WILLCOX SAVAGE

Employment Law Outlook

Fall 2016

TREATMENT OF OPT-OUT PAYMENTS FOR ACA REPORTING PURPOSES

Cher E. Wynkoop & Corina V. San-Marina

On July 8, 2016, the Internal Revenue Service (IRS) issued proposed regulations that expand upon the treatment of cash incentives provided to an employee who waives coverage under his employer's group health plan (Opt-Out Payment). The proposed regulations confirm prior guidance regarding treatment of unconditional Opt-Out Payments and clarify treatment of conditional Opt Out Payments. An unconditional Opt-Out Payment is one in which the only requirement for receiving payment is that the employee waives coverage under the health plan. A conditional Opt-Out Payment requires that the employee satisfy another condition in addition to waiving coverage under the health plan such as obtaining alternate coverage.

If an employer offers an unconditional Opt-Out Payment, the amount of the payment must be added to the amount the employees are charged for the single level lowest-cost option in order to determine if the offer is affordable for purposes of the Affordable Care Act. The same treatment applies to conditional Opt-Out Payments unless the alternate coverage is an "eligible opt-out arrangement."

An eligible opt-out arrangement is an arrangement under which an employee's right to receive the opt-out payment is conditioned on (1) the employee declining to enroll in the employer-sponsored coverage; and (2) the employee providing annually reasonable evidence (e.g., annual attestation) that the employee and all individuals in his expected tax family (those for whom he expects to claim a personal tax exemption) have or will have minimum essential coverage from an alternate source. The alternate source may be any type of group health plan such as a spouse's or parent's plan, but may not be coverage in the individual market, whether or not obtained through the Marketplace. In addition, no Opt-Out Payment will be paid if the employer knows that the employee or a member of his tax family does not have alternate coverage.

If all the above requirements are satisfied, the amount of Opt-Out Payment is not required to be added to the generally applicable premium to determine if the health coverage is affordable. If the alternate coverage

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JOIN OUR SEMINAR

2016 EMPLOYMENT LAW UPDATE

Thursday, October 27

8:00 a.m. - 12:00 p.m.

8:00 a.m. Continental Breakfast
8:30 a.m. Program Begins

DoubleTree by Hilton Norfolk Airport

Complimentary Seminar

AGENDA

Top Developments in Employment Law
William M. Furr/Jerrauld C.C. Jones

Expanded Protections for Employees: LGBT, Obesity, Religion, and Pregnancy
Phillip H. Hucles

Avoiding Common Overtime Pitfalls Under the Fair Labor Standards Act
David A. Kushner

ACA Updates & Retirement Plans for Non-Profits
Cher E. Wynkoop

Register by October 21

www.willcoxsavage.com
(Seating is limited)

Approved for 3.5 hours HRCI and SHRM credit

INCREASED CIVIL FINES AND PENALTIES FOR EMPLOYERS FOR IMMIGRATION-RELATED VIOLATIONS

James B. "Jimmy" Wood

On November 2, 2015, President Obama signed the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the Inflation Adjustment Act) into law. The Inflation Adjustment Act seeks to align federal civil fines and penalties with the current rates for inflation. On August 1, 2016, the U.S. Departments of Homeland Security (DHS), Justice (DOJ), and Labor (DOL) completed the initial enactment of the Act for immigration-related offenses by increasing the civil fines and penalties for employers who commit these offenses. The Inflation Adjustment Act now also requires federal departments and agencies to complete annual adjustments for inflation to civil fines and penalties based on the Consumer Price Index for All Urban Consumers. Therefore, these fines will be adjusted again next year.

The DHS, DOJ, and DOL penalty and fine increases affect employers who commit immigration-related offenses, such as I-9 Form paperwork and E-Verify violations, H-1B visa violations, and knowingly hiring or employing unauthorized workers. Moreover, pursuant to the Inflation Adjustment Act, these higher penalties can be assessed against any employer who committed an affected immigration-related violation occurring after November 2, 2015 as long as the penalty is or was assessed after August 1, 2016.

