

COMPLIANCE UPDATE

APRIL 2018

HSA REDUCTION RELIEF MAY BE COMING

As we reported in the last newsletter, the IRS retroactively reduced the maximum 2018 family HSA contribution by \$50. That is not a lot of money but it does create an administrative headache for those that previously contributed the maximum amount prior to the announcement.

[Transition relief may follow HSA contribution reduction](#)

It is possible Congress may step in and provide legislation granting transitional relief for the \$50 excess contribution. As we indicated in the last newsletter, it makes sense to simply monitor the situation before going through all the steps to withdraw the excess \$50 plus the earnings attributable to that amount.

NEW OHIO DRUG DISCLOSURE RULE

The Ohio Department of Insurance issued a bulletin that requires insurers and pharmacists to lift a “gag order” that prevents pharmacists from disclosing to consumers the most affordable prescription drug option available to them.

[Ohio Requiring Prescription Transparency for Consumers](#)

The new rule kicks in immediately and is designed to make people more informed consumers when it comes to prescription drugs.

NEW ERISA CLAIMS PROCEDURES FOR DISABILITY CLAIMS

We have previously reported there are new ERISA claim procedures for disability claims. The new rules apply to disability claims filed on or after April 1, 2018.

[New DOL Disability Rules Now in Effect](#)

Note the rules apply to ERISA disability claims. These would include claims filed under an ERISA disability plan or pension plan benefits contingent upon a finding of disability. On the other hand, the new rules would not apply to a payroll practice or sick pay plan not covered under ERISA.

SEVERANCE PLANS AND ERISA

The preceding article talks about the new disability claim rules and note that only plans covered under ERISA are subject to the rules. This article talks about severance plans and ERISA. Note that the article is linked to a previous article that goes into more detail about the ERISA ramifications.

[Why severance should be subject to ERISA](#)

As a general proposition, an individually negotiated severance agreement is not a severance plan and, as such, is not subject to ERISA. Also, ERISA preempts state laws and, as a general rule, the only remedy under ERISA is the plan benefits. This means punitive damages as well as amounts for pain and suffering are not available to the plaintiff if ERISA is controlling the lawsuit.

HEALTH FSAs AND HSAs

High deductible health plans (“HDHPs”) and health savings accounts (“HSAs”) are becoming more popular. To be eligible to make or receive HSA contributions, the individual has to be covered under an HDHP and not have disqualifying coverage. A person may be disqualified from making or receiving HSA contributions depending on the type of Health FSA.

[HSAs and FSAs recap](#)

This article talks about the interplay between HSAs and Health FSAs. There is nothing new here; this is just a recap of the rules.

COBRA PENALTY APPLIES TO PLAN ADMINISTRATOR, NOT OWNERS

COBRA has been around for 30 years and it does not look like it is going away any time soon. With the health care exchanges or marketplaces, fewer people are electing and paying for COBRA. However, the penalties still apply for not complying with the COBRA notice requirements.

[Owners not held liable for COBRA notice penalty](#)

In this lawsuit a former employee sued the owners for failing to comply with the COBRA notice requirements. The Court dismissed the lawsuit saying that the penalty applies to the plan's administrator and does not extend to the owners. Note that the Court did not say there should not be a penalty; only that the owners were not personally liable for any penalties in their capacity as owners.

HSA Changes Coming?

I always am hesitant to talk about proposed changes. This is especially true with the current climate in Washington.

[Possible Changes for HSAs](#)

However, this article talks about some potential changes to the rules governing HSAs. The Trump administration supports HSAs, and HSAs continue to grow in popularity. Again, these are just proposed changes!!!

Association Health Plans May Hit Rough Waters

The Department of Labor issued proposed rules in January of this year designed to encourage the formation of association health plans or AHPs. An AHP is a form of MEWA under which small employers can band together and be treated like a large employer when it comes to buying health coverage.

[AG coalition opposes AHP expansion](#)

A lot of organizations support the proposal but AHPs also have their critics. A coalition of 17 Attorneys General have registered their opposition to the Department of Labor's proposed rules. The Department of Labor asked for public comments, and the period to submit those comments has expired. If and when the final rules are released, it is very possible a number of states may file one or more lawsuits to contest the rules. It could take years to sort this all out.

