

# EPCRS Adjustments and IRS Newsletters Emphasize Need for Compliance Procedures, New Nondiscrimination Rules for Federal Contractors in Effect on April 8, 2015 and New Worries on Confidentiality Clauses

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## **IRS EPCRS Adjustments and IRS Newsletter Emphasize Value of Compliance Procedures**

While the recent IRS Revenue Procedures 2015-27 and 2015-28 provided welcome relief on corrections of common qualified plan mistakes, overpayment of defined benefit pension plan benefits, participant loan mistakes, and errors in implementing qualified automatic contribution arrangements, certain missed deferral election implementations, and other automatic enrollment arrangements. To obtain the relief from the changes regarding missed deferrals, there are timing requirements that require catching and correcting the mistake quickly, notifying the participant among other requirements. The relief on defined benefit plan overpayments of benefits permits plan sponsors to avoid demanding repayment from the plan participant or beneficiary, provided certain circumstances were satisfied, such as the employer paying the plan the amount of the overpayment with interest. The IRS is considering in what circumstances this relief permitting a plan to avoid requesting repayment of the overpayment from the participant or beneficiary will apply. The IRS indicated in the guidance that it will share its correction and the related conditions with the U.S. Department of Labor. The U.S. Department of Labor has also taken positions in audits regarding the proper handling of correction of benefit overpayments.

The guidance on corrections for less than fully implemented automatic enrollment or automatic contribution requirements lowered the cost of the correction for what the IRS has called the “missed deferral opportunity” from the employer paying 50% of the missed deferral opportunity to only 25% of the missed deferral opportunity which is welcome relief. However, there are a number of conditions that must be satisfied including the new timing requirement that this correction that means it must be caught and corrected very quickly and that the employer provide the employee with a notice regarding the error and the correction be provided very rapidly following the correction. In order to be able to utilize these less costly corrections, the plan should have in place compliance procedures to help it to catch any of these omissions quickly so that the plan will be eligible for the new options. Compliance procedures are the focus point for IRS audits because if in place and followed, the plan is less likely to have missteps in operations. If your plan does not have compliance procedures that fit your plan’s design, they should be developed so you are best able to catch and correct errors in the most cost effective manner and able to respond to the IRS request on audit for those compliance procedures. They do request this information in audits.

## **New Challenges for Confidentiality Clauses with Employees**

Last month the General Counsel of the National Labor Relations Board issued a General Counsel Memorandum 2015-04 outlining and summarizing some recent employer work rules that it had struck down as unfair labor practices and some of which were upheld. A number of these challenges were related to employer confidentiality clauses in employee handbooks prohibiting discussion of certain information and very closely reading employee handbook provisions. Some of the unlawful clauses prohibited employees from disclosing... details about the employer, sharing conversations heard at work with anyone outside of the immediate work group, discussing work matters in public places and sharing anything that is not public information, because these could cause employees to understand that they cannot discuss non-public information such as employee wages, benefits and other terms and conditions of employment.

While this clearly applies to employers with unionized workforces, other employers should also review their employee handbooks because they could be subject to such a charge if a group of employees seeks to take concerted action. Unions have been gaining footholds in many new places, including with private university graduate assistants.

While you may have thought you only needed to worry about labor laws on confidentiality clauses, the Dodd-Frank Act anti-retaliation provision has now been construed by the SEC to also place restrictions on confidentiality clauses.

The SEC recently instituted an enforcement action against a company for using improperly restrictive language in confidentiality agreements with the potential to stifle the whistleblowing process. The SEC announcement issued on April 1 challenged a company's requirement that employees who were witnesses in an internal investigation interview sign confidentiality statements with language warning that they could face discipline or be fired if they discussed the matters in the interview with outside parties without prior approval of the company's legal departments. The SEC found this violated Rule 21F-17 which prohibited companies from taking any action to impede whistleblowers from reporting possible securities violations to the SEC. So before you use a confidentiality clause, be sure your labor and Dodd-Frank/securities lawyers have reviewed it. A company's costs and legal risks from improper confidentiality clauses continue to grow.

### **Effective as of Today- Federal Contractors Must Comply with the Federal Government's Regulations Prohibiting Discrimination Against Members of the LGBT Community**

This is a quick reminder that the regulation discussed in the December 12, 2014 alert impacting the operations of federal contractors is effective today requiring new notices, contract provisions and protections for members of the Lesbian Gay Bisexual and Transgender community. The U.S. Department of Labor's website today announced the effective date and provided the link to the federal government's Office of Personnel Management disclosing the federal government's own policies in this area which can be found at:

<http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/>

For a quick refresher on the regulation's requirements from the prior alert, the relevant alert section is copied below:

### **Federal Contractors Must Provide Protections for LGBT in Notices, Contract Provisions and in Operations Effective On and After April 8, 2015**

While this final regulation primarily impacts federal contractors in employment matters with respect to hiring, workplace rules, advertising for open positions, promoting and demoting and transferring employees, it also applies to the terms, conditions, rates of pay or "other forms of compensation" or training of employees. Thus, this may impact employee benefits as part of the "other forms of compensation" provided. This final regulation prohibits an employer from discriminating in many aspects of employment with regard to an individual's race, color, religion, sex, sexual orientation, or gender identity in the same manner as it is prohibited from discriminating based on an individual's race, color, religion, sex or national origin. The regulation prohibits segregated facilities and requires notices in job advertisements and to be posted by the federal contractor. This final regulation implements President Obama's Executive Order 13673 Issued on July 31, 2014 entitled, "Fair Pay and Safe Workplaces".

***A federal contractor is also required to include a provision in its contracts for services, subcontracts and purchase orders which it enters into on or after April 8, 2015, so HR departments of federal contractors need to be aware that they will need to include new clauses in the contracts with their plan service providers to comply with this regulation if they enter into a new contract or purchase order, etc. on or after April 8, 2015 to comply with the requirements of this regulation.***

The extent to which this extends to require a change in health plan coverage for treatment of gender dysphoria was not addressed specifically, but there is to be no discrimination with respect to term, conditions, rates of pay or other forms of compensation based on sexual orientation or gender identity under the regulation's requirements.

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