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# Tech Flex

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NATIONAL ACCOUNT SERVICES

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## ORIENTATION PERIOD FINAL REGULATIONS RELEASED

On June 20, 2014, the Departments of Labor, Treasury, and Health and Human Services (the Departments) released final regulations pertaining to the 90-day waiting period limit imposed under the Affordable Care Act (ACA) and the allowable "orientation period."

### Background

Under the ACA, for plan years beginning on or after January 1, 2014, a group health plan or health insurance issuer offering group health plan coverage is prohibited from requiring that an otherwise eligible employee wait longer than 90 days for enrollment and coverage to be effective under the terms of the plan. The 90 days is comprised of all calendar days including weekends and holidays. Being "otherwise eligible to enroll" under the terms of the plan means the individual has satisfied the plan's substantive eligibility terms. For example:

- Being in an eligible job classification
- Achieving job-related licensure requirements specified in the plan's terms
- Meeting a reasonable and bona fide employment-based orientation period

On February 24, 2014, the final 90-day waiting period regulations were published in the Federal Register. Proposed regulations were also published allowing plans to use "orientation periods" of up to one month in addition to the 90-day waiting period as long as the period was a "reasonable and bona fide employment-based orientation period."

### Orientation Period Final Regulations

The final regulations regarding the orientation period, as released on June 20, 2014, stated that the orientation period will not violate the 90-day waiting period rule if the following requirements are met:

- The period is not more than one month
- The 90-day waiting period begins on the first day after the orientation period

During this one-month period, according to the Departments, the employer and employee can:

- Evaluate whether the employment situation is satisfactory to both parties
- Begin standard orientation and training procedures

Under the final regulations, the one-month period is determined by adding one calendar month and subtracting one calendar day, measured from an employee's start date in a position that is otherwise eligible for coverage. For example, if an employee's start date is May 3, the last permitted day of the orientation period is June 2. In another example, if the employee's start date is October 1, the last permitted day of the orientation period is October 31.

If there is not a corresponding date in the next calendar month when adding a calendar month, the last permitted day of the orientation period is the last day of the next calendar month. For example, if the employee's start date is January 30, the last permitted day of the orientation period is February 28 (or February 29 in a leap year).

The preamble to the final regulations on orientation periods also stipulates that adherence to the 90-day waiting period and orientation period rules will not always result in compliance by an employer with the ACA employer mandate rules under Internal Revenue Code Section 4980H. An employer subject to the employer mandate may have to pay a penalty if the employer does not offer affordable minimum coverage to certain newly hired, full-time employees by the first day of the fourth calendar month following their start date.

The orientation period final regulations apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2015. However, for the remainder of 2014, employers may rely on the proposed orientation period regulations, which are substantively consistent with the final regulations.

For a copy of the final orientation period final regulations, please click on the link provided below.

http://www.gpo.gov/fdsys/pkg/FR-2014-06-25/pdf/2014-14795.pdf

## SUPREME COURT RULES ON ACA CONTRACEPTIVE COVERAGE MANDATE

The Supreme Court issued an opinion in *Burwell v. Hobby Lobby Stores, Inc.* on June 30, 2014, that addresses whether a closely held business's health plan must comply with the mandate under the Affordable Care Act (ACA) to provide certain contraceptive benefits if providing such benefits would violate the sincerely held religious beliefs of the business owners. In a 5-4 decision, the Court ruled that regulations issued by the Department of Health and Human Services (HHS) violated the Religious Freedom Restoration Act (RFRA) by requiring closely held, faith-based for-profit businesses to provide contraceptive benefits to their employees.

### Background

The ACA requires non-grandfathered group health plans to cover certain preventive care and screenings without any cost sharing requirements. Guidelines issued by the Health Resources and Services Administration (HRSA) of the HHS require that a number of contraceptive methods approved by the Food and Drug Administration be furnished by non-grandfathered health plans without any cost sharing requirements. The HRSA guidelines exempt religious employers from this mandate. Further, regulations issued by HHS permit religious non-profit organizations to request that their insurance carrier (or third-party administrator) exclude contraceptive coverage from the non-profit's plan and provide plan participants with separate payments for contraceptive services without imposing any cost sharing requirements on the plan participants or costs on the non-profit.

### Supreme Court Decision

The plaintiffs in this case, Conestoga Wood Specialties Corp., Hobby Lobby Stores, Inc., and Mardel, are all closely held businesses with owners who have religious convictions against the use of certain types of contraceptive methods. The plaintiffs sued HHS to challenge the contraceptive mandate under the RFRA. The RFRA prohibits the government from burdening a person's exercise of religion, unless the action is (i) in furtherance of a compelling governmental interest and (ii) the least restrictive means of furthering that compelling government interest. A divided Supreme Court found that closely held,

for profit employers are “persons” who can avail themselves of the protection of RFRA. The Court also held that the HHS’s regulations regarding the contraceptive method mandate do not comply with RFRA since there were other less restrictive means for HHS to further its objective of providing no-cost contraceptive methods to women.

