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### **Tax Treatment of Benefits Paid by Fixed Indemnity Health Plans**

For the second time in six months, the IRS Chief Counsel has addressed the taxation of certain benefits. In the Chief Counsel's pronouncement dated April 14, 2016, the IRS reviewed the taxation of wellness program rewards (see *Taxability of Wellness Program Rewards*, *Benefit Beat*, 6/7/2016). The IRS concluded that any cash reward, incentive or other benefit that would not otherwise qualify as a deductible IRC Section 213(d) medical expense, such as a gift card or gym membership fees, are taxable and includible in the employee's compensation, subject to federal income tax withholding, as well as FICA and FUTA taxes. Only certain *de minimis* gifts such as a t-shirt or water bottle can be provided without imposing taxes.

The **IRS Chief Counsel Memo** dated December 12, 2016 addresses the tax treatment of benefits paid by fixed-indemnity health plans. A fixed indemnity health plan is one that pays covered individuals a specified amount of cash for the occurrence of certain health-related events, such as office visits or days in the hospital. Because this type of plan does not generally reimburse medical services, the IRS concluded that if the employer pays for indemnity coverage, or allows payment of the coverage by salary reduction through the terms of a Section 125 cafeteria plan, the benefit paid is taxable. If the employee pays the premium on an after-tax basis, the benefit can be tax-favored.

Further, the IRS addressed a scenario whereby a wellness plan pays employees a fixed indemnity cash payment benefit of \$100 for completing a health risk assessment, \$100 for participating in certain prescribed health screenings, and \$100 for participating in other prescribed preventive care activities. The IRS determined that because the premiums for the wellness plan are paid with amounts that are not included in the employee's gross income and wages, the tax exclusion would not apply to the fixed indemnity cash benefit payments; and thus, the payments would be included in the employee's gross income and wages.



## Short-term Disability Plan Meets ERISA's Payroll Practice Exemption

A recent District Court of Appeals case (*Foster v. Sedgwick Claims Management Services, Inc.*, D.C. Cir. No. 15-7150, Nov. 29, 2016) provides a good reminder of understanding which plans are subject to ERISA and which are not. At issue in this case was an employer's short-term disability (STD) program. This program, like many STD programs, was designed as a continuation of an individual's compensation during a time-off period due to a medical condition.

ERISA provides a specific exemption for this type of payroll practice wherein payment of the employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment). By being exempt from ERISA, the STD payroll practice program is not subject to ERISA requirements such as plan documentation, Form 5500 filings and the like, but could be subject to state and/or local jurisdiction requirements.

It is important for employers to understand which of their programs are subject to ERISA and which ones are not, to ensure that all federal, state or local requirements are satisfied.

## Fiduciary Advice Rules Under Review

The investment advice rules issued by the Department of Labor's Employee Benefits Security Administration (EBSA) were to become applicable on April 10, 2017 (see the May and December 2016 editions of our *At Issue* newsletters). These rules, sometimes referred to as the 'fiduciary advice rules', impose fiduciary standards on certain investment advisers. The goal of these rules is to ensure that the best interest of the individual is maintained and that no conflicting investment advice is given.

Plans subject to the fiduciary advice rules include pension plans subject to ERISA, health savings accounts, Archer medical savings accounts, Coverdell Education Savings Accounts and individual retirement accounts (IRAs). In a nutshell, the rules attempt to regulate individuals deemed to render investment advice when the advice is given for a fee or other direct or indirect compensation, and such advice entails recommendations relating securities or other investment property.

On February 3, 2017, President Trump issued a **Memorandum** directing the Secretary of Labor to prepare an updated economic and legal analysis concerning the likely impact of these rules. Any proposed changes derived from this review, which could potentially rescind or revise the current fiduciary advice rules, would then undergo a regulatory review process, referred to as a notice and comment period. While this directive does not specifically delay the implementation date of these rules, it is unclear at this point what changes, if any, would be made by the Department of Labor and accepted by the Executive Branch. We will continue to provide updates on this matter as they become available.

## Protecting Employee Rights under FMLA

A recent court case provides two very important reminders about Family and Medical Leave Act (FMLA) administration. First, it is essential that individuals who request a leave of absence or otherwise assert their FMLA rights not be discriminated against; and secondly, medical information relating to an FMLA claim must be kept confidential.

In the case of *Holtrey v. Collier County Bd. of County Commissioners* (No. 16-34. M.D. Fla. Jan. 12, 2017), the employee's medical information giving rise to an FMLA-serious health condition event was shared in a staff meeting with some of the individual's co-workers without his knowledge and consent, and later used by his co-workers to mock him because of his condition. The court determined that while the employer fulfilled its obligation to allow this employee to take FMLA leave, it did not protect the employee's right to privacy and the disclosure of confidential information resulted in materially affected work condition, both violations of the FMLA. Once again we are reminded, privacy reigns supreme. An individual's information should only be shared on a need to know basis.

