TTAA Legislative Update
September 14, 2020

ACA Penalties Increase for 2021

Since 2015 Applicable Large Employers (ALEs) have had to comply with the Affordable Care Act (ACA).

Employers with an average of 50 or more full-time employees (including full-time equivalent employees) on business days during the preceding calendar year are required to offer medical coverage that is both affordable and offers minimum value coverage.

Failure to comply with these obligations under the ACA can lead to penalties by the Internal Revenue Service. The IRS has issued the updated annual per-employee penalties under Code § 4980H for the 2021 calendar year.

The subsection (a) penalty, which may apply when an ALE fails to offer minimum essential coverage to at least 95% of its full-time employees (minus the first 30), will increase to $2,700 (up from $2,570 for 2020). The subsection (b) penalty, which may apply when an ALE offers minimum essential coverage to the required percentage of full-time employees but the offered coverage either is unaffordable or does not provide minimum value, will increase to
$4,060 (up from $3,860 for 2020). The subsection (b) penalty is triggered if an employee receives government-subsidized coverage through an exchange.

As previously released, in 2021 employer-sponsored coverage will be considered affordable under the employer shared responsibility rules if the employee's required contribution for self-only coverage does not exceed 9.83 percent of the employee's household income for the tax year.

ALEs should keep the affordability percentage in mind when setting 2021 employee contribution rates.

U.S. Supreme Court Will Hear ACA Cases in November

The United States Supreme Court has granted the House of Representatives' request to expand the time allotted on November 10 for oral argument in the consolidated Patient Protection and Affordable Care Act (ACA) cases that will determine whether the statute stands in the aftermath of the 2017 Tax Cuts and Jobs Act, which amended the ACA to zero out the shared responsibility payment. The Court expanded the previously allotted one hour to 40 minutes for each side.

The adjusted time allotment gives 30 minutes to California (and other states that support the ACA); 10 minutes to the House of Representatives (which supports the ACA); 20 minutes for the Solicitor General (who the ACA struck down); and 20 minutes for Texas (and other states that want the ACA struck down).

Two private citizens and 18 Republican-controlled states filed suit against the United States to have the ACA declared unconstitutional on the ground that the shared responsibility payment was no longer a tax because it was set at $0.

DOL Issues Opinion Letter Regarding Permissible Use of the Fluctuating Workweek Method of Compensation

The U.S. Department of Labor (DOL) has issued an opinion letter addressing whether the fluctuating workweek method of compensation (FWW) may be used when an employee's weekly hours fluctuate only above and not below 40 hours per week.

The DOL concluded there is no requirement, under the Fair Labor Standards Act (FLSA) or its interpreting regulations and guidance, that an employee's hours worked fluctuate below 40 hours per week when utilizing the FWW. The DOL noted that courts have generally reached the same conclusion.

The opinion letter also reaffirms a related point regarding deducting pay for employee absences. Generally, when using the FWW, an employer may not deduct pay for absences occasioned by the employee.

However, there is an exception to this general prohibition for deductions related to an employee's willful absences, tardiness, or infractions of major work rules. This exception has been explicitly incorporated into the recently amended FWW rule.

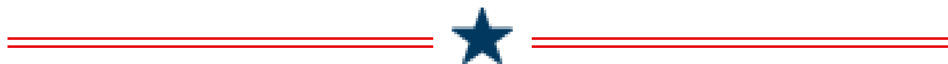
FWW Generally

The FWW is an alternative method for computing overtime pay, which allows an employer to pay a nonexempt employee a fixed salary plus an overtime rate of one-half the employee's regular rate, rather than the standard "time and a half."

In order to utilize this alternative method for computing overtime, the following criteria must be met:

- The employee works hours that fluctuate from week to week;
- The employee receives a fixed salary that does not vary with the number of hours worked in the workweek;
- The fixed salary is sufficiently large to satisfy the minimum wage rate requirements for every hour worked; and
- The employee and employer have a clear and mutual understanding that the fixed salary is compensation for all hours worked each workweek regardless of the number of hours worked.

State law may either prohibit the use of the fluctuating workweek method or place limitations on its use.



All Employers Are Required to Display Federal and State Postings

All employers are required to post certain federal and state postings. On a federal level, if an employer has less than 50 employees, they are required to post 5 notices: Fair Labor Standards Act; Employee Polygraph Protection Act; Equal Employment Opportunity; Uniformed Services Employment and Reemployment Rights Act; and Occupational Safety and Health Administration.

If an employer has 50 or more employees, federal law requires that they also post a notice related to the Family and Medical Leave Act.

Each state has varying requirements on what notices must be posted.

DOL Provides Work From Home Guidance

The Wage and Hour Division of the U.S. Department of Labor (DOL) has published guidance addressing employer obligations to track employee hours while teleworking.

Under the Fair Labor Standards Act (FLSA), employers are required to compensate employees for all "hours worked."

Hours worked includes any time the employee spent that was "suffered or permitted" by the employer, even if it is not requested or authorized by the employer.

Importantly, the guidance applies a "reasonable diligence" standard to determine when employers have "reason to believe" work was performed.

This standard focuses on what work time employers should have known about, not what they could have known.

Though employers could be liable if they actually know of an employee working uncompensated hours, employers are not required to sift through any available data (e.g., network access times or phone calls to supervisors) to determine whether employees are accurately recording time.

NLRB Issues Decisions regarding Social Media and Non-Disparagement Rules

Employee social media expression can damage an organization's brand and violate its social media and non-disparagement rules. Discipline for social media expression can run afoul of the National Labor Relations Act (NLRA).

The National Labor Relations Board (NLRB) recently clarified the types of employee social media activity employers may regulate, giving employers more latitude to discipline employees for social media conduct that violates employer rules and threatens the employer's reputation.

In short, employers still need to carefully review social media policies to make sure they protect the company's reputation with customers and/or the general public without impermissibly limiting employees' rights to discuss working conditions among themselves.