

HEALTH & WELFARE PLAN LUNCH GROUP

December 6, 2018

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1. 2018: The Year In Review



2018: The Year In Review

December 2018


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H&W Developments


- Tax Reform Act**
- Appropriations Act**
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- Proposed Legislation Impacting Account Based Plans**
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H&W Aspects of Tax Reform Act

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2017 Tax Cuts and Jobs Act Impact on Health and Welfare Benefits

The Cutting Room Floor: What Did Not Change

- Overall Provisions of ACA
 - Employer Mandate and Employer Reporting
 - Cadillac Tax – still scheduled to go into effect, but delayed by Continuing Appropriations Act (2 years) Until 2022
- Adoption Assistance – Code section 137 not affected
- Tuition reimbursement – Code section 127 not affected
- Dependent Care Assistance – Code section 129 not affected

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2017 Tax Cuts and Jobs Act Impact on Health and Welfare Benefits

Individual Mandate

- Effective for months beginning after December 31, 2018, the individual mandate tax penalty is reduced to \$0.
 - Further litigation
 - *Texas v US* -- Litigation challenge to ACA – individual mandate is unconstitutional (no longer a tax) and thus remainder of ACA should be stricken. 20 state plaintiffs
 - DOJ position: Individual mandate is unconstitutional, and is inseparable from the ACA’s “guaranteed issue” and “community rating” provisions



2017 Tax Cuts and Jobs Act Impact on Health and Welfare Benefits

Qualified Moving Expense Reimbursement

- Effective for taxable years beginning after December 31, 2017, and before January 1, 2026, qualified moving expense reimbursements are **included** in an employee’s gross income (active duty military exception).
- In addition, the individual above the line Form 1040 moving expense deduction is suspended for 2018 – 2025.

Tax credit for FMLA-like paid leave

- May allow employers to take tax credit for disability benefits
- Notice 2018-71 FAQs



2017 Tax Cuts and Jobs Act

Impact on Health and Welfare Benefits

Employer Deduction for Transportation Benefits

- The *employer deduction*, which allows employers to deduct the cost of employer-provided transportation up to \$260 per month in benefits (transit passes, parking) is repealed effective 2018. Non-profits subject to UBIT
 - Proposed legislation to address UBIT issue
- Employee exclusion is not impacted. Thus employees will continue to receive parking, transit passes and vanpooling benefits tax free; section 132(f) relatively unaffected.
 - Must weigh FICA tax savings on payroll vs loss of deduction
 - Some confusion related to impact on employer deduction for salary reductions
 - IRS addressed in Pub 15B




Other Items of Note

2017 Tax Cuts and Jobs Act

- Chained CPI will slow increase in benefits thresholds
 - Cadillac tax threshold, HSA contribution limits, etc.
 - Example: 2018 Family HSA Contribution reduced to \$6850
 - Bulletin 2018-10 Modifying \$6900 limit announced in May 2017 in Rev Proc 2017-37
 - IRS backed off in Rev Proc 2018-27
 - 6900 ok
 - 6850 Ok
 - Can put extra 50 back in
 - If keep it – after tax vs pre-tax treatment


Continuing Appropriations Act

- As noted above, delays Cadillac Tax until 2022
- Suspends health insurer sector fee (HIT tax) for 1 year in 2019
- Reauthorizes CHIP program for 6 years



IRS Guidance On “Preventive Care” for HSA Purposes


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What is Preventive Care for HSA Purposes

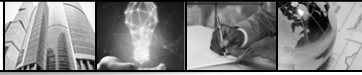
- IRS Notice 2018-12
 - Broader than ACA preventive care
 - Does not include male contraception or male sterilization
 - Transition relief until 2020
 - Comment period for preventive care issues
- Technical Correction to IRC 223

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Account based plan proposed legislation

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Bills Considered in House

Increasing Access to Lower Premium Plans and Expanding Health Savings Accounts (version of HR 6311),

- (1) allows carryforward of FSA balances (up to 3x statutory max);
- (2) allows persons entitled to Medicare by reason of age to have HSAs;
- (3) increases maximum HSA contribution limit to amount of deductible and OOP limit (\$6,650 and/\$13,300 family for 2018);
- (4) allow both spouses to make catch-up contributions to same HSA;
- (5) allow certain expenses incurred before the HSA was established to be paid form the HSA;
- (6) provide that bronze and catastrophic plans are HSA qualified;
- (7) allow all individuals purchasing health insurance in the individual market to perchance a copper plan; and
- (8) further suspend the health insurer fee for 2020 and 2021 (currently suspended for 2019).

