

Employee Benefit Plan Select Issues

Supreme Court Activity:

ACA Subsidies Upheld. At the close of its summer session, the United States Supreme Court determined that health insurance subsidies obtained by people who qualify for such and enroll in coverage offered through a Federally-run Marketplace are effective. This is important not only for individuals, but also for employers since full-time employees who obtain subsidies through the Marketplace can trigger penalties for those employers subject to the Employer Mandate.

Same-sex Marriage. Also at the close of its summer session, the United States Supreme Court struck down in *Obergefell v. Hodges* all state bans on same-sex marriage. In light of this decision, employers will want to review the eligibility clauses of their various employee benefits to ascertain whether any discriminate against same-sex spouses. In particular, employers sponsoring any benefits for spouses will want to consider providing the same coverage to same-sex and opposite-sex spouses. Otherwise, the risk of facing a discrimination claim under Title VII of the Civil Rights Act of 1964 is real. Retirement benefits should already be compliant at this time in light of guidance that was issued after the *Windsor* case, which struck down the definitions of “marriage” and “spouse” under the Defense of Marriage Act (DOMA). However, *Windsor* did not have as extensive of an impact on welfare benefit plans so special care should be taken to confirm the eligibility scope of these plans. Employers in states which did not previously recognize same-sex marriage will also want to confirm that benefits for same-sex spouses are taxed in the same manner as opposite-sex spouses under state law. (North Carolina recognized same-sex marriage in October 2014 and South Carolina recognized it in November 2014.)

On a related note, *Obergefell* eliminates the distinction between “place of celebration” and “place of residence” rules the U.S. Department of Labor issued under the Family and Medical Leave Act’s (FMLA) definition of spouse. Employers in states which did not previously recognize same-sex marriage will need to extend FMLA protections insofar as they relate to same-sex spouses.

IRS Audit Guidance for Nonqualified Deferred Compensation:

For the first time since 2005, the IRS has issued guidance on its areas of concern regarding nonqualified deferred compensation (NQDC) plans such as salary reduction arrangements, bonus deferral plans, supplemental executive retirement plans (SERPs) and excess benefit plans. This guidance emphasizes that employers should ensure appropriate tax treatment is extended to such plans, including the timing of FICA and FUTA withholdings and income taxation of amounts upon an employee’s constructive receipt. Also, employers sponsoring 401(k) retirement plans alongside NQDC plans will want to ensure that participation in the NQDC plans is not conditioned on participating or not participating in the 401(k) plan.

More Guidance on the Cadillac Tax:

In our March Newsletter, we discussed IRS Notice 2015-16, which offered insight into how the IRS intends to implement this future excise tax on “rich” health insurance benefits. In spite of present bipartisan efforts to repeal the Cadillac Tax (H.R.2050 - Middle Class Health Benefits Tax Repeal Act of 2015, which presently has 132 co-sponsors), the IRS has issued Notice 2015-52, which offers additional guidance on future implementation. Even though the Middle Class Health Benefits Tax Repeal Act of 2015 has some momentum behind it, it is unclear whether it will be passed and how it may function in its final form if passed. Therefore, employers should continue to pay attention to these IRS Notices insofar as they may affect benefits employers offer in anticipation of the Cadillac Tax, which is scheduled to commence in 2018.

Contraceptive Mandate:

The IRS recently released final regulations clarifying what preventive services are required under the Affordable Care Act and what accommodations are available for certain for-profit entities that may have religious objections to the contraceptive mandate.

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