AssuredPartners
COMPLIANCE OBSERVER

3rd Quarter 2017

Determining if Your Business is an ALE for Reporting & Penalty Purposes

To the dismay of most employers, the Affordable Care Act's employer reporting and shared responsibility penalties have not been repealed. Therefore, small businesses that grew to fifty or more full-time/full-time equivalent employees in 2016 are now considered Applicable Large Employers (ALE) and are subject to 2017 reporting and penalties.

5-step process to determine if your business is an ALE:

1. For each month in 2016, count the number of employees who were employed to work, on average, at least thirty hours per week. This includes all full-time common law employees (including seasonal employees) who work for all entities treated as part of the same controlled group or affiliated service group.
2. For each month in 2016, add the total number of hours for all other employees not counted in step one and divide each monthly sum by 120 – this will give you the number of full-time equivalent employees for each month.
3. Add the monthly results of steps one and two to obtain the sums of each month of 2016.
4. Average the monthly sums by adding them up and dividing by twelve (do not round up). If the result is less than fifty, then you're not an ALE.
5. If the result of step four is fifty or more, then you're an ALE. BUT, if you had more than fifty employees for no more than four months during 2016 and you exceeded fifty in those months because you had seasonal employees, then you may not be considered an ALE.

Employer penalties to consider if you crossed the threshold status to ALE status:

- **Penalty A** – if group health coverage was not offered to at least 95% of your full-time employees, and their dependents, and a full-time employee purchases subsidized Marketplace coverage for any given month, the employer will be subject to a penalty equal to $188.33 per full-time employee in excess of 30 for that month.
- **Penalty B** – if group health coverage was offered to at least 95% of your full-time employees, and their dependents, and a full-time employee declined and instead purchased subsidized Marketplace coverage for any given month, the employer will be subject to a penalty for that month equal to the lesser of the Penalty A amount or $282.50 for each full-time employee with subsidized Marketplace coverage. An employee is able to purchase subsidized Marketplace coverage if they were not offered group health coverage that meets the minimum value and affordability tests by their employer.

Source: Crawford Advisors

Current Status of the ACA

All ACA repeal and replace efforts, to date, have failed.
The ACA remains current law and employers must continue to comply with all applicable ACA provisions.

Final Forms for 2017 ACA Reporting

On September 28, 2017, the Internal Revenue Service (IRS) released final 2017 forms for reporting under Internal Revenue Code (Code) Sections 6055 and 6056.

- **2017 Forms 1094-C and 1095-C** are used by applicable large employers (ALEs) to report under Section 6056, as well as for combined Section 6055 and 6056 reporting by ALEs who sponsor self-insured plans. Related draft instructions were released on Aug. 31, 2017, and have not been finalized at this time.
- **2017 Forms 1094-B and 1095-B** are used by entities reporting under Section 6055, including self-insured plan sponsors that are not ALEs. Related draft instructions were released on Aug. 31, 2017, and have not been finalized at this time.

The 2017 forms are substantially similar to the 2016 versions, however employers should become familiar with the revisions to the forms, and prepare to file these final versions in early 2018.

Important Dates

- ✓ **January 31, 2018** – Statements for 2017 must be furnished to individuals
- ✓ **February 28, 2018** – Returns for 2017 must be filed with the IRS (April 2, 2018, if filed electronically, since March 31, 2018 is a Sunday).

EEOC'S NEW WELLNESS PROGRAM RULES A BUST

In May 2016, the Equal Employment Opportunity Commission (EEOC) released its final rule with regard to employer wellness programs. The rules went into effect January 1, 2017, and state that the incentive (or penalty) for participating (or not participating) in a wellness program may not exceed 30% of a group health plan. Basically, these new rules allow employers to offer a discount on insurance costs to those participating or increase costs to those not participating.

