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IRS INCREASES ACA AFFORDABILITY PERCENTAGES

The Internal Revenue Service (IRS) recently issued Revenue Procedure 2014-37, which updates the applicable percentage amounts used to calculate an individual's premium tax credit and the required contribution percentage used to determine whether an individual is eligible for affordable, employer-sponsored coverage. The ACA provides that, for plan years beginning after 2014, the IRS must adjust the affordability percentage to reflect the excess of the rate of premium growth over the rate of income growth for the preceding calendar year. These adjusted percentages are effective for plan years beginning after 2014. Highlights are below.

Employer Mandate

- Applicable Large Employers (ALE) may be subject to a penalty if not offering full-time employees affordable, minimum value, employer-sponsored coverage beginning, for most, in 2015
- ALE coverage will be affordable if the employee's contribution for self-only coverage does not exceed 9.56 percent of the employee's household income
- Prior to this change, the affordability percentage was 9.5 percent
- This adjusted affordability percentage will be used to determine eligibility for premium tax credits for coverage purchased through an Exchange, beginning in 2015. Those employees offered affordable, minimum value, employer-sponsored coverage will not be eligible for a premium tax credit

  Affordability safe harbors are as follows (which is currently not modified to reflect 9.56%):

  - The Form W-2 safe harbor (affordability determined based on Form W-2 wages from that employer)
  - The rate of pay safe harbor (affordability determined based on an employee's rate of pay)
  - The Federal Poverty Line (FPL) safe harbor (affordability determined based on FPL for a single individual)

Individual Mandate

- Those that are exempt from the individual mandate are those without access to affordable Minimum Essential Coverage (MEC). MEC is unaffordable for plan years beginning after 2014, if the cost of MEC exceeds 8.05 percent of an individual's household income
  - Previously this exemption required the employee contributions for self-only not to exceed 8 percent of household income
- This percentage is to be adjusted annually thereafter

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IRS Increases ACA Affordability Percentages (Continued)

For Taxable Years Beginning in 2015, the Applicable Percentage Table for Purposes of Determining Premium Tax Credits in the Exchange

Household Income Percentage of Federal Poverty Level (FPL)*:	Initial Percentage	Final Percentage
Less than 133%	2.01%	2.01%
At least 133% but less than 150%	3.02%	4.02%
At least 150% but less than 200%	4.02%	6.34%
At least 200% but less than 250%	6.34%	8.10%
At least 250% but less than 300%	8.10%	9.56%
At least 300% but not more than 400%	9.56%	9.56%

* For 2014, the FPL is $11,670 for a single person and $23,850 for a family of 4.

Action Required

Employers who are subject to the employer mandate in 2015 should be aware of these changes in the affordability provisions in order to prevent subjection to the employer mandate penalty for not offering affordable, employer-sponsored coverage to all full-time employees.

For complete details, see Revenue Procedure 2014-37, at: http://www.irs.gov/pub/irs-drop/rp-14-37.pdf

Also see Revenue Procedure 2014-41 and 2014-46; each address complex and special cases for the premium tax credits, at:

Rev. Proc. 2014-41: http://www.irs.gov/pub/irs-drop/rp-14-41.pdf

Rev. Proc. 2014-46: http://www.irs.gov/pub/irs-drop/rp-14-46.pdf

Questions and Answers on the Premium Tax Credit: http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-the-Premium-Tax-Credit

Final and Temporary Regulations: http://www.gpo.gov/fdsys/pkg/FR-2014-07-28/pdf/2014-17695.pdf

Proposed Regulations: http://www.gpo.gov/fdsys/pkg/FR-2014-07-28/pdf/2014-17696.pdf

For the FPL guidelines, see: http://aspe.hhs.gov/poverty/14poverty.cfm

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HHS LIMITS ACA MARKET REFORMS IN U.S. TERRITORIES

On July 16, 2014, the Department of Health and Human Services (HHS) released letters to the insurance commissioners of the five U.S. territories (U.S. Virgin Islands, Northern Mariana Islands, Guam, American Samoa, and Puerto Rico) addressing the ACA insurance market reforms. Going forward, HHS has changed course regarding application of the insurance market reform provisions in those jurisdictions whereby provisions added to the Public Health Service Act (PHSA) by the ACA do not apply to insurers in the individual or group insurance markets in the U.S. territories. Highlights of the identically-worded letters are below.