I-9 Forms that are improperly completed or incomplete can lead to some of the most common and often unintentional immigration-related violations and fines. These fines assessed for I-9 Form paperwork violations have increased from $110-$1,100 per form/individual to $216-$2,156 per form/individual. Usually, this fine is assessed by DHS in conjunction with an I-9 Inspection where substantive and/or uncorrected technical violations are found within the employer's I-9 forms. Typically, when DHS identifies an error or errors with the I-9 Forms, the investigating officer applies a formula to determine the fine per form/individual based on factors, such as whether the employer has a record of previous I-9 Form offenses, the number of violations identified in the inspection, and the severity of the substantive verification violations.

In addition to the I-9 Form paperwork violations, the penalties for knowingly hiring or employing illegal aliens and unauthorized workers have drastically increased. The fines for first offenses have increased from $375-$3,200 to $539-$4,313 per unauthorized worker; second offenses have increased from $3,200-$6,500 to

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RELIGIOUS DISCRIMINATION CLAIMS RISING AMIDST CHANGING SOCIAL LANDSCAPE

Phillip H. Hucles

Religious discrimination claims are on the rise. Employees are increasingly willing to challenge employers' policies based on their religious beliefs. Workplace issues involving no-fault attendance policies and mandatory vaccination policies may implicate Title VII's prohibition of religious discrimination.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees because of their religious beliefs. Employers have a duty to accommodate employees' religious beliefs so long as the accommodation does not impose an undue burden. Title VII not only protects employees whose faith is widely held, but it also protects employees who practice nontraditional religions and even those employees who have no religious beliefs.

Many employers have neutral or no-fault attendance policies that subject employees to discipline for missing a certain number of days of work. Some employees have religious beliefs that restrict them from working on certain days. There are numerous cases in which employees have sued for discrimination when they were required to work on their Sabbath. Although Title VII requires employers to try to accommodate their employees' religious beliefs, employers can require employees to work if the requested accommodation creates an undue hardship on the employer.

Employers can successfully defend religious discrimination claims if they can establish that they engaged in an interactive process with their employees and offered a reasonable accommodation. An employer has no obligation to hire another employee to assume the duties of the absent employee. However, when an employer can easily find a replacement for the employee, can easily reassign his or her duties, or can offer time off or other leave without undue hardship, courts have required the employer to accommodate the employee's request.

Employees have also filed religious discrimination claims against employers who require their employees to receive vaccinations. Courts have generally held that employers cannot require their employees to get vaccinated if they refuse based on a medical disability, or for religious reasons. The courts do not require the employee to be a member of an organized religion in order to refuse the vaccine, provided the refusal is based on a sincerely held religious belief. Unfortunately for employers, the law is not yet clear on other reasonable accommodations an employer can make for employees who refuse vaccinations on religious grounds.■

EMPLOYEE DRESS CODES: BE MINDFUL OF TITLE VII

Jerrauld C. C. Jones

Many employers opt to enforce a workplace dress code for a variety of reasons, and the attire may range from casual to business formal depending on the needs and environment of the workplace. However, employers must be cognizant of the potential pitfalls of employing a dress code for its employees.

Employers with at least 15 employees must comply with Title VII of the Civil Rights Act of 1964 (Title VII). In general, federal law allows employers to establish and enforce a dress code for its employees. The Equal Employment Opportunity Commission (EEOC) permits employers to require their employees to follow a uniform dress code even if the dress code conflicts with some workers' ethnic beliefs or practices. Despite this latitude, employers are prohibited from enforcing a dress code that does not comport with an employee's religion, national origin, or disability unless accommodating the employee's request for an exception would be an "undue burden."

The EEOC's list of examples of religious dress and grooming practices that must usually be accommodated includes a Muslim hijab (headscarf), a Sikh turban, Rastafarian dreadlocks, and Jewish sidelocks.

