possible.

Rehire Waiting Period

The amended rules state that if an employee is rehired within six months of separation and had not reached the required 120-day waiting period to begin using accrued sick time during their first period of employment, that employee must be credited the previous calendar days worked from the first period of employment towards the 120-day waiting period upon rehire.

Carry-Over Rules

An employee may carry over up to 40 hours of unused sick time from one calendar year to the next, unless the employer has a policy of paying employees for unused sick time at the each of the calendar year in which the time was accrued.

Penalties for Non-Compliance

If an employer fails to respond to a notice of violation of the ESTA, that employer is subject to a fine of $500, in addition to other penalties that may be imposed as a result of the department's investigation.

If an employer has an official or unofficial policy or practice of not providing or allowing the use of sick time pursuant to the ESTA, the employer is subject to penalties on a per employee, not per violation, basis.

Lastly, an employer who does not allow accrual of sick time pursuant to the ESTA will be required to provide relief to employees in one of two ways. The employer will be required to apply 40 hours of sick time to an affected employee's sick time balance if the employer cannot calculate the amount of sick time hours the employee accrued. However, if calculable, the employer will be required to apply the accrued hours due for the time worked by the employee, up to 80 hours.

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New York City Amends Paid Sick Leave Ordinance (Continued)

Action Required

Employers in New York City should pay close attention to the new earned sick time rules and update their policies if they are not currently in compliance.

For the complete details, see:

Notice of Adoption of Rule to ESTA:
http://rules.cityofnewyork.us/sites/default/files/adopted_rules_pdf/amendment_of_earned_sick_time_rules_1_27_16_-_final_approval_-_legal_6360439_4.pdf

VERMONT BECOMES FIFTH STATE TO ENACT PAID SICK LEAVE ORDINANCE

On March 9, 2016, Vermont passed new legislation, entitled "H.187" which requires employers, beginning January 1, 2017, to allow their employees to accrue paid sick leave. However new employers need not comply until one year after the employer hires its first employee. Highlights of the new law are summarized below.

Covered Employers and Employees

Covered Employers

A Covered Employer, who is subject to the law, is broadly defined as any individual, organization, or governmental body doing business or operating within the State of Vermont.

Covered Employees

Part-time and full-time employees are eligible to earn paid sick leave if they are employed for an average of 18 hours or more per week during a year, and not otherwise exempt.

The law excludes the following workers:

- State and Federal employees,
- Workers that are under 18 years of age
- Workers who have been employed for 20 weeks or less in a 12-month period; or
- Workers who are employed on jobs that last 20 weeks or fewer.

Earning Paid Sick Leave

Earned Leave Subject to Caps

Covered Employers must provide Covered Employees with earned sick time at the rate of at least one hour for every 52 hours worked, subject to certain caps:

- From January 1, 2017 through December 31, 2018, employers may limit employees to 24 hours (3 days) of earned sick time in a 12-month period; and
- After December 31, 2018, employers may limit an employee to 40 hours (or 5 days) of earned sick time in a 12-month period.

Using Paid Sick Leave

Waiting Period

For newly hired or current employees employed on the law's effective date, employers may implement a waiting period of up to one year beginning January 1, 2017, during which employees can accrue but cannot use sick time.

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Vermont Becomes Fifth State to Enact Paid Sick Leave Ordinance (Continued)

Valid Uses of Paid Leave

Employees can use accrued sick time for the following reasons:

- To care for the employee or a family member's illness, injury, need for medical diagnosis or treatment, or need for preventative medical care
- To obtain services or care for the employee or a family member who is the victim of domestic violence, sexual assault, or stalking; or
- To care for a family member because the school or business where that individual is normally located during work hours is closed for public health or safety reasons

Paying Out Sick Leave

Employers can limit an employee from using earned sick time in increments that are shorter than one hour. Paid sick leave must be compensated at a rate equal to the greater of:

- The employee's normal hourly wage; or
- Vermont's minimum wage rate.

Unused Paid Sick Leave

Earned and unused leave shall be carried over to the next year. Alternatively, an employer can opt to compensate an employee for unused earned sick time, in lieu of carrying over the unused leave. Earned sick leave is subject to annual caps, as specified above.

Upon separation from employment, an employee is not entitled to payment for unused earned sick time (unless agreed upon by the employer). If an employee is discharged after completing the waiting period, and is subsequently rehired by the same employer within 12 months, the employee may begin accruing sick time without a waiting period. However, the employee does not retain the sick time accrued during the previous employment period (unless agreed upon by the employer). On the other hand, if the employee voluntarily separates from employment and is subsequently rehired by the same employer within 12 months, then the employer can reinstate a waiting period.