Insurance Market Reform Provisions Inapplicable to U.S. Territories

- Guaranteed availability
- Community rating
- Single risk pool
- Rate review
- Medical Loss Ratio (MLR)
- Coverage of Essential Health Benefits (EHB)

The ACA provisions that revised PHSA that were also incorporated into ERISA and the Internal Revenue Code (IRC) for application to employer-sponsored group health plans still apply in the U.S. territories. As a result, group health plans must continue to comply with insurance market reform provisions even though they do not apply directly to insurers in those jurisdictions. These provisions include:

- Prohibition on lifetime and annual dollar limits on EHBs
- Prohibition on rescissions
- Coverage of preventive health services
- Revised internal and external appeals process

No Action Required

Employers should be aware of this change to the extent that ERISA and the IRC make health care reform mandates applicable to group health plans sold in the territories but other insurance market reform provisions may not apply to insurance carriers in those markets.

For the complete details, see: Letter to U.S. Virgin Islands Ins. Comm'r (Jul. 16, 2014); Letter to N. Mariana Islands Ins. Comm'r (Jul. 16, 2014); Letter to Guam Ins. Comm'r (Jul. 16, 2014); Letter to Amer. Samoa Ins. Comm'r (Jul. 16, 2014); Letter to Puerto Rico Ins. Comm'r (Jul. 16, 2014), at:

U.S. Virgin Islands: http://www.cms.gov/CCIIO/Resources/Letters/Downloads/letter-to-Francis.pdf

N. Mariana Islands: http://www.cms.gov/CCIIO/Resources/Letters/Downloads/letter-to-Igisomar.pdf

Guam: http://www.cms.gov/CCIIO/Resources/Letters/Downloads/letter-to-Ilagan.pdf

Amer. Samoa: http://www.cms.gov/CCIIO/Resources/Letters/Downloads/letter-to-Tanuvasa.pdf

Puerto Rico: http://www.cms.gov/CCIIO/Resources/Letters/Downloads/letter-to-Weyne.pdf

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SAN DIEGO PAID SICK LEAVE MANDATE PASSES CITY COUNCIL AND MAYORAL VETO MAY BE OVERRIDDEN

Recently, the San Diego City Council approved the City of San Diego Earned Sick Leave and Minimum Wage Ordinance (herein referred to as the "Ordinance") which would require all employers in San Diego to provide up to five days a year of paid sick leave to qualified employees. Mayor Kevin Faulconer vetoed the Ordinance, but the City Council may choose to override the veto if securing six votes in favor of the Ordinance. The Ordinance passed City Council by a vote of six to three, indicating a strong likelihood that the Mayoral veto has a good chance of being overridden. If the Ordinance becomes law, San Diego will become the second California city to mandate paid sick leave, following San Francisco (effective since February 5, 2007). Other jurisdictions with paid sick leave mandates include: Seattle, Portland, New York City, Newark, Jersey City, Washington D.C. and the state of Connecticut. Highlights of the Paid Sick Leave Ordinance are below.

Accrual and Rights

- One hour of paid sick leave earned for every 30 hours of paid work performed in San Diego, capped at 40 hours (5 calendar days) per year
- Employers with a more generous sick leave or a similar accrued Paid Time Off (PTO) policy need not offer additional leave to employees
- San Diego employees will begin accruing paid sick time on April 1, 2015, or the commencement of employment, whichever is later
- Employees may use paid sick leave after 90 days of employment or July 1, 2015, whichever is later
- If an employee works at least 240 hours in the City within a one year period, the employee is eligible for paid sick leave once reaching 240 hours regardless of the number of hours worked for the employer in subsequent years
- Carryover is required for up to 40 hours of accrued, unused paid sick time per year, however employers are not required to provide more than 40 hours of paid sick leave in any single year
- Employers may set a reasonable minimum increment for use, not to exceed two hours
- Employer may require up to seven days' advance notice of the need to use earned, paid sick time when foreseeable or as soon as possible when unforeseeable
- Employer may request reasonable documentation for absences of more than three consecutive days
- Employer is not required to pay out unused sick time
- If rehired within six months, the employee is entitled to reinstatement of previously accrued sick time
- A posted notice, as well as a notice provided to each employee at the time of hire or by April 1, 2015, whichever is later, must be provided and must include the employer's name, address, telephone number and the employer's duties under the earned sick leave law. Employers may provide the notice electronically
- Employers must maintain records documenting the wages, accrual and use of sick leave for at least three years
- Penalty for noncompliance includes a private right of action for employees for payment of back wages, damages and reinstatement of employment, plus attorney's fees and costs, in addition to civil penalties of up to $2,000 per incident

