MARSH & McLENNAN AGENCY

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IN THIS ISSUE

- Deadline to Furnish Form 1095-Cs/1095-Bs Extended and Good Faith Relief
- Penalties Increase for ERISA Violations
- Fringe Benefit Changes: Bike Reimbursements, Transit and Parking Benefits
- Seattle Amends Paid Sick and Safe Time Law
- Question of the Month

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DEADLINE TO FURNISH FORM 1095-Cs (AND FORM 1095-Bs) TO EMPLOYEES/INDIVIDUALS EXTENDED AND GOOD FAITH TRANSITION RELIEF FOR EMPLOYERS/INSURERS

On December 22, 2017, the Internal Revenue Service (IRS) released Notice 2018-06 (hereinafter "Notice). Notice 2018-06 extended the deadline for employers and insurers to furnish Forms 1095-C and Form 1095-B to employees/insureds to **March 2, 2018**. Originally, these Forms were required to be furnished to employees/insureds by January 31, 2018. This Notice does **not** extend the current deadlines for **filing** an employer's or insurer's Forms with the IRS, which continue to be April 2, 2018 for employers/insurers who file electronically, and February 28, 2018 for employers/insurers who file paper copies of these Forms.

The Notice also grants "good faith" relief to employers and insurers filing their 2017 Forms. This "good faith" relief provides employers (and insurers) penalty relief for furnishing or filing inaccurate or incomplete Forms, so long as the employer/insurer furnishes/files these Forms in good faith. However, employers/insurers will not be provided penalty relief if they intentionally furnish or file inaccurate and incomplete Forms, or file and furnish these Forms after their respective deadlines.

No Action Required

Employers and Insurers should be aware of the extension of good faith compliance relief. In addition, employers and insurers should be aware of the extension of the deadline to furnish Forms 1095-C and 1095-B to employees and insureds by March 2, 2018.

For Notice 2018-06, see: https://www.irs.gov/pub/irs-drop/n-18-06.pdf

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PENALTIES INCREASE FOR ERISA VIOLATIONS

The Department of Labor (DOL) recently published its interim rule which increases penalties for ERISA violations. The increase will apply to penalties assessed after **January 2, 2018**.

Violation	Rate for Penalties Assessed After January 13, 2017 and before January 2, 2018	Increased Rate for Penalties Assessed After January 2, 2018
Failure to furnish reports (i.e., statement of benefits) to former retirement plan participants and beneficiaries or failure to maintain records for a retirement plan.	$28/employee	$29/employee
Failure or refusal to file annual report (Form 5500).	$2,097/day per plan	$2,140/day per plan
Failure of Multiple Employer Welfare Arrangement (MEWA) to file required report (M-1).	$1,527/day	$1,558/day
Failure to furnish employee benefit plan documents to DOL upon request (including plan and trust documents and summary plan description).	$149/day (but no greater than $1,496 per request)	$152/day (but no greater than $1,527 per request)
Failure by employer to inform employees of Medicaid/CHIP coverage opportunities.	$112/day/employee	$114/day/employee
Failure of group health plan's plan administrator to provide state with timely coverage coordination disclosure form from Medicaid/CHIP eligible individuals.	$112/day/participant or beneficiary	$114/day/participant or beneficiary
Genetic Information Nondisclosure Act (GINA) violation by group health plan sponsor/health insurance issuer.	$112/day/participant or beneficiary (if not corrected before notice of violation is received – subject to minimum of $2,790/day/participant or beneficiary for *de minimis* violations or $16,742/day/ participant or beneficiary for violations that are not *de minimis*; maximum of $558,078 for unintentional failures)	$114/day/participant or beneficiary (if not corrected before notice of violation is received – subject to minimum of $2,847/day/participant or beneficiary for *de minimis* violations or $17,084/day/ participant or beneficiary for violations that are not *de minimis*; maximum of $569,468 for unintentional failures)
Failure to provide Summary of Benefits Coverage to participant or beneficiary of group health plan.	$1,105/failure	$1,128/failure

No Action Required

Employers should be aware of the increases in penalty amounts that they could be exposed to for ERISA violations.

For the DOL final rule, see: https://www.federalregister.gov/documents/2018/01/02/2017-28224/department-of-labor-federal-civil-penalties-inflation-adjustment-act-annual-adjustments-for-2018

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FRINGE BENEFIT CHANGES: BICYCLE REIMBURSEMENTS, TRANSIT BENEFITS, AND PARKING BENEFITS

Background

Previously, employees were allowed to receive a non-taxable bicycle reimbursement of up to $20, to be used for any expenses associated with an employee riding their bicycle to and from work. Also, previously, if an employer paid any portion of an employee's work related transit or parking benefit, an employer could claim that payment as a business deduction. However, the Tax Cut and Jobs Act of 2017 changes how certain fringe benefits may be provided and how these benefits are taxed. Highlights of the changes to these fringe benefits are below.

