Employee Benefits Report

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The ACA and Temporary Workers

American businesses use more than 3 million temporary workers per day. How will the Affordable Care Act affect the use of temporary and leased workers?

The Affordable Care Act (ACA) will require employers with 100 or more full-time equivalent employees to offer them "affordable" health insurance starting in 2015 or pay a penalty. Employers with 50 or more must comply starting in 2016. Many business experts expect this to boost temporary employment, as employers strive to keep their employee count below the compliance threshold.

How will the use of temporary and leased employees affect your benefit responsibilities?

"Employer Mandate" Applies to Staffing Firm Employees… But

The employer mandate will also apply to staffing firms. Under regulations released in February 2014, employers cannot impose waiting periods longer than 90 days on individuals otherwise eligible for coverage. This means that any worker

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This Just In…

A gift horse? The Pasco County, Florida, school district has received an offer to provide its teachers with life insurance at no cost to the district or its employees. According to a report in the *Wall Street Journal*, a group of investors would buy the policies, then split death benefits with the school district and the employees' designated beneficiaries.

Many states ban this type of arrangement, called stranger-originated life insurance (STOLI). They require the owner of a life insurance policy to have an "insurable interest" in the life of the insured, such as a family or employer relationship. In other words, they should have a greater interest in having the insured be alive than dead.

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who works full-time for more than 90 days would typically be eligible for coverage.

However, lobbying from the staffing industry prompted regulators to create a safe harbor for variable-hour employees. IRS Notice 2012-58 defines a variable-hour employee as one the employer cannot determine is "reasonably expected to work on average at least 30 hours per week" based on the facts and circumstances at his/her start date. IRS regulations give employers a look-back period of three to 12 months to determine whether new variable-hour employees or seasonal employees are full-time employees, without being subject to the employer responsibility payment for this period.

If variable-hour employees meet the criteria for full-time status during the look-back period, the employer must treat them as full-time employees during the subsequent "stability period," which must last at least as long as the look-back period. The employer must treat these variable-hour employees as full-time with respect to benefits, even if their hours drop below full-time during the stability period.

You Might Still Have Liability for Benefits for Temps

Temporary employees hired through an agency work under the supervision of the client company; however, the temporary agency provides pay and benefits. Leased employees are part of a staffing arrangement where a leasing firm "employs" company personnel, handling payroll, taxes, benefits and other HR functions. Some leasing firms supply companies with an entire staff of employees for extended time periods.

In almost all temporary or leasing situations, your company and the staffing agency or leasing firm are considered joint employers. While the agency or firm is the primary employer, both entities have some responsibility for providing employee benefits. Which provides what portion of benefits depends upon your relationship with the staffing agency and the benefits offered to your permanent employees.

To reduce your company's responsibility for benefits for temporary and leased employees, employment law experts offer this advice:

- Evaluate the staffing company's credentials. Before signing up with a temporary agency or leasing firm, investigate to make sure it is reputable, financially stable, and that the staffing or leasing plans don't violate IRS or other federal employment guidelines. If the agency fails to pay all payroll expenses, workers' compensation and benefits for a temporary employee, your organization could become liable for these benefits as the joint employer.
- Relinquish control. Wherever possible, defer control and responsibility of temporary employees to the staffing agency. Allow the agency to maintain control of employment actions such as recruiting, training, job assignments, firing, complaints, raises and payroll issues.
- Differentiate workers. Set up clear differences between temporary and permanent staff. This means that temporary workers should ordinarily be excluded from using company facilities like gyms and stores. Even badges or other employee identification should be distinct from those of permanent staff.
- Compare plans. Employers should know and understand exactly what benefits the temporary agency offers. Comparing the agency's benefits to those offered by the client company helps employers assess risk in case an employee is misclassified. While federal law does not prohibit joint employers from excluding contingent staff from employee benefit plans, there are exceptions. If an employee is otherwise eligible, an employer can't impose minimum age or length-of-service requirements to deny participation.

STOLI differs from viatical or life settlements, in which a chronically or terminally ill insured sells his/her life insurance policy to investors. In exchange for receiving a portion of the policy's face value, the insured makes the investor the policy's beneficiary. The beneficiary then receives the death benefit when the insured dies.

Group life insurance remains a very affordable benefit. Many Americans lack adequate life insurance coverage, so employer-sponsored plans play an important role in the financial security of many families. For information, please contact us.

