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## IN THIS ISSUE



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# NOTICE 2015-87: DEPARTMENTS RELEASE APPLICATION OF MARKET REFORM PROVISIONS

In December of 2015, the Departments of Labor, Treasury, and Health and Human Services (hereinafter referred to as "Departments") released Notice 2015-87, which further provides guidance on the application of the Affordable Care Act (ACA) as it relates to Employer Sponsored health coverage, in addition to other legislative provisions. Highlights of the final regulations are contained below.

## Employer Contributions and Affordability

Employer contributions will only reduce an employee's premium contribution if it qualifies as a "health flex contribution." An employer contribution will be considered a health flex contribution, only if:

1) The employee may **not** receive such amounts as a taxable benefit
2) The employee may use such amounts to pay for Minimum Essential Coverage; and
3) The employee may use the amount to exclusively pay for medical care, within the meaning of Internal Revenue Code (IRC) Section 213 (i.e., qualified medical expenses)

If employer contributions do not qualify as health flex contributions then they will **not** help to reduce an employee's premium contribution for purposes of the affordability of the plan to that employee. Below is an example of how the affordability of a plan can be affected by employer contributions that do not qualify as health flex contributions.

**Facts**: Employer A offers employee coverage under a Section 125 Cafeteria plan. An employee contributes $200 per month towards the cost of self-only coverage. However, Employer A also offers employees $100 as a cash benefit for waiving coverage, or the $100 waiver credit can be used as a contribution to that employee's 401(k).

**Conclusion**: Because Employer A offers an additional $100 cash benefit (or retirement contribution) as a waiver credit, it is not considered a health flex contribution. Therefore, employees are considered to have paid $300 ($200 contribution by the employee for medical benefits + $100 opt-out credit/401(k) contribution). This **increases** the employee's premium contribution for benefits, potentially making the plan unaffordable to that employee, when it would have been previously affordable at $200 per month.

### Reimbursements that are Considered Health Flex Contributions

If an employee receives an employer contribution towards medical benefits that can be used/taken by the employee for any of the following (not exhaustive), it will be considered to reduce the employee's contribution towards benefits, and will be added to the employee's original contribution amount towards benefits for affordability purposes:

1) HRA contributions to reimburse premiums, that **cannot** be received as a cash (i.e., taxable benefit) to the employee
2) Fringe wages received by employees, pursuant to the McNamara-O'Hara Service Contract Act (SCA), and the Davis-Bacon Related Acts (collectively with the Davis Bacon Act, the "DBRA") (at least until January 1, 2017, or when further guidance is issued)

## Notice 2015-87: Departments Release Application of Market Reform Provisions (Continued)

**Reimbursements that are *not* Considered Health Flex Contributions**

If an employee receives an employer contribution towards medical benefits that can be used/taken by the employee for any of the following (not exhaustive), it will **not** be considered to reduce the employee's contribution towards benefits, and will be added to the employee's original contribution amount towards benefits for affordability purposes:

1) Cash (i.e., taxable benefit)
2) Dependent Care FSA contributions
3) Group Term Life Insurance
4) Waiver/Opt-Out Credit

**Transition Relief for Non-Compliant Plans where Plan could be Considered Unaffordable**

For employers who provided flex credits to employees that could be used for non-medical expenses, or who offered waiver credits, and did so prior for plan years prior to December 16, 2015 (or planned to do so prior to December 16, 2015), may temporarily continue to do so, until the plan year beginning before January 1, 2017 (and for waiver credits, for plan years beginning before January 1, 2017, or when further guidance is issued) so long as employers do not increase the waiver credit or flex credit for non-medical benefits for future plan years.

In addition, the Notice states that although it is acceptable for employers to report in 2015 and 2016 each employee's original contributions (i.e., the amount that does **not** include the waiver credit/non-health flex dollars), it is recommended that they do include the additional amounts (i.e., flex/waiver credits) in the employee's Form 1095-C, and then identify each type of contribution when the Marketplace/Exchange contacts the employer regarding the affordability of the plan, when an employee qualifies for a subsidy. In addition, employees in these situations would still be entitled to a subsidy, based upon the **increased** amount of employee contribution, but the employer would not be penalized for offering unaffordable coverage, so long as the **reduced** (i.e. the amount that does **not** include the waiver credit/non-health flex dollars) amount is still affordable to the employee.

