



2018 Benefits & Employment Law Update (Sneak Peek)

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**Presented By
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#MeToo and Sexual Harassment Developments

- ▼ Expect prevalence of high profile sexual harassment allegations to carry over into the workforce
- ▼ Indictment of corporate America and shows lack of trust
- ▼ The rules are the same, but the way they are viewed may be changing...



#MeToo and Sexual Harassment Developments

▼ Policies

- ▼ *Sexual* innuendo vs. *romantic* innuendo
- ▼ Clear, but flexible methods of reporting complaints
- ▼ Prompt and thorough investigations of allegations
- ▼ Prompt and effective remedial action based on investigations



▼ Training

- ▼ Training that is not meaningful can send message that the company trivializes the issue
- ▼ Attendance should be mandatory for **EVERYONE**
- ▼ Consider sessions designed specifically for senior executives and boards of directors to focus on unique roles and responsibilities

▼ Compliance starts at the top

TRUMP ADMINISTRATION & DEREGULATION

The FLSA White Collar Exemption

- ▼ Proposed increase of White Collar threshold to \$47,476 with auto update every 3 years
- ▼ Preliminary Injunction entered on Nov. 22 (*State of Nevada v. U.S. Department of Labor*, No. 4:16-cv-731 (E.D. Tex.) (J. Amos L. Mazzant, III))



TRUMP ADMINISTRATION & DEREGULATION

The FLSA White Collar Exemption

- ▼ **White Collar Exemption regulations – changing**
 - ▼ June 2017 – DOL substantively abandoned its appeal of TX court’s nationwide injunction against Obama-era white collar exemption rule
 - ▼ But continues to appeal the narrow issue of DOL’s right to establish a minimum salary in order to qualify for an exemption
 - ▼ July 26, 2017 – DOL issued a Request for Information, indicating it is considering a new rule increasing the minimum salary but probably not as much as the Obama rule – “somewhere around \$33,000” - ~\$634/wk

TRUMP ADMINISTRATION & DEREGULATION

▼ The New EEO-1 – **Employer Relief**

- ▼ Until the Obama Administration rule in 2016, EEO-1s were to be filed by September 30 each year (employers with 100 or more employees, federal contractors with 50 or more)
- ▼ Obama era rule implemented much more data-heavy EEO-1 requiring reporting on employee pay in addition to demographics; moved reporting to March of each year
- ▼ **August 2017** – EEOC announces “review and immediate stay” of new EEO-1 form; reporting will continue in March of each year but employers to use old form

Interns and the FLSA

- ▼ In January 2018, DOL indicated that it will apply a “primary beneficiary test” to determine whether interns are employees for FLSA purposes
 - ▼ Primary Beneficiary Test allows courts to examine the economic realities of the relationship between the intern and employer to determine which party is the primary beneficiary
- ▼ In line with recent U.S. Circuit Court rulings rejecting confusing, inconsistent DOL approach
- ▼ Intern vs. Employee also has additional implications, including ACA employer mandate

Interns and the FLSA

▼ Primary Beneficiary Test Considerations:

- ▼ The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
- ▼ The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- ▼ The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- ▼ The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- ▼ The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- ▼ The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

NLRB UPDATE

- ▼ Revised workplace rule standard – *The Boeing Co.* (December 17, 2017)
 - ▼ NLRB overruled prior holding that facially neutral workplace rules unlawfully interfere with protected NLRA rights if the rules would be "**reasonably construed**" by an employee to prohibit the exercise of NLRA rights.
 - ▼ New standard: When evaluating a facially neutral policy, rule, or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (1) the **nature and extent of the potential impact** on NLRA rights; and (2) **legitimate justifications** associated with the rule.
 - ▼ The majority then held that Boeing lawfully maintained a no-camera rule that prohibited employees from using camera-enabled devices to capture images or video without a valid business need and an approved camera permit, finding the rule's impact was relatively minimal and outweighed by important justifications, including national security concerns.
- ▼ Employers may **enforce reasonable policies** requiring the **confidentiality of customer information** among other proprietary information. *Macy's Inc.*, 01-CA-123640 (August 14, 2017)

NLRB UPDATE

- ▼ Protected Activity and “**Opprobriousness**”
 - ▼ **The Rule:** The NLRA prohibits employers from terminating employees for engaging in **protected concerted activity** (engaging in activity for the mutual aid and protection of two or more employees), but even an employee engaged in union activity can lose the protection of the Act when he engages in “**opprobrious conduct.**”
- ▼ *Consider the following examples...*

NLRB UPDATE

Facebook post by an employee where “Bob” is his supervisor who gave him a customer service instruction 5 minutes before the post:

“Bob is such a NASTY MOTHER F@\$KER don’t know how to talk to people!!!! F@\$k his mother and his entire f@\$king family!!!! What a LOSER!!!! Vote YES for the UNION!!!!”

