HUMAN RESOURCES & ADMINISTRATION
NEWS & BEST PRACTICES
Marshall & Sterling GROUP BENEFITS

2017 'Pay or Play' Penalty and Affordability Amounts

The IRS has updated its existing Q&As on the Affordable Care Act's employer shared responsibility ("pay or play") requirements to reflect adjustments to the pay or play penalty and affordability amounts. Those adjustments are as follows:

- For calendar year 2017, the applicable per-employee dollar penalties of $2,000 and $3,000 are adjusted to **$2,260** and **$3,390**, respectively.
- For plan years beginning in 2017, the affordability threshold for purposes of both the pay or play affordability safe harbors and the premium tax credit provisions is **9.69%**.

The Q&As also address what counts as an "offer of coverage" for purposes of pay or play compliance. Click here to view the Q&As in their entirety.

Check out our Pay or Play section for step-by-step guidance, worksheets, and calculators that can help employers understand whether they will be subject to a penalty, and how to calculate it.

MAY 2017

In This Issue...

Redesigned Green Cards Impact Form I-9 Compliance

U.S. Citizenship and Immigration Services (USCIS) has announced a redesign to the **Permanent Resident Card ("Green Card")** and the **Employment Authorization Document ("EAD")**. USCIS is expected to begin issuing the new Green Cards and EADs on **May 1, 2017**.

The new Green Cards and EADs will:

- Display the individual's photos on both sides;
- Show a unique graphic image and color palette:
  - **Green Cards** will have an image of the Statue of Liberty and a predominately green palette; and
  - **EADs** will have an image of a bald eagle and a predominately red palette;
- Have embedded holographic images; and
- No longer display the individual's signature.

Also, Green Cards will **no longer** have an optical stripe on the back.

What Employers Need to Know

Employers should be aware of the following regarding the redesigned Green Cards & EADs:

- Both the existing and the new versions of Green Cards and EADs **remain acceptable** for purposes of Form I-9 and E-Verify compliance.
- Both the existing and the new Green Cards and EADs will **remain valid** until the expiration date shown on the card.
- Some older Green Cards, which do not have an expiration date, **remain valid**.
- Certain EADs held by individuals with Temporary Protected Status and other designated categories have been automatically extended.
- Some Green Cards and EADs issued **after May 1, 2017** may still display the existing design format, as USCIS will continue using existing card stock until current supplies are depleted.

Check out our section on Form I-9 for more information on complying with employment eligibility verification requirements.

Avoiding Employee Misclassification Under the FLSA

Our Independent Contractors section includes more information on how to correctly determine worker classification.

In order for the federal Fair Labor Standards Act's (FLSA) minimum wage and overtime pay requirements to apply to a worker, the worker must be an "employee" of the employer, meaning that an employment relationship must exist between the worker and the employer. The FLSA defines "employ" as including to "suffer or permit to work," representing the broadest definition of employment under the law, as it covers work that the employer directs or allows to take place. Applying the FLSA's definition, workers who are **economically dependent** on the business of the employer, regardless of skill level, are **considered to be employees**. On the other hand, **independent contractors are workers with economic independence who are in business for themselves**.

While the U.S. Department of Labor (DOL) finds that **most workers are employees under the FLSA**, in order to make the determination of whether a worker is an employee or an independent contractor, the DOL uses the multi-factor "economic realities" test, which focuses on **whether the worker is economically dependent on the employer or in business for him or herself**. Each factor of the "economic realities" test is outlined below.

- **Is the Work an Integral Part of the Employer's Business?** If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer. A true independent contractor's work, on the other hand, is unlikely to be integral to the employer's business.
- **Does the Worker's Managerial Skill Affect the Worker's Opportunity for Profit or Loss?** This factor should not focus on the worker's ability to work more hours, but rather on whether the worker exercises managerial skills and whether those skills affect the worker's opportunity for both profit and loss.
- **How Does the Worker's Relative Investment Compare to the Employer's Investment?** The worker should make some investment (and therefore undertake at least some risk for a loss) in order for there to be an indication that he or she is involved in an independent business. The worker's investment should not be relatively minor compared with that of the employer. If the worker's investment is relatively minor, that suggests that the worker and the employer are not on similar footings and that the worker may be economically dependent on the employer.
- **Does the Work Performed Require Special Skill and Initiative?** A worker's business skills, judgment, and initiative, not his or her technical skills, will aid in determining whether the worker is economically independent.
- **Is the Relationship Between the Worker and the Employer Permanent or Indefinite?** Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee. However, a lack of permanence or indefiniteness does not automatically suggest an independent contractor relationship. The key is whether the lack of permanence or indefiniteness is due to operational characteristics intrinsic to the industry or the worker's own business initiative.
- **What is the Nature and Degree of the Employer's Control?** The employer's control should be analyzed in light of the ultimate determination of whether the worker is economically dependent on the employer or truly an independent businessperson. The worker must control meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his or her own business.

President Trump Signs Repeal of OSHA's 'Volks Rule'

Please visit our section on Safety & Wellness for more information about worker safety and health.

President Trump has signed into law House Joint Resolution 83, which repeals the "Volks Rule," a U.S. Occupational Safety and Health Administration (OSHA) rule which imposed on employers certain continuing obligations to make and maintain accurate records of recordable injuries and illnesses. The rule previously became effective on January 18, 2017.

OSHA Recordkeeping Regulations
OSHA's recordkeeping regulations require employers to record information about certain work-related injuries and illnesses on an OSHA 300 Log. Employers must enter each recordable injury or illness on the OSHA 300 Log, as well as on a supplementary OSHA 301 Incident Report, **within 7 calendar days** of receiving information that a recordable injury or illness has occurred. At the end of each calendar year, employers must create, certify, and post annual summaries of the cases listed on their 300 Logs for the prior calendar year. Generally, employers **must retain** their OSHA Logs, Incident Reports, and annual summaries for **5 years** following the end of the calendar year that they cover.

If an employer **initially fails to record** a recordable injury or illness on the OSHA 300 Log or the corresponding OSHA 301 Incident Report, the employer still has an ongoing duty to record that case; as long as an employer fails to comply with the ongoing recording duty, there exists an **ongoing violation** of OSHA's recordkeeping requirements. OSHA can cite employers for such recordkeeping violations **for up to 6 months** after the 5-year retention period expires.

'Volks Rule' Explained
OSHA's "Volks Rule," which became effective on January 18, 2017, amended OSHA's recordkeeping regulations to state that:

- If an employer failed to record an injury or illness within 7 days, the obligation to record continued on past the 7th day, such that each successive day where the injury or illness remained unrecorded constituted a continuing "occurrence" of the ongoing violation.

- Under the rule, an employer could not avoid the five-year maintenance requirement by failing to make the record in the initial 7 days; rather, the obligation to make the record, for both the OSHA 300 Log as well as the OSHA 301 Incident Report, continued throughout the 5-year maintenance period even if the employer failed to meet its initial obligation.

'Volks Rule' Repealed
On April 3, 2017, President Trump signed into law House Joint Resolution 83 (H.J. Res. 83), which declares the "Volks Rule" to **no longer have force or effect**.

To read more about worker safety and health, please visit our section on Safety & Wellness.

Firing a Problem Employee

Firing an employee is never easy. As unpleasant as any layoff or termination situation is, however, handling one with a problem employee makes the task even more challenging. Watch the video below to learn the steps an employer should take when firing a problem employee.

Check out our Discipline & Termination section for more helpful tips.

Marshall & Sterling Insurance will continue to provide you with updates and information regarding important issues. Should you have specific questions or need more information, please contact us.

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