WILLCOX SAVAGE

Employment Law Outlook

Winter 2016

TELECOMMUTING: A PHILOSOPHICAL CHANGE TO THE "WORKPLACE" IS ON THE HORIZON

Phillip H. Hucles

A recent study found that employees "telecommuting" in the workplace has increased approximately 103% over the past decade. The increase generally correlates with technological changes (making telecommuting more accessible, cost efficient, and user-friendly) and the changing demographics of the workplace (the millennial demographic replacing the baby-boomers as the largest segment in the workplace).

As the millennial workforce grows, and as technology continues to improve, the benefits of telecommuting for many employers may outweigh the costs. Accordingly, employers should begin strategizing whether telecommuting is feasible in their industry or business, and if so, develop telecommuting policies and agreements.

Recent Studies Have Found that Telecommuting Has Significant Benefits

Two recent studies conducted by Cisco and Brigham Young University found that telecommuting offers tremendous benefits for many employers and employees. The flexibility afforded by telecommuting gives employees better work/life balance, which in turn increases their productivity during working hours. Generally, the studies found that telecommuting employees had higher work performance ratings than their peers.

Telecommuting also provides benefits for the employer. For example, an employer traditionally limited to recruiting within a small geographic region can attract more diverse (and potentially more qualified) applicants by offering a telecommuting option. This makes the employer a more attractive option for applicants and also decreases operational costs of maintaining office space for employees.

Employers also cite a host of other benefits for telecommuting, such as: lower absenteeism rate; fewer issues inherent with "office gossip"; fewer reports of harassment; and longer tenures of its telecommuting employees (decreasing training and administrative costs).

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Affordable Care Act 2016

Extensions, Updates, Delays and Modifications

DATE

Wednesday, February 24, 2016

TIME

8:00 a.m. - 9:45 a.m.

LOCATION

Willcox Savage

440 Monticello Ave., Ste. 2200, Norfolk

SPEAKERS

Cher Wynkoop and Corina San-Marina

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Seating is limited

Applied for 1.5 hours HRCI credit

Telecommuting Can Also Present Many Legal and Practical Problems

Telecommuting is not without practical and legal problems. The most obvious practical problem is that employees working remotely are not subject to the same supervisory conditions as office workers. Another practical problem with telecommuting is the segregation of the workforce. Telecommuting employees may feel distanced and not connected with the workplace. Conversely, employees working at the employer's office may resent the flexibility afforded to telecommuters.

Notwithstanding the practical problems, telecommuting also presents a number of legal dilemmas:

- Tracking all hours worked (including overtime);
- Travel time pay for meetings in the office;

(CONTINUED ON PAGE 3)

IS YOUR HEALTH REIMBURSEMENT ARRANGEMENT ACA COMPLIANT?

Cher E. Wynkoop & Corina V. San-Marina

On December 16, 2015, the Internal Revenue Service issued Notice 2015-87 containing guidance on a wide range of topics under the Affordable Care Act (ACA). In addition to providing guidance on affordability and COBRA matters (which will be described in subsequent newsletters), the Notice clarifies prior guidance regarding the use of health reimbursement arrangements to reimburse premiums paid for individual market premiums.

In prior guidance issued in 2013 and 2015, the IRS provided that arrangements, whereby employers reimburse employees (whether on a pre-tax or after-tax basis) for medical-related costs (including premiums), are group health plans subject to the ACA's market reforms. By design, these health reimbursement arrangements (HRAs) and premium payment plans cannot on their own satisfy certain market reforms, such as the required coverage of preventive services or prohibition on annual limits. Therefore, in order for HRAs to be ACA compliant, they must be "integrated" with a group health plan that meets the ACA's market reforms. Although the IRS allows an HRA to be integrated with a group health plan, including a group health plan not sponsored by the employer sponsoring the HRA, the IRS has unequivocally stated that an HRA cannot be integrated with an individual market plan (subject to the few exceptions described below).

In prior guidance, the IRS has already declared after-tax reimbursements for individual market insurance premiums impermissible and has provided guidance on integration with group health plans, Medicare and TRICARE. With Notice 2015-87, the IRS now provides the following additional guidance related to HRAs:

- HRAs limited to retirees may reimburse individual market insurance premiums (including Medicare supplement plans) and other medical-related costs. The rationale for this exception is that the Internal Revenue Code and ERISA contain a "retiree-only exception," stating that plans covering less than two active employees are excepted plans that are not required to comply with the market reforms.

- Unless the retiree-only exception applies, unused amounts in an HRA cannot be used to reimburse premiums paid by former employees for individual market coverage even if the amounts were originally earned in the HRA when the HRA was properly integrated with a group health plan.

- Amounts credited to an HRA before January 1, 2014 under the terms of an HRA also in effect on January 1, 2013, may be used after December 31, 2013 to reimburse medical expenses pursuant to the terms in effect before 2014 without violating the ACA market reforms.

- An HRA that reimburses medical expenses for an employee and the employee's spouse and dependents cannot be integrated with self-only group health plan coverage provided by the employer. However, the IRS will not enforce this requirement until 2017.

Thus, starting in 2017, an HRA generally cannot reimburse medical expenses for a spouse or dependent not covered by the group health plan coverage sponsored by the employer. However, given prior guidance in Notice 2013-54 that allows an employee's HRA to be integrated with a group health plan sponsored by his or her spouse's employer, most likely an HRA could still reimburse that spouse or dependent if he or she was covered by another group health plan (even if not one sponsored by the participant's employer).