NLRB v. Pier Sixty, LLC, April 21, 2017, Cabranes, J

NLRB:



NLRB UPDATE

Statements *shouted by a white picketing union member to African American employees crossing the picket line to work during a strike:*

“Hey, did you bring enough KFC for everyone? Hey, anybody smell that? I smell fried chicken and watermelon!”

Cooper Tire & Rubber Co. v. NLRB, 8th Cir., No. 16-2721 (Aug. 8, 2017)

NLRB:

Nothing opprobrious here: “[i]mpulsive behavior on the picket line is to be expected, especially when directed against nonstriking employees or strike-breakers.”

Health and Welfare Plan Dollar Limits

	2017	2018
Annual Cost Sharing Limit (self-only coverage)	\$7,150	\$7,350
Annual Cost Sharing Limit (other than self-only coverage)	\$14,300	\$14,700
HDHP Out-of-Pocket Maximum (self-only coverage)	\$6,550	\$6,650
HDHP Out-of-Pocket Maximum (family coverage)	\$13,100	\$13,300
Annual HDHP Deductible (self-only coverage)	Not less than \$1,300	Not less than \$1,350
Annual HDHP Deductible (family coverage)	Not less than \$2,600	Not less than \$2,700
Maximum Annual HSA Contributions (self-only coverage)	\$3,400	\$3,450
Maximum Annual HSA Contributions (family coverage)	\$6,750	\$6,900
Maximum HSA Catch-Up Contribution	\$1,000	\$1,000
Health Flexible Spending Account Maximum	\$2,600	\$2,650

