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*In This Edition:*



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## HEALTH SAVINGS ACCOUNTS: 2018 INFLATION ADJUSTMENTS

In **Revenue Procedure 2017-37**, the IRS released the 2018 cost of living adjustments relating to health savings accounts (HSA). For 2018, the individual and family contribution limits, annual high deductible health plan (HDHP) deductible limits, and out-of-pocket (OOP) limits will increase.

As a reminder, the $1,000 catch up contribution available to accountholders aged 55 and over is not tied to a cost of living adjustment and thus, remains at $1,000.

| | *Individual/Self Only* | | *Family* | |
|---|---|---|---|---|
| | 2018 | 2017 | 2018 | 2017 |
| HDHP ANNUAL DEDUCTIBLE | $1,350 | $1,300 | $2,700 | $2,600 |
| HDHP ANNUAL OUT-OF-POCKET LIMIT* | $6,650 | $6,550 | $13,300 | $13,100 |
| CONTRIBUTION LIMIT | $3,450 | $3,400 | $6,900 | $6,750 |

**Note: The out-of-pocket (OOP) limits applicable to high deductible health plans used in conjunction with HSAs differ slightly from the ACA-