Posting Requirements

Employers must post notices of Vermont's Paid Sick Leave law at the employer's place of business, and must notify employees of the sick leave provisions upon hiring.

Penalties for Noncompliance

Employers in violation of the law may be fined up to $5,000.00.

Action Required

Vermont employers should review their current paid sick leave policies and update or modify their policies as needed to ensure compliance with the new law. Employers with preexisting paid sick leave or paid time off policies that are equal to or more generous than the obligations required by the new law need not revise their policies to offer additional time off.

For the complete details, see:

Text of H.189: http://hr.cch.com/ELD/BILLASPASSEDTHEHOUSEANDSENATE-030916.pdf

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CHANGES TO CALIFORNIA PREGNANCY DISABILITY LEAVE LAW UNDER THE FAIR EMPLOYMENT AND HOUSING ACT

In January of 2016, the California Department of Fair Employment & Housing (DFEH) announced changes to the Fair Employment & Housing Act (FEHA), which focused heavily on amending the regulations relating to harassment and discrimination. However, the focus of this article is on the amendments impacting California's Pregnancy Disability Leave (PDL) law. These amendments became effective April 1, 2016 and include substantive changes to the PDL regulations, as well as changes to the notice requirements. Highlights of the amendments are contained below.

Changes to the Regulations

The following changes were made to the PDL regulations:

- An employee is now entitled to **up to four months of leave per pregnancy**, not per year.
- The four months leave per pregnancy no longer needs to be taken in one continuous period of time. The amendments now allow an employee to take leave intermittently or on a reduced schedule.
- Employers may not exclude transgender individuals when determining whether an employee is disabled by pregnancy.

Changes to the Notice Requirements

Previously, employers were provided with different Rights and Responsibilities notices based on the size of the company. The amended regulations, however, **consolidate** these notices (previously referred to as Notice A and Notice B). This consolidated document is titled "Your Rights and Responsibilities as a Pregnant Employee" (hereinafter referred to as the "Notice") and must contain information about the FEHA and how to contact the DFEH to file a complaint.

The Notice needs to be posted in a **conspicuous place within the workplace** and the text must be legible and large enough to be easily read**.** Electronic posting is permitted if the Notice is posted in a conspicuous place or places where employees would tend to view it in the workplace**.** Employers must also provide a copy of the notice to an employee who discloses she is pregnant as soon as practicable. Further, a translated notice must also be posted in every language spoken by at least 10% of the workforce.

Action Required

California employers should review their current pregnancy disability policies and notices, and update or modify their policies and notices to ensure compliance with the amended regulations.

For the complete details, see:

Test of the FEHA: http://www.dfeh.ca.gov/res/docs/FEHC/FinalText.pdf

Copy of the Notice from the DFEH website: http://www.dfeh.ca.gov/Publications_Publications.htm

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COMPLIANCE REMINDER: ANNUAL REPORTS DUE APRIL 30TH

San Francisco's Health Care Security Ordinance (HCSO) or Healthy San Francisco require "covered employers" (i.e., for-profit employers with 20 or more total employees and nonprofit employers with 50 or more total employees) to spend a **minimum** amount on health care benefits for covered employees.

Plan: Covered Employers must file an Annual Report with the City on the health care expenditures made for employees working in San Francisco. Covered Employers must file the 2015 Annual Reporting Form (ARF) no later than April 30, 2016. Below are links to the 2015 Annual Reporting Form and instructions:

- Login: 2015 Employer Annual Reporting Form
- Instructions: Annual Reporting Instructions

Tips for completing the Annual Reporting Form

1. Do not submit (2) separate 2015 Annual Reporting Forms using the same Business Account Number unless you are submitting a correction. If multiple businesses or locations share the same Business Account Number, combine the relevant data into a single Annual Reporting Form. If multiple forms are submitted, only the most recent submission will be recorded.
2. Fill out the form completely. Do not enter commas in numeric fields. Enter zeros where appropriate. Enter all dollar amounts in whole dollars; do not include cents.
3. You may report multiple types of health care expenditures for each employee. For example, if you paid health insurance premiums and also paid into a HRA for a particular employee, the employee would be reported on both the Health Insurance page and the Revocable Expenditure page.
4. Employees who worked for you throughout the year should be counted in each quarter.
5. If you cannot access the online forms, call the HCSO Office at (415) 554-7892 to request a paper copy of the Annual Reporting Form.

Employers who fail to submit the form are subject to a $500.00 penalty for each quarter that the violation occurs.

Irrevocable Expenditures

For 2016, **only 20% of the 2016 expenditure** per person **may** qualify as **revocable**. **Note:** Percentages are for each individual and not an average for the group.

