

## Employers Face More Compliance Challenges



Gerald C. Davis

This past January, the Michigan Unemployment Insurance Agency (MUI) mailed a new determination to employers – Form UIA 6367, Notice of Determination of Employer Charging (Notice). The MUI uses this form to notify employers that they have the potential to be charged for (unemployment) claims for which the employer does not provide timely or adequate information in the calendar year.

Michigan law provides that if an employer or its agent has demonstrated a pattern of failing to timely or adequately respond to Agency requests for information, then benefits paid to a claimant will be charged to that employer's account. State law defines what constitutes a "pattern" in this context as the following: *MCL 421.20(a) states that "pattern" means that the number of failures must be more than four in number and constitute two percent (2%) or more of all the requests directed to the employer during the prior calendar year.*

In order to determine a pattern, the Agency established a baseline date to ensure that an employer's failure to timely or adequately respond does not meet the requirements imposed by State law. The Agency then gathers, tracks, and analyzes the response data to determine, on an annual basis, which employers will be charged.

The Notice contains the information necessary for the employer to protest if they believe they were timely and designated as unresponsive in error. The Notice also includes a list of the cases (claimants) upon which the Notice was based and the criteria applied. Having established a pattern does not automatically indicate that the employer will be charged. The provision is only applied if the employer has established a pattern AND is not timely or adequate in responding on the current claim.

The rule from this new procedure is that, even if an employer does not wish to contest a claim, it is important that the employer responds to a request for information from the Agency. If, for example, the former employee voluntarily quit employment, that employee would not qualify for unemployment compensation benefits, but sometimes the employer would not respond if the employer agrees with the Agency's determination. However, fail-

ing to respond is counted as an untimely or inadequate response and will impact the annual evaluation.

In the current version of the Notice, the Agency recites that the employer's account will not be credited for any claims filed during the calendar year for which the employer does not provide timely or adequate information. In my opinion, this qualification is temporary. Why else would the Agency create this elaborate procedure to identify employers who have failed to timely respond to Michigan Unemployment Insurance Agency inquiries?

The American system of jurisprudence strongly disfavors imposing liability or guilt legislatively without a formal adjudication on a case-by-case basis. A Bill of Attainder is defined as a special legislative enactment that imposes penalty without a judicial trial upon a particular person or class of persons. A Bill of Attainder is thus an act of the legislature finding a person guilty without a trial, contrary to the United States Constitution, Article I, Section 9, Paragraph 3, that provides no "Bill of Attainder or ex post facto law will be passed." An ex post facto law is a law that retroactively changes the legal consequences or status or actions that were committed, or relationships that existed, before the enactment of the law. In other words, it is a law that makes illegal an act that was legal when committed, or increasing the penalties for an infraction after it has been committed, or otherwise changes the rules of evidence or makes conviction easier. Interpretation of the ex post facto provision is therefore liberally interpreted.

The Notice constitutes a new Agency form and a new process, which undoubtedly will be court-tested to determine its efficiency, fairness, legality and, perhaps, its constitutionality, but in the interim, all employers are advised to respond to each Notice received from the MUI and requests for information, whether they agree with the decision, statement or conclusion or not.

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## Contributing to a Roth IRA through the Backdoor



Linda Davis Friedland

**M**any high income earners believe that they cannot contribute to a Roth IRA. This is because they are unaware of the loophole they can use by contributing through the backdoor.

The income limitations imposed by the Internal Revenue Service create the perceived barrier. For 2016, the income and contribution limits for a Roth IRA are as follows:

| Filing Status  | Modified Adjusted Gross Income       | Contribution Limit       |
|--|--------------------------------------|--------------------------|
| <b>Married, Filing Jointly</b>   | <\$184,000                           | Up to the limit*         |
|  | ≥ \$184,000, but less than \$194,000 | Phased Out Amount        |
|  | ≥\$194,000                           | Ineligible               |
| <b>Married, Filing Separately (lived with spouse during the year)</b>  | <\$10,000                            | A reduced amount         |
|  | ≥10,000                              | Ineligible to contribute |
| <b>Single, Head of Household, Married Filing Separately (did not live with spouse at any time during the year)</b> | <\$117,000                           | Up to the limit*         |
|  | ≥\$114,000, but less than \$132,000  | Phased Out Amount        |
|  | ≥\$132,000                           | Ineligible to Contribute |

\*The limit on contributions for 2016 for all traditional and Roth IRAs: \$5,500.00 (\$6,500.00 if age 50 or older).

