HR News Alert

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Health Care Reform: New Guidance on Large Employers, "Pay or Play," Annual Limit Rules, and More

A new wave of final rules and FAQs provides guidance for employers and group health plans on a number of upcoming requirements under Health Care Reform. The following are key highlights:

PPACA Full Time Employee

As we are preparing to become compliant for the PPACA's January 1, 2014 implementation deadline, there is one important calculation that many employers should be aware of today - **Who is a large employer?**

The first thing is to see how many employees are considered full time. The PPACA designates those employees who work **30 hours or more per week are considered "full time"**. For many employers, this is a drastic change in the definition of the traditional 40 hours per week full time role. Employers will now have to recognize a full time employee as 30 hours per week, which will literally change the whole mindset of employers and their benefit-eligible employee calculations.

A large employer is defined as employers with 50 or more FTE's. The large employer will be required to provide the "minimum essential" healthcare coverage for their full time employees, or pay a penalty.

What many employers do not realize is that for January 1, 2014, there is a 3 to 12 month look back of hours of their employees. This is also referred to as the stability period to determine if their employee averages 30 hours or more per week in any given month.

So while most payroll records are automated, are you really looking at your payroll hours? Most Human Resources, Payroll and department managers review and audit payroll records looking for red-flags such as overtime or abuse of sick time. Now, employers should get in the mindset of looking and reviewing ***average weekly hours in a month*** in anticipation of the definition of large employers.

This is just one of the many facets of healthcare reform our clients must be aware of and ensure compliance of the PPACA.

Marshall and Sterling is ready to assist with your PPACA implementation and provide you knowledge and guidance for this transition. Please contact your Account Manager or Employee Benefit Consultant/Producer for more information.

Determining Minimum Value for Employer "Pay or Play"

Beginning in 2014, certain large employers (generally those with at least 50 full-time employees and full-time equivalents) may be required to **pay a penalty** if they do not offer full-time employees affordable health coverage that provides "minimum value."

A **final rule** outlines acceptable methods for plans to determine minimum value, including a **Minimum Value Calculator** (now available for informal external testing) for use by employer-sponsored group health plans that are not in the individual or small group market.

As an alternative to using the calculator, an employer-sponsored plan will be able to use a number of safe harbor checklists (not yet available) to determine whether the plan provides minimum value without the need to perform any calculations.

Guidance on Integrated vs. Stand-Alone HRAs for Compliance with Annual Limit Rules

A **new set of FAQs** provides guidance regarding the distinction between integrated and stand-alone HRAs for purposes of compliance with the upcoming prohibition on **annual dollar limits** with respect to coverage of "essential health benefits." In general, HRAs that are "integrated" with other coverage as part of a group health plan that itself has no annual limits will be deemed to comply with the requirement to eliminate annual limits, while "stand-alone" HRAs will violate the rules.

The FAQs clarify that:

- An HRA is not considered integrated with primary health coverage offered by the employer unless the HRA is available only to employees who are covered by primary group health plan coverage provided by the employer and meeting the annual limit requirements.
- An employer-sponsored HRA cannot be integrated with individual market coverage or with an employer plan that provides coverage through individual policies.
- An employer-sponsored HRA may be treated as integrated with other coverage only if the employee receiving the HRA is actually enrolled in that coverage.
- Future guidance is expected to provide that unused amounts credited before January 1, 2014, consisting of amounts credited before January 1, 2013 and amounts credited in 2013 under the terms of an HRA as in effect on January 1, 2013, generally may be used after December 31, 2013 to reimburse medical expenses in accordance with those terms without causing the HRA to fail to comply with the annual limit rules.

Standards for Essential Health Benefits and Limits on Cost-Sharing

Also beginning in 2014, non-grandfathered health plans offered in the individual and small group markets will be required to cover "essential health benefits" and meet certain actuarial values (the percentage of total average costs for covered benefits a plan will cover), detailed in the **final rule**.

In addition, non-grandfathered group health plans will need to ensure that cost-sharing under the plan for such coverage does not exceed certain limitations, including limits on both out-of-pocket maximums and deductibles. Under the final rule and **FAQs**:

- The annual limitation on out-of-pocket expenses applies generally to all non-grandfathered group health plans, and is tied to the enrollee out-of-pocket limit for high deductible health plans in connection with health savings accounts (HSAs); and
- Non-grandfathered plans in the small group market must comply with the annual limitation on deductibles, which may not exceed $2,000 (for self-only coverage) or $4,000 (for non-self-only coverage) for plan years beginning in calendar year 2014. Contributions to flexible spending arrangements (FSAs) are not taken into account when determining the deductible maximum.

Guidance on Coverage of Preventive Services

A **new set of FAQs** addresses a number of issues related to the requirement that non-grandfathered group plans cover recommended preventive services without cost-sharing, including clarification regarding coverage of over-the-counter recommended items and services and preventive services for women.