**Conclusion**

The IRS intends to issue guidance in 2016 to provide more details on how opt-out credits and health flex contributions should be accounted for when doing affordability testing. It is clear the IRS intends that non-health flex contributions should not offset an employee's contribution when determining affordability. It is also clear that non-conditional opt-out credits need to be added to the single contribution when determining affordability. However, conditional opt-out credits have yet to be addressed, which may be addressed in upcoming guidance.

## Health Reimbursement Arrangements and Notice 2013-54

Guidance regarding integration of Health Reimbursement Arrangements (HRAs) and major medical coverage was provided in Notice 2013-54; unfortunately, further clarification was necessary regarding integration of HRAs with major medical coverage. Notice 2015-87 clarifies and adds new provisions to rules surrounding HRAs. As a reminder, HRAs must be integrated with employer sponsored coverage, and cannot be integrated with an individual policy, as to avoid the prohibition against maximum annual/lifetime dollar limits, in addition to no cost-sharing of preventative services for employer sponsored plans. The following are highlights of the new provisions:

- **HRAs that reimburse family members' expenses, *cannot* be integrated with self-only coverage, and *must* be integrated with family coverage (i.e., HRAs must be limited to ONLY reimbursing the employee's expenses, and not family members' expenses, if the employee is enrolled in self-only coverage)**
  - **Transition relief applies to this rule. For any plans that currently allow HRA reimbursement to family members, despite the HRA being integrated with self-only coverage, may do so until the plan year renewal prior to January 1, 2017**
- An HRA, so long as the plan is used by fewer than two participants who are current employees (e.g., retiree-only HRA), may reimburse individual market coverage/policies
- Unused portions of an HRA, that is no longer integrated with major medical coverage, still cannot be used to purchase an individual policy, if the policy holder is a current employee
- Unused portions, that exist after transition relief was awarded for HRA amounts preceding Notice 2013-54, cannot be used to reimburse an employee's individual policy
- HRAs may reimburse individual dental and vision policies, and other excepted benefit policies
- Employer Section 125 Cafeteria plans cannot reimburse employees for Marketplace/Exchange coverage

Employer HRAs and Section 125 Cafeteria plans should ensure compliance with the above rules.

# Notice 2015-87: Departments Release Application of Market Reform Provisions (Continued)

## Increases to Affordability of a Plan under the Employer Mandate

The Treasury and the Internal Revenue Service (IRS) intend to amend the definition of "affordability" in the areas of affordability safe-harbors, multiemployer transition relief, offers of coverage, and qualifying offers of coverage. As a reminder, so long as the employee contribution for self-only coverage for the lowest cost plan is 9.5% or less of the employee's household income, the plan is considered affordable to the employee. If an employee is not offered affordable coverage, an employer is exposed to penalties if the employee obtains a subsidy for purchasing coverage in the Marketplace/Exchange.

The Notice indicates that because the determination of affordability for receiving subsidies in the Marketplace/Exchange are based upon inflationary adjustments to the 9.5% of an employee's household income, those same inflationary adjustments should also apply to other affordability rules in the ACA. These include:

- Affordability safe harbors
- Employer required enrollment into an affordable, minimum value health plan
- Multiemployer affordability arrangement thresholds; and
- Qualifying Offer and Qualifying Offer transition relief under Form 1095-C

Following, are the inflationary adjustments:

- 9.56% in 2015
- 9.66% in 2016

Employers may begin using these inflationary adjustments for measuring the affordability of health coverage to their employees, for the 2015 calendar year and going forward.

## Increases to Penalties under the Employer Mandate

Under the ACA, an employer may face penalties of $2,000 per year if that employer did not offer Minimum Essential Coverage to substantially all (70% of full-time employees in 2015, 95% of full-time employees in 2016 and beyond) of its employees, and one employee goes to the Marketplace/Exchange and receives a subsidy for purchasing Marketplace/Exchange coverage. In addition, even if an employer offers Minimum Essential Coverage to substantially all of its employees, an employer could still be exposed to an annual penalty of $3,000 per employee who receives a subsidy in the Marketplace/Exchange, if the employer fails to offer affordable, minimum value coverage to that employee.

