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In This Edition:

CBIZ Benefits & Insurance Services

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THE HSA CONUNDRUM

Health savings account (HSA) eligibility continues to be fraught with challenges. As discussed in last month's *Benefit Beat* (see *HSA Eligibility: A Cautionary Tale*, 2/7/18), to be eligible for an HSA, an individual can only be covered by a qualified high deductible health plan (HDHP). One of the requirements of a qualified HDHP is that it must meet a statutory deductible standard. Medical expenses, with the exception of preventive health services, cannot be reimbursed by any health plan until the minimum statutory deductible of an HDHP is satisfied.

Some states, Maryland, for example, have passed laws requiring insured plans to cover male sterilization for low or no deductible. This has raised a question about whether male sterilization or male contraceptive services qualify as preventive health services. The IRS has determined, by way of **IRS Notice 2018-12,** that male sterilization or male contraceptive services are not deemed to be preventive health services at this time. The IRS sets forth some transition relief for years prior to 2020, providing that if an individual is covered by a plan that is required to include this type of disqualifying coverage, then the individual will remain HSA-eligible. However, beginning in 2020, the individual would become HSA-ineligible. This transition relief is being granted to give states an opportunity to change their insurance laws, if they deem it appropriate.

Other types of programs likewise constitute a trap for the unwary such as telemedicine programs, on-site clinics or value-based health plans that provide medical services prior to satisfaction of the deductible.

We will be discussing this topic, along with other HSA matters, in our upcoming CBIZ Benefits & Insurance webinar on September 18th. To register for "*The Compatibility Factor: Making HSAs Work With Your Employee Benefits Plan*", click **here**.

Revised 2018 Cost of Living Adjustments

One of the provisions of the Tax Cuts and Jobs Act (TCJA) changed the computation of cost of living adjustments from a Consumer Price Index for all Urban Consumers ("CPI-U") computation formula to a chained CPI-U ("C-CPI-U") index. This includes cost of living adjustments applicable to income, as well as certain benefit-related tax code provisions.

To this end, the IRS has released adjusted cost of living amounts (**IRS Rev. Proc. 2018-18**) applicable to health savings accounts, Archer medical savings accounts, the wage limit applicable to the small business tax credit, and adoption assistance limits. In addition, the IRS has made adjustments to civil penalties for certain failures. Following are these changes:

Health Savings Accounts (HSA)

For HSA purposes, the only parameter affected by this change is the family contribution limit. The adjusted limit for the 2018 calendar year is now $6,850 (*previously $6,900*). Following is the revised cost of living table applicable to HSAs:

	2018	
	Individual	*Family*
HDHP Annual Deductible	$1,350	$2,700
HDHP Annual Out-of-Pocket Limit	$6,650	$13,300
Contribution Limit	$3,450	$6,850 *(previously $6,900)*

As a result of the adjusted family contribution amount, if the full statutory limit has been elected for the year, the account holder should adjust his/her election to correspond to the reduced limit. If the full statutory limit has already been contributed, then the account holder should contact the HSA trustee to obtain a refund of the excess amount.

Archer Medical Savings Accounts

The limits applicable to family high deductible health plans and the out-of-pocket expense limit for individuals have been adjusted as follows:

	2018	
	Single	*Family*
HDHP Annual Deductible	Between $2,300 and $3,450	Between $4,550 and $6,850 *(previously, between $4,600 and $6,850)*
Out-of-Pocket Expenses	$4,550 *(previously, $4,600)*	$8,400

Qualified Adoption Assistance Reimbursement Program

An employer-provided adoption assistance program that meets the qualifications of IRC §137 allows participants to recover expenses relating to adoption, such as reasonable adoption fees, court costs, attorney's fees and traveling expenses. Below are the adjusted exclusion limits and AGI phase-out limits for 2018:

	2018
Exclusion Limit	$13,810 *(previously, $13,840)*
AGI Phase-out Limits	Between $207,140 and $247,140 *(previously, between $207,580 and $247,580)*

Small Business Tax Credit (SBTC)

Small businesses and tax-exempt employers who provide health care coverage to their employees under a qualified health care arrangement are entitled to a tax credit, as established by the Affordable Care Act. To be eligible for the small business tax credit, the employer must employ fewer than 25 full-time equivalent employees whose average annual wages are less than $53,200 (adjusted limit for 2018; *previously, $53,400*). The tax credit phases out for eligible small employers when the number of its full-time employees (FTEs) exceeds 10; or, when the average annual wages for the FTEs exceeds $26,600 (adjusted limit for 2018; *previously, $26,700*) in the 2018 tax year.

