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Employment Law Outlook

Winter 2019

NLRB Makes It Easier To Classify Workers As Independent Contractors Rather Than Employees

William M. Furr

On January 25, 2019, in a three-one decision, the National Labor Relations Board made it easier for employers to classify workers as independent contractors rather than employees. Now under a Republican majority, the NLRB reversed the Obama-Era decision in *FedEx Home Delivery*.

In *SuperShuttle DFW, Inc.*, the NLRB found SuperShuttle's shuttle drivers to be independent contractors based on the following facts: the workers set their own schedules; the workers only worked when they wanted to work; they owned or leased their vans and therefore had a significant investment in their business; the workers received all of the fares from customers except for the franchise fees they paid to SuperShuttle; and the workers signed independent contractor agreements with SuperShuttle. The NLRB rejected the union's argument that the drivers should be considered employees because they were required to wear uniforms, were subject to discipline, and were prohibited from working for SuperShuttle's competitors.

The NLRB's decision in *SuperShuttle* reversed its 2014 *FedEx Home* decision that had made it more difficult to establish independent contractor status. The decision in *FedEx Home* stressed the employer's right to control the manner and means of work performed by the worker. The NLRB's ruling in *SuperShuttle* places a greater emphasis on entrepreneurial opportunity in determining whether a worker is an independent contractor or an employee. The ruling makes it easier for a business to establish independent contractor relationships with its workers. Consequently, the NLRB's decision will make it more difficult for labor unions to organize workers who are treated as independent contractors because the National Labor Relations Act does not permit independent contractors to unionize.■

Upcoming H-1B Visa Lottery and Changes to the H-1B Visa Lottery Process

James B. Wood

Employers (and their immigration attorneys) are preparing for the FY2020 H-1B season, which starts the first week in April. At this time employers will submit their H-1B visa petitions to the U.S. Citizenship and Immigration Services (USCIS), which is when these petitions are first eligible. The H-1B visa program is designed to allow employers to hire foreign nationals for specialty occupations or the occupations wherein a Bachelor's degree in a specialty field is required.

Currently, Congress has allotted 65,000 "Regular" H-1B visas and an additional 20,000 Master's Cap H-1B visas to be issued each fiscal year. The Master's Cap visas are those visas set aside and available specifically for graduates of a Master's degree program from a U.S. college or university.

It is critical to file these H-1B cases within the first week of April. If USCIS receives a sufficient number of cases in the first five business days of April they will stop accepting petitions and conduct an H-1B lottery. To date, the lottery has been conducted by USCIS first randomly selecting petitions that will apply to the 20,000 Master's Cap H-1B visas. Any Master's Cap-eligible cases not selected in the initial lottery are then rolled into the regular lottery wherein USCIS selects the cases for the 65,000 regular H-1B visas. At the conclusion of this lottery process, any cases not selected are then returned to the petitioners and rejected on the basis of not being selected in the lottery.

For the most part, this process has remained consistent over the past few years. However, as a result of President Trump's "Buy American and Hire American" Executive Order instructing the Department of Homeland Security to "propose new rules and issue new guidance…to

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protect the interests of United States workers…" and to "suggest reforms to ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries," USCIS published a final rule on January 31, 2019 which makes two critical and major changes to the H-1B visa process effective April 1, 2019.

Specifically, this new rule: (1) adds an electronic registration requirement for employers seeking to file H-1B Master's Cap-subject petitions; and (2) reverses the order of the lottery USCIS will use to select the 65,000 regular H-1B petitions and the additional 20,000 Master's Cap H-1B cases.

The electronic registration requirement is a major change that will alter the way H-1B season is conducted. However, while the new rules go into effect on April 1, 2019, USCIS has suspended the electronic registration requirement for this year's H-1B season in order to complete the necessary testing to ensure the system is fully functional. USCIS does anticipate that the system will be implemented next year. Ultimately, once the new system is implemented, USCIS will notify employers that the system is open and provide at least 14 days prior to April 1 to allow employers to complete the appropriate registration – a period USCIS will refer to as the "initial registration period." In this registration period, employers will be required to register each potential H-1B employee-beneficiary on the system and provide basic information about the person and the proposed position.

At the conclusion of the initial registration period, USCIS will determine whether a sufficient number of registrations has occurred that necessitate a lottery, or whether the system should remain open. If USCIS finds that the number of registrations received is sufficient to reach the H-1B visa caps, then USCIS will conduct the H-1B lottery from the pool of timely-filed electronic registrations and only those who are selected will be eligible to file a full petition and receive adjudication. If a registration is selected, USCIS will notify the employer that they are eligible to file an H-1B petition within a designated filing period which would be at least 90 days. A benefit of this process would be that employers would not have to go through the time and expense of preparing a full H-1B petition unless and until they are notified that a case has been selected.

As mentioned, the lottery process will also undergo a major change starting this year. Specifically, instead of selecting Master's Cap cases first, USCIS will pool all H-1B cases and select the initial cases for the 65,000 regular H-1B cap initially. Then, USCIS will take any remaining, eligible Master's Cap cases and select an additional 20,000 for the Master's Cap. By doing this, they will increase the initial regular H-1B cap pool by at least 20,000 cases where the employee holds a Master's degree or higher from a U.S. institution of higher education. USCIS estimates that this reversal could lead to 16% (or 5,340) more cases selected where the H-1B beneficiary holds a higher level degree from a U.S. college or university.

