The List of Gotchas Continues to Grow for Employers Offering Cash-In-Lieu of Benefits

Labor & Employment Law Update

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Years ago, providing cash to employees that declined benefits was fairly common. Over the past few years, increasing regulations have made that practice mostly obsolete. Then, on June 2, 2016, the Ninth Circuit added FLSA overtime implications to the list of gotchas.

We routinely receive questions from employers contemplating offering cash to employees that decline benefits. Non-exhaustive examples of the concerns are:

- The option needs to be provided through a cafeteria plan
- The cash amount may impact "affordability" under the ACA
- The option cannot enable/require an employee to purchase an individual policy
- The option needs to be offered to all eligible employees and not just a select few or those with high claims
- Depending on the timing/structure of the payments, an employer can risk losing overpayments to employees that leave mid-year
- With events such as marriage or birth of a child, employees can still exercise HIPAA special enrollment rights
- Unintended consequences – individuals with high claims will not likely be the ones declining coverage

If this isn't enough reason to change course, the Ninth Circuit, in Flores v. City of San Gabriel, confirmed that employers need to also account for overtime obligations under the Fair Labor Standards Act ("FLSA").

The City offered a set amount to employees for purchasing benefits. An employee could decline coverage and receive the unused portion as an extra cash payment on her regular paycheck. In a case of "first impression" (i.e., where no court has decided the issue before), the court determined cash payments to employees should have been included in regular rate of pay and overtime calculations.

The City argued that payments should not be part of the "regular rate" because they were not for "hours worked" and similar to payments such as vacation or sick time. The court did not agree. Instead, the court held that a payment may not be excluded from the employees' regular rate of pay where it is generally understood as "compensation for work, even though the payment is not directly tied to specific hours worked by an employee." The court likened the payments to board and lodging which is not pay for "hours worked" but is still included in the "regular rate."

The City also argued that the payments were not part of the "regular rate" because they were made "incidental" to a "bona fide" benefit plan. The City lost this argument for 2 reasons: 1) the payments were not to a third party; and 2) the payments were not "incidental" to the plan, as they represented more than 40% of contributions to the plan.

All of this begs the question – Can an employer still possibly structure a cash-in-lieu offering to its employees that is compliant with all state and federal laws? What is clear is that any employer offering or contemplating a cash-in-lieu option should immediately contact experienced counsel in order to verify compliance and/or for assistance in promptly remedying non-compliance.

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