The Court’s decision is limited to whether certain closely held businesses will have to comply with the ACA mandate to provide the full range of contraceptive methods specified by HRSA if the provision of those methods would violate the religious beliefs of the owners of the businesses. The various ACA insurance market reforms, coverage mandates and individual and employer mandates remain in place after the Court’s decision.

For a copy of the Supreme Court opinion please click on the link provided below.

http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf

## UNPRECEDENTED FUTA TAX INCREASES MAY APPLY IN 2014

The Federal Unemployment Tax Act (FUTA) tax rate is normally 0.6% of wages paid up to a limit of $7,000 per worker, or $42 per employee per year. However, employers in as many as 13 states and the U.S. Virgin Islands may pay an increased FUTA tax rate in January 2015, based on FUTA taxable wages paid in the affected jurisdictions during 2014.

As background, for-profit employers pay federal and state unemployment insurance (UI) taxes on wages paid. The FUTA tax rate is nominally 6.0%, but includes a credit of 5.4% for payment of state UI taxes, making the effective FUTA tax rate 0.6 %. However, when state UI funds are depleted, states draw from a designated federal loan account, and if such loans are not repaid within two years, part of the 5.4% FUTA tax credit is reduced, thereby increasing the effective FUTA tax rate in affected states.

When this “credit reduction” applies, the FUTA tax typically increases by 0.3%, or $21 per employee, payable in January of the following calendar year with Internal Revenue Service (IRS) Form 940. This credit is further reduced annually by 0.3% until loans are repaid.

In addition, because many of the jurisdictions affected will have had outstanding FUTA debt for five years, they may be subject to a special “Benefit Cost Ratio (BCR)” add-on tax in 2014, which could increase the FUTA tax by more than the typical 0.3% per year. The BCR add-on is less predictable but more substantial; for example, California’s effective FUTA rate is expected to increase from 1.5% to 1.8% due to credit reduction alone in 2014. If deemed to be in effect, the BCR add-on tax would add another 1.5%, for a total of 3.3%. The combination of credit reduction and BCR could result in a five-fold increase over the normal FUTA tax rate.

Example: ABC Corporation pays wages of $50,000 to the corporation’s sole employee for 2014. ABC Corporation’s FUTA tax due on the individual’s wages paid in 2014 would normally be $42 ($7,000 x 0.6%). If the employee worked in California, a credit reduction state, and if the BCR add-on tax is deemed to apply, the total FUTA tax would be $231. For additional information, please click on the following IRS link. http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/FUTA-Credit-Reduction

The U.S. Department of Labor (DOL) has identified the states that could be subject to the FUTA BCR add-on and/or credit reduction for 2014. These include:

| State | 2013 FUTA Rate | 2014 FUTA Rate | 2014 Estimated BCR Add-on | Total 2014 Potential FUTA Rate | FUTA Tax Per Employee | Increase Over Normal |
|---|---|---|---|---|---|---|
| Arkansas | 1.5% | 1.8% | 0.5% | 2.3% | $161 | 283% |
| California | 1.5% | 1.8% | 1.5% | 3.3% | $231 | 450% |
| Connecticut | 1.5% | 1.8% | 0.5% | 2.3% | $161 | 283% |
| Delaware | 1.2% | 1.5% | 1.5% | | $105 | 150% |
| Georgia | 1.5% | 1.8% | 0.6% | 2.4% | $168 | 300% |
| Indiana | 1.8% | 2.1% | 1.2% | 3.3% | $231 | 450% |
| Kentucky | 1.5% | 1.8% | 1.0% | 2.8% | $196 | 367% |
| Missouri | 1.5% | 1.8% | 0.4% | 2.2% | $154 | 267% |
| New York | 1.5% | 1.8% | 0.7% | 2.5% | $175 | 317% |
| North Carolina | 1.5% | 1.8% | 0.5% | 2.3% | $161 | 283% |
| Ohio | 1.5% | 1.8% | 1.4% | 3.2% | $224 | 433% |
| Rhode Island | 1.5% | 1.8% | 1.0% | 2.8% | $196 | 367% |
| South Carolina | 0.6% | 2.1% | 0.5% | 2.6% | $182 | 333% |
| Virgin Islands | 1.8% | 1.8% | 1.6% | 3.4% | $238 | 467% |

*Source: U.S. Department of Labor, June 18, 2014*

Employers in the credit reduction states should plan on increased FUTA taxes in 2014 (payable in January 2015). However, states can apply for waivers or pay off FUTA loans during the year to avoid these additional taxes, and many states are announcing such actions. The U.S. DOL will track waiver requests and loan repayments, and determine in mid-November whether additional FUTA taxes will apply to specific states for 2014.

