LEGISLATIVE AND REGULATORY UPDATE

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LOUISVILLE EMPLOYEE BENEFITS COUNCIL
LOUISVILLE, KENTUCKY
October 8, 2013

New guidance addresses HRAs, 'employer payment plans,' FSAs, and EAPs under ACA: New agency guidance addresses the application of Affordable Care Act group health plan standards to health reimbursement arrangements, "employer payment plans" (premium reimbursement arrangements), health flexible spending arrangements, and employee assistance programs. The guidance limits the extent to which pre-tax contributions may be used for purchasing individual policies and addresses how these contributions affect eligibility for exchange subsidies. The guidance also says that an employee assistance program may be an excepted benefit if it does not provide significant benefits that are medical care or treatment. ***See IRS Notice 2013-54 and DOL Technical Release 2013-03***

Labor Department adopts 'place of celebration' rule for ERISA same-sex marriage: Same-sex couples legally wed anywhere in the US or abroad are considered married for any ERISA purpose within the Department of Labor (DOL)'s jurisdiction, including HIPAA provisions that parallel ERISA. This recognition doesn't extend to civil unions or domestic partnerships. DOL Technical Release 2013-04 takes the same "place of celebration" approach as IRS guidance issued Aug. 29. DOL intends to issue future guidance addressing specific provisions of ERISA. **Technical Release 2013-14 (DOL, 18 Sep 2013, 1 page); News Release (DOL, 18 Sep 2013, 1 page) »**

Projected 2014 limits for FSA, MSA, transit, adoption, and long-term care plans: Mercer has ***projected*** 2014 limits for health flexible spending arrangements (FSAs), Archer medical savings accounts (MSAs), parking and transit benefits, adoption assistance programs, and long-term care plans. This article provides those projections, along with the official 2014 limits on health savings account (HSA) contributions, high-deductible health plan (HDHP) deductibles, and HDHP out-of-pocket maximums. Starting next year, nongrandfathered group health plans also must adhere to out-of-pocket limits, which are tied to the HDHP maximums for 2014. The unofficial projected values shown in this article are determined using the Code's cost-of-living adjustment methods and CPI-U values through August. The IRS is expected to announce the actual 2014 limits for most benefits in October.

Health FSA, Archer MSA, transit, adoption, and long-term care limits

Mercer's projected 2014 limits for health FSAs, Archer MSAs, parking and transit benefits, and adoption assistance programs reflect the 1.7% 2012 to 2013 increase in the average CPI-U for the 12 months ending Aug. 31. The American Taxpayer Relief Act increased tax-free mass transit benefits to equal parking benefits for 2012 and 2013. Unless Congress extends this parity, mass transit benefits will revert to the original indexing formula in 2014. Qualified long-term care premium and per diem limits reflect the 2.3% increase in the CPI-U's medical care component from August 2012 to August 2013.

Benefit-related limits	Estimated 2014	2013	2012
Health FSA limit (Section 125(i))			
Maximum salary reduction contribution	$2,500	$2,500	NA
Archer MSA limits (Section 220(c)(2))			
Self-only coverage			
Minimum annual deductible	2,200	2,150	2,100
Maximum annual deductible	3,250	3,200	3,150
Maximum out-of-pocket limit	4,350	4,300	4,200
Family coverage			
Minimum annual deductible	4,350	4,300	4,200
Maximum annual deductible	6,550	6,450	6,300
Maximum out-of-pocket limit	8,000	7,850	7,650
Tax-free qualified transportation fringe benefits (Section 132(f))			
Monthly parking	250	245	240
Monthly transit passes or commuter highway vehicle transportation	130	245	240
Qualified adoption assistance benefits (Section 137)			
Exclusion for child with special needs (regardless of expenses incurred)	13,190	12,970	12,650
Aggregate dollar limit for all taxable years (child without special needs)	13,190	12,970	12,650
Phaseout begins at modified AGI of	197,880	194,580	189,710
Phaseout completed at modified AGI of	237,880	234,580	229,710
Qualified long-term care limits (Sections 213(d) and 7702B(d)(4))			
Premium limits			
Age 40 or younger	370	360	350
41 – 50	700	680	660
51 – 60	1,400	1,360	1,310
61 – 70	3,720	3,640	3,500
Older than 70	4,660	4,550	4,370
Per diem limit	330	320	310

HSA and HDHP limits

The IRS has already announced the 2014 limits on HSA contributions and HDHP deductibles and out-of-pocket maximums ***(Revenue Procedure 2013-25)***. The 2014 values (before rounding) reflect the 1.8% rise in the average CPI-U for the 12 months ending March 31, 2013. The HSA catch-up contribution limit is set by statute and is no longer adjusted.