These regulations were intended to better streamline the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) with the Affordable Care Act (ACA), but both groups are finding them inconsistent with the "voluntary" requirements. The American Association of Retired Persons (AARP) is also arguing (and filed suit in October 2016) that these requirements are in no way "voluntary" as employees who do not participate and can't afford to pay the 30% penalty would be forced to disclose their protected information, when otherwise, they wouldn't have to do so. They also argue that the EEOC never provided an adequate explanation for the changes.

The parties took the question to court to be reviewed under *Chevron* deference, which is when a court is to defer to interpretations of statutes by those involved, unless such interpretations are unreasonable. Since neither the ADA nor GINA had a clear definition of "voluntary" participation, the court deferred to the EEOC's interpretation of the term, but found that they also failed to make a clear understanding. The District Court for the District of Columbia found that these new rules were ill-reasoned and could

not be accepted, so the EEOC is to review and revise the new regulations or they can move forward with appealing the decision.

As of now, your company can continue as is with its wellness programs for 2017. As for the future, it is unclear at this point. The EEOC hasn't made it clear yet as to which approach it is taking, whether it be to appeal the decision or to rectify the new rules and regulations. Accordingly, be cautious of your wellness program offerings for next year.

Source:* *Crawford Advisors

New SBC Template Required for 2018 Open Enrollment

The updated template and related materials for the summary of benefits and coverage (SBC) are required for annual open enrollment periods beginning on or after April 1, 2017. For calendar year plans, this means that ***the updated template must be used for the 2018 open enrollment period***.

Employers should do the following to prepare for the new SBC template and related materials for the 2018 open enrollment period.

- ✓ Self-funded plan sponsors should ensure that they are using the new template.
- ✓ Employers with insured plans should make sure the carrier is providing the correct version of the template.

The new template and instructions can be found here.

Changing HSA Contributions under a Cafeteria Plan

Do you allow employees to make pre-tax HSA contributions under your cafeteria plan? Do you know when an HSA participant is allowed to make midyear changes to his/her HSA elections?

Under proposed IRS regulations (which may be relied upon until final regulations are issued), employees may ***prospectively*** start, stop, or otherwise change an election to make HSA contributions through pre-tax salary reductions under a cafeteria plan ***at any time during the plan year***. The proposed regulations provide that if a cafeteria plan offers pre-tax HSA contributions, the written cafeteria plan document must:

1. specifically describe the HSA contribution benefit;
2. allow participants to *prospectively* change their salary reduction elections for HSA contributions on at least a monthly or more frequent basis; and
3. allow participants who become ineligible to make HSA contributions to prospectively revoke their salary reduction elections for HSA contributions.

Remember that other cafeteria plan election changes may be made ***only if*** they are permitted under the IRS's cafeteria plan election change rules. Consequently, an employee who elects to reduce or discontinue HSA contributions during a plan year may be limited to receiving the difference as taxable compensation—additional nontaxable benefits cannot be elected unless the cafeteria plan election change rules otherwise allow a midyear change to the elections for those benefits.

Important: In order for your cafeteria plan to include HSA contributions as a plan benefit, your written cafeteria plan document must currently include or be amended to include HSA contributions as one of the qualified benefits offered and must address the terms and conditions of the HSA benefit. The

circumstances under which midyear election changes will be allowed for HSA contributions is just one of the terms and conditions that must be addressed in the cafeteria plan document and in participant communications.

Source: EBIA/Thomson Reuters

More Employers Requiring Same-Sex Couples to Marry to Receive Benefits

More employers are requiring same-sex couples to marry to receive health care benefits after the 2015 Supreme Court ruling to legalize same-sex marriage. The International Foundation of Employee Benefit Plans revealed that three in ten employers will be eliminating same-sex domestic partner benefits.

The year prior to the Supreme Court ruling, employers reported that:

- 51% provided benefits to same-sex partners in civil unions
- 59% provided benefits to same-sex domestic partners
- 79% provided benefits to same-sex spouses

The year after the Supreme Court ruling, employers reported that:

- 31% are providing benefits to same-sex partners in civil unions (down 20% from 2014)
- 48% are providing benefits to same-sex domestic partners (down 11% from 2014)

At the same time, the larger companies (10,000 or more employees) are more likely to continue offering same-sex domestic partner benefits and most employers (86%) are providing benefits to same-sex spouses, which is an increase of 7% from 2014. Offering the same coverage to same-sex couples and opposite-sex couples makes it fair, consistent and an easier task for administrators.