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- Evaluate after 1,000 hours. Temporary employees might become eligible for participation in your defined benefit retirement plan under the 1,000 hour rule. Title 1 of ERISA requires defined benefit pension plans to credit part-time workers who work 1,000 hours or more per year with a portion of the benefit in proportion to what they would have earned if they were employed full-time. However, your company might not have to cover the worker if the plan contains a proper exclusion provision or if the worker does not otherwise fit the definition of a common law employee (such as one hired for a specific project or work of a type not done by direct employees).
- Ensure temps have leave benefits. Leased and temporary employees are eligible for Family and Medical Leave Act (FMLA) protection as long as they meet the other requirements for coverage. Under FMLA, joint employers must both count the temporary/leased employee in staffing levels to determine employee coverage and employer liability. As primary employer, the temporary agency/leasing firm is responsible for giving required notice to the employees, providing FMLA leave and maintaining health benefits.

For further information about complying with the Affordable Care Act, benefits for contingent workers, or other aspects of your benefits program, please contact us. ■

Qualified vs. Nonqualified Retirement Plans

Qualified retirement plans earn their name by "qualifying" participants and sponsors for certain tax benefits. But sometimes administrative and other concerns outweigh these benefits. Nonqualified plans offer other options.

Qualified retirement plans are employer-sponsored retirement plans that "qualify" participants for certain tax benefits by meeting requirements under federal law for coverage, participation, funding and vesting.

Tax Advantages

Employers take a current tax deduction for all plan contributions, while employee accounts grow tax-free until the time of distribution. Employer contributions to qualified plans are held in trust until the employee is entitled to receive them, an arrangement that helps assure employees that the money will actually be there when they retire.

Qualified retirement plans have several drawbacks. Plans must cover at least 70 percent of non-highly compensated employees and employers must generally offer them to all full-time employees on the same terms. Any time an employer makes a contribution, it must make contributions on behalf of all participants. Some plans require employers to make annual contributions whether or not the company is profitable. Benefits are not guaranteed in most plans, and participants face a substantial penalty for early withdrawals.

In addition, complex rules create high administrative costs for plan sponsors, and maximum contribution limits mean employers might not be able to adequately compensate high-wage or valuable workers. In response, some companies have turned to non-qualified plans.

Non-qualified plans allow an employer to offer a benefit to a select group of executive or key employees. If the plan is properly structured, the employer can include only those employees it chooses without having to abide by the anti-discrimination, participation or vesting rules that qualified plans must follow.

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Although non-qualified plans are subject to fewer government regulations, they receive fewer tax benefits. Any earnings in the plan are taxable to the employer, and taxable to the employee when distributed as benefits. However, the employer can take a tax deduction at the time of distribution. And since non-qualified plan contributions are not held in a separate trust, employees receive no guarantee that benefits will be there when they retire, and any assets set aside for future payouts are subject to claims by employers' creditors.

Irrevocable Trusts

Employers can reduce the potential financial risk to non-qualified benefits by setting up an IRS-approved irrevocable trust into which the employer contributes the plan assets, which are managed and distributed by the trustee. Although these trusts do not protect the assets against creditors' claims in case of company insolvency, they generally offer protection in the event of a corporate takeover, change in management or other events that could threaten the availability of benefits.

Without a requirement that non-qualified plan assets be held in trust, many companies pay non-qualified benefits out of general corporate assets as they become due. This approach assumes that future growth of the company will cover its benefit obligations. Smaller companies might find this arrangement strains their coffers on payout day and leaves executives wondering about the security of their benefits.

An alternative to the pay-as-you-go approach is to create an asset reserve for future plan obligations by using corporate-owned life insurance (COLI). Typically, the company buys a cash value life insurance policy, either whole life or universal life, on the life of the key employee and names itself as beneficiary. The employer owns the policy and pays all premiums. After the employee retires, the company can use the policy's cash value to pay the benefit. If the employee dies, the policy pays a tax-free death benefit to the company.

The advantage of funding with COLI is that the cash accumulation inside the policy grows tax-free. However, COLI offers no protection against any creditor's claims, so it won't provide an employee total peace of mind. A trust can hold the COLI; however, trusts have tax implications for both the employer and the participant.

We can work with your tax professional to help you set up a nonqualified plan that benefits both your company and your highly compensated employees. Please call us for more information. ■

Through Thick and Thin: Using Skinny Plans and Fat Plans to Cut Healthcare Costs

In a previous issue (September 2013), we discussed so-called "skinny plans," a strategy some employers plan to use to cut healthcare costs under the Affordable Care Act. Others are planning to use the opposite strategy: high-cost plans with rich benefits, or "fat plans."