IRS Collection Notices

As previously reported, the IRS has started sending out notices informing large employers (i.e. those with 50 or more full-time and full-time equivalent employees) they may owe the

employer mandate penalty for 2015. This article talks about what employers should do if the IRS contacts them about the potential penalty.

[Watch for IRS penalty letters](#)

The individual mandate penalty is repealed beginning next year. However, the employer mandate penalty remains in effect until repealed by Congress and signed by President Trump.

MALE STERILIZATION AND HSAs

One of the requirements for an individual to make or receive HSA contributions is that the person be covered under a high deductible health plan or HDHP. An HDHP is precluded from providing first-dollar coverage except for preventive care.

[Transitional Relief for Male Sterilization and HSA Eligibility](#)

The IRS has ruled that, until December 31, 2019, a HDHP can provide first-dollar coverage for male sterilization even though the benefits are not considered preventive care. This means the HDHP will not be disqualified for providing first-dollar coverage for male sterilization prior to 2020. As a result, individuals participating in such plans will be eligible to make or receive HSA contributions prior to January 1, 2020.

RECENT TRENDS RE: RETIREE HEALTH COVERAGE

In the past the Courts have favored retirees in lawsuits where the employer tried to reduce or terminate retiree health coverage.

[Trend Favors Employers in Retiree Medical Litigation](#)

However, that pendulum is starting to swing back in favor of employers. That is, the Courts have started ruling in favor of the employer when the employer has modified or terminated retiree coverage. Rather than having to resort to litigation, it is in everyone's best interest to clearly spell out the terms and duration of the retiree health coverage to avoid litigation in the first place.

EMPLOYEE BENEFIT CHANGES UNDER NEW TAX LAW

President Trump signed the biggest overhaul to the Internal Revenue Code in thirty years. The press has been focusing in on the new tax rates for individuals and corporations. However, some of the changes impact certain employee benefits.

[Fringe Benefits Affect by New Tax Law](#)

This article talks about those changes. As a practical matter, the employee benefits involved are not your typical benefits but you should read this article to ensure the changes do not have a major impact on your programs.

OPT-OUT PLAN CONSIDERATIONS

Some employers offer employees a cash incentive to waive coverage under the employer's group health plan as a way to save money. These programs have been around for a while but there is an added level of complexity due to the Affordable Care Act or Obamacare. If the program is not set up properly, the opt-out program can impact the affordability test under the employer mandate.

[Are Opt-Out Payments Right for Your Plan?](#)

The government has taken the informal position that as long as the opt-out program is available to all employees, the program does not violate the Medicare Secondary Payer Rules. At some point the government may take a formal position regarding the opt-out program's status under the Medicare Secondary Payer Rules.

PROTECTING EMPLOYEES' HEALTH INFORMATION

On one hand, the rules seem pretty simple when it comes to protecting health information. However, as a practical matter, the HIPAA rules can be extremely complex and are very fact sensitive.

[What Employers Need to Know About HIPAA](#)

It really turns on how the employer obtained the information as to whether HIPAA applies. Even if HIPAA does not apply, the employer needs to keep the information confidential. This article talks about the employee's obligation to protect the individual's health data.

COBRA AND MEDICARE

There has been a tremendous amount of confusion regarding the interplay between COBRA and Medicare ever since COBRA was enacted more than thirty years ago. Part of the problem is the way the statute is written. It states that Medicare entitlement is a qualifying event under COBRA. However, that rarely is the case.

[How COBRA and Medicare Interact](#)

A qualifying event under COBRA is really a two-part process. First, there has to be an enumerated event. Second, that event must cause a loss of coverage. In the case of Medicare entitlement, the first prong is satisfied. However, Medicare entitlement rarely causes a loss of coverage due to the Medicare Secondary Payer Rules. As a result, as this article outlines, Medicare entitlement is rarely a qualifying event under COBRA.

HEALTH SHARING PROGRAMS GROW IN POPULARITY

People continue to look for ways to reduce health care costs. A popular trend is health-sharing programs as an alternative to traditional health plans.

[Health-Sharing Programs vs Tradition Health Plans](#)

A health-sharing program is a faith-based program that facilitates voluntary sharing among members for eligible medical expenses. The members send in premiums each month that are sent to other members to pay their medical expenses.

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