Julie Stich, CEBS, Associate VP of Content at the International Foundation states that she “wouldn’t expect all employers to drop the domestic partner benefits” though. “Competitive employers are always working to provide an inclusive benefit package, and offering domestic partner benefits can build a culture of inclusion and help the company attract the best talent.”

Source: Crawford Advisors

Links:
Employee Benefits Survey: 2016 Results
Domestic Partner Benefits After the Supreme Court Decision: 2015 Survey Results
Employee Benefits for Same-Sex Couples: The DOMA Decision One Year Later

DID YOU KNOW?

2018 IRS Plan Maximums & Benefit Limits

	2018 Limit	2017 Limit
CAFETERIA PLANS (Section 125):		
Health FSA Maximum	TBA	$2,600
Dependent Care Assistance Plans (Dependent Care FSA) annual maximum (unless married filing separately	$5,000	$5,000
Dependent Care Assistance Plans (Dependent Care FSA) annual maximum (if married filing separately)	$2,500	$2,500
Compensation amount for determining Highly Compensated Employee	TBA	$120,000
Compensation amount for determining Key Employee (officers/owners earning over)	TBA	$175,000
HIGH DEDUCTIBLE HEALTH PLANS (HDHP):		
Minimum annual HDHP deductible – Single	$1,350	$1,300
Minimum annual HDHP deductible – Family	$2,700	$2,600
HEALTH SAVINGS ACCOUNTS (HSA):		
Annual HSA Contribution Limit – Single	$3,450	$3,400
Annual HSA Contribution Limit – Family	$6,900	$6,750
Annual HSA Contribution Limit – Age 55+ Catch-up	$1,000	$1,000
Plan Out-of-Pocket Max for HSA Eligibility – Single	$6,650	$6,550
Plan Out-of-Pocket Max for HSA Eligibility – Family	$13,300	$13,100
QUALIFIED SMALL EMPLOYER HEALTH REIMBURSEMENT ACCOUNTS (QSEHRA):		
Qualified Small Employer HRA Limit – Single	TBA	$4,950
Qualified Small Employer HRA Limit – Family	TBA	$10,000
AFFORDABLE CARE ACT (ACA):		
Plan Out-of-Pocket Max for ACA Compliance – Individual	$7,350	$7,150
Plan Out-of-Pocket Max for ACA Compliance – Family	$14,700	$14,300
Imbedded individual Out-of-Pocket Maximum, if applicable	$7,350	$7,150
ACA Affordability Percentage	9.56%	9.69%

TBA - To Be Announced

REMEMBER! Medicare PART D Notices

Employers whose health care plans include prescription drug benefits must notify Medicare-eligible individuals by **October 13th** (since October 15th falls on a Sunday) whether their plan provides "creditable coverage," meaning that it is expected to cover, on average, as much as the standard Medicare Part D prescription drug plan. The CMS Creditable Coverage website provides complete text of the guidance and Model Notices

New Form I-9 Must be Used Now

The U.S. Citizenship and Immigration Services (USCIS), part of the U.S. Department of Homeland Security has issued an updated version of Form I-9: Employment Eligibility Verification (Form I-9). Under federal law, every employer that recruits, refers for a fee or hires an individual for employment in the United States must complete a Form I-9.

The updated form replaced a version that was issued in 2016. Employers had to discontinue using the 2016 form by September 17, 2017. ***Exclusive use of the updated form was expected by September 18, 2017.***

Download the 2017 Form I-9 from the USCIS website.

Listen to our AP Webinar on I-9 and E-Verify

Should you have any questions or concerns please contact your AssuredPartners Benefits Team