Despite the flurry of recent tax legislation, the income limits have remained in place for contributions to a Roth IRA. However, for conversions from a Traditional IRA to a Roth IRA, the Tax Relief Unemployment Insurance Reauthorization and Job Creation Act of 2010 removed these income limits, creating a backdoor for interested investors to utilize. To contribute to a Roth IRA through the backdoor, follow these steps:

**Step 1: Consult with a tax adviser to determine whether a Roth IRA is the best retirement vehicle for you.**

**Step 2: Contribute to a non-deductible, Traditional IRA up to the contribution limit.**

- Your contribution will most likely be non-deductible given the income limits, however, contributions to a Roth IRA are not tax deductible anyway.
- Your contribution will be your “cost basis” for tax purposes.

**Step 3: Convert your Traditional IRA to a Roth IRA.**

This process will be much easier if both your Traditional IRA and Roth IRA are held with the same custodian, and if the deposit to the Traditional IRA and the conversion to a Roth IRA, are part of one seamless transaction.

- Do not confuse “conversion” with “distribution,” the latter of which will subject you to a 10% penalty if you are under age 59 ½.

- The amount of the conversion will be limited to the \$5,500.00 (or \$6,500.00, if over age 50) assuming that a new Traditional IRA is being opened just for this purpose.
- For those with an existing Traditional IRA, the limit will be the balance of the account. Keep in mind, however, that the amount of the conversion will have to be reported as ordinary income, so it may be best to convert smaller portions of the existing Traditional IRA over a number of years.
- In determining whether it would be better to convert smaller portions of a Traditional IRA over a number of years, consideration should be given to whether the amount of the conversion will bump you up to a higher tax bracket.
- More likely than not, if requested, your custodian will leave one penny in your Traditional IRA account so that this process can be repeated every year. (Be sure to ask if interested.)

**Step 4: Make note of any income tax due as a result of the conversion to the Roth IRA.**

- The income tax due will be zero or close to zero if the non-deductible deposit into the Traditional IRA is followed by an immediate conversion into a Roth IRA.
- If the conversion results in a higher tax bracket, or more income tax due than the budget allows, then work with your custodian to reverse the process.

**Step 5: Notify the Internal Revenue Service.**

Make sure that IRS Form 8606 is filed with the income tax return for each year that a backdoor Roth IRA contribution is made, in order to alert the IRS that the deposit into the Traditional IRA is non-deductible. This will also help maintain records of the cost basis.

### Roth 401(k) Plans Offered through Employer

For those who have access to a Roth 401(k) Plan through work, this could be a viable alternative – or addition to the Roth IRA. Roth 401(k)s have no income limits, but for 2016, the contribution limit is the same as for a regular 401(k) - \$18,000 (\$24,000 if age 50 or over). Contributions can be made to both a Roth 401(k) and a regular 401(k) in the same year, so long as the contribution does not exceed the \$18,000/\$24,000 limit.

The most noteworthy distinction between a Roth IRA and a Roth 401(k), is that the Roth 401(k) is subject to the same minimum distribution rules as a traditional or regular 401(k). Of the three vehicles, the Roth IRA offers the most flexibility in retirement, although contributions are more difficult during the accumulation years for high income earners. The chart on page 3 can provide assistance in determining whether a Roth IRA, Roth 401(k), or a traditional or regular 401(k) is the best option for your particular situation.