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Bills Considered in House


Restoring Access to Medication and Modernizing Health Savings Accounts Act (version of HR 6199):

- (1) allow first dollar coverage flexibility for High Deductible Health Plans;
- (2) modify the treatment of Direct Primary Care Service Arrangements (150/300 per month) to not be treated as a health plan that would disqualify an individual from contributing to an HSA;
- (3) allow certain employment related services such as on-site and some retail clinics to not be treated as disqualifying coverage for the purposes of an HSA;
- (4) allow contributions to an HSA under certain circumstances if a spouse has a health FSA;
- (5) allow FSA And HRA Terminations or Conversions to Fund HSAs;
- (6) reverse the restriction on over-the-counter medicines for all tax-favored health accounts and add feminine or “menstrual care products” as a qualified medical expense for the purposes of these accounts and
- (7) allow certain qualified sports and fitness (500/1000) and safety (250/500) expenses to be treated as qualified medical expenses .




Issues NOT Addressed in House Bills

- Cadillac tax delay or carve-out
- Employer Mandate Repeal



STLDI


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Final Short Term Limited Duration Insurance (STLDI) Regs


- Changes
 - Expands duration from 3 months to 12 months
 - Allows insurers to renew for up to 36 months
- Impact
 - Will likely further undercut Exchange markets

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State Based Laws


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State Based Laws Impacting H&W Plans

- Massachusetts EMAC Supplement and New HIRD Form
- New Jersey Out of Network/Balance Billing Law
- San Francisco Health Care Ordinance Contribution Requirements
- Panoply of Paid Leave Laws

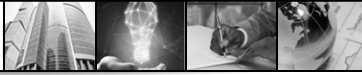
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DOL Fiduciary Rule Update

Good things come to those who wait . . .

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Potential Impact of Fiduciary Advice Regulation on HSAs

- Department of Labor (“DOL”) issued a final regulation that defines when a person or entity is a fiduciary under ERISA and the Tax Code as a result of providing “investment advice.”
- This rule applies to both employer-sponsored plans and Individual Retirement Accounts (“IRAs”). For this purpose IRA includes HSAs.
- Receipt of compensation by investment advisor as a result of investment recommendation is a prohibited transaction
- The DOL also issued a prohibited transaction exemption and revised previous exemptions that permit the receipt of compensation that varies with different investment choices. Other statutory exemptions may apply.

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Developments

- Prior DOL Announcement that Rules Apply June 9th 2017
 - Impartial conduct standard
 - Best interest of accountholder
 - No misleading statements, and disclosure of conflicts and compensation
 - Reasonable compensation
 - BICE Extended Until July 1, 2019 and Transition Rule applied until then
- DOL RFI
 - Information request with regard to whether special rules should apply to HSAs and HSA investments
- 5th Circuit Court Decision Invalidates DOL Regulation and Exemptions
 - *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 2018 WL 1325019 (5th Cir. 2018).
- DOL Non-Enforcement Announcement Pending Further Guidance
 - DOL Field Assistance Bulletin 2018-02 (May 7, 2018)
- SEC Proposed Rule Imposes Many of Same Fiduciary Requirements on Entities That Might be Brokers Under SEC Rules



AHPs and Other Recent Developments



The Road to Relief?

- Executive Order from President Trump (10/17):
 - Directs DOL to consider regulations that expand access to association health plans.
 - Goal: enable MORE small, unrelated employers to more easily band together to receive advantages only available to larger employers.
 - Prior rules made it very difficult for small employers to band together and be treated like a large employer.



Final Bona Fide Association

- Participating employers acting directly as an employer of at least one employee covered (see also working owner rule)
 - Coverage offered only to the employees, former employees, and their family members
- Formal organization/structure with by-laws
- Controlled directly/indirectly (through representation) by employers
- Members have Commonality of Interest
- Association is not a health insurer
- Health coverage does not discriminate
 - Retained in final rule for AHPs, unclear how applies to pre-rule bona fide associations
 - Some employer based underwriting may be allowed based on age/gender



Proposed Bona Fide Association

- Commonality of Interest – under final rule, at least ONE “substantial business purpose” (need not be primary purpose) unrelated to provision of health insurance:
 - Trade, Industry, line of business or profession
 - Principal place of business in same geographic region within a state/metropolitan area with at least one
 - Ask: would association exist but for provision of health insurance.