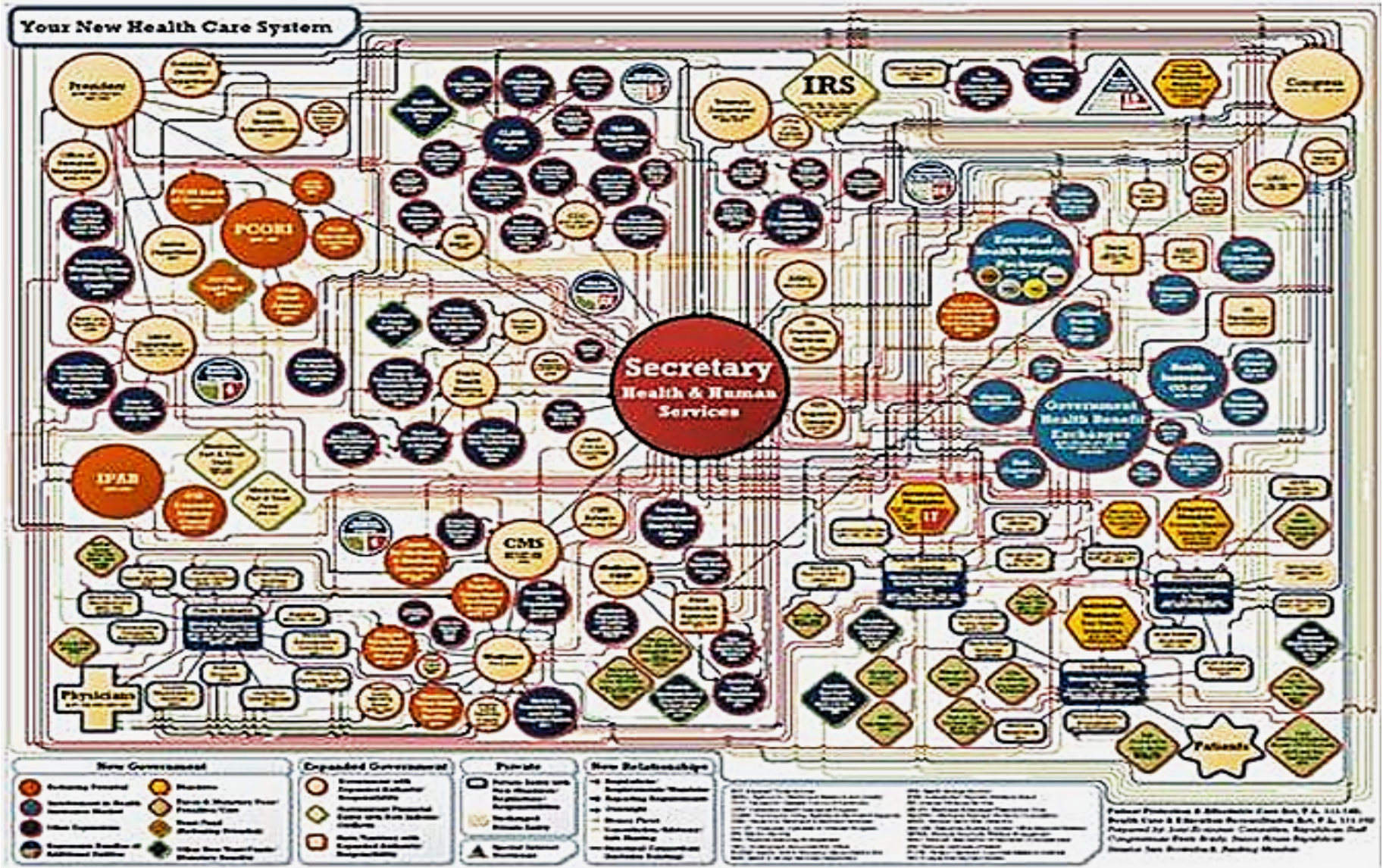
Qualified Retirement Plan Dollar Limits

Applicable Limit	2017	2018
Limit on Section 401(k) deferrals (Section 402(g))	\$18,000	\$18,500
Dollar limitation for catch-up contributions (Section 414(v)(2)(B)(i))	\$6,000	\$6,000
Limit on deferrals for government and tax-exempt organization deferred compensation plans (Section 457(e)(15))	\$18,000	\$18,500
Annual benefit limitation for a defined benefit plan (Section 415(b)(1)(A))	\$215,000	\$220,000
Limitation on annual contributions to a defined contribution plan (Section 415(c)(1)(A))	\$54,000	\$55,000
Limitation on compensation that may be considered by qualified retirement plans (Section 401(a)(17))	\$270,000	\$275,000
Dollar amount for the definition of highly compensated employee (Section 414(q)(1)(B))	\$120,000	\$120,000
Dollar amount for the definition of a key employee in a top-heavy plan (Section 416(i)(1)(A)(i))	\$175,000	\$175,000
Dollar amount for determining the maximum account balance in an ESOP subject to a five-year distribution period (Section 409(o)(1)(C)(ii))	\$1,080,000	\$1,105,000
SIMPLE retirement account limitation (Section 408(p)(2)(E))	\$12,500	\$12,500
Social Security Taxable Wage Base	\$127,200	\$128,700

Disability Claims Procedures

- ▼ **What Plans are affected?**
 - ▼ “Disability” plans
 - ▼ Pension or other retirement plans
- ▼ **What is required?**
 - ▼ Revised claims procedures to provide disability claimants with additional rights and review
 - ▼ Claims procedures should be updated by TPA or plan sponsor
- ▼ **Deadline to revise plan terms: April 1, 2018**

AFFORDABLE CARE ACT UPDATE



AFFORDABLE CARE ACT UPDATE

- ▼ **House – The American Health Care Act**
 - ▼ **Amended AHCA passed in the House on May 4, 2017**
- ▼ **Senate – The Better Care Reconciliation Act**
 - ▼ **Proposed on June 22, 2017**
- ▼ **Senate #2 - The Graham-Cassidy Bill**
- ▼ **Individual Mandate repealed in Tax Law (effective 2019)**

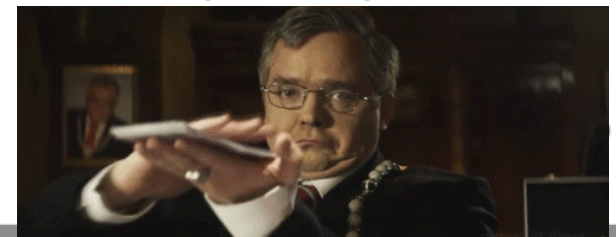
TrumpCare? ObamaCare?

- ▼ **ACA is still the law of the land**
- ▼ **ACA changes in short-term spending bill**
 - ▼ **Cadillac tax further delayed until 2022 (the 40% excise tax on high-cost employer-sponsored group health plans)**
 - ▼ **Additional one-year suspension of the tax on health insurers**
- ▼ **Association Health Plans**
- ▼ **Continue as usual...**
 - ▼ **Employer mandate**
 - ▼ **ACA reporting**

ACA Employer Shared Responsibility Assessments



- ▼ **2015 ESRPs**
- ▼ IRS has issued Letter 226J to employers for which it has determined that, for at least one month in the year, one or more of the employer's full-time employees was enrolled in an exchange plan for which a premium tax credit was allowed (and the ALE did not qualify for an affordability safe harbor or other relief for the employee)
- ▼ Based on information reported to the IRS on Forms 1094-C and 1095-C and information about full-time employees of the ALE that were allowed the premium tax credit
- ▼ Exchange appeals do NOT determine liability for ESRP
- ▼ Initial focus appears to be on Code section 4980H(a) penalty – \$2,080/year or \$173.33/month