Guaranteed Availability of Coverage and Limits on Premium Variations

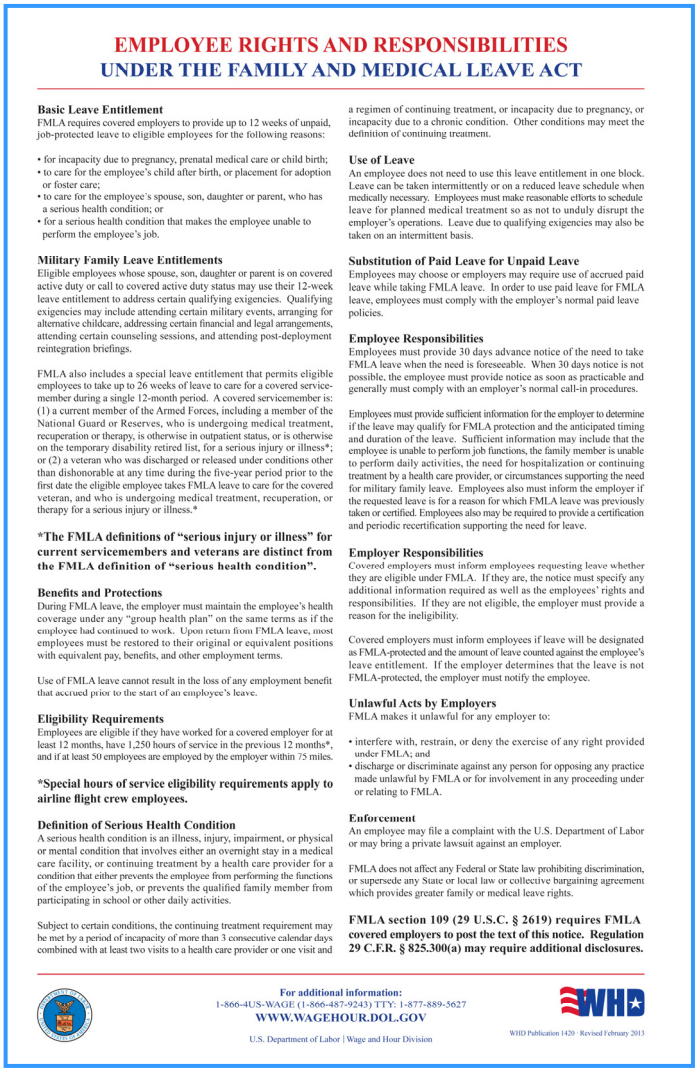
A **final rule** has been issued regarding the requirements related to guaranteed availability of coverage and fair premiums for issuers offering non-grandfathered health insurance coverage in the individual or small group market.

- For plan years beginning on or after January 1, 2014, issuers are required to accept every individual and employer in the state that applies for coverage, subject to certain exceptions.
- In addition, issuers will be allowed to vary premiums only based on age (within a 3:1 ratio for adults), tobacco use (within a 1.5:1 ratio for adults and subject to wellness program requirements in the small group market), family size, and geography.

Visit our section on **Health Care Reform** for more information regarding these updates and to stay on top of changes.

New FMLA Poster and Final Rules on Military Family Leave Amendments

A **new poster** reflecting changes to the federal Family and Medical Leave Act (FMLA) related to military family leave is now available and must be posted no later than March 8th. Employers with 50 or more employees are generally required to display the FMLA poster where both employees and applicants can see it.



EMPLOYEE RIGHTS AND RESPONSIBILITIES
UNDER THE FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement
FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- for incapacity due to pregnancy, prenatal medical care or child birth;
- to care for the employee's child after birth, or placement for adoption or foster care;
- to care for the employee's spouse, son, daughter or parent, who has a serious health condition; or
- for a serious health condition that makes the employee unable to perform the employee's job.

Military Family Leave Entitlements
Eligible employees whose spouse, son, daughter or parent is on covered active duty or call to covered active duty status may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered service-member during a single 12-month period. A covered servicemember is: (1) a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness*; or (2) a veteran who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran, and who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.*

***The FMLA definitions of "serious injury or illness" for current servicemembers and veterans are distinct from the FMLA definition of "serious health condition".**

Benefits and Protections
During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements
Employees are eligible if they have worked for a covered employer for at least 12 months, have 1,250 hours of service in the previous 12 months*, and if at least 50 employees are employed by the employer within 75 miles.

***Special hours of service eligibility requirements apply to airline flight crew employees.**

Definition of Serious Health Condition
A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave
An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave
Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities
Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities
Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers
FMLA makes it unlawful for any employer to:

- interfere with, restrain, or deny the exercise of any right provided under FMLA; and
- discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement
An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulation 29 C.F.R. § 825.300(a) may require additional disclosures.