So What?

- Somewhat easier for small employers (including sole proprietors with no common law employees) to band together for health plan purposes subject to the less stringent large group market rules
 - Commonality of interest could be satisfied solely on the fact that the members have a principal place of business within a city or state—even though they have no similar business connection.
 - Must have principal purpose other than provision of health insurance
- But.
 - Association health plans are still MEWAs.
 - Special ERISA preemption rules for MEWAs



Wellness Program Rule Reversal

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AARP vs. EEOC


- Court vacates—Effective January 1, 2019-- two aspects of the EEOC's ADA and GINA related wellness program regulations from 2016
 - 30% rule under the ADA
 - Allowing incentive for the spouse's medical history

- So now what?

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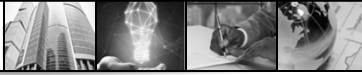
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Proposed HRA Regulations

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2 New HRAs Proposed in 2020

- Premium Reimbursement HRA
 - Integrated with Individual Market MEC
 - Cannot offer both GHP and a Premium Reimbursement HRA
 - Rules identify classes of eligible employees
 - Benefits for a class must be on same terms for everyone in class
 - May differ benefits (or not offer benefits) to one or more of the classes
 - Employees and dependents must have MEC to be covered
 - QSHERA like notice requirement required
 - May help ALEs satisfy 4980H(a) and (b) penalties
 - May also disqualify participant from premium tax credit/subsidy if “affordable”
 - Upgraded ERISA voluntary plan safe harbors for policies paid for with Premium Reimbursement HRA
 - ERISA still applies to HRA

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2 New HRAs Proposed in 2020

- Excepted Benefit General Purpose HRA
 - Max reimbursement up to 1800
 - Carry over allowed
 - Eligible employees must also be offered major medical coverage from employer (but don't have to enroll)
 - Same benefits offered to similarly situated participants
 - Cannot reimburse most group premiums (exception, COBRA)



New Contraception Regulations



Contraception Exemption Final Regulations

- Exempts entities that object to providing contraceptives based on sincerely held religious belief, **but only for items for which entity objects**
 - Applies to churches, non-profits, and for-profit entities
 - Accommodation process is voluntary
- Allows nonprofits, closely held businesses (other than publicly traded businesses), and higher education institutions to object based on sincerely held moral conviction



Section 1557



ACA Section 1557

- Northern District of Texas national injunction regarding HHS' definition of "sex"
- Lawsuits still followed
- New rule at OMB for review



Adjusted Limits for 2019



Adjusted Limits for 2019

- Health FSA Limit on employee salary reduction - \$2,700 (up from \$2,650)
- Qualified Transportation Fringe Benefits
 - Monthly limit that may be excluded for qualified parking - \$265 (from \$260)
 - Combined monthly limit for transit passes and vanpooling- \$265 (from \$260)
- QSEHRA
 - Maximum reimbursements - \$5,150 self / \$10,450 family (from \$5,050 self / \$10,250 family)
- Adoption Assistance
 - Maximum that may be excluded from employer-provided adoption assistance - \$14,080 (up from \$13,810)
 - AGI related phase out



Adjusted Limits for 2019

- ACA OOP Max (HHS Notice of Benefit & Payment Parameters)
 - Must not exceed \$7,900 self-only / \$15,800 family (subjected to embedded OOP rule)
- HSA Requirements: HDHP (Rev. Proc. 2018-30)
 - Deductible must be at least \$1,350 self-only / \$2,700 family
 - OOP max may not exceed \$6,750 self-only/ \$13,500 family
- HSA Contribution Limits (Rev. Proc. 2018-30)
 - \$3,500 self only / \$7,000 family
- PCORI (plan years ending on or after October 1, 2018 but before October 1, 2019-\$2.45)



Adjusted Limited for 2019

- Affordability for 2019-9.86%
- ERISA and HIPAA Privacy Penalties Increased
- HCE limit-\$125,000 (from \$120,000 in 2018)



Forms and Filings



Forms and Filings

- Revised (slightly) Form 5500 and schedules issued by DOL
- Form M-1 form and instructions released
- 2018 1095s required to be furnished to recipients delayed to March 4, 2019 and good faith compliance continued for 2018
 - Due date for forms to IRS not delayed



Question & Answer