ESRP Summary Table

	Information Reported to IRS						
Month	a. Form 1094-C, Part III, Col (a) Minimum essential coverage offer indicator offered to at least [70% or 95%]	b. Form 1094-C, Part III, Col (b) Full-time employee count for ALE member	c. Allocated reduction of full-time employee count for IRC Section 4980H(a)	d. Count of assessable full-time employees with a PTC for IRC Section 4980H(a)	e. Count of assessable full-time employees with a PTC for IRC Section 4980H(b)	f. Applicable IRC Section 4980H provision	g. Monthly ESRP amount
Jan	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Feb	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
March	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Apr	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
May	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
June	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
July	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Aug	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Sep	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Oct	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Nov	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
Dec	[Yes/No]	[xxx]	[xx]	[x]	[x]	[4980H(a)/4980H(b)]	[\$xx,xxx]
						Total Proposed ESRP	[\$xxx,xxx]

ACA Employer Shared Responsibility Assessments

New Process and Forms

- ▼ Letter 226J – Initial IRS Contact regarding ESRP
- ▼ Form 14765 – Employee Premium Tax Credit (PTC) List
- ▼ Form 14764 – ESRP Response
- ▼ Letter 227 – IRS Response
- ▼ Written Request for Pre-assessment Conference
- ▼ Notice CP 220J – Notice and Demand for Payment
- ▼ Response window: 30 days from the date of the Letter
- ▼ Payment options include installment payments

Lessons from the First Employer Shared Responsibility Assessments

- ▼ Initial focus appears to be on Code section 4980H(a) penalty – \$2,080/year or \$173.33/month
- ▼ Significant liability (e.g., \$2.5M)
- ▼ Mailroom should be “on alert”
- ▼ Check your Form 1094-C
 - ▼ If errors, work to correct them
 - ▼ To file or not file?
- ▼ Obtain letter of explanation from service provider
- ▼ Form of your response
- ▼ IRS’s template letter approach can lead to confusion
- ▼ Establish and document ACA Measurement Period (and policy)
- ▼ Available defenses??

Form 1094-C (2017) 120218
Page 2

		(a) Minimum Essential Coverage - Other Indicator		(b) Section 4980H Full-Time Employee Count for ALE Member	(c) Total Employee Count for ALE Member	(d) Aggregated Group Indicator	(e) Reserved
		Yes	No				
23	All 12 Months	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
24	Jan	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
25	Feb	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
26	Mar	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
27	Apr	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
28	May	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
29	June	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
30	July	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
31	Aug	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
32	Sept	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
33	Oct	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
34	Nov	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
35	Dec	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	

Form 1094-C (2017)

2018 Deadlines for 2017 Reports

To IRS

Paper Filers

February 28, 2018

Electronic Filers

April 2, 2018

To Employees

January 31, 2018

* Good faith standard extended, but not for late filing

Brief Update on Tax Law

- ▼ No deduction for sexual harassment settlements involving non-disclosure agreements
- ▼ Tax Credit for Paid FMLA Leave – Businesses can claim a general business credit between of 12.5% and 25% of the amount of wages paid to qualifying employees during any period in which the employees are on FMLA
 - ▼ Rate of payment must be at least 50% of the wages normally paid to the employees
 - ▼ Credit increases .25% for each additional percentage point paid compared to normal wages
 - ▼ Strings attached, including that all qualifying full-time employees have to be given at least two weeks of annual **paid** family and medical leave (all less-than-full-time qualifying employees have to be given a commensurate amount of leave on a pro rata basis)

2018 APSC Programs

- ▼ **How the New Tax Plan Affects Benefits Programs and the Impact to Payroll and Corporate Tax**
 - ▼ February 27, 2018 @ Federal Reserve
 - ▼ Panel discussion featuring moderator Tracy Carbonie with PayCor, legal counsel with Maynard, Cooper & Gale, and a tax advisor from Highlands Accounting Group
- ▼ **What to Expect in a Healthcare Investigation**
 - ▼ May 1, 2018 @ BJCC Complex prior to ALSHRM Conference
 - ▼ Presentation by Carla Gatling from the EBSA and the Department of Labor to discuss “What to Expect in a Healthcare Investigation.”

2018 APSC Programs

- ▼ **Health and Financial Wellness Programs - Changing your Employees Approach to Health and Financial Security**
 - ▼ August 21, 2018 @ Federal Reserve
 - ▼ The discussion will center on the effectiveness of implementing Health and Financial Wellness Programs in your organization.
- ▼ **Identity Theft: Planning for the Future**
 - ▼ November 13, 2018 @ Federal Reserve
 - ▼ We will examine the current state of identity theft, potential future challenges, and how to address those issues.



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