Those penalties are adjusted for inflation and will adjust to the following amounts for 2015/2016:

1) In 2015, the $2,000 penalty increased to $2,080, and the $3,000 penalty increased to $3,120
2) In 2016, the $2,000 penalty increases to $2,160, and the $3,000 penalty increases to $3,240

Employers comparing the cost of offering health coverage to employees, versus potentially being exposed to penalties for failing to offer substantially all of their employees coverage, or failing to offer affordable, minimum value coverage to employees, should pay close attention to these increases in penalties for 2015/2016 and future years.

## Employer Reporting

Notice 2015-87 reiterates (after previous guidance on Employer Reporting) that the IRS will not impose penalties on Applicable Large Employers that can show that they have made a good faith effort to comply with the information reporting requirements (e.g., Forms 1094-C and 1095-C), including incorrect or incomplete Forms, or untimely delivery of the Forms to employees or the IRS.

## Modification to the Definition of Hours of Service and Miscellaneous Employee Categories

**Hours of Service under the Employer Mandate versus the Department of Labor Regulations**

Originally under the Employer Mandate final regulations, the definition of "hours of service" (i.e., full-time employees are defined as employees who are expected to have 30 or more hours of service per week) were defined similarly to 29 CFR 2530.200b-2(a) under the Department of Labor (DOL) regulations. However, because the concept of hours of service under the DOL and the Employer Mandate are somewhat different, clarification was necessary under the Employer Mandate.

The following clarifications were made to the Employer Mandate final regulations:

- An hour of service does **not** include any hours after an individual terminates employment with the employer
- An hour of service does **not** include an hour for which an employee is directly or indirectly paid (or entitled to payment) on account of a period for during which no duties are performed, and if such payment is made or due under a plan maintained solely for the purpose of complying with applicable workers' compensation, or unemployment or disability insurance laws

# Notice 2015-87, Departments Release Application of Market Reform Provisions (Continued)

## Modification to the Definition of Hours of Service and Miscellaneous Employee Categories (Continued)

**Hours of Service under the Employer Mandate versus the Department of Labor Regulations (Continued)**

However, the Notice goes on to say that if an individual is not performing services, but is receiving payments due to short-term or long-term disability, that would result in hours of service being attributed to the employee, **unless** the payments are made from an arrangement to which the employer did not contribute directly or indirectly for those benefits. A disability payment that was paid with **after-tax** contributions (and therefore excluded from income) would be treated as an arrangement to which the employer did not contribute, and therefore, payments made from such disability insurance would not give rise to hours of service. Wage replacement through workers' compensation provided by a state or local government would also not count as hours of service.

**Hours of Service for Non-Educational Organization Employees Working for an Educational Organization**

As a reminder, the "rehire" rules essentially state that a full-time employee of a **non-educational organization employer** who had 0 credited hours of service for 13 weeks or more could be considered newly hired/rehired, and be subject to all of the requirements a new hire would need to complete to become benefits eligible (e.g., Waiting Period, Initial Measurement Period, etc.). However, for **educational organization employers** the rule was lengthened to 26 weeks or more of 0 credited hours of service, before a current employee would be considered newly hired or rehired.

Previously, some educational organizations were hiring employees from staffing agencies to take advantage of the shortened 13 weeks rule for rehire for non-educational organizations. Through this Notice, this will no longer be allowed, and any employees hired in relation to an educational organization will be subject to the longer 26 weeks of 0 credited hours of service rule, before they are considered newly hired. The Notice seems to indicate that the 26 week rule would only apply if employment for the educational organization related employee was not available all year long. If employment by the educational organization was made available all year long to the educational organization related employee, the 13 week rehire rule would apply.

**AmeriCorps Members not Considered Employees**

AmeriCorps members that provide service to a grantee receiving assistance under the national service laws (e.g., National and Community Service Act), are **not** considered employees of AmeriCorps or the grantee receiving assistance through the AmeriCorps program.

**Employee Eligibility for TRICARE Based upon Employment with Employer**

An offer of coverage under TRICARE for any month due to employment with an employer that results in eligibility for TRICARE is treated as an offer by that employer of Minimum Essential Coverage under an eligible employer sponsored plan for that month.