- An HRA that reimburses an employee for premiums paid for individual market coverage will not result in a violation of the ACA market reforms if the coverage solely provides excepted benefits. Thus, for example, an HRA could reimburse premiums for individual market dental or vision benefits.

- An employer payment plan or HRA that is part of a cafeteria plan established under Section 125 of the Internal Revenue Code must be integrated with a group health plan to be ACA compliant. Some benefits consultants have advised that employers may reimburse employees for individual market premiums if the reimbursement is funded with employee salary deferrals or employer flex credits made to a cafeteria plan. Notice 2015-87 effectively ends this practice.

- In order to be compliant with the ACA's market reforms, an HRA apparently must be in both documentary and operational compliance. For example, it is not enough that the HRA not actually reimburse employees for medical coverage purchased on the individual market. The terms of the HRA must explicitly state that individual insurance reimbursements are not permitted.

Considering the guidance issued over the past few years with respect to HRAs, and Notice 2015-87's apparent documentary compliance requirements, employers should review their HRA documentation to assess compliance with the ACA. Given the potential pitfalls, employers considering establishing an HRA should proceed carefully and consult with counsel.■

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(CONTINUED FROM PAGE 1)

- Protecting confidential and proprietary information;
- Employees suffering injuries while working at home;
- Providing a safe working environment in an employee's home;
- Compliance with a Drug and Alcohol Free Workplace;
- Employees working remotely in a different state than the employer;
- Technological problems from an employee's home computer;
- Employee (or a family member) causes damages to a company-issued workstation or computer;
- Selection criteria for eligibility to telecommute;
- Gender discrimination (higher propensity for female employees to "self-select");
- Fewer training opportunities for those not in the office; and
- Some employees may live in an area zoned for no business use.

Employers Can Embrace the Changing Workplace While Limiting Risks

To combat many of the risks inherent with allowing employees to telecommute, employers should promulgate telecommuting policies that establish the expectations, requirements, and limitations of telecommuting. Furthermore, to mitigate liability, an employer should also enter into telecommuting agreements with each employee.

A valid telecommuting policy should include: a policy statement; selection and eligibility criteria; time keeping expectations; equipment assignments; establishing work hours; and expectations for compliance with the employer's workplace rules, among other things.

An employer should also enter into a telecommuting agreement with the employee that includes: durational limits; job duties; inspections by the employer; reporting hours worked; schedule; equipment (and its return); security measures (including protection of trade secrets and other confidential information); and insurance, among other things.

Employers who believe that a telecommuting policy would benefit their workplace – or who believe their industry's trend will require it to contemplate such a policy – should seek legal advice on preparing a telecommuting policy and agreement for its employees.■

PER DIEM PAYMENTS TO TEMPORARY WORKERS

Dawn L. Merkle

"*Other employers should take note of this investigation*." – Frank McGriggs, Department of Labor, December 2015 –

"This investigation" refers to the DOL's ongoing investigation of staffing agencies and other employers who are compensating employees by "per diem" payments. The DOL's most recent investigation has been concentrated in the Gulf Coast regions and in the construction, maritime, oil and gas industries. Staffing agencies in the region have this year alone paid over $3.5 million in back wages. If the work is performed on federal government contracts, subcontractors can face debarment or suspension for government contracting work.

While staffing companies have been the focus of recent headlines for illegal per diem schemes, the companies who engage workers through them are not off the hook. They can be liable as joint employers. And the DOL has previously sought debarment of federal government prime contractors whose subcontractors violated prevailing wage laws, based on their failure to adequately ensure subcontractors' compliance with wage and overtime requirements.

Given the DOL's admonishment, employers can expect that the current investigation will expand to other regions and other industries. While paying what the DOL regulations label as "day rates" and per diem payments are not illegal in themselves, if a company or a subcontractor is using these payment methods, it is important to make sure the minimum wage and overtime laws (as well as tax law) are followed.

Some companies in certain industries, such as those recently targeted by the DOL, have been paying lower than average hourly rates with high per diem payments. This is often driven by the fierce competition for qualified employees and for the subcontractors to supply them. The prime contractors in these industries often need employees only for discrete projects located in areas without a large pool of qualified workers. These payment schemes allow staffing companies to underbid (or, they may argue, remain competitive with) their competition, because they are not including the per diem payments in the calculations for overtime, and they are not paying payroll taxes, or workers' compensation and unemployment insurance, or other such costs on the per diem payments. Employees don't complain because the per diem is higher than any travel expenses and there are no deductions from it.

(CONTINUED ON PAGE 4)

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PAYMENTS TO TEMPORARY WORKERS

(CONTINUED FROM PAGE 3)

"Per diem" payments, however, must be for legitimate travel expenses and must meet the requirements of the federal tax code. The DOL has found the staffing companies' schemes to be illegal and evasive because the per diem payments do not meet these requirements and are excluded from the calculation of the workers' hourly rates. Overtime wages, in turn, are then calculated on a much lower hourly rate, cheating the workers out of wages they are due. Any company paying its employees a "per diem" or using subcontractors that do so should monitor closely how and why per diem payments are being made and how hourly rates are being calculated.■

IRS EXTENDS DUE DATE FOR 2015 ACA EMPLOYER REPORTING

- Furnishing Form 1095-C to individuals - from February 1, 2016, to March 31, 2016
- Filing with the IRS Form 1094-C and Form 1095-C - from February 29, 2016, to May 31, 2016, if not filing electronically, and from March 31, 2016, to June 30, 2016 if filing electronically

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