HSA/HDHP limits	2014	2013	2012
Self-only coverage			
Maximum tax-deductible HSA contribution	$3,300	$3,250	$3,100
HDHP minimum annual deductible	1,250	1,250	1,200
HDHP out-of-pocket maximum	6,350	6,250	6,050
Family coverage			
Maximum tax-deductible HSA contribution	6,550	6,450	6,250
HDHP minimum annual deductible	2,500	2,500	2,400
HDHP out-of-pocket maximum	12,700	12,500	12,100
HSA catch-up contribution limit at age 55 and older	1,000	1,000	1,000

Nongrandfathered health plan out-of-pocket maximums

One of the Affordable Care Act's mandates for group health plans places annual dollar limits on cost sharing for essential health benefits when covered individuals use in-network providers. The out-of-pocket caps apply for plan years starting on or after Jan. 1, 2014. The 2014 limits are tied to the maximum out-of-pocket expenses allowed for HDHPs used with HSAs. Future adjustments will reflect the increase in the average per-person health insurance premium in the US. The out-of-pocket limits do not apply to grandfathered group health plans or any plan consisting solely of excepted benefits (such as standalone dental or vision plans). Certain transition relief is available for the 2014 plan year.

ACA out-of-pocket limit	2014
Out-of-pocket maximum, self-only coverage	$6,350
Out-of-pocket maximum, family coverage	12,700

Job title does not determine employment status under the ADEA, EEOC says: Even partners in accounting firms may be employees protected by the Age Discrimination in Employment Act (ADEA), Equal Employment Opportunity Commission (EEOC) Legal Counsel Peggy R. Mastroianni said in two informal discussion letters issued July 25 and July 29. In enforcing the ADEA, EEOC will not presume job titles place individuals outside the act's coverage but instead will review actual roles performed by the partners, she asserted.

ADEA covers employees. The ADEA protects individuals ages 40 and older from age-based discrimination in employment terms and conditions. However, the law's protections extend only to prospective, current, and former employees. Over the years, EEOC has sued several large law firms, alleging that policies terminating, demoting, or "easing out" older partners violate the ADEA. A threshold issue in these cases was whether the individuals were truly partners or, as EEOC contended, well-paid employees with little or no management responsibility.

Control governs employment status. Individuals subject to a firm's control are employees, while those who act independently and participate in managing the firm are not, the discussion letters pointed out. In distinguishing between partners and employees under the ADEA, federal courts consider all aspects of an individual's working relationship with the firm, the EEOC legal counsel noted. However, she identified six nonexhaustive factors relevant to this determination:
(i) whether the firm can hire or fire the individual or regulate his or her work; (ii) whether and to what extent the firm supervises the individual's work; (iii) whether the individual reports to someone higher in the firm; (iv) whether and to what extent the individual is able to influence the firm; (v) whether written contracts show the parties intend the individual to be an employee; and (vi) whether the individual shares in the firm's profits, losses, and liabilities.

Status affects worker rights. Employers may be able to defeat claims or deny rights under the ADEA and other federal employment laws by showing that workers are partners, independent contractors, or other nonemployee service providers. While tests for determining employment status vary somewhat for different statutes or judicial circuits, an organization's lack of control over a service provider's work is a common factor countering an employer-employee relationship. In all cases, however, the tests require a fact-sensitive, case-by-case analysis of an individual's duties, authority, and role in an organization — and do not rely on formal job titles or descriptions. As a result, employers should always consult counsel in making classification decisions.

Proposed ACA employer-reporting rules will require tracking new information: Recently proposed IRS rules set out when, how, and what employers must annually report about group health plans, full-time employees, and covered family members. The two new reports are part of ACA's shared-responsibility and minimum essential coverage requirements. The first IRS filings and employee statements about 2015 coverage will be due in early 2016. IRS has attempted to reduce the new reporting burden and invites suggestions on other ways to simplify the process. Employers have until Nov. 8 to submit comments or requests to speak at the Nov. 18 and 19 public hearings. **IRS proposed rules on MEC reporting (Federal Register, 9 Sep 2013, 11 pages), IRS proposed rules on employer shared-responsibility reporting (Federal Register, 9 Sept 2013, 18 pages)**

Federal tax reporting changed for same-sex spouses' health coverage: Employers currently providing health coverage to employees' same-sex spouses need to address federal tax reporting now. Same-sex couples legally wed anywhere in the US or abroad are considered married for federal tax purposes — no matter where they live — according to a recent IRS Revenue Ruling and FAQs (reported in the last LEBC Update). The Department of Labor has adopted the same definition for any ERISA purpose within its jurisdiction, including applying HIPAA provisions that parallel ERISA (see article above).

The IRS ruling, issued in response to the US Supreme Court's decision in *US v. Windsor*, took effect prospectively on Sept. 16, 2013. While many federal tax questions remain open, a US Treasury official speaking informally said employers providing health coverage to same-sex spouses should stop imputing income to employees by Sept. 16 or as soon after that date as practicable. Employers covering same-sex spouses will want to identify which employees are affected by the tax change and work toward implementing payroll and reporting changes. The IRS ruling applies only for federal tax purposes; state tax laws may differ.

