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In The ACA Age, Employee Handbooks Can Help — Or Hurt

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Law360, New York (May 16, 2016, 10:44 AM ET) -- Many employers offer a variety of benefits to their employees, including medical, dental and other "health and welfare" benefits. These plans are subject to a broad swath of substantive as well as reporting and disclosure requirements under the Affordable Care Act and the Employee Retirement Income Security Act. Many of these requirements have become effective only within the past two to five years.

Notably, under the ACA's employer mandate effective Jan. 1, 2015, large employers (generally, those with 50 or more full-time and full-time equivalent employees) must either make a good "offer" of affordable, minimum-value medical coverage to full-time employees (30+ hours of service per week), or risk a steep penalty — up to $2,000 per full-time employee per year.

Employers have already seen a steep uptick in health and welfare plan audits by the U.S. Department of Labor, and Internal Revenue Service audits are expected to increase later this year as the IRS reviews tax returns for potential ACA noncompliance for the first time. Now more than ever, it is important that employers review health and welfare benefit documentation. Indeed, many employers have already diligently drafted and adopted wrap documents, ACA policies, employee communications and other materials to demonstrate compliance with the ACA and ERISA in the event of an audit or participant lawsuit. In addition, many employers have carefully reviewed and updated existing health and welfare plan documents, such as summary plan descriptions and summaries of benefits and coverage, to make sure that they reflect the ACA and ERISA.

However, even the most diligent employers, when drafting, reviewing and updating health and welfare benefits documents, overlook the employee handbook. The handbook can be a great tool to highlight compliance with the ERISA and the ACA, but can also draw attention to noncompliance. Here are four reasons why a handbook review is in order.

1. The handbook can be used to help document an "offer of coverage."

As noted above, under the ACA, large employers must make a good "offer" of medical coverage in order to avoid ACA penalties. The IRS has not been entirely clear as to what sort of documentation is needed in order to memorialize the "offer of coverage." In our view, the platinum "offer" standard is an advance written notice describing the offer and enrollment instructions in detail, coupled with a signed waiver collected from all employees who decline the offer.

But what if an employer cannot reasonably collect waivers from all employees who receive an offer of medical coverage? In that case, an employer will want to show that employees received so much information about the offer that they must have known medical coverage was available. A widely distributed handbook with clear information about the employer's medical coverage, including a summary of eligibility terms, can be a valuable part of an employer's information blitz.

2. The employer is not in compliance with the ACA or ERISA, and the handbook makes this fact painfully obvious.

The ACA's employer mandate is not an easy thing to figure out. Neither is the ERISA. Some employers have made heroic efforts to comply, but have simply misunderstood the rules. Other employers have received incorrect advice from their advisers. Some employers are in denial, or avoiding compliance with the ACA in hopes of a repeal. For whatever reason, something is not quite right.

For example, here are three very common noncompliance issues that I frequently encounter:

- **Blanket exclusions from medical coverage of specific employee groups, such as temporary employees, interns, apprentices, prevailing wage employees, co-ops and casual employees:** Under the ACA's employer mandate, all employees, regardless of classification, must be evaluated under the IRS' measurement rules to see if they meet the 30-hour "full-time" threshold. If they do, they must receive an offer of affordable, minimum value medical coverage, or the employer is at risk for a penalty. Because categorical exclusions are meaningless for purposes of the ACA's employer mandate, excluding a class of employees without considering whether they work fewer than 30 hours per week could result in "full-time" employees not receiving offers of coverage — and steep penalties for the employer.

  For purposes of identifying "full-time" employees, all paid hours count as "hours of service", except for very narrow exceptions. Employers may only exclude hours performed by bona fide volunteers, hours performed as part of a federal (or similar state or local) work-study program, hours if compensation for services constitutes income from sources without the U.S., and hours performed by individuals who have taken a vow of poverty.

- **Prohibited waiting periods:** The ACA's insurance reforms prohibit waiting periods of more than 90 days before major medical coverage can start. It is important to remember that there must be an opportunity for the employee to begin coverage no later than the end of the 90-day period. I continue to encounter plans that permit employees to start coverage "on the first day of the next month following the 90th day of hire." The IRS and DOL have made clear that this interpretation is unacceptable because, in most cases, coverage cannot begin until after the end of the 90-day period. Similarly, a three-month waiting period does not work, since three months is often more than 90 days (e.g., June + July + August = 92 days).

- **Vague or incorrect full-time standard:** Many handbooks refer to "full-time" employees but do not set forth a clear "full-time" standard, including the number or hours and how those hours are counted. Other handbooks continue to impose a standard greater than 30 hours of service per week for medical plan eligibility.

A handbook review can help an employer identify — and remedy — these sorts of errors.

3. The employer *is* in compliance with the ACA, but the handbook does not reflect that.

Employers who worked hard to tighten up their plans and policies to comply with the ACA should make sure that handbooks and any other employee communications are updated to reflect their efforts. For example, if an employer has carefully developed an ACA "full-time" employee policy, why not include that policy in the handbook? If an employer has shortened its benefits waiting periods and offered coverage to additional classes of employees, why continue to distribute a handbook which contains outdated (and incorrect) coverage terms?

There are potential payoffs for handbook revision efforts. First, employers can avoid any unnecessary employee confusion and questions about what the current benefits and eligibility standards are. But more importantly, having an up-to-date handbook will help avoid any unnecessary IRS or DOL confusion in the event of an audit, which leads to my final point...

4. If an employer is audited, the IRS or DOL will probably ask to see the handbook.

In recent audits, the DOL has included the employee handbook on its standard document request lists. When the IRS starts its ACA audits (as soon as this summer) there's a good chance the IRS auditors will request handbooks as well. No employer wants to hand over to the government an employee handbook that is out of date and/or reveals ACA or ERISA noncompliance.

Conclusion

The ACA and ERISA impose a host of substantive as well as reporting and disclosure requirements on health and welfare benefits plans, and the stakes have never been higher. Employers are advised to thoroughly review and update employee handbooks as part of their ACA and ERISA compliance efforts.

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