

## **401(k) Report; Affordable Care Act Auto-Enrollment, Waiting Periods, and Contraceptives; Misclassified Workers**

This Employee Benefits Update provides information on developments involving the IRS 401(k) Compliance Questionnaire Interim Report, Affordable Care Act guidance, and misclassified workers.

The government issued guidance including the following:

- IRS 401(k) Compliance Questionnaire Interim Report. The IRS has summarized the data it received from a review of 1,200 randomly-selected 401(k) plan sponsors. The Interim Report includes useful information about plan design. For example, 96% of plans allowed catch-up contributions, but only 22% allowed Roth contributions. For more details, see: <http://www.irs.gov/retirement/article/0,,id=253875,00.html>.
- Affordable Care Act Automatic Enrollment, Shared Responsibility, and Waiting Periods. New information has been issued in Notice 2012-17 which covers three areas of the Affordable Care Act. See: <http://www.irs.gov/pub/irs-drop/n-12-17.pdf>. Automatic enrollment rules for large health plans will not be ready to take effect by 2014 according to the Notice. Upcoming guidance is expected to provide that an employer will not be subject to payment under the employer shared responsibility requirements of Health Care Reform by reason of having a three-month waiting period. Expected positions on the 90-day waiting period limitation also are discussed in this Notice.
- Affordable Care Act Contraceptive Coverage. Preventive services, including contraceptive services, are generally required for non-grandfathered health plans under Health Care Reform. In a statement issued January 20, 2012, the Department of Health and Human Services addressed transition rules for non-profit employers who, based on religious beliefs, do not currently provide such coverage; however, on February 10, 2012, the White House issued a statement discussing coverage by insurance companies where non-profit religious organizations choose not to offer contraceptive coverage. This area is evolving and more guidance is expected. For more information, see: <http://www.hhs.gov/news/press/2012pres/01/20120120a.html> and <http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions>.
- Misclassified Workers. Employers incorrectly identifying an employee as an independent contractor might find relief under the IRS's Voluntary Worker Classification Settlement Program, but employers should remember to review benefit plan implications. For information on the Voluntary Classification Settlement Program, see: <http://www.irs.gov/businesses/small/article/0,,id=246013,00.html>. The Department of Labor and IRS have agreed to share information to help prevent worker misclassification: <http://www.dol.gov/opa/media/press/whd/WHD20111373.htm> and <http://www.dol.gov/whd/workers/MOU/irs.pdf>.

What should employers do?

1. Employers with 401(k) plans may find the IRS report to be of interest. The IRS expects to issue additional guidance as a follow up to the questionnaire project. Employers can use the questionnaire itself as a self-audit tool. See: [http://www.irs.gov/pub/irs-tege/epcu\\_401k\\_questionnaire.pdf](http://www.irs.gov/pub/irs-tege/epcu_401k_questionnaire.pdf).
2. Employers with health plans should evaluate how the preventive care contraceptive coverage developments affect their plans and watch for additional guidance. Employers should read Notice 2012-17 for information about automatic enrollment, shared responsibility, and the 90-day waiting period.
3. Misclassified workers can create benefit plan administrative mistakes that can be costly to fix. A self-audit and good procedures for establishing independent contractor status are tools to head off problems in this area.

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