Tax Cut and Jobs Act of 2017

Beginning **January 1, 2018** (until January 1, 2027), employers can no longer offer the $20 bicycle reimbursement to their employees as a fringe benefit. If an employer chooses to reimburse employees without imputing income to that employee, or if employees are contributing the $20 to a commuter benefit program as a pre-tax benefit, they will no longer be able to do so **on or after January 1, 2018**. The benefit is set to be suspended until January 1, 2027. Therefore, an employer may no longer reimburse the $20 to an employee without imputing it as income to the employee, and employees may no longer contribute the $20 to a pre-tax account for future reimbursements related to their bicycle commute to/from work.

Second, **for employers who reimburse employees for either transit or parking benefits**, employees may still receive these benefits on a pre-tax basis as a fringe benefit whether they contribute to a pre-tax account, or whether an employer reimburses these expenses without imputing income to the employee. However, if an employer chooses to reimburse these expenses to an employee as a fringe benefit, the employer can **no** longer claim a **business deduction** for the reimbursement.

Action Required

Employers offering a bicycle reimbursement should stop doing so, unless they are imputing this as income to the employee. Second, employers may want to consider no longer contributing towards employees' transit and/or parking benefits, if they currently do so.

For the complete details, see Tax Cut and Jobs Act of 2017: https://www.congress.gov/bill/115th-congress/house-bill/1

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SEATTLE, WASHINGTON AMENDS PAID SICK AND SAFE TIME LAW

Seattle's Paid Sick and Safe Time Ordinance (PSST) went into effect on September 1, 2012 and requires employers to provide employees with paid sick and safe time leave to care for the health of themselves and their families. Employees may use accrued PSST to take time off to care for themselves or a family member due to illness, medical appointments or critical safety issues, including domestic violence, sexual assault or stalking.

On December 15, 2017, Seattle, Washington Mayor Jenny A. Durkan signed into legislation amendments to the PSST. These amendments take effect on January 14, 2018. Highlights of the amendments to the PSST include:

Definition of Covered Employer

Previously the PSST defined Tier 1 covered employers as having more than *four* employees and fewer than 50 full-time equivalents. The amendment now defines Tier 1 covered employers as having at least *one* employee and fewer than 50 full-time equivalents, regardless of where those employees are employed, on average per calendar week.

240 Threshold Hours for "Occasional Basis" Employees Removed

Previously under the PSST, covered employees included employees who were generally based outside of Seattle, but worked in Seattle for more than 240 hours within a year. The ordinance referred to these employees as "occasional basis" employees. The amendment removes the bright-line rule of 240 hours for an employee to qualify as an "occasional basis" employee. Unfortunately, the amendment did not redefine how many hours an employee had to work to qualify as an "occasional basis" employee. Instead the requirements will later be redefined in rules to be issued by the Office of Labor Standards Director.

Expansion of Covered Employee

Work study employees as well as paid interns are now considered covered employees under the amendment.

Definition of "Family Member"

Under the PSST, an employee could use personal sick leave benefits to care for a "family member," which originally included a child (minor or dependent), spouse, registered domestic partner, parent, or grandparent. The amendment now adds grandchildren, siblings and any children of the employee (of any age) to the definition of "family member."

Prohibition on Finding Replacements

The amendment prohibits employers from requiring employees to find a replacement worker to cover the hours they would miss under the paid sick and paid safe time ordinance.

Prohibition on Cap on Annual Use

Originally, the PSST permitted employers to cap the **use** of PSST. The amendment removes this provision, and only allows an employer to cap an employee's ability to **carryover** a certain amount of paid sick and paid safe time, but an employer may not cap the actual **use** of the paid sick and paid safe time.

Frontloading Permissible

The amendment includes provisions that allow employers to frontload PSST in advance of accrual.

Waiting Period for Use Reduced to 90 calendar Days

Previously, the PSST allowed employers to establish a *180*-day waiting period. The amendment shortens the waiting period to *90*-days after an employee's hire date.

Time Increments for Overtime Eligible Employees

For overtime eligible employees, the amendment requires employers to permit use of PSST in either hourly increments or the smallest increment in which compensation is tracked.

Shift Swapping Eliminated

The amendment eliminates the "eating-and-drinking- establishment" exception, which previously allowed certain eating and drinking establishments to offer employees a shift swap instead of time off and still deduct paid sick leave hours from the employee's bank.

