



Two New California Employment Laws Now in Effect

Insights

1.14.08

Required Notice of EITC to all Employees

January 1, 2008, is the effective date of the Earned Income Tax Credit Information Act (the Act). This legislation evolved from a California Franchise Tax Board study showing that approximately 460,000 California families qualified, but did not file, for the federal earned income tax credit (EITC.) The EITC Act requires employers on an annual basis to notify their employees of their potential eligibility for the EITC.

Who is Affected?

The Act applies to all California employers who are required to furnish unemployment insurance to their employees under the California Unemployment Insurance Code. These employers must give information about the EITC to all employees who are covered by unemployment insurance, *even if the employee is not actually eligible for EITC.*

Employers have the flexibility to create their own notice explaining how an employee can get Form W-5 and Notice 797 from the IRS in order to apply for the EITC. The simplest notice method is to use the following recommended language found in the statute:

BASED ON YOUR ANNUAL EARNINGS, YOU MAY BE ELIGIBLE TO RECEIVE THE EARNED INCOME TAX CREDIT FROM THE FEDERAL GOVERNMENT. THE EARNED INCOME TAX CREDIT IS A REFUNDABLE FEDERAL INCOME TAX CREDIT FOR LOW-INCOME WORKING INDIVIDUALS AND FAMILIES. THE EARNED INCOME TAX CREDIT HAS NO EFFECT ON CERTAIN WELFARE BENEFITS. IN MOST CASES, EARNED INCOME TAX CREDIT PAYMENTS WILL NOT BE USED TO DETERMINE ELIGIBILITY FOR MEDICAID, SUPPLEMENTAL SECURITY INCOME, FOOD STAMPS, LOW-INCOME HOUSING OR MOST TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PAYMENTS.

EVEN IF YOU DO NOT OWE FEDERAL TAXES, YOU MUST FILE A TAX RETURN TO RECEIVE THE EARNED INCOME TAX CREDIT. BE SURE TO FILL OUT THE EARNED INCOME TAX CREDIT FORM IN THE FEDERAL INCOME TAX RETURN BOOKLET. FOR INFORMATION REGARDING YOUR ELIGIBILITY TO RECEIVE THE EARNED INCOME TAX CREDIT, INCLUDING INFORMATION ON HOW TO OBTAIN THE IRS NOTICE 797 OR FORM W-5, OR ANY OTHER NECESSARY FORMS AND INSTRUCTIONS, CONTACT THE INTERNAL REVENUE SERVICE BY CALLING 1-800-829-3676 OR THROUGH ITS WEB SITE AT WWW.IRS.GOV.

Distributing the Notice

You must give all employees this notice within one week, either before or after, the employees receive an "annual wage summary." In most cases, the "summary" refers to a Form W-2, however, the EITC Act applies to any other annual wage summary, including a Form 1099. Employers usually issue 1099s to non-employees, however, in the event that you do issue a 1099 or other wage summary to an employee, you must also issue the required notice.

The notice may be either hand-delivered to the employee or mailed to the employee's last known address. Posting the notice on an employee bulletin board or sending it through office mail is not sufficient, although the EITC Act encourages employers to distribute the notice by these methods *in addition* to the required delivery methods.

Final Thoughts

The EITC Act states that employers must process IRS Form W-5 for advance EITC payments upon the request of an employee. Employers are already required to do this under federal law, so this provision does not have a practical impact.

Surprisingly, there is no specific penalty for noncompliance or violation of the notice requirement, but an employer could potentially be liable for noncompliance under a general penalty rule in the California Code. Therefore, our advice is to err on the side of caution and distribute this notice annually with the W-2 forms.

San Francisco Health Care Security Ordinance

In November 2006, the Golden Gate Restaurant Association filed a lawsuit challenging San Francisco's Health Care Security Ordinance (HCSO) based on ERISA preemption of state law. A district court hearing on these motions was held on November 2, 2007. The District Court ruled on December 26, 2007 that the HCSO was invalid under ERISA.

On December 27, 2007, the City filed an appeal and an emergency motion for a Stay Pending Appeal, asking the Court of Appeals to allow the HCSO to go into effect while the appeal is pending. The Court of Appeals granted the City's motion for a Stay, which allowed the Ordinance to go into effect on January 9, 2008. Thus, San Francisco's HCSO *is in effect* while the appeal of the district court order which invalidated it is pending. San Francisco's Office of Labor Standards Enforcement has stated that it will enforce the law, starting January 9, 2008.