An Irrevocable Health Care Expenditure is an expenditure that the employer cannot recover. Employers who set up benefit plans, such as a limited scope HRA (e.g. dental-only plan), will no longer be able to recover the unused amounts, even if the employee leaves the job or if the business ceases to exist. An irrevocable expenditure includes premium payments to insurers for medical, dental, vision coverage, contributions to employees' HSA, MSA, etc. Any payment to the City Option is considered irrevocable.

Conditions for Revocable Expenditures.

- The expenditure is "reasonably calculated to benefit the employee," and the employer must provide an expenditure summary notice within 15 days of each employer expenditure.
- Employer must provide the summary notice within 3 days of termination of employment.
- No portion of the expenditure can revert to the employer prior to the earliest of: 24 months from the date of the expenditure or, 90 days after termination of employment.

Click here for an OLSE Sample Contribution Summary for an HRA with revocable contributions.

The 2015 and 2016 HCSO-required health care expenditure rates are as follows:

Employer Size	Number of Employees	2015 Expenditure Rate	2016 Expenditure Rate
Large	All employers w/100+ employees	$2.48 per hour payable	$2.53 per hour payable
Medium	Businesses w/20-99 employees Nonprofits w/50-99 employees	$1.65 per hour payable	$1.68 per hour payable
Small	Businesses w/0-19 employees Nonprofits w/0-49 employees	Exempt	Exempt

Notice Update: Covered Employers must replace last year's posted Official Notice with the updated HCSO 2016 Official Notice at every workplace or job site where there is an HCSO-eligible individual.

This is informational only, and is not intended to serve as legal, tax or financial advice. You should consult with our qualified legal, tax, or financial advisor before making any changes to your plan.

DEPARTMENT OF LABOR ISSUED FINAL REGULATIONS ON THE NEW SUMMARY OF BENEFITS AND COVERAGE TEMPLATE

Summary

On April 6, 2016, the Department of Labor (DOL) released the final rules for the new Summary of Benefits and Coverage (SBC) template. The new SBC template is intended for use as of April 1, 2017.

The Affordable Care Act requires SBCs as a means to provide standard plan information to assist individuals in comparing their medical offerings. The final SBC template and instructions reflects material updates that were proposed in February of 2016. Below is a brief list of changes made to the previous SBC template:

- Restructured content that reduced the template to 5 pages (please note: SBC limit remains 8 pages/4 double-sided pages).
- Example of an additional cost for a foot fracture treated in the Emergency Room.
- Revised claims/pricing data for the coverage example calculator.
- New language for **minimum essential coverage** and **minimum value** as well as for **continuation and appeals/grievance rights**. There are also other sections within the template with revised language.
- An updated Uniform Glossary.

No Impact on Expatriate Plans. This new template does not affect expatriate plans because both U.S. issued fully insured and self-funded expatriate plans are exempt from the SBC regulations.

Action Required

Employers should be aware of the new SBC template, and ensure that the updated version of the SBC is provided to employees on or before April 1, 2017.

For the complete details, see:

SBC Template:

http://search.usa.gov/search?utf8=%E2%9C%93&affiliate=u.s.departmentoflabor&query=SBC

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QUESTION OF THE MONTH

Q: One of our employees would like to drop his DCAP election under our calendar-year cafeteria plan because a neighbor has offered to take care of his child at no cost. Can we allow this midyear election change?

A: Yes, provided that your plan document has been drafted as expansively as IRS rules allow regarding midyear election changes due to changes in cost or coverage. The rules apply broadly to dependent care assistance programs (DCAPs), permitting midyear election changes in a variety of circumstances involving changes in care providers or in the cost of care. IRS officials have informally commented that a DCAP election change is permitted when a child is switched from a paid provider to free care (or no care, in the case of a "latchkey" child). Other circumstances in which IRS rules would allow a DCAP election change include changes in the hours for which care is provided and changes in the fee charged by a provider. (However, an election change is not allowed if a cost change is imposed by a care provider who is the employee's relative as defined in IRS rules.) Note that, while the cost or coverage election change rules apply broadly to DCAPs, they do not apply to health flexible spending arrangements (health FSAs); this is one of several areas in which the rules differ for health FSAs and DCAPs.

For more information, see EBIA's Cafeteria Plans manual at Sections XIV.E.8 ("Applying the Significant Cost Change Rules to DCAPs"), XIV.F.6 ("Significant Coverage Curtailment (With or Without Loss of Coverage): DCAP Election Changes—Broad Rules Apply"), and XIV.G.6 ("Addition or Significant Improvement of Benefit Package Option: DCAP Election Changes—Broad Rules Apply").

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