Collective Bargaining Waivers Eliminated

Previously, the PSST did not apply to employees covered by a collective bargaining agreement with an express waiver in clear and unambiguous terms. The amendment provides that these waivers are only available through December 31, 2018, or the expiration of a collective bargaining agreement in existence on December 31, 2018, and **only** for provisions of the PSST ordinance that are more

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Seattle Amends Paid Sick and Safe Time Law (continued)

generous than the state law. Additionally, the amendment states that beginning January 1, 2019, collective bargaining agreement waivers of PSST requirements are not permitted.

Exempt Employees Still Covered

Under Washington State's paid sick leave law, employers are not required to offer paid sick leave to exempt employees. However the PSST is different and the amendments apply to hourly and overtime-exempt employees working in Seattle.

Breaks in Service Extended

The PSST previously provided that if there was a separation from employment and the employee was rehired within seven months of separation by the same employer, unused accrued paid sick and safe time would be reinstated. The amendment extends the period and allows for reinstatement of PSST after **twelve months** of separation.

New Written PSST Policy Requirements

The PSST requires employers to provide employees with a written PSST policy describing the benefit year, tier size, accrual, use and carryover information, the manner for which employees determine what they have available for PSST when wages are paid, and the requirements for notice and requesting leave. The amendment also requires the written PSST policy to include (1) information on employees' right to PSST (2) non-retaliation language (3) information on frontloading (4) verification of requirements for use of more than three consecutive days (5) information on PSST sharing/donation; and (6) information on a universal paid time off (PTO) program that includes PSST provisions.

Action Required

Employers with employees working in Seattle should amend their written paid sick and safe time policies to incorporate these new changes before January 14, 2018.

For the complete details, see the Amendments to the PSST:
https://seattle.legistar.com/LegislationDetail.aspx?ID=3217373&GUID=6AE399D5-9506-494B-9D56-9A99D2326BBB&Options=Advanced&Search=&FullText=1

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QUESTION OF THE MONTH

Can We Reimburse Dependent Care Expenses Incurred After an Employee's DCAP Participation Terminates?

QUESTION: Our company has a cafeteria plan with a health FSA and a DCAP. When DCAP participants terminate employment midyear with unused DCAP contributions, can they be reimbursed for expenses incurred after their termination of employment, or are the unused contributions forfeited?

ANSWER: The answers depend on the terms of your company's plan. Unlike health FSAs, DCAPs are not subject to COBRA, so DCAP participants generally have no right to continue coverage after their employment terminates. However, proposed IRS cafeteria plan regulations allow a DCAP to be designed to allow employees whose participation has ceased (e.g., due to termination of employment) to be reimbursed from their remaining DCAP account balances for eligible expenses incurred during the remainder of the plan year (including any grace period immediately following the plan year, if provided under the DCAP). If such a "spend-down provision" is offered, it must be included in the written plan document. Note that this special rule does not extend to other benefits such as a health FSA. The regulations also make clear that a spend-down provision is optional. If an employer does not design its plan to include a spend-down provision, any remaining contributions would be forfeited unless they are used to reimburse expenses incurred prior to termination of participation and submitted by the end of the DCAP's run-out period.

Of course, expenses incurred after termination of employment can only be reimbursed if they enable the employee and spouse (if the employee is married) to be "gainfully employed." Generally, gainful employment requires the employee and spouse to be employed or actively looking for work. (Special rules apply in certain situations—e.g., a spouse who is a full-time student or incapable of self-care may be deemed to be gainfully employed.) An example in the regulations confirms that a DCAP can reimburse expenses incurred while a former employee works for an employer other than the DCAP sponsor.

To illustrate, assume that Mike elects $1,200 of DCAP benefits under his employer's calendar-year cafeteria plan, which does not have a grace period. Between January 1 and June 30, he makes DCAP contributions of $600. Mike quits his job effective June 30. The plan provides that DCAP participation ceases upon termination of employment, and Mike did not incur any dependent care expenses between January 1 and June 30. If the plan does not allow former participants to spend down their accounts, Mike must forfeit the unused $600. In contrast, if there is a spend-down provision, Mike can be reimbursed for up to $600 of eligible dependent care expenses incurred during the remainder of the plan year. (Because the uniform coverage rule does not apply to DCAPs, Mike can only be reimbursed for $600 of eligible expenses—not the $1,200 he originally elected.) Of course, the expenses must meet the same requirements applicable to other dependent care expenses to be eligible for reimbursement under the plan. Thus, Mike (and his spouse, if married) must, among other requirements, be employed or looking for work when the expenses are incurred.

Source: EBIA

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