## Reporting and Disclosure Reminders; Increased Penalties for Violations

Following are some reporting and disclosure reminders and updates. In addition, penalties for failure to comply with certain reporting and disclosure obligations, as well as failure to post certain work site notifications have increased.

### REPORTING REMINDERS

- ❑ **Medicare Part D Disclosure Notice to CMS.** All group health plans, whether insured or self-funded, are required to provide notices of creditable or non-creditable coverage to the Centers for Medicare and Medicaid Services (CMS) on an annual basis.



The Creditable Coverage Disclosure Form filing must be accomplished electronically, and is due within 60 days of the commencement of the plan year. For calendar year plans, this means the disclosure filing must be accomplished no later than March 1, 2016. In addition, this disclosure form must be completed within 30 days upon other events such as when the prescription drug benefit is cancelled, or if any material change in the prescription drug benefits that would cause it to change status from creditable to non-creditable, or vice versa. [Guidance and instructions](#), as well as the [disclosure form](#), are available on the CMS website.

- ❑ **Form M-1 Filing.** If you sponsored a multiple employer welfare arrangement (MEWA) in 2016, make certain that you file the Form M-1 annual report by March 1, 2017 (see last month's *Benefit Beat* article).

## UPDATED MODEL DISCLOSURE NOTICES

### ❑ Notice of Marketplace Options – Expiration Date

The Affordable Care Act requires all employers to provide a Notice of Marketplace Options to their employees explaining the pros and cons of buying coverage through the marketplace. There are two different versions of the model notice – one to be used by employers who offer health coverage to some or all employees, and the other version is to be used by employers who do not offer health coverage. Both model notices were approved for use by the Office of Management and Budget (OMB), with an expiration date of January 31, 2017.

On February 1, 2017, the Department of Labor (DOL) published a [notice in the federal register](#) requesting OMB to extend the current version of the forms another three years, without any substantive change in the language contained in the forms. Once the comment period ends on March 3, 2017, it is anticipated that the model forms will be re-issued to reflect a new expiration date. In this interim, the DOL has released revised editions of the forms that now reflect an OMB expiration date of February 28, 2017. Employers are encouraged to use these updated versions that display the February 28, 2017 expiration date until further notice from the DOL.

As a reminder, the notice of marketplace options must be provided to all new hires including full-time and part-time employees, without regard to eligibility status for the health plan, within 14 days of date of hire. Once the OMB and the DOL release updated versions of these notices, we will provide them to you. Following are links to the current forms that can continue to be used:

- ◆ Model notice for use by employers *who offer coverage* to some or all employees, available in English ([pdf](#) or [word](#)) and Spanish ([pdf](#) or [word](#)).
- ◆ Model notice for employers *who do not offer* health coverage, available in English ([pdf](#) or [word](#)) and Spanish ([pdf](#) or [word](#)).

### ❑ Updated Medicaid/CHIP Premium Assistance Notice

Employers sponsoring health plans are obligated to annually provide a premium assistance notice to their workforce. This notification can be accomplished by using a model notice provided by the DOL's Employee Benefit Security Administration (EBSA). The DOL has recently updated its model Medicaid/CHIP notice. The revised notice, current as of January 31, 2017, makes the following changes from the July 31, 2016 version:

- ◆ New Medicaid program information, website and phone numbers in Colorado; and
- ◆ Revised website addresses for Medicaid offices in Indiana, Iowa, Massachusetts, Minnesota, North Carolina, Oregon, Pennsylvania, South Carolina, Texas and Washington.

The notice explaining the right to premium assistance must be provided to employees residing in the below-listed states at least once annually, without regard to where the employer is located, or where the plan is situated.

<i>States with Premium Assistance</i>		
Alabama	Minnesota	Pennsylvania
Alaska	Missouri	Rhode Island
Arkansas	Montana	South Carolina
Colorado	Nebraska	South Dakota
Florida	Nevada	Texas
Georgia	New Hampshire	Utah
Indiana	New Jersey	Vermont
Iowa	New York	Virginia
Kansas	North Carolina	Washington
Kentucky	North Dakota	West Virginia
Louisiana	Oklahoma	Wisconsin
Maine	Oregon	Wyoming
Massachusetts		

As mentioned below, the Department of Labor increased the penalty for certain reporting and disclosure failures. The penalty for failure to provide the Medicaid/CHIP notice is now \$112 per day, per person, up from \$110 per day, per person.

The revised Medicaid/CHIP notice is available for viewing and/or downloading from the DOL's website, in both English ([pdf](#) or [word](#)) and Spanish ([pdf](#) or [word](#)).