The Affordable Care Act requires all health plans to cover certain preventive care services with no copayment. They also must meet standards for affordability and minimum value. In addition, plans offered in the individual and small group markets, both inside and outside of the health insurance exchanges, must offer a comprehensive package of items and services, known as essential health benefits. The law prohibits plans from placing annual dollar limits on these essential health benefits for plan years starting January 1, 2014.

Skinny Health Plans

The essential health benefits provision—arguably the most costly portion of the law—does not apply to large group health plans. This creates a loophole for large employers, generally those with 101 or more employees. Although large group plans must cover preventive care services with no copayment, they do not have to cover "essential health benefits."

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Skinny plans designed to meet ACA requirements for large employers would meet two of the three requirements for ACA-compliant coverage. They would cover the required preventive services. They would be affordable, because they would not cover the essential health benefits. This omission means they would not meet the minimum value standard, which requires a plan to pay at least 60 percent of the total cost of medical services for a standard population.

Fat Plans

Other employers are taking the opposite tack and plan to offer their employees plans that meet the ACA's preventive benefit and minimum essential coverage requirements but do not meet the affordability standard. Either the plan will be high-cost due to a rich benefit package, or the employee's share of premium will exceed the affordability standard. The ACA requires the employee's share of premiums for single-only coverage not to exceed 9.5 percent of the employee's household income.

The Strategy

Some large employers have done the math and have figured that it will cost them less to offer inexpensive coverage that doesn't meet minimum value requirements, plus a shared responsibility payment, than to offer comprehensive health coverage to their employees. Others figure it will cost less to offer high-cost plans that some employees might take up, but most will reject due to cost.

This works because the amount of the employer shared responsibility payment depends partly on whether the employer offers health insurance.

- If you don't offer insurance, the annual penalty equals $2,000 for every full-time employee (excluding the first 30 employees. For 2015 only, the penalty will be calculated by reducing the employer's number of full-time employees by 80 rather than 30.)
- If you do offer insurance, but the insurance doesn't meet the minimum value or affordability requirements, the annual penalty equals $3,000 per full-time employee who qualifies for subsidized coverage in the health insurance exchange.

Shared responsibility payments will apply to employers only if at least one of their employees applies for coverage in the health insurance exchanges created by the ACA and qualifies for premium subsidies.

Obama administration officials have said that skinny plans would qualify as health insurance under the ACA. However, using either skinny or fat plans to avoid covering employees might backfire as an employee recruiting and retention strategy in all but low-wage, high-turnover businesses in areas with high unemployment. Health benefits rank near the very top of the list of what employees value most in their jobs, along with salary, scheduling flexibility and opportunities for growth.

We can provide other suggestions for controlling healthcare costs. For more information on structuring a health plan or complying with the Affordable Care Act, please contact us. ■

DeMinimis Benefits: Little Perks that are not Taxing

Want to give your employees something to smile about? A section of the IRS code allows for something called de minimis fringe benefits. De minimis benefits do not count towards and employee's taxable income. They consist of occasional small gestures, such as buying the office lunch, bringing a birthday cake in for an employee's birthday, or the occasional dozen doughnuts. The key is that the value of such benefits is small—so small in fact, that determining the fair market value of the benefit is more trouble than it's worth, to you or the IRS.

The de minimis rule exists for "administrative convenience," but should not be abused. IRS regulations make it clear that season tickets to the local ball team or providing a company vehicle more than one day a month exceed the de minimis limit. The IRS would consider this type of benefit includible in the employee's taxable income.

The IRS lists the following items as acceptable de minimis benefits:

- Controlled, occasional employee use of photocopier
- Occasional snacks, coffee, doughnuts, etc.
- Occasional tickets for entertainment events
- Holiday gifts
- Occasional meal money or transportation expense for working overtime
- Group-term life insurance for employee spouse or dependent with face value not more than $2,000
- Flowers, fruit, books, etc., provided under special circumstances
- Personal use of an employer-provided cell phone provided primarily for noncompensatory business purposes.

The IRS specifically excludes cash and cash equivalent items (such as gift certificates) from the de minimis rule. These items must be included in the employee's taxable income. An exception applies for occasional meal money or transportation fare to allow an employee to work beyond normal hours.

In determining whether a benefit is de minimis, you should always consider its frequency and its value. An essential element of a de minimis benefit is that it is occasional or unusual in frequency. It also must not be a form of disguised compensation.

Psychologically, the occasional perk can be more effective than an everyday benefit. Employees are surprised, feel that the perk is special and appreciate it more. ▪

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