## Governmental Entities

**Governmental Agencies are Subject to the Same Aggregation Rules as Private Employers**

Private employers are required to combine and report commonly owned corporations under IRC Section 414. However, there are currently no comparative rules that apply to governmental entities, and therefore, the Notice states that governmental entities must use a good faith interpretation as to whether they are, or are not, under common control. In addition, if the governmental entities/agencies are considered an Applicable Large Employer (each entity/agency has its own Employer Identification Number (EIN)), each entity/agency must file its own separate Form 1094-C, even if the collective governmental agencies as a whole have a Designated Governmental Entity (DGE) preparing the Form 1094-C on behalf of those governmental agencies.

## Notice 2015-87, Departments Release Application of Market Reform Provisions (Continued)

### HSA Contributions and Veterans

Previously, Veterans were unable to contribute to an HSA if they received medical benefits administered by the Department of Veterans Affairs (VA) within the previous three months. With the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, the Federal Government modified that rule to allow Veterans to contribute to an HSA, regardless of when they received medical benefits from the VA, and so long as such condition was related to a disability the Veteran received from service. **For ease of administration purposes, the Federal Government through Notice 2015-87, allows *any* hospital care or medical services received from the VA by a veteran who has a disability rating from the VA to be considered a service-connected disability**.

### Flexible Spending Accounts (FSA)

**Limitations on Carryovers**

A Health FSA plan may limit the availability of the carryover of unused amounts (up to $500) to individuals who have elected to participate in the health FSA. An employer may require participation in the Health FSA to utilize the carryover amount). Second, Health FSA plans may also limit how long the FSA carryover can be utilized (e.g., carryover amounts must be utilized within one year of carryover date). Employers may also require employees to elect to participate in the following year, to access carryover amounts.

**Carryover Health FSAs**

Typically, an employer need not provide COBRA coverage under a Health FSA for a qualifying event of an employee, unless the amount of the available benefit exceeds the premiums for the remainder of the year. With recent guidance, employees may now carryover up to $500 per year of unreimbursed Health FSA monies. For employers with Carryover Health FSAs (FSA plans are not required to offer a carryover feature), the amount that is **carried over** from the previous year will be counted towards the amount the qualified beneficiary may become entitled to receive during the remainder of the plan year. Employers should be aware of this rule, and its impact on whether or not the Health FSA offered qualifies for COBRA continuation coverage.

**Setting COBRA rates for FSAs with a Carryover Feature**

An employer would typically base its reasonable estimate of the "applicable premium" for COBRA coverage (taking into account both employee and employer contributions (if applicable)) to qualified beneficiaries for a Health FSA by taking into consideration the cost of coverage provided to similarly situated non-COBRA beneficiaries on the maximum amount available under a Health FSA. For Health FSAs with a carryover feature, Notice 2015-87 states that the applicable premium cost of Health FSA COBRA coverage **excludes** the cost of the carryover from the previous plan year.

**Qualified COBRA Beneficiaries Entitled to a Carryover**

Not all plans require participants to be entitled to carryover amounts. However, if non-COBRA beneficiaries are entitled to carryover amounts, COBRA qualified beneficiaries are also entitled to such carryover amounts. Notice 2015-87 provides guidance that although carryover amounts need to be provided to COBRA qualified beneficiaries if they are offered to non-COBRA beneficiaries, for Health FSAs that do not require COBRA to be offered at the time of a qualifying event, the Health FSA plan need not allow COBRA qualified beneficiaries to elect additional salary reduction amounts or to have access to employer contributions to the Health FSA, even if they elect to have a previous years contributions carryover to the following year.

## Action Required

Employers should go through each of the above categories to ensure compliance with the above rules, specifically focusing on the HRA section, health flex contributions section, and penalties and affordability sections of the Employer Mandate in Notice 2015-87.