Permitted Paid Sick Leave Uses

- The employee is physically or mentally unable to perform his or her duties due to illness, injury, or a medical condition
- Obtaining professional diagnosis or treatment for a medical condition of the employee
- Other medical reasons pertaining to the health of the employee, such as pregnancy or obtaining a physical examination
- Providing care or assistance to a family member, with an illness, injury, or medical condition

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San Diego Paid Sick Leave Mandate Passes City Council and Mayoral Veto May Be Overridden (Continued)

Permitted Paid Sick Leave Uses (Continued)

- An employee's use of "Safe Time"[1]
- Place of business is closed by order of a public official due to a public health emergency
- Providing care or assistance to a child, whose school or child care provider is closed by order of a public official due to a public health emergency

Action Required

Employers with employees working within the City limits of San Diego should review their PTO and/or sick leave policies to ensure compliance with the mandate by the 2015 effective date. When the Ordinance becomes effective, employers will be required to post a notice informing employees of their rights under the earned sick leave law in a conspicuous place at any workplace or job site where any eligible employee works. The notice must be in English and any other language spoken by at least 5% of the employees at the particular workplace. The notice will be made available by the City to employers in the future.

For complete details on the Ordinance, go to: http://assets.xperthr.com.s3.amazonaws.com/free/downloads/san-diego-minimum-wage-ordinance.pdf

EEOC ISSUES ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION

The U.S. Equal Employment Opportunity Commission (EEOC) issued Enforcement Guidance on Pregnancy Discrimination and Related Issues, along with a Question and Answer (Q&A) document about the guidance and a Fact Sheet for Small Businesses. The Enforcement Guidance, Q&A document, and Fact Sheet will be available on the EEOC's website. This is the first comprehensive update of the Commission's guidance on the subject of discrimination against pregnant workers since the 1983 publication of their Compliance Manual which included one chapter on the subject. This guidance supersedes that document and incorporates significant developments in the law over the past 30 years. In addition to addressing the requirements of the Pregnancy Discrimination Act (PDA), the guidance discusses the application of the Americans with Disabilities Act (ADA) as amended in 2008, to individuals who have pregnancy-related disabilities. This guidance will aid employers, job seekers, and workers in complying with the PDA and ADA, and thus advance EEOC's Strategic Enforcement Plan to address the interaction between these two anti-discrimination statutes. Much of the analysis in the enforcement guidance is an update of longstanding EEOC policy.

The guidance sets out the fundamental PDA requirements that an employer may not discriminate against an employee on the basis of pregnancy, childbirth, or related medical condition; and that women affected by pregnancy, childbirth or related medical conditions must be treated the same as other persons similar in their ability or inability to work. The guidance also explains how the ADA's definition of "disability" might apply to workers with impairments related to pregnancy. Highlights from the guidance can be found on the following page.

[1] Safe time includes time away from work that is necessary due to domestic violence, sexual assault or stalking, provided the time is used to allow the employee to obtain for the employee or her family member one or more of the following: (1) medical attention; (2) services from a victim services organization; (3) psychological or other counseling; (4) relocation; or (5) related legal services.

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EEOC Issues Enforcement Guidance on Pregnancy Discrimination (Continued)

- PDA's requirement to cover not only current pregnancy, but discrimination based on past pregnancy and a woman's potential to become pregnant
- Lactation as a covered pregnancy-related medical condition
- Circumstances under which employers may have to provide light duty for pregnant workers
- Issues related to leave for pregnancy and for medical conditions related to pregnancy
- PDA's prohibition against requiring pregnant workers who are able to do their jobs to take leave
- The requirement that parental leave (which is distinct from medical leave associated with childbearing or recovering from childbirth) be provided to similarly situated men and women on the same terms
- When employers may have to provide reasonable accommodations for workers with pregnancy-related impairments under the ADA and the types of accommodations that may be necessary
- Best practices for employers to avoid unlawful discrimination against pregnant workers

No Immediate Action Required

Employers should review the enforcement guidelines to ensure compliance with the nondiscrimination rules surrounding pregnancy disability and similar issues. The EEOC enforces federal laws prohibiting employment discrimination. Further information about the EEOC is available on its website at: www.eeoc.gov.

For additional resources on Pregnancy Discrimination and Related Issues, go to:

EEOC's Enforcement Guidance: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

Q&A: http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm

Fact Sheet: http://www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm

FAQ ISSUED REGARDING NOTICE REQUIREMENT IN RESPONSE TO HOBBY LOBBY CASE

On July 17, 2014, the Departments of Labor (DOL), Health and Human Services (HHS) and Treasury issued joint Frequently Asked Questions (FAQ). The FAQ addresses what notice requirement would apply when a closely-held, for-profit corporation changes its health plan coverage for some or all contraception services, mid-year. In the Hobby Lobby case, the Supreme Court held that health plans of such corporations cannot be required to cover contraception if doing so would contradict the owner's religious beliefs. The FAQ consists of one question, found below.