The HCSO affects employers with 50 or more total employees (regardless of their worksite, job classification or hours worked); this includes both for-profits and non-profits. The HCSO expands on April 1, 2008 to include for-profit employers with 20-49 employees. Non-profits with fewer than 50 employees and for-profit employers with less than 19 employees are exempt from the law. HCSO requires that, every calendar quarter, covered employers make qualifying health care expenditures to or for the benefit of their covered employees.

Definitions

Covered employers are those who 1) meet the size requirement in the above paragraph, 2) engage in business within the City of San Francisco and 3) are required to obtain a valid San Francisco business registration certificate. Whether or not an employer is physically located in San Francisco has no bearing on its status. For leased employees and co-employees under professional employer organizations (PEOs), both the worksite employer/client and the PEO or leasing agency may be considered a covered employer.

Covered employees are persons who 1) have been employed for at least 90 calendar days, including periods of leave (these do not have to be consecutive days), 2) are entitled to payment of minimum wage (excluding owners), and 3) work at least 10 hours per week within San Francisco (this number decreases to 8 in 2009).

Excluded from covered employee status are: 1) managerial, supervisory or "confidential" employees earning more than \$76,851 (or \$36.95/hour) in 2008 (this amount indexed annually); 2) employees eligible for Medicare or Tricare/CHAMPUS; 3) employees covered by the San Francisco Health Care Accountability Ordinance (which covers City contractors); 4) trainees of non-profit organizations, in accordance with a federal bonafide training program; and 5) employees who voluntarily provide written verification that they are covered by another employer's health plan (as an employee or dependent) and waive coverage annually on a specific waiver form.

Health care expenditures are defined as amounts paid to covered employees or to a third party on their behalf (or their spouse, domestic partner, family member or other dependent) for the purpose of providing health care services or reimbursing covered employees for health care services. Health care services include medical, dental and vision care, services or goods which qualify as deductible medical expenses under Section 213 of the Internal Revenue Code, including over-the-counter drugs.

Examples of qualifying health care expenditures include payment of insurance premiums, expenditures by self-insured plans (including administrative fees paid to third parties), contributions to health care flexible spending accounts, health savings accounts and health reimbursement accounts, or payment to the City of San Francisco for the Health Access Program or to establish medical reimbursement accounts with the City. A covered employer may choose to satisfy the required Health Care Expenditures via more than one method. However, a covered employer who chooses to satisfy the requirement by making payments to the City must provide covered employees with a specific written notice.

The required health care expenditure rate is the amount of health care expenditures that a covered employer is required to make for each hour paid for each of its covered employees during a quarter. These rates are as follows:

- Employers with 100+ employees = \$1.76/hour for every hour paid;

- Employers with 50-99 employees = \$1.17/hour paid;
- Beginning April 1, 2008, employers with 20-40 employees = \$1.17/hour paid

These rates will increase by 5% on January 1, 2009, to \$1.85/hour and \$1.23/hour. Effective January 1, 2010, these rates will be set by the City based on the City Health Service System contributions. "Hours paid" includes all hours worked in the City of San Francisco plus any paid time off (if a covered employee also works outside San Francisco, paid time off included will be pro rata based on hours worked in San Francisco).

A covered employer's required health care expenditure is calculated by multiplying the total number of hours paid to each covered employee during the quarter (starting on the first day of the calendar month following 90 days of employment), up to a maximum of 172 hours per month or 516 hours per quarter, by the applicable rate.

Timing and Penalties

Quarterly health care expenditures must be made within 30 days of the end of the preceding quarter; thus, the health care expenditure for the first quarter of 2008 must be made no later than April 30, 2008, although employers are free to begin making expenditures before that time.

If you are a covered employer, you must keep records of health care expenditures made and calculations of minimum health care expenditures required under the law (including wage and hour information) as well as any waiver and notice given regarding payments to the City for 4 years after a covered employee's employment terminates.

Covered employers must also annually report their compliance to the City. Failure to make the health care expenditure penalties include payment of the health care expenditure and/or reimbursement of a covered employee's out-of-pocket expenses during the time of failure and an administrative penalty of 1.5 times the unpaid expenditure plus interest of 10% (total administrative penalty maximum of \$1,000/covered employee per week of failure).

In the coming weeks, the Office of Labor Standards Enforcement will send all registered businesses the 2008 HCSO Notice and the first Annual Reporting Form. All covered employers (those with 20 or more employees) are required to report on their 2007 health care spending, in order to provide the City with a baseline understanding of current practices.

If you have questions about either of these two new laws, please contact an attorney in one of our California offices:

Irvine 949.851.2424

San Diego 858.597.9600

San Francisco 415 490 9000

This Legal Alert provides an overview of important aspects of two recent laws. It is not intended to be, nor should it be construed as, legal advice on any specific factual situation.