**For the complete details, see:**

**Notice 2015-87:** https://www.irs.gov/pub/irs-drop/n-15-87.pdf

# LIMITS ON PARKING AND TRANSIT BENEFITS INCREASED, AND GUIDANCE PROVIDED FOR RETROACTIVE APPLICATION IN NOTICE 2016-06

On December 18, 2015, the President of the United States signed into law the Protecting Americans from Tax Hikes (PATH) Act. This law effectively increased the fringe benefit limit that an employee may receive for Parking and Transit Benefits. Fringe benefits, up to these limits, may be elected and paid for on a pre-tax basis. Illustrated below are changes made for 2016, which increased both Parking and Transit Benefit limits to $255 per month. The Act also modified, retroactively, the 2015 limit to $250 per month.

**Parking and Transit Benefit Limits**

| | 2015 | 2016 | Change |
|---|---|---|---|
| Parking Benefit | $250 | $255 | $5 |
| Commuter and Transit Benefit | $250[(1)] | $255 | $5 |

[(1)] The original amount, before the retroactive amendment, was $130 for 2015.

On January 11, 2016, the IRS released Notice 2016-6, which explains to employers how to provide retroactive correction of monies that were taken out as wages, which could have been used as contributions to an employee's transit benefits. This typically would be completed through Form 941 or 941-X. Employers should speak with a tax accountant to make any retroactive corrections to quarterly tax filings.

## Action Required

Employers should check with their Parking and Transit Benefit vendors to adjust for limit increases, as these increases may provide some additional tax savings to employers and employees. Although the government retroactively changed the Transit Benefit limit for calendar year 2015, retroactive corrections are complicated; therefore, employers should seek tax counsel to implement a policy for retroactive application of the limit increase for 2015.

**For the complete details, see:**

**PATH Act:** https://www.congress.gov/113/bills/hr5771/BILLS-113hr5771pcs.pdf

**Notice 2016-6:** https://www.irs.gov/pub/irs-drop/n-16-06.pdf

# UPDATES TO THE AFFORDABLE CARE ACT INFORMATION RETURNS (AIR) PROGRAM

## Summary

Employers filing Forms 1094-C and 1095-C online through the government's Affordable Care Act Information Returns (AIR) Program without the assistance of third party vendors should note that there have been updates made to the webpage connected to the filing system as of January 6, 2016.

## Action Required

Employers who have chosen to file Forms 1094-C and 1095-C without assistance from third party vendors should check the updates that were made to the AIR Program webpage.

**For the complete details, see:**

**AIR website:** https://www.irs.gov/for-Tax-Pros/Software-Developers/Information-Returns/Affordable-Care-Act-Informaiton Return-AIR-Program

# INTERNAL REVENUE SERVICE RELEASES INSTRUCTIONS ON EXEMPTIONS TO INDIVIDUAL MANDATE PENALTIES

## Summary

On December 15, 2015, the Internal Revenue Service (IRS) released instructions on Form 8965, the form used by individuals seeking exemptions from the Individual Mandate Penalties. As a reminder, individuals are subject to penalties for failing to have Minimum Essential Coverage during the calendar year. However, some individuals may receive an exemption from those penalties, which may be reported using Form 8965.

## No Action Required

Employers interested in assisting employees with questions surrounding the Individual Mandate should familiarize themselves with the instructions for filing Form 8965.

**For the complete details, see:**

**Instructions for Form 8965:** https://www.irs.gov/pub/irs-pdf/i8965.pdf

# NEW AND REVISED PAID SICK LEAVE LAWS

## Pittsburgh, Pennsylvania Paid Sick Leave Ordinance Repealed

In August of 2015, the City of Pittsburgh, Pennsylvania enacted a paid sick leave law, which would have required all private employers provide paid sick leave to employees working in Pittsburgh, Pennsylvania. On December 21, 2015, the Allegheny County Court of Common Pleas found the ordinance to be "invalid and unenforceable" due to a state law that prohibits municipalities from determining requirements for businesses and employers, unless the ordinance fell within an exception of the state statute.

Employers with employees in Pittsburgh, Pennsylvania should contemplate modifying their paid sick leave policy if it was previously modified based upon the sick leave law. However, employers should be cautious that the decision to set aside the law may be appealed to a higher court, where the decision could be overturned.