If ADP is responsible for filing Form 940 for your organization, ADP will automatically calculate and pay any additional FUTA tax due as a result of FUTA credit reductions, and you will receive an invoice in January 2015 for credit reduction amounts due with your 2014 IRS Form 940.

## TWO MORE STATES TO INCREASE MINIMUM WAGE

The states of Massachusetts and Rhode Island have enacted legislation to increase the minimum wage as follows.

### MASSACHUSETTS

On June 26, 2014, Massachusetts Governor Deval Patrick signed into law S. 2195, "An Act Restoring the Minimum Wage and Providing Unemployment Insurance Reforms" which gradually raises the minimum wage to $11 incrementally over the next three years as follows. The current minimum wage in Massachusetts is $8.00 per hour.

| | |
|---|---|
| January 1, 2015 | $9.00 per hour |
| January 1, 2016 | $10.00 per hour |
| January 1, 2017 | $11.00 per hour |

It is also important to note that S. 2195 amends the state "Minimum Fair Wage Law" to provide that in no case shall the minimum wage rate be less than 50 cents higher than the federal minimum wage rate (Currently the law says no less than 10 cents higher than the federal rate).

The minimum cash wage for tipped employees will also increase as follows:

| | |
|---|---|
| January 1, 2015 | $3.00 per hour |
| January 1, 2016 | $3.35 per hour |
| January 1, 2017 | $3.75 per hour |

Tipped employees are service workers who regularly and customarily receive more than $20 a month in tips. The combination of cash wages plus tips received must equal at least the state minimum wage.

For a copy of S. 2195 please click on the link provided below.

https://malegislature.gov/Bills/188/Senate/S2195

## RHODE ISLAND

On July 3, 2014, Rhode Island Governor Lincoln Chafee signed into law two bills (H . 7194A and S.2249A) that will raise the minimum wage in the state by $1.00 per hour. The current minimum wage in Rhode Island is $8.00 per hour. Effective January 1, 2015, the Rhode Island minimum wage rates will be as follows:

- The minimum wage rate will be changing from $8.00 per hour to $9.00 per hour.
- Tipped employees must be paid a minimum hourly rate of $2.89 per hour in direct wages (no change). Therefore, the maximum tip credit will be increasing from $5.11 to $6.11 per hour.
- The percentage for minors, ages 14 and 15 remains at 75% of the effective minimum wage for the first 24 hours. As a result, the rate will increase from $6.00 to $6.75.
- The percentage for a full time student under the age of 19 remains at 90% of the effective minimum wage. As a result, the rate will increase from $7.20 to $8.10.

For a copy of the enacted bills please click on the links provided below:

**H. 7194A**

http://webserver.rilin.state.ri.us/billtext14/housetext14/h7194a.htm

**S. 2249A**

http://webserver.rilin.state.ri.us/billtext14/senatetext14/s2249a.htm

## REVISION OF DEFINITION OF "SPOUSE" UNDER FMLA PROPOSED

On Friday June 20, 2014, the United States Department of Labor (DOL) announced a Notice of Proposed Rulemaking (NPRM) to revise the definition of spouse under the Family and Medical Leave Act of 1993 (FMLA). This proposed change was a result of the United States Supreme Court's June 26, 2013 decision in *United States v. Windsor*, which found section 3 of the Defense of the United States Supreme of Marriage Act (DOMA) to be unconstitutional. The NPRM proposes to amend the definition of spouse so that eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouse or family member regardless of where, they live.

Currently the FMLA defines the term "spouse" as follows:

"Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized." (825.800).

Consequently an employee who resides in a state that does not recognize same-sex marriage would not be eligible to take FMLA leave in relation to their same-sex spouse.

The NPRM proposes to define the spouse as follows:

"Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into at least one State. This definition includes an individual in a same-sex or common law marriage that either (1) was entered into in a State that recognizes such marriages or, (2) if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State."

The adoption of the proposed definition of the term "spouse" will result in eligible employees in legal same-sex marriages being able to take FMLA leave to care for their spouse or family member regardless of where there reside.

The NPRM has yet to be published in the Federal Register but "will specify the dates of the public comment period."

It is important to note that the NPRM does not provide a proposed effective date of the change. More information will be forthcoming as it becomes available.

For a copy of the DOL announcement please click on the link provided below:

http://www.dol.gov/whd/fmla/nprm-spouse/

Please click on the link below for a copy of the NPRM:

http://www.dol.gov/whd/fmla/nprm-spouse/NPRM.pdf

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