*continued on page 3*

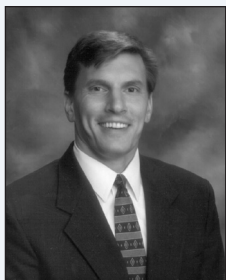
## Comparison of Roth 401(k), Roth IRA, and Traditional 401(k) Retirement Accounts

|                                      | Designated Roth 401(k) Account  | Roth  | Traditional, Pre-Tax 401(k) Account   |
|--------------------------------------|---|---|---|
| <b>Contributions</b>                 | Designated Roth employee elective contributions are made with after-tax dollars.  | Roth IRA contributions are made with after-tax dollars.   | Traditional, pre-tax employee elective contributions are made with before-tax dollars.        |
| <b>Income Limits</b>                 | No income limitation to participate.  | Income limits:<br>• 2016- modified AGI married \$194,000/single \$132,000<br>• 2015 - modified AGI married \$193,000/single \$131,000   | No income limitation to participate.  |
| <b>Maximum Elective Contribution</b> | Aggregate employee elective contributions limited to \$18,000 in 2015 and 2016 plus an additional \$6,000 for employees age 50 or over.   | Contribution limited to \$5,500 for 2016, plus an additional \$1,000 for employees age 50 or over (\$6,500).  | Same aggregate limit as Designated Roth 401(k) Account  |
| <b>Taxation of Withdrawals</b>       | Withdrawals of contributions and earnings are not taxed provided it's a qualified distribution – the account is held for at least 5 years and made:<br>• On account of disability,<br>• On or after death, or<br>• On or after attainment of age 59½. | Same as Designated Roth 401(k) Account and can have a qualified distribution for a first time home purchase.<br>Note:<br>• Contributions (direct) may be withdrawn anytime, without tax or penalty (make sure a record is kept of contributions).<br>• Conversions may be withdrawn without tax, (and without penalty, but only if held for 5 years). | Withdrawals of contributions and earnings are subject to Federal and most State income taxes. |
| <b>Required Distributions</b>        | Distributions must begin no later than age 70½, unless still working and not a 5% owner.  | No requirement to start taking distributions while owner is alive.  | Same as Designated Roth 401(k) Account.   |

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## Employee Handbooks are Essential for Small Businesses



Christopher G. Schultz

Clients frequently question the value of preparing an employee handbook. Many small business owners do not provide employees with an updated, legally-sound handbook due to the anticipated time needed to develop it and/or the belief that it is not necessary since they have good relations with their employees. Providing all employees with information on the company's policies and guidelines, employee programs, attendance rules, and other work-related rules is one of the most important tools an employer can utilize to protect the company from employee disputes and legal liabilities.

An employee handbook minimizes misunderstandings and can be used as a communication tool between the company and its employees. A well-written handbook defines the job responsibilities and expectations of employees, outlines the employer's obligations to its employees, and defines workplace expectations. Further, it sets uniform policies and procedures for addressing complaints, requesting time off, safety protocol, time keeping, and other workplace issues.

An employee handbook is also an opportunity to distribute the company's employee benefit guide. Employees may not fully understand or appreciate all the benefits being offered to them, either at no cost or subsidized, by the employer. This includes paid vacation time, 401(k) plans, healthcare benefits, medical insurance at reduced rates, short-term disability and paid holidays.

Another significant benefit of an employee handbook is that it confirms and reiterates to each employee that an employee's rights to employment are "at will," meaning any employee may resign at any time, for any reason, or for no reason, and that any

employee may be *terminated* at any time for any reason, or for no reason.

From a liability perspective, an employee handbook can be used as evidence in a court action brought by an employee to demonstrate that certain acts are prohibited by the employer. Many employment, harassment, and wrongful termination claims can be defeated by establishing the rules and procedures of the workplace in the event violations of those rules and procedures led to disciplinary action, including termination.

A company's existing employee handbook should be updated to address new concerns. As social media accounts become more prevalent, employers should consider adding a policy that addresses what communications are prohibited and the consequences of misuse of social networking related to the workplace. Employers should consider placing limits on posting confidential or proprietary company information, as well as photos taken at the workplace. It is imperative, however, that the policy, both as written and in practice, does not violate any rights given to employees under the National Labor Relations Act. To avoid subjecting the company to liability for claims of invasion of privacy, employers must understand the boundaries and apply the agreed-upon policy in a consistent and thoughtful way.

Attorneys at CMDA regularly counsel clients with developing and updating legally-sound employee handbooks that protect companies from employee disputes and legal liabilities.

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