## New Brunswick, New Jersey Enacts Paid Sick Ordinance

On December 17, 2015, New Brunswick, New Jersey passed a paid sick leave ordinance providing paid sick time to employees working in New Brunswick, New Jersey, beginning January 6, 2016. Employees who are eligible to accumulate paid sick leave will accrue sick time at 1 hour of sick time for every 35 hours worked in New Brunswick, New Jersey, up to a maximum of 40 hours of paid sick leave to be used during a calendar year. Some highlights of the law are listed below:

- Private-sector employers with **10 or more employees** are required to provide full-time employees (i.e., employees who average 35 or more hours of work a week) with up to 40 hours of paid sick leave in a calendar year and part-time employees (i.e., employees who average between 20 and 34 hours of work a week) with up to 24 hours of paid sick leave in a calendar year
- Private-sector employers with **less than 10 employees** are required to provide up to 24 hours of paid sick leave in a calendar year
- An employee would begin accruing paid sick leave on their first day of hire, but could be restricted from using that sick leave by an employer for 120 days after the date of hire
- The ordinance does not apply to the following workers:
    - Individuals employed by a governmental entity
    - Any person who is a member of a construction union covered by a collective bargaining agreement (CBA)
    - Employees subject to a CBA, that have expressly waived such paid sick time in clear and unambiguous terms
    - Employees who average less than 20 hours of work per week
    - Employees who work for employers that have less than 5 full-time equivalent employees (as defined in the law)
    - Individuals who work from home
    - Independent contractors; and
    - Per diem or temporary hospital employees

Employers in New Brunswick, New Jersey, should modify their sick leave policies if they are not currently in compliance, and have more than 5 full-time equivalent employees who work in the city of New Brunswick, New Jersey.

## Oregon Clarifies Paid Sick Leave Ordinance

In anticipation of the January 1, 2016 effective date, the Oregon Bureau of Labor and Industries (BOLI) published administrative rules to implement the Oregon Sick Leave Law. Below are highlights of these changes:

- Employers with an average of 10 or more workers in Oregon must provide employees up to 40 hours of paid sick leave a year; employers with an average of 6 or more employees working specifically in Portland, Oregon, must offer up to 40 hours of paid sick leave a year
- The definition of family member (for whom the employee may use paid sick time for) has been expanded to include: same-gender domestic partners, custodial parents, non-custodial parents, adoptive parents, foster parents, biological parents, step-parents, parents-in-law, a parent of an employee's same-gender domestic partner, an employee's grandparent or grandchild, or a person with whom the employee is or was in an "in loco parentis" relationship with
- For multiple hourly rate employees, the regular rate of pay is calculated either by:
    - The wages the employee would have been paid, if known, for the period of time in which the sick time is used; or
    - The weighted average of all regular rates of pay during the previous pay period
- Employers may frontload the 40 hours of sick time at the beginning of the year, but if an employer converts from the accrual method to the frontloading method, the employer must grant the 40 hours as of the date of the transition to that method
- An exemption to the paid sick leave law may apply for certain collectively bargained employees

## New and Revised Sick Leave Laws (Continued)

Employers in Oregon should pay close attention to the above clarifications, as they may require employers in Oregon to modify current paid sick leave policies.

## Action Required

Employers with employees in New Brunswick, New Jersey and Oregon should pay close attention to these new paid sick leave ordinances and clarifications.

**For the complete details, see:**

**New Brunswick, New Jersey Paid Sick Leave Law:** http://thecityofnewbrunswick.org/planninganddevelopment/wp-content/uploads/sites/8/2015/12/Paid-Sick-Leave-Ordinance-O-121501-Adopted-Signed.pdf

**Oregon Bureau of Labor and Industries:** http://www.oregon.gov/boli/WHD/OST/Documents/OL 537 %282015%29.pdf

# CALIFORNIA LAWS RELATED AND UNRELATED TO HEALTH CARE REFORM

The California Legislature proposed several bills recently, which Governor Brown signed into law. Many of these rules were due to the Affordable Care Act (ACA). Below is a list of many of these updates.

## AB 248 Sets Minimum Value Requirement for Large Group Plans

AB 248 states that all health care service plans (and insurers issuing a policy) that offer, amend, or renew a health plan contract in the large group market must provide Minimum Value coverage (i.e. 60% Actuarial Value) to its participants. This, therefore, would disallow "skinny plans" or MEC fully-insured plans from being offered in the large group market. However, AB 248 does not apply to any "excepted benefits" such as: 1) limited wraparound coverage, 2) policies that provide for Medicare services pursuant to government contracts, or 3) certain grandfathered health insurance policies that provide basic health care services without annual or lifetime limits.