## INFLATIONARY ADJUSTMENTS TO CERTAIN REPORTING AND DISCLOSURE FAILURES

Failure to abide by certain reporting and disclosure obligations could result in civil penalties assessed by the Departments of Labor, Health and Human Services and Treasury. These civil penalties may be adjusted at certain times for inflationary reasons due to enactment of the *Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015*. For example, below are select **inflationary adjustments** announced by the Department of Labor that become effective January 13, 2017, as compared with the inflationary adjustments in effect last year (see [Increased Penalties for Reporting and Disclosure Violations, Benefit Beat, 7/7/2016](#)):

	2017 Penalty Amount	2016 Penalty Amount
Failure or refusal to file the annual Form 5500	Up to \$2,097 per day	Up to \$2,063 per day
Failure to file Form M-1	Up to \$1,527 per day	Up to \$1,502 per day
Failure to provide Summary of Benefits and Coverage	Up to \$1,105 per failure	Up to \$1,087 per failure
Failure to notify employees of Children’s Health Insurance Program (CHIP) coverage opportunities	Up to \$112 per day	Up to \$110 per day

It should also be noted that several penalty adjustments apply to the protections afforded under the Genetic Information Nondiscrimination Act (GINA). For example, individuals denied access to group health coverage based on his/her genetic information could result in civil penalties of up to \$112 per day of noncompliance (up from \$110 per day).

**Work Site Postings.** The penalty for failure to post certain workplace posters has increased, as follows:

- An employer subject to the federal Family and Medical Leave Act is required to post a notice in their work site locations that summarizes the major provisions of the Family and Medical Leave Act. Failure to post this notice could result in a civil money penalty assessed by the Department of Labor’s Wage and Hour Division of up to \$166 per each separate offense (up from \$163). The model FMLA work place poster is available in both English and Spanish through the DOL’s Wage and Hour Division’s [website](#).

- In a separate set of regulations, the Equal Employment Opportunity Commission (EEOC) announced an **increase in the penalty** for failure to post the EEOC notice from \$525 to \$534 per violation. As background, employers subject to various laws enforced by the EEOC should ensure that they have the appropriate EEOC notice posted in their workplaces. The EEOC enforces laws that prohibit workplace discrimination under such laws as:
  - Title VII of the Civil Rights Act (relating to discrimination on the basis of race, color, religion, national origin, or sex);
  - Americans with Disabilities Act (ADA) and ADA Amendments Act (ADAA);
  - Age Discrimination in Employment Act (ADEA);
  - Genetic Information Nondiscrimination Act of 2008 (GINA); and
  - Pregnancy Discrimination Act (PDA)

The EEOC poster, “Equal Employment Opportunity is the Law” is available in four languages: English, Spanish, Arabic and Chinese and can be obtained by downloading and printing it via [EEOC website](#).

## HHS Releases 2017 Federal Poverty Guidelines

The **federal poverty guidelines (FPL) for 2017** have been issued by the Department of Health and Human Services. These poverty guidelines are important for a number of reasons, not the least of which is the Affordable Care Act. The FPL guidelines are used to determine eligibility for premium assistance and cost-sharing, as well as eligibility for other federal entitlement programs such as the Children’s Health Insurance Program, certain parts of Medicaid and subsidies for Medicare Part D prescription benefits.

In addition, the FPL guidelines are used for purposes of the safe harbor available for satisfying the affordability standard applicable to employers subject to the ACA’s employer shared responsibility provisions. Coverage under an employer-sponsored plan is deemed affordable if the employee’s required contribution to the plan does not exceed 9.69% (indexed for 2017) of the employee’s household income for the taxable year, based on the cost of single coverage in the employer’s least expensive plan.



The FPL safe harbor method also permits use of the federal poverty guidelines in effect six months prior to the beginning of the plan year in order to provide adequate time to establish premium amounts in advance of the plan's open enrollment period.

2017 POVERTY GUIDELINES FOR THE 48 CONTIGUOUS STATES AND DISTRICT OF COLUMBIA*		
<i>Persons in family/household</i>	<i>2017 Poverty Guidelines</i>	<i>2016 Poverty Guidelines</i>
1	\$12,060	\$11,880
2	16,240	16,020
3	20,420	20,160
4	24,600	24,300
5	28,780	28,440
6	32,960	32,580
7	37,140	36,730
8	41,320	40,890
For families/households with more than 8 persons	Add \$4,180 for each additional person	Add \$4,160 for each additional person

\*Note: The FPL limits vary slightly in Alaska and Hawaii. Additional FPL information is available from the HHS Office of the Assistant Secretary for Planning and Evaluation: <http://aspe.hhs.gov/poverty-guidelines>.

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