Next steps for health plans covering same-sex spouses

The IRS ruling has nationwide impact, affecting federal income tax treatment even for employees who reside in states that don't recognize same-sex marriage. Immediate action steps for employers sponsoring health plans that cover same sex spouses include the following:

Identify same-sex spouses. Many employers providing health coverage to same-sex couples currently do not distinguish among domestic partners, civil union partners, and same-sex spouses. The IRS ruling applies only to same-sex couples who are legally married, not to domestic or civil union partners. To ensure proper tax treatment, employers need to know which same-sex couples are married, so employers lacking this information should take steps to obtain it. Employers may want to contact all employees who currently have same-sex partner coverage to ask them if they are married, and if so, the date of marriage. Employers that don't ask for proof of opposite-sex marriages generally should refrain from requesting proof of same-sex marriages.

Stop imputing income to employees. Before *Windsor*, employers imputed the value of health coverage for same-sex spouses to employees' income, unless the same-sex spouse qualified for tax-free health plan coverage as a dependent. For federal tax purposes, employers should stop imputing income to employees with same-sex spouses for coverage on or after Sept. 16. While further guidance might let employers "true up" the tax reporting at year-end, current guidance seems to require employers to act sooner if they can.

Evaluate optional tax adjustments for 2013. While not required in guidance issued to date, employers are permitted to change federal tax treatment of same-sex spouse coverage for periods earlier in 2013. Employers may make adjustments for excess income tax withholding related to 2013 same-sex spouse benefits as long as they reimburse employees for the overwithheld income tax by Dec. 31.

Explore tax refund opportunities. For prior "open" tax years (generally 2010 and later), employees may amend federal income tax returns to exclude the cost of same-sex spouse coverage from income. For example, an employee who was married to a same-sex spouse in 2011 may file a Form 1040X for 2011 to recover taxes paid on spousal health coverage — as long as the employee also adjusts all other items on the 2011 return that are affected by marital status. Future guidance may address whether employers must reissue Form W-2s for prior years to assist employees in this process. The IRS will soon publish streamlined procedures employers may use to claim refunds for excess Social Security and Medicare taxes paid on same-sex spouse benefits.

Let employees pay with pretax contributions. Some uncertainty about *Windsor*'s impact on midyear changes to cafeteria plan elections remains. For employees who are already paying for same-sex spouse coverage, it appears that employers can convert 2013 after-tax employee contributions to pretax contributions. And employees who marry a same-sex spouse on or after Sept. 16 may elect to pay for their same-sex spouses' group health coverage on a pretax basis, both as a permitted status change and required HIPAA special enrollment event. It's unclear whether employers can let employees already married but not currently covering their same-sex spouses now add them. The IRS has promised future guidance on cafeteria plan issues.

Identify other affected health and welfare benefits. The guidance affects other health and welfare benefits available to same-sex spouses. Employers should, for example, review dependent care plans and certain fringe benefits, such as tuition reimbursement and employee discounts. If previously taxable income is now excluded, employers should implement payroll and reporting changes. Same-sex spouses can also have their eligible expenses reimbursed under health flexible spending accounts and health reimbursement arrangements, at least for expenses incurred on and after Sept. 16. The IRS intends to provide more guidance on these account-based arrangements.

Review health and welfare plan documents, communications, and enrollment materials. Employers should revisit definitions of "spouse" and "domestic partner" in plan documents, insurance policies, trust agreements, service agreements, beneficiary forms, and required notices. Related communications may have to be updated to reflect the new tax treatment of benefits for same-sex spouses. Employers covering same-sex spouses may also wish to highlight the new tax rules in open enrollment materials.

Review Medicare eligibility of same-sex spouses. If a health plan has paid secondary to Medicare under the Medicare Secondary Payer rules for active employees' domestic and civil union partners who qualify for Medicare because of age, the plan should be modified consistent with *Windsor* to ensure that the plan will pay primary to Medicare for employees' same-sex spouses. Plans should consider implementing these changes now to avoid complicated collections by the Centers for Medicare and Medicaid Services at a later date.

Review state tax reporting. Though the IRS guidance applies for federal tax purposes, state law will continue to govern state taxation and reporting of same-sex spouse benefits. When employees live in states that do not recognize same-sex marriage, employers will need to determine whether to continue to include the value of the spousal health coverage in employees' imputed income for state tax purposes. Likewise, cafeteria plan contributions that are pretax at the federal level could be subject to state income tax withholding. Because many states' definitions of income and wages follow the federal tax code, this may be a complex state-by-state analysis in jurisdictions that have legislative or constitutional bans on same-sex marriage.

More IRS guidance expected

Additional IRS guidance in the near future is expected to address such issues as:

- Actions (if any) required for amounts already imputed and withheld in 2013, before Sept. 16
- Cafeteria plan issues, including midyear changes
- *Windsor*'s impact on flexible spending accounts and health reimbursement arrangements
- Streamlined procedures for employers to claim FICA refunds for prior years