## AB 339 Requires Coverage for Medically Necessary Outpatient Prescription Drugs

Previously, some health plans would place prescription medication that treated a specific condition on the highest cost tier of a drug formulary. AB 339 seeks to provide access to medication while maintaining affordable premiums. This regulation requires health insurance plans offered, renewed or amended after January 1, 2016 provide coverage for outpatient prescription drugs, including single-tablet and extended-release drugs, unless the plan or insurer can demonstrate that multi-tablet and non-extended release drugs are more or equally effective. In addition, the regulation requires copayments, coinsurance and other cost sharing measures be reasonable.

## SB 43 Essential Health Benefits for Small Group Plans

SB 43 prohibits limits on habilitative and rehabilitative services from being combined, and defines essential health benefits for small group health care service plans. For plan years beginning and after January 1, 2016, the definition of "habilitative services" will be revised to mean "health care services and devices that help a person keep, learn, or improve skills and functioning for daily living" including "physical and occupational therapy, speech-language pathology, and other services for people with disabilities in a variety of inpatient or outpatient settings" (so as to conform to federal standards).

## California Laws Related and Unrelated to Health Care Reform (Continued)

## SB 388 Plans Must Provide Non-English Translations of Summary of Benefits and Coverage

SB 388 aims to improve access to critical health care information for non-native English speakers. The ACA requires a plan or insurer disclose the benefits, services and terms of the contract or policy, and offer enrollees language assistance and translation of vital documents. SB 388 gives teeth to this regulation, clarifying that the Summary of Benefits and Coverage (SBC) is a vital document, and plans must translate the SBC into non-native English languages spoken by a significant portion of their enrollees. Beginning July 1, 2016, the California Department of Managed Health Care and the Department of Insurance will provide written translations of the SBC template, in the required language groups, on their websites. This is a more strict regulation than the federal rule, which only requires an SBC be provided in a culturally relevant format if ten percent of the population in the county in which the SBC is being delivered to is only literate in a non-English language.

## SB 503 Modifies Plan Notifications Provided to Cal-COBRA Participants

Currently, under the California Continuation Benefits Replacement Act (Cal-COBRA), health care service plans and insurers providing coverage under a group benefit plan must provide specified disclosures to covered employees. For example, plans and insurers must explain to a covered employee who is considering declining continuation of coverage that companies selling individual health insurance may require a review of the employee's medical history, which could result in a higher premium or denial of coverage. SB 503 would eliminate the current disclosure requirement, and instead, replaces the current disclosures with the following language:

> "In addition to your coverage continuation options, you may be eligible for the following:
>
> 1. Coverage through the state health insurance marketplace, also known as Covered California. By enrolling through Covered California, you may qualify for lower monthly premiums and lower out-of-pocket costs. Your family members may also qualify for coverage through Covered California.
>
> 2. Coverage through Medi-Cal. Depending on your income, you may qualify for low or no-cost coverage through Medi-Cal. Your family members may also qualify for Medi-Cal.
>
> 3. Coverage through an insured spouse. If your spouse has coverage that extends to family members, you may be able to be added on that benefit plan.
>
> Be aware that there is a deadline to enroll in Covered California, although you can apply for Medi-Cal at anytime. To find out more about how to apply for Covered California and Medi-Cal, visit the Covered California Internet Web site at http://www.coveredca.com."

## SB 304 California Paid Sick Leave Clean Up Bill

This bill amends Section 246 of the Labor Code, or California's Paid Sick Leave Bill. Below are a few highlights of SB 304:

- Clarifies an employee who works in California for the same employer for 30 or more days in a given year is entitled to paid sick leave;
- Clarifies that employers may satisfy the accrual methods by providing at least 24 hours or 3 days of accrued paid sick leave by the 120th day of employment of each calendar year, or in each 12-month period;
- Provides employers with several alternative methods to calculate accrued paid sick leave;
- Clarifies how to calculate the rate of pay for paid sick leave for nonexempt and overtime exempt employees
    - Nonexempt employees- Calculate paid sick leave in the same manner you would calculate the regular rate of pay for the workweek in which the employee uses paid sick time *or* by dividing the employee's total wages, not including overtime pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment
    - Overtime exempt employees: Calculate paid sick leave in the same manner as you would for other forms of paid sick leave.
- Grandfathered Paid Time Off (PTO) policies specifying different accrual methods in place before January 1, 2015, so long as the employees receive at least one day, or eight hours of paid time off within 3 months of employment, and are eligible to earn at least 3 days or 24 hours of PTO within 9 months of employment;
- Clarifies that if an employee is rehired within one year, the employer must reinstate previously accrued and unused paid sick leave. The employer may cap the leave at 48 hours or 6 days.
- Allows employers providing unlimited paid sick leave or PTO to notify employees that they have unlimited leave available, rather than follow a specified accrual method.

## California Laws Related and Unrelated to Health Care Reform (Continued)

- Explains that an employer is not obligated to inquire into or record the purposes for which an employee uses paid leave or PTO.
- Excludes retired annuitants of a public entity from paid sick leave.

## Action Required

Employers should ensure that they are in compliance with the laws listed above, as it relates to their employee benefits offered or their sick leave policy.

**For the complete details, see:**

**AB 248:** http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB248

**AB 339:** https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB339

**SB 43:** http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0001-0050/sb_43_bill_20141205_introduced.html

**SB 388:** https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB388

**SB 503:** https://legiscan.com/CA/text/SB503/2015

**SB 304:** https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB304

# EMPLOYER-PROVIDED CREDIT MONITORING AND IDENTITY THEFT PROTECTION SERVICES PRIOR TO BREACH TO BE EXEMPT AS INCOME TO EMPLOYEES

Previously, in Announcement 2015-22, the IRS issued guidance that the value of credit monitoring and other identity theft protection services provided by employers to employees would be exempt from an employee's taxable income only if it was in connection with a data breach. In response to comments from the public, and pursuant to Announcement 2016-02, the IRS announced that the value of credit monitoring and other identity theft protection services provided to an employee **prior** to a breach would also be exempt as income to an employee.

Employers currently offering, or thinking about offering credit monitoring or identity theft protection services to employees should consider doing so because the cost of such coverage may be excluded as income to the employee, providing some tax savings to both the employer and employee.

## No Action Required

Employers may want to provide additional incentives to employees to attract and retain talent, and this may include employer-sponsored credit monitoring and theft protection services.

**For the complete details, see:**

**Announcement 2016-02:** https://www.irs.gov/pub/irs-drop/a-16-02.pdf

# QUESTION OF THE MONTH

**Q:** Our company sponsors a group health plan, and we just discovered that we did not send a COBRA election notice to a terminating employee within the required time period. Can we avoid IRS excise taxes by immediately providing the notice?

**A:** So long as you have not received an audit letter from the IRS, excise taxes generally may be avoided if the failure to send an election notice was due to reasonable cause and was corrected within 30 days. More specifically, the excise tax under Code § 4980B does not apply to failures to comply with COBRA due to "reasonable cause and not willful neglect" that are corrected within 30 days after any person liable for the tax "knew, or exercising reasonable diligence would have known," of the failure.

A COBRA failure is considered corrected if the failure is retroactively undone to the extent possible and any affected beneficiary is placed in a financial position as good as the beneficiary would have been in had the failure not occurred. A failure to send a COBRA notice is typically corrected by sending the notice as soon as possible and making sure that the participant has the same election and coverage periods that he or she would otherwise have been entitled to. You may need to provide a longer election period but still offer coverage retroactive to the qualifying event.

The terms "reasonable cause" and "reasonable diligence" are not clearly defined. But COBRA's legislative history identifies the following factors as relevant to whether any tax should be imposed: (1) the existence of a compliance program that trains responsible individuals and includes written instructions; (2) the existence of a compliance program based on professional advice regarding legal rules; and (3) a process for auditing compliance.

Assuming that your failure to provide an election notice was due to reasonable cause, that it is corrected within 30 days of discovery, and that it would not have been discovered earlier by a person exercising reasonable diligence, then excise taxes should not apply and Form 8928 should not be required.

Source: Thomson Reuters/EBIA