THE
NATIONAL LAW REVIEW

Government Contractors: Some DOL/Wage and Hour Guidance on How to Coordinate Fringe Benefit Requirements with Affordable Care Act

Monday, April 4, 2016

We each had to hold our collective breath, but the Wage and Hour Division (WHD) of the ***Department of Labor (DOL)*** finally issued an *All Agency Memorandum 220 (AAM)* last week on March 30, 2016 to provide guidance to governmental agencies on how the Affordable Care Act's (ACA) provisions regarding the employer shared responsibility provisions interact with the fringe benefit requirements of the ***McNamara-O'Hara Service Contract Act (SCA)*** and Davis-Bacon Act and the ***Davis-Bacon Related Acts (DBRA)*** (together DBA/DBRA).

What is particularly nice about the AAM is that there are no surprises in the WHD's position. We feel prescient!

We thus summarize the salient provisions of the AAM.

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SCA, DBA/DBRA, and ACA are Separate Laws.

The AAM underscores that the SCA, DBA/DBRA, and ACA are separate federal laws. For example, just because an ALE satisfies SCA does not necessarily mean it satisfies ACA. None of the guidance in the AAM contradicts this principle.

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 (IRS).

Employer Contribution to Health — Appropriate Credit to SCA and 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 provides long-awaited guidance 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.

Employer Payment of Excise Tax – Inappropriate Credit to SCA and DBRA Fringe Care.

If an ALE decides alternatively to forego providing health care by instead paying the excise tax to the IRS, 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.

The Choice of Providing Cash or Benefits Remains the Employer's.

Government contractors' employees often wrongly believe they should have the choice in receiving cash in lieu of SCA or DBA/DBRA mandated benefits. 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 from wages. For example, if pays 100% of a medical plan benefit for an employee than the employer simply can provide the benefit (and take credit under SCA/DBA/DBRA). On the other hand, if the employer pays only 80% of the medical plan benefit, than the employee must agree to the benefit and the employee portion deductions.