The EEOC's list of examples of religious dress and grooming practices that must usually be accommodated includes a Muslim hijab (headscarf), a Sikh turban, Rastafarian dreadlocks, and Jewish sidelocks. Employers must also consider certain religious prohibitions against wearing certain garments (*i.e.*, a Muslim or Orthodox Jewish woman's practice of not wearing pants or short skirts).

However, courts have found certain accommodations to be an undue hardship on employers. For example, in *Cloutier v. Costco Wholesale Corp.,* 390 F.3d 126 (1st Cir. 2004), Costco implemented a grooming policy that forbade employees from wearing facial jewelry, in order to maintain a professional appearance. Body piercings were part of the plaintiff's religion, and Costco attempted to accommodate the plaintiff by allowing her to cover the piercings with a band-aid or replace the jewelry with plastic retainers during her shift. The plaintiff rejected both of the proposed accommodations because her religious beliefs required her to display her facial jewelry openly at all times. Ultimately, the court found that to require Costco to accommodate the employee's desire to wear facial jewelry would present an undue hardship because Costco had a legitimate interest in maintaining a professional appearance in its employees.

Employers may not treat some employees less favorably because of their national origin. The EEOC takes the position that a dress code prohibiting certain kinds of ethnic dress, such as traditional African or East Indian attire, but otherwise allowing casual dress treats certain employees less favorably and will be considered discriminatory. However, employers may ultimately deny an accommodation if doing so would present an undue hardship. The same approach applies if an employee discloses a disability that may conflict with the established dress code.

Employers are also advised to keep in mind the breadth of the EEOC's definition of national origin: national origin includes not just an individual's place of origin, but also covers his or her ancestor's place of origin as well.

Employers are also advised to keep in mind the breadth of the EEOC's definition of national origin: national origin includes not just an individual's place of origin, but also covers his or her ancestor's place of origin as well.

Ultimately, employers should not deny a request for an accommodation for the company dress code without considering an accommodation. Employers should assess and document whether the accommodation involves national origin, religion, or a disability and whether an accommodation would be an undue burden before a final decision is made in order to prevent running afoul of Title VII.■

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terminates before the end of a plan year, the employer may continue to exclude the Opt-Out Payment from the determination of affordability for the remainder of that plan year.

With some exceptions for employers that are a party to a collective bargaining agreement, the regulations are proposed to apply for taxable years beginning after December 31, 2016. To the extent the employer is a party to a collective bargaining agreement, it does not have to add the Opt-Out Payment to the employee's share of the premium for arrangements that do not qualify as an eligible opt-out arrangement until the expiration of the contract in effect before December 16, 2015, if later than the beginning of the 2017 plan year. Also, employers who provide unconditional Opt-Out Payments under a program that was in effect prior to December 16, 2015, do not have to be considered for affordability purposes until the 2017 plan year.

Employers should review their opt-out arrangements and revise the open enrollment materials to require employees to attest that they and their tax family members have alternate group health coverage and clarify that coverage in the individual market is not permissible in order to receive the Opt-Out Payment.■

INCREASED CIVIL FINES AND PENALTIES FOR EMPLOYERS FOR IMMIGRATION-RELATED VIOLATIONS

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$4,313-$10,781 per unauthorized worker; and the fines for subsequent offenses have increased from $4,300-$16,000 to $6,469-$21,563 per unauthorized worker.

These significant civil fine and penalty increases and the annual inflation increases demonstrate the importance of ensuring that employers comply with all immigration regulations. It is a good recommendation for companies to: review their I-9 policies and procedures; ensure all company representatives who complete I-9 Forms are fully trained; and complete periodic internal I-9 audits in order to identify any potential discrepancies, so that they can take remedial actions prior to an immigration-related audit or investigation.

Please feel free to contact us should you have any questions about the increased civil fines and penalties, or if you would like our assistance in assessing your company's exposure to immigration compliance violations.■