We will continue to monitor developments related to these changes and keep you informed, as it is expected that there may be legal challenges to the new process.■

IRS Examples - HSA Contributions Employers Can Correct

Employers cannot recoup mistaken contributions to an employee's HSA unless the employee was never an eligible individual or the amount exceeds the statutory limit. Recently, the IRS has provided examples of additional mistaken contributions caused by administrative or process errors that employers may correct:

- Amount deposited in an employee's HSA for a pay period exceeds the amount shown on the employee's HSA salary reduction election.
- An employer contribution amount is mistakenly deposited because an incorrect spreadsheet is accessed or employees with similar names are confused with each other.
- Incorrect amount deposited in an employee's HSA because it is incorrectly entered by a payroll administrator (whether in-house or third-party).
- Amount received as a second contribution because duplicate payroll files are transmitted.
- Amount received as a contribution because a change in employee payroll elections is not processed timely so that amounts withheld and contributed are different than the employee elected.
- Amount received because an HSA contribution amount is calculated incorrectly (e.g., employee elects a total amount for the year that is allocated over an incorrect number of pay periods).
- Wrong amount received because the decimal position is set incorrectly resulting in a contribution greater than intended.

2019 - Defined Contribution Changes

Cher E. Wynkoop **Corina V. San-Marina**

Employers who sponsor a 401(k) plan or a 403(b) plan that offers hardship withdrawals have to decide how and when to implement new changes introduced by the Bipartisan Budget Act (Budget Act) of 2018. In November 2018, the Internal Revenue Service (IRS) issued proposed regulations answering many questions left unanswered by the Budget Act. While the regulations are proposed, they probably won't change significantly when issued in final form, and because the rules are effective January 1, 2019, employers and plan administrators should consider their options and check with their service providers about implementing changes in plan operations as soon as possible.

The changes made by the Budget Act are summarized below.

Six-month suspension of elective contributions is eliminated

Under the prior law, in an attempt to discourage hardship withdrawals, participants were prohibited from making elective or employee contributions to any employer plan for six months after taking a hardship withdrawal. Under the new law, plans are prohibited from restricting contributions following hardship withdrawals made in plan years beginning on or after January 1, 2020. Plans can choose to remove the contribution restriction as early as their plan year beginning on or after January 1, 2019, including for participants who took a withdrawal and were restricted from making contributions in the six months prior to January 1, 2019.

This change should make it easier to administer hardship withdrawals. Employers that sponsor nonqualified deferred compensation plans that allow for hardship withdrawals will also need to be amended, and deferral to those plans can no longer cease when a participant takes a withdrawal from a qualified plan.

No longer required to first take a loan

Under the prior law, if a plan wanted to take advantage of a safe harbor to determine if a withdrawal is necessary to satisfy a financial need, participants were required to take all other withdrawals and loans from employer plans. Under the new law, all plans must require participants to take all other distributions from qualified and nonqualified plans before taking a hardship withdrawal, but participants are no longer required to take available loans. This provision is optional. Elimination of the loan requirement will simplify plan administration.

Note that, if the hardship processing is to be handled by a recordkeeper and there are other qualified or non-qualified plans that allow in-service distributions, a process must be established to ensure this requirement is met.

Participant representation of no available assets to satisfy need

Under the prior law, the employer had to determine, based on all facts and circumstances that the participant doesn't have other resources to meet the need, which previously included mortgaging a second home. Beginning no later than January 1, 2020 (for calendar year plans), participants must be required to provide a written statement (which can be given electronically) that they don't have cash or other liquid assets to satisfy the immediate and heavy financial need. The plan administrator can rely on the participant's statement unless the plan administrator has actual knowledge to the contrary. This eliminates the need for the employer to delve into a participant's personal financial situation and the participant's need to exhaust illiquid assets in a time of crisis.

Investment earnings can now be distributed

Under the prior law, plans were prohibited from distributing investment earnings accrued after 1988 on elective contributions in a hardship withdrawal. Only the amount of the original elective contribution could be distributed. Now, earnings on elective contributions can be distributed in a 401(k) plan hardship withdrawal. This change is optional, and plans can continue to restrict distributions to just contribution amounts and no earnings if desired, but most plans will likely find retaining contribution data burdensome. It does not apply to 403(b) plans, which are still prohibited from distributing investment earnings in a hardship withdrawal.

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Safe harbor contributions, QNECs, and QMACs can now be distributed

This change is also optional and applies only to 401(k) plans and 403(b) plans that are funded with an insurance company annuity and not a custodial account. Since many 403(b) plans use a custodial account, many 403(b) plans won't be able to distribute safe harbor contributions, QNECs, and QMACs.

Expanded list of "immediate and heavy" financial needs

One more automatic "immediate and heavy" need has been added: the need to cover expenses and losses on account of a federally declared disaster. The deemed heavy need for damage to a principal residence that would qualify for a casualty loss deduction has also been changed. It now states that qualification as a casualty loss will be determined without the late 2017 changes to the casualty loss deduction rules.

Documentation deadlines – amendments and communication to participants

While this gives until the end of 2021 for most plans to document how they implemented these changes, the better practice would be to amend closer in time to when the change is effective. Participants should be notified of hardship withdrawals changes before or shortly after they are implemented so that hardship withdrawals are effectively available to everyone and there is no potential for discrimination in the availability of hardship withdrawals.■

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