Q: My closely held for-profit corporation's health plan will cease providing coverage for some or all contraceptive services mid-plan year. Does this reduction in coverage trigger any notice requirements to plan participants and beneficiaries?

A: Yes. For plans subject to the Employee Retirement Income Security Act (ERISA), ERISA requires disclosure of information relevant to coverage of preventive services, including contraceptive coverage. Specifically, the Department of Labor's longstanding regulations at 29 CFR 2520.102-3(j)(3) provide that, the Summary Plan Description (SPD) shall include a description of the extent to which preventive services (which includes contraceptive services) are covered under the plan. Accordingly, if an ERISA plan excludes all or a subset of contraceptive services from coverage under its group health plan, the plan's SPD must describe the extent of the limitation or exclusion of coverage. For plans that reduce or eliminate coverage of contraceptive services after having provided such coverage, expedited disclosure requirements for material reductions in

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covered services or benefits apply. *See* ERISA section 104(b)(1) and 29 CFR 2520.104b-3(d)(1), which generally require disclosure not later than 60 days after the date of adoption of a modification or change to the plan that is a material reduction in covered services or benefits. Other disclosure requirements may apply, for example, under State insurance law applicable to health insurance issuers.

No Action Required

Employers of closely-held, for-profit organizations with strong religious beliefs regarding the use of contraception may in the future be able to opt out of this requirement. The FAQ does not address whether and how to do so, nor does it create a notice obligation other than the existing ERISA obligation to provide notice for any mid-year plan change. When a plan reduces or eliminates contraceptive coverage, it is a material reduction in covered benefits subject to the regulation's expedited disclosure requirements, under which disclosure must be made no later than 60 days after the date the plan change was adopted.

For more information, the FAQ can be found at: http://www.dol.gov/ebsa/faqs/faq-aca20.html

2015 San Francisco Health Care Security Ordinance Rate Adjustment and Amendment to Irrevocable Expenditures

The San Francisco Health Care Security Ordinance (HCSO) provides that qualified employees who work in San Francisco are entitled access to affordable healthcare. To accomplish this, certain employers are required to spend a minimum amount of money each quarter on behalf of their covered employee's healthcare. Below are the adjusted rates for calendar year 2015:

Employer Size	Number of Employees	2014 Expenditure Rate	2015 Expenditure Rate
Large	All employers w/100+ employees	$2.44 per hour payable	$2.48 per hour payable
Medium	Businesses w/20-99 employees Nonprofits w/50-99 employees	$1.63 per hour payable	$1.65 per hour payable
Small	Businesses w/0-19 employees Nonprofits w/0-49 employees	Exempt	Exempt

Irrevocable Contributions by Employers

On June 17, 2014, the San Francisco Board of Supervisors amended the HCSO, to begin phasing out over a three year period, the revocability of employer contributions towards reimbursement arrangements. Essentially, employers will not be able to keep any unused employer contributions made in compliance with HCSO in a reimbursement account (i.e. Health Reimbursement Arrangements) either through expiration on the use of the funds, or through termination of employment with the employer.

Previously, employers could make contributions either in the form of "irrevocable" contributions towards medical insurance premiums (i.e. to the City Option or through other private group health insurance coverage)

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for which they would never receive any monies back, or “revocable” contributions (i.e. HRAs), where unused monies could return back to the employer if the employee were to terminate from employment or the use of those monies expired.

The amendment requires that in 2015, 60% of any unused funds in a reimbursement arrangement (i.e. HRA) cannot go back to the employer, and must be kept by the employee or former employee. In 2016, 80% of any unused funds in a reimbursement arrangement (i.e. HRA) cannot go back to the employer, and must be kept by the employee or former employee. Finally, as of January 1, 2017, an employer may no longer retain any monies from its contributions into a reimbursement arrangement made in conjunction with HCSO. Practically speaking, after January 1, 2017, San Francisco employers may need to reconsider contributing HCSO monies to an HRA, unless the employer plans to allow the account to be accessed by the employee in perpetuity.

This amendment does allow for employer HCSO contributions made **prior** to January 1, 2014, to be voluntarily waived by an employee.

For more reading on this amendment to the HSCO ordinance, go to:

http://sfgsa.org/modules/showdocument.aspx?documentid=11976

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COMPLIANCE REMINDERS...

HIPAA Business Associate Agreement (BAA) Updates

Deadline to Update Existing BAAs is September 22, 2014

Business Associate Agreements (BAA) that were already in place, but did not contain new required provisions following new regulations in final HITECH Regulations issued in 2013, must be modified to account for guidance released early last year. Companies that were already HIPAA-compliant with existing BAAs have until the earlier of (1) the date the BAA is renewed or modified after September 23, 2013, or (2) September 22, 2014. Companies that were required to be HIPAA-compliant, but were not, were subjected to an earlier compliance deadline. Plan sponsors should review existing BAAs to ensure they are up-to-date with the latest BAA provision requirements by no later than September 22, 2014.

Covered Entities include self-funded plans. These plans must be HIPAA-compliant and include Health Reimbursement Arrangements (HRA), Health Savings Accounts (HSA), Flexible Spending Accounts (FSA) and free-standing Employee Assistance Programs (EAP)

Previously, BAAs only had to contain the following types of provisions:

- A description of permissible uses or disclosures of PHI
- Requirements to help the covered entity respond to individual rights
- Termination provisions

Now, pursuant to the final HITECH Regulations released January 25, 2013, Business Associates (BA) are directly subject to the HIPAA/HITECH rules, including provisions to:

- Comply with the HIPAA Security rule
- Execute BAAs with their subcontractors
- Comply with any HIPAA rule applicable to any obligation the BA carries out on behalf of a covered entity, Report breaches of unsecured PHI to the covered entity

BAs are required to fully comply with HIPAA/HITECH and are subject to direct liability for noncompliance. However, it is still the covered entity's responsibility to ensure the appropriate BAAs are in place. The deadline for covered entities to complete this task is September 22, 2014.

For more information and sample BAA provisions visit the HHS website, at:
http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/contractprov.html

For more information on the final HIPAA/HITECH Regulations, see: http://www.gpo.gov/fdsys/pkg/FR-2013-01-25/pdf/2013-01073.pdf

QUESTION OF THE MONTH

QUESTION: *Our Company would like to start giving awards to employees at significant service milestones, like 25 years of service, and gifts to employees who retire. The awards and gifts would be items with a meaningful value, like a watch or a crystal bowl. Will those awards and gifts be taxable?*

ANSWER: Generally, all employer-provided benefits are taxable income for the employees who receive them unless the Code provides a specific exclusion. The awards and gifts your company is contemplating might qualify for one of two exclusions: the exclusion for achievement awards or the exclusion for de minimis fringe benefits. We will briefly explain both below.

To be excluded from income as an employee achievement award, an award or gift must be—

- Tangible personal property
- Given by an employer to recognize either length of service or safety achievement

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Question of the Month (Continued)

- Awarded as part of a “meaningful presentation”; and
- Awarded under circumstances that do not create a significant likelihood of the payment of disguised compensation

In addition, the award’s cost cannot exceed the amount that the employer can deduct for the expense. Employers’ achievement award expense deductions are generally limited to $400, so the amount that employees can exclude from income is also generally limited to that amount. However, if an award is made as part of an established written plan that does not discriminate in favor of highly compensated employees, and the average cost of all plan awards for the year does not exceed $400, then individual awards under the plan may cost as much as $1,600. If the cost of an employee’s award exceeds the amount that the employer can deduct, then the employee’s income is the greater of the employer’s nondeductible cost or the amount by which the award’s fair market value exceeds the employer’s deduction.

While these limits seem likely to be high enough to allow your company’s awards to be excludable (assuming that the other conditions are met), there is one potential problem. The Code allows length of service achievement awards to be excluded only once every five years. If, for example, an individual receives an award after 25 years of service and retires 3 years later, a retirement award would not qualify for exclusion. In this situation, the de minimis fringe benefit rule may be available, although the guidance supporting its use is not clear.

A benefit is considered de minimis (and excludable) if it has a value so small that accounting for it is unreasonable or administratively impracticable. Although value is not the only criterion, the fact that your awards will have “meaningful value” and be made under a regular program tends to undermine the argument that it is unreasonably difficult to account for their value. On the other hand, there is some support for use of the de minimis fringe benefit rule to fix the rigidity of the five-year restriction on achievement awards and allow the exclusion of retirement awards (like a watch) in situations where the employee has received a length of service award within five years of retiring. Employers that anticipate granting retirement awards in that situation should consult with their tax advisors.

Source: EBIA Thomson Reuters

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