For additional information:
1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV

U.S. Department of Labor | Wage and Hour Division

WHD Publication 1420 · Revised February 2013

Military Family Leave Provisions

The FMLA includes two special military family leave entitlements for **eligible employees**:

- Military caregiver leave allows an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member with a serious injury or illness to take up to 26 workweeks of FMLA leave during a single 12-month period to care for the service member.
- Under the qualifying exigency leave provisions, an eligible employee whose spouse, son, daughter, or parent is a military member on covered active duty is allowed to take up to 12 workweeks of leave to address certain special issues (called "qualifying exigencies") arising out of the military member's active duty or call to active duty in support of a contingency operation. Qualifying exigencies include activities such as attending military sponsored functions, making appropriate financial and legal arrangements, and arranging for alternative childcare.

Final Rules Implement Changes to FMLA

The new FMLA poster accompanies **final rules** which implement previous amendments to the military family leave provisions. Highlights of the final rules include:

- Expansion of the definition of a covered service member to include certain veterans. The final rules expand the 26-workweek military caregiver leave provision to include leave to care for covered veterans who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness incurred or aggravated in the line of duty on active duty and that manifested before or after the veteran left active duty.
- Inclusion of pre-existing injuries or illnesses aggravated in the line of duty on active duty. The final rules expand military caregiver leave to cover current service members with serious injuries or illnesses that existed before the service member's active duty but were aggravated by service in the line of duty.
- Expansion of qualifying exigency leave for employees with family members in the Regular Armed Forces. The final rules expand the qualifying exigency leave entitlement to employees whose spouse, son, daughter, or parent serves in the Regular Armed Forces, and incorporates the statutory requirement that the military member, whether in the Regular Armed Forces or the Reserve components, must be deployed to a foreign country.
- Certain changes to the categories of qualifying exigency leave, including a new qualifying exigency category that allows an eligible employee to take FMLA leave for certain activities related to the care of the military member's parent who is incapable of self-care where those activities arise from the military member's deployment or impending deployment.

The final rules also implement amendments clarifying the application of the FMLA to airline flight crew employees.

Additional information regarding these changes, including a military leave guide, fact sheets, and FAQs, is available from the **U.S. Department of Labor**. You can learn more about the Family and Medical Leave Act in our section on the **FMLA**.

Social Media and Employment

People with access and interest in social media are now infiltrating into the fiber of all workplace environments. Between immediate notifications of posts, tweets, etc… on our smartphones or through email, we live in an age where this has expanded beyond our personal time, but has slowly crept into our work time. For Human Resources professionals, social media issues have become essential to evaluate and educate themselves on.

Human Resource professionals and hiring managers are trained to avoid potential liability questions that may appear even on the surface to be discriminatory. Questions that could potentially provide hints to a protected job class status are strongly discouraged and possibly illegal. However, in the age of social media, some HR professionals and hiring managers have taken to looking up applicants on Google, Facebook, Twitter, etc…. This is a potential liability on behalf of the employer.

There are several federal existing laws that may be violated by looking at someone's on-line information or "profile." This includes, but is not limited to: Title VII, ADA, Immigration Status, ADEA, Pregnancy Discrimination Act, GINA, etc…For example:

- In an interview, you would not ask an applicant's age or race on an interview, but you can view or determine that information on their Facebook page.
- If someone has a pink breast cancer ribbon as their profile picture and sees an applicant's post about participating in a breast cancer awareness event for their mom, GINA may be in jeopardy since you cannot discriminate against someone who may have a genetic pre-disposition to an illness.
- If you screen a female candidate over the phone for a position, then look up their profile and see she appears pregnant, then decide not to hire her, this could be a violation of the Pregnancy Discrimination Act.

Additionally, some employers have tried to ask applicants for access to their Facebook, Twitter and other social media accounts. In 2012, 5 states passed a prohibition of employers asking for access to applicant's social media accounts (California, Delaware, Illinois, Maryland and New Jersey). In the same year, 10 other states introduced similar legislation.

Social Media concerns and policies are evolving quickly in these times. If you have any questions regarding these types of issues, please contact Marshall and Sterling and we will be happy to assist you.

Small Business Tax Tools and Resources Online

With tax season underway, now is a great time to check out the **IRS Small Business and Self-Employed Tax Center**, a convenient way for small employers to find answers to tax questions, educational materials and other tools to help run their businesses.

Among the information and resources available on the website are:

- Small business forms and publications;
- Online applications for an employer identification number (EIN);
- Employment tax information--including federal income tax, Social Security and Medicare taxes, FUTA and self-employment tax;
- Tax-related news that could affect small businesses;
- Small business educational events;
- IRS videos for small businesses; and
- The A-Z Index for Business.

Other resources available on the IRS website include a virtual small business tax workshop for learning about federal tax obligations, and a **12-month tax calendar for small business taxpayers** with information on general business taxes, electronic filing and paying options, retirement plans, business publications and forms, and common tax filing dates.

To take advantage of these free tools from the IRS, access the Small Business and **Self-Employed Tax Center**. Our section on **Employer Tax Laws** provides additional information on an employer's tax responsibilities.

Marshall & Sterling Insurance will continue to provide you with updates and information regarding important issues. Should you have specific questions or need more information, please contact us.

Regina Murdock
Human Resources Services Specialist
914-962-1188, x-2487
rmurdock@marshallsterling.com