Adjusted Tax Information Reporting Penalties

The IRS can assess penalties when certain tax information is not provided on a timely basis. Specifically, penalties may be assessed for failure to file information returns or provide payee statements, such as the Form W-2 and Form 1099, and notably, the Affordable Care Act's Forms 1094 and 1095, or related payee statements. Following are the adjusted penalties applicable for the 2019 tax year:

- The penalty for failure to file a correct information return is $270 for each return for which the failure occurs, with the total penalty cap of $3,275,500 (*previously, $3,282,500*) for a calendar year.
- The penalty for failure to provide a correct payee statement is $270 for each statement for which the failure occurs, with the total penalty cap of $3,275,500 (*previously, $3,282,500*) for a calendar year.

Special rules apply that increase the per-statement and total penalties if there is intentional disregard of the requirement to file the returns and furnish the required statements.

Other Types of Benefits

It should be noted that the cost of living adjustments applicable to pension and retirement plans for 2018 were not changed by TCJA (this was previously announced by the IRS). In addition, no adjustments have been made thus far to plans such as flexible medical spending account plans or qualified transportation programs.

IRS Releases Revised Form W-4 for Employees

The IRS released a new version of the Form W-4 to help taxpayers check their 2018 tax withholding following passage of the Tax Cuts and Jobs Act (TCJA) in December, 2017.

The Form W-4, *Employee's Withholding Allowance Certificate*, is used in particular by employees to indicate the amount of withholding from their paychecks. Because the TCJA made numerous changes in the tax code, including increasing the standard deduction, the removal of personal exemptions, the increase in the child tax credit, as well as modifying other deductions, tax rates and brackets, the IRS is encouraging all individuals to review their current W-4 on file with their employers, and make necessary changes, if indicated. To assist individuals with this process, the IRS provides a Withholding Calculator, together with a set of FAQs, on its website.

City of Austin Enacts Paid Sick Leave Ordinance

Austin became the latest jurisdiction to require private sector employers to provide paid sick leave to their employees. The City Council of Austin enacted the Earned Sick Time Ordinance on February 15, 2018. The law requires private sector employers to provide paid sick leave to their employees beginning October 1, 2018. For employers with fewer than 5 employees, the applicability date of the law is delayed until October 1, 2020. Following is a summary of this Ordinance.

Employers subject to the law. For purposes of this Ordinance, an *employer* is defined as any person, company, corporation, firm, partnership, labor organization, non-profit organization or association that pays an employee to perform work for the employer, and exercises control over the employee's wages, hours and working conditions. Employer does not include the United States, the state of Texas, or a political subdivision of the state that cannot be regulated by city ordinance.

Eligible employees. An *eligible employee* is one who performs at least 80 hours of work in a calendar year within the City of Austin for the employer subject to the law, including those who work through a temporary or employment agency. Independent contractors, and unpaid interns, are not eligible for the earned sick time benefit.

Amount of leave. Employees accrue at least one hour of sick leave for every 30 hours worked in the City.

Accrual, Cap, Frontloading, and Carryover

Employees begin to accrue earned sick time beginning on the later of 1) the date of hire, or, 2) October 1, 2018. Earned sick time can be used as soon as it is accrued. An employer can delay usage of an individual's accrued leave until after he/she has worked 60 days, but only in the event where the individual is expected to be employed at least one year.

The accrual cap and use of leave is contingent upon the employer size, as follows:

- Employers with 16 or more employees must allow employees to accrue, and use up to 64 hours of earned sick time per year;
- Employers with 15 or fewer employees must allow employees to accrue and use up to 48 hours of earned sick time per year.

Alternatively, an employer that provides earned sick time for immediate use at the beginning of each year 64 (or 48 hours, as applicable) is not required to provide carryover, or additional accrual. Unused accrued earned sick time can be carried over to the next following year, subject to these 64 or 48 hour limits.

Use of leave. Earned sick time can be taken for the following reasons:

- To attend to one's own needs, or to attend to the needs of a family member's illness, injury, medical diagnosis or treatment, including preventative medical care; or,
- To obtain services or care as a result of domestic violence, sexual assault, or stalking.

For this purpose, a *family member* includes the employee's spouse, child, parent, or any other individual related by blood, or whose close association with the employee is the equivalent of a family relationship.

Notice Requirements

- **Employee notice obligations.** An employee's request for the use of earned sick time shall be made as timely as possible prior to the employee's scheduled work time. An employer may adopt reasonable verification procedures to establish that an employee's request for earned sick time for more

than three consecutive work days meets the requirements of the ordinance.

- **Employer workplace posting and notice obligations**. Employers are required to display a poster describing the requirements of this Ordinance, in all appropriate languages of its employee population, in a conspicuous place where employee notices are customarily posted. In addition, an employer must include information about the earned sick time benefit in its employee handbook. The City of Austin's Equal Employment Opportunity/Fair Housing Office is delegated to create and make available on its website, a model workplace posting that can be used for this purpose. In addition, employers are required to provide a monthly earned sick time statement, either by paper or electronically, reflecting the usage and available amount of the employee's earned sick time.

Coordination with employer's existing time off policy. An employer's existing leave policy can satisfy the obligations of the City of Austin's paid sick leave law as long it is at least as generous as the Ordinance requires.

Coordination with other laws. This law must be coordinated with other federal, state or local laws, where applicable.

Record retention. Employers are required to maintain records establishing the amount of earned sick time accrued and used by each covered employee for three years.

Enforcement. The City of Austin's Equal Employment Opportunity/Fair Housing Office (EEO/FHO) enforces the provisions of this law, including complaints of violations and employment retaliation matters. Violations of the Ordinance could result in civil penalties.

LITIGATION CORNER: SEXUAL ORIENTATION DISCRIMINATION

As a result of a recent court decision, the Second Circuit has now joined the Seventh Circuit (see *Sex Discrimination, at least according to the Seventh Circuit, Benefit Beat*, 5/8/17) in affirming that sexual orientation discrimination is a violation of Title VII of the Civil Rights Act,

In the matter of *Zarda v. Altitude Express* (No. 15-3775, 2d Cir. 2017), the plaintiff, Donald Zarda, had been fired after he revealed his sexual orientation to a client. He then brought suit against his employer, Altitude Express, alleging Title VII sex discrimination. Title VII's prohibition on sex discrimination applies to any practice in which sex is a motivating factor. In its review of the matter, the Court concluded that:

> *"…sexual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account. Sexual orientation discrimination is also based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted. Finally, sexual orientation discrimination is associational discrimination because an adverse employment action that is motivated by the employer's opposition to association between members of particular sexes discriminates against an employee on the basis of sex. Each of these three perspectives is sufficient to support this Court's conclusion and together they amply demonstrate that sexual orientation discrimination is a form of sex discrimination".*

While the Second Circuit (which has appellate jurisdiction in Connecticut, New York, and Vermont) and Seventh Circuit (which has appellate jurisdiction in Illinois, Indiana and Wisconsin) concur on the matter, the Eleventh Circuit (which has appellate jurisdiction in Alabama, Florida and Georgia) does not. Because there continues to be a split among the Circuit Courts, the issue may be ripe for review by the Supreme Court.

In the meantime, remember that Title VII impacts all matters of employment, including the provision of employee benefits. Thus, plan sponsors should exercise caution with regard to any plan provisions that could be deemed to discriminate based on sexual orientation. It is prudent to consult with legal counsel with any questions.