MARSH & McLENNAN AGENCY

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IRS REDUCES 2018 LIMITS FOR HSA AND ADOPTION PROGRAMS

On March 6, 2018, the IRS released Revenue Procedure 2018-18, which adjusts a number of tax limits for 2018. The changes come as a result of the Tax Cuts and Jobs Act (H.R. 1), which became law late last year.

Notable Changes for Employee Benefits Programs:

1. *Health Savings Accounts*: Previously, the IRS set the 2018 HSA contribution limits at $6,900 (family HDHP coverage) and $3,450 (self-only HDHP coverage). *See IRS Revenue Procedure 2017-37*. This **new** revenue procedure lowers the HSA contribution limit for **family** HDHP coverage to **$6,850** (a reduction of $50 from the previous guidance released in 2017). The HSA contribution limit for self-only HDHP coverage remains unchanged at $3,450.

2. *Adoption Assistance Programs*: Previously, the IRS set the 2018 adoption assistance program limit at $13,840. The **new** revenue procedure lowers the program limit to **$13,810** (a reduction of $30 from the previous guidance released in 2017).

The contribution limits for other common employee benefits programs (e.g., premium conversion accounts, health FSAs, dependent care FSAs, and transit benefits) remain unchanged.

For employees who already had greater than $6,850 contributed to their HSA account, the employee may correct this by withdrawing those excess contributions (including any growth in the account), prior to filing his/her 2018 tax return, due in 2019.

Action Required

Employers should review their employees' 2018 elections for HSAs (and pay close attention to any employees that elected the family HDHP) and adoption assistance programs to identify any elections that could potentially exceed the new limits. Employers should also advise any affected employees that their elections will be reduced to conform with the new, lower IRS limits.

Employers should also make appropriate changes to payroll deductions, review their employee communications and plan documents, and make appropriate changes to sections regarding HSAs and adoption assistance programs.

For the text of IRS Revenue Procedure 2018-18, see:
https://www.irs.gov/irb/2018-10_IRB#RP-2018-18

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AUSTIN, TEXAS PASSES PAID SICK LEAVE ORDINANCE

On February 16, 2018, the Austin City Council passed an ordinance ("Ordinance") requiring private employers in Austin, Texas to provide covered employees paid sick leave each year. The effective date of the Ordinance depends on the size of the covered employer. Details of the Ordinance are described below.

Covered Employers

The Ordinance applies to private employers in Austin, Texas, regardless of the number of employees. However, the effective date of the Ordinance for employers with six (6) or more employees is October 1, 2018, and the effective date of the Ordinance for employers with five (5) or less employees is October 1, 2020. The Ordinance does not apply to Federal government or state government employers.

Covered Employees

The Ordinance applies to employees who have worked at least 80 hours in a calendar year for an employer in Austin, Texas. The Ordinance does not apply to independent contractors or unpaid interns.

Accrual, Caps, and Carryover of Sick Leave

Accrual

Covered employees begin to accrue paid sick leave on the first day of employment or October 1, 2018, whichever date is later. Covered employees accrue one (1) hour of sick leave for every thirty (30) hours worked within Austin, Texas.

Annual Caps

An employer may cap the amount of sick leave an employee accrues per year, depending on the size of the employer. Medium or large employers who employ more than fifteen (15) employees in the previous year may cap an employee's accrual of paid sick leave at sixty-four (64) hours per year. Small employers who employ fifteen (15) or less employees in the previous year may cap an employee's accrual of paid sick leave at forty-eight (48) hours per year.

Carryover

Employees are permitted to carryover accrued but unused paid sick leave to the following calendar year. However, even if an employee carries over accrued sick time to the following calendar year, an employer can still cap the total accrued sick time for a year at a total of either sixty-four (64) or forty-eight (48) hours, depending on the size of the employer.

If an employer already offers a paid sick leave policy that meets the requirements of, or is more generous than the requirements of this Ordinance, the employer is not required to provide additional sick leave under the Ordinance.

Permitted Uses of Sick Leave

Generally, employees may use sick leave as soon as the time is accrued. However, an employer may impose a sixty (60) day waiting period before a newly hired employee is permitted to **use** accrued sick leave, if an employer establishes that the employee will be employed by the employer for at least one (1) year. An employer is permitted to limit an employee's **use** of sick leave to eight (8) calendar days per year.

Employees may use paid sick leave for the following reasons:

- An employee or family member's mental or physical illness, injury, or health condition, or the need for preventative care;
- An employee's need to seek medical attention, relocate, obtain services from a victim services organization, or participate in a legal or court ordered action related to domestic violence, sexual assault, or stalking involving the employee or family member.

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AUSTIN, TEXAS PASSES PAID SICK LEAVE ORDINANCE (CONTINUED)

The Ordinance defines "family member" as the employee's spouse, child, parent, or any other individual related to the employee by blood, or someone who has a close association with the employee that is equivalent to a family relationship.

An employer may not require an employee to find a replacement worker as a condition to using sick leave.

Reinstatement of Accrued Sick Leave

If a covered employee separates from the employer but is rehired within six (6) months of that separation, an employer is required to reinstate the employee's accrued sick leave upon rehire.

Request for Use of Sick Leave

Generally, covered employees are required to timely request the use of sick leave before his/her scheduled time to work. However, an employer cannot prevent an employee from using accrued sick leave for failure to make a timely request due to an unforeseeable absence.

An employer may require an employee to verify that sick leave was taken for a permitted use if the employee requests the use of sick leave time for more than three (3) consecutive working days.

Records and Notice for Use of Sick Leave

Employers must keep records documenting the amount of sick leave accrued and used by each covered employee. In addition, employers must provide each covered employee a monthly statement showing the amount of accrued sick leave available to him/her.

If an employer maintains an employee handbook, the employer must include a notice in the handbook detailing all covered employees' rights and remedies under the Ordinance. An employer must also post a notice about the requirements of the Ordinance in a conspicuous place within the workplace, once the notice is provided by the Austin City Council.

No Retaliation

An employer may not retaliate against an employee for requesting or using sick leave provided under this Ordinance by demoting, terminating, suspending, threatening, or reducing the hours of that employee. An employer may be subject to civil penalties for retaliation under the Ordinance.

Enforcement and Violations

The City of Austin Equal Employment Opportunity and Fair Housing Office (EEO/FHO) will enforce the requirements of the Ordinance. Beginning June 1, 2019, covered employers may be subject to civil penalties of up to $500 per violation of the Ordinance. The EEO/FHO may provide a covered employer ten (10) business days to comply with the Ordinance prior to imposing civil penalties.

Action Required

Employers in Austin, Texas should review their sick leave policies with their legal counsel to ensure their policies are in compliance with this Ordinance, or revise their policies as needed.

For the text of the Ordinance, see:
http://www.austintexas.gov/edims/council_document_lookup.cfm?num=293797&date=2018-02-15

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HHS RELEASES 2018 FEDERAL POVERTY GUIDELINES

Recently, the Department of Health and Human Services (HHS) released its Federal Poverty Guidelines for 2018. These Federal Poverty Guidelines provide separate federal poverty wage guidelines for the mainland United States, Hawaii, and Alaska.

As a reminder, the Federal Poverty Guidelines are both tied to the Marketplace premium tax credits, and considered when analyzing whether an employer is offering affordable coverage to its employees under the Employer Mandate. The IRS provides a "safe harbor" for employers to test whether the coverage they offer to an employee is, or is not, considered affordable coverage to that employee. One of these safe harbors is the Federal Poverty Line safe harbor.

Specifically, the Federal Poverty Line safe harbor requires an employer to multiply the applicable household affordability percentage for that year (9.56% in 2018), by the Federal Poverty Line for a single person for that year (or any federal poverty wage guideline released in the previous six months prior to an employer's plan year). After multiplying the applicable household affordability percentage (9.56% in 2018) by the applicable federal poverty wage guideline ($12,140 for the Federal Mainland Poverty Line in 2018), the result would be divided by 12 to calculate the maximum monthly contribution an employee may make for self-only coverage for the lowest cost plan, for that employee to be considered as having been offered affordable coverage by his/her employer under the Federal Poverty Line safe harbor.

Below are the most recently released Federal Poverty Guidelines for 2018.

2018 Federal Poverty Guidelines for a Household of 1

	2017	2018	Change
Federal Mainland Poverty Line	$12,060	$12,140	+ $80
Hawaii Poverty Line	$13,860	$13,960	+ $100
Alaska Poverty Line	$15,060	$15,180	+ $120

No Action Required

If an employer was previously utilizing the 2017 Federal Poverty Guidelines for the purpose of calculating the employee contribution based upon the Federal Poverty Line affordability safe harbor, and plans to utilize the Federal Poverty Line affordability safe harbor again for 2018, it may want to consider utilizing the Federal Poverty Guidelines in 2018 and incrementally increase its employees' contributions to more closely align with the new Federal Poverty Guidelines released in 2018.

For the complete details, read the Annual Update of the HHS Poverty Guidelines:

https://www.federalregister.gov/documents/2017/01/31/2017-02076/annual-update-of-the-hhs-poverty-guidelines

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IRS RELEASES GUIDANCE ON HEALTH SAVINGS ACCOUNTS: STATE REQUIREMENTS FOR HEALTH COVERAGE FOR NO COST SHARING FOR MALE CONTRACEPTIVES AND STERILIZATION

Recently, the Internal Revenue Service (IRS) released IRS Notice 2018-12. IRS Notice 2018-12 addresses certain state laws that require health plans and policies to provide coverage for male contraceptive and sterilization services (e.g., condoms and vasectomies) without cost sharing to the insured. These state law requirements would disqualify individuals from contributing to a Health Savings Account (HSA). More details on this issue are outlined below.

Requirements for an Individual to be Eligible to Contribute to a Health Savings Account

An individual is only eligible to contribute to an HSA if he/she meets the following requirements:

1) The individual is enrolled in a High Deductible Health Plan (HDHP); and
2) The individual is not enrolled in any disqualifying coverage that provides benefits for any year, until the minimum deductible (under the HDHP) is met for that year.

HDHPs can only cover services post-deductible, with the exception of preventive care services. The federal government releases a list of benefits annually, which they consider to be qualified preventative care services. These preventive care services are dictated by the Public Health Service Act (PHS Act) and also are services that are recommended by the United States Preventative Services Task Force (USPSTF). Male sterilization and contraceptive services **are not** designated preventive care services.

HDHP Coverage and State Requirements for Male Contraceptive Services and Sterilization as a Benefit with No Cost Sharing

In cases where state law requires HDHPs to provide first dollar coverage of male contraceptive services, this benefit will automatically disqualify the HDHP under the guidelines set forth by the IRS. This is because male contraceptives and sterilization services are not a listed benefit under the prescribed federal list of preventative services, and therefore are not considered preventative care. This means that individuals who enroll in these non-qualifying HDHPs are ineligible to contribute to an HSA. Maryland recently enacted a state law that requires any medical plans sold within that state to cover male contraceptive and sterilization services without cost sharing to the insured.

This state law only applies to insured plans. Self-funded plans in the state can exclude first dollar coverage of male contraceptive services and maintain qualifying HDHP status.

Transition Relief

Currently, individuals who are enrolled in a health plan that would otherwise qualify as a HDHP (but for the inclusion of no cost sharing coverage for male contraceptives and sterilization services), may continue to contribute to his/her HSA until December 31, 2019. Thereafter, an individual would be disqualified from contributing to his/her HSA if they continued to be enrolled in such coverage, unless the state requirement is relaxed or repealed in its application to HDHP coverage.

Action Required

For plan years beginning in 2019, employers in Maryland (and other states that require male contraceptives and sterilization coverage at no cost to insureds) should check to make sure the state law has not been amended. If the state law requires first dollar coverage of male contraceptive services, employers may want to reconsider offering fully-insured HDHPs written in that state in 2019. At a minimum, employers should educate employees that they may be disqualified from contributing to an HSA beginning 2020 as a result of the state law requirements.

For more information, see IRS Notice 2018-12: https://www.irs.gov/pub/irs-drop/n-18-12.pdf

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QUESTION OF THE MONTH

Will Owners Be Able to Participate In the HRA?

QUESTION: Our company would like to establish a health reimbursement account (HRA) when we switch to higher deductible health coverage. Will our owners be able to participate in that HRA?

ANSWER: The answer depends on several factors, including how your company is organized and the amount of the company owned by each working owner. Tax-free benefits under an HRA can be provided only to current and former employees (including retirees), and their spouses, covered tax dependents, and children who have not attained age 27 by the end of the tax year. Owners who are "self-employed individuals" within the meaning of Code §401(c) are not considered employees for this purpose and may not participate in an HRA on a tax-favored basis. Generally, a self-employed individual is an individual who has net earnings from self-employment as defined in Code §1402(a), taking into account only earnings from a trade or business in which the "personal services of the taxpayer are a material income-producing factor." Ineligible owners include partners, sole proprietors, and more-than-2% shareholders in a Subchapter S corporation. Stock ownership by employees of a Subchapter C corporation does not preclude their tax-favored HRA participation.

The ownership attribution rules in Code § 318 apply when determining who is a more-than-2% shareholder of a Subchapter S corporation, so any employee who is the spouse, child, parent, or grandparent of a more-than-2% shareholder of a Subchapter S corporation would also be unable to participate in the S corporation's HRA on a tax-favored basis. Disqualified individuals (whether due to direct or attributed ownership) could, however, be the beneficiary of a qualifying participant's HRA coverage if they are the qualifying participant's spouse, tax dependent, or child under age 27.

Although the IRS has not clearly addressed whether self-employed individuals may participate in an HRA if the company treats the HRA coverage as a taxable benefit, informal IRS comments suggest that participation on a taxable basis is not allowed (even though the IRS has permitted such participation for non-tax dependent domestic partners). While self-employed individuals cannot participate in HRAs, they can have HSAs, although they cannot receive tax-free contributions to their HSAs through a cafeteria plan. This relative advantage for HSAs has led some employers to favor HSA programs over HRAs. HRAs have other advantages for employers, though, including more control over how amounts are spent and typically lower costs relative to the nominal amount of benefits provided. (While the full HSA contribution must be funded with cash, HRAs typically are notional accounts that need only be funded when participants incur expenses, and not all participants will incur expenses up to the limit established by the employer.) Thus, the decision will seldom be made based on the participation rules alone.

Source: *EBIA*

CONTACTS

Christopher K. Bao, Esq.
Manager, Employee Benefits Compliance
& Regulatory Affairs, MMA West
Chris.Bao@MarshMMA.com
+1 415 230 7224

Brittany D. Botterill, Esq.
Manager, Employee Benefits Compliance
& Regulatory Affairs, MMA West
Brittany.Botterill@MarshMMA.com
+1 858 587 7511

Leah N. Nguyen, Esq.
Manager, Employee Benefits Compliance
& Regulatory Affairs, MMA West
Leah.Nguyen@MarshMMA.com
+1 949 540 6924

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