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DOL Issues Guidance on Intersection of Affordable Care Act and Federal Prevailing Wage Laws

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Long-awaited guidance to governmental agencies on how the Affordable Care Act's provisions regarding employer shared responsibility interact with the fringe benefit requirements of the McNamara-O'Hara Service Contract Act (SCA), Davis-Bacon Act (DBA) and the Davis-Bacon Related Acts (DBRA) (together DBA/DBRA) finally has been issued by the Wage and Hour Division of the Department of Labor in an All Agency Memorandum 220 (AAM). SCA and DBA/DBRA require covered contractors to pay prevailing wages and fringe benefits to covered employees based on wage determinations issued by DOL. The AAM provides written guidance on the interplay between the ACA and these laws, including the critical issue of whether employers can take credit for ACA premiums and associated payment against required prevailing wage fringe benefits. The answer is "yes" for actual premium payments and "no" for excise tax payments made in lieu of offering and ACA compliant plan. This guidance is in line with the counseling and advice our benefits and prevailing wage attorneys have been providing on these issues based on our discussions with officials at DOL pending release of this written guidance.

SCA, DBA/DBRA, and ACA are Separate Laws

The AAM underscores that the SCA, DBA/DBRA, and ACA are separate federal laws and government contractors that are applicable large employers (ALEs) should be mindful that each law is independent. Thus, for example, just because an ALE satisfies SCA does not necessarily mean it satisfies ACA.

ACA Employer Shared Responsibility

In general, the ACA's employer shared responsibility provisions require an employer with an average of at least 50 full-time employees (including full-time equivalents) to provide its full-time employees (and their dependents) affordable health care offering minimum value. If the ALE to whom this applies chooses not to offer such health care, then it may make a non-deductible payment (by way of an excise tax) to the Internal Revenue Service.

Employer Contribution to Health — Appropriate Credit to SCA, DBA/DBRA Fringe

Under SCA and DBA/DBRA, an employer cannot take credit against the required prevailing wage

benefits for those benefits required by federal, state, or local law (such as the federal obligation for an employer to contribute to Social Security). The AAM confirms that, because an ALE may offer ACA-compliant health care or, *alternatively,* may simply pay an excise tax to the IRS, the ACA does not *require* an employer to provide health care.

Consequently, WHD permits ALEs to credit contributions to a health plan towards SCA or DBA/DBRA fringe obligations. The DOL thus treats the ACA the same way it has treated Massachusetts's medical care requirement, by allowing credit, and not like Hawaii's mandated health care coverage, which DOL does not allow credit toward fringes (but under SCA, does provide a separate and lower health and welfare benefit rate).

Employer Payment of Excise Tax — Inappropriate Credit to SCA, DBA/DBRA Fringe Care

If an ALE decides alternatively to forego providing health care by paying the excise tax to the IRS instead, the employer cannot credit the payment of such tax towards SCA or DBA/DBRA fringe obligations. The AAM notes that such a payment does not confer benefits specifically on the workers and, therefore, is not a bona fide fringe benefit as that term is defined and interpreted under SCA and DBA/DBRA.

Choice of Providing Cash or Benefits Remains Employer's

Government contractors' employees often wrongly believe they should have the choice of receiving cash in lieu of benefits mandated by SCA or DBA/DBRA. The AAM reconfirms that whether to provide employees with benefits or cash in lieu is the ALE's option (so long as not otherwise required under a collective bargaining agreement):

Thus, for example, if an ALE covered by SCA/DBRA chooses to provide all employees with fringe benefits in the form of health coverage, it may do so even if some or all of its employees might prefer to receive…cash…. [A] contractor need not obtain an employee's concurrence before contributing the [entire fringe to health care].

Bear in mind, however, that an employee's concurrence (and a writing authorizing deductions) is needed for any benefit the employer intends to provide that requires an employee payment or premium share that will be deducted from wages. For example, if the employer pays 100 percent of a medical plan benefit for an employee, then the employer simply can provide the benefit (and take credit under SCA/DBA/DBRA). On the other hand, if the employer pays only 80 percent of the medical plan benefit, then the employee must agree to the benefit and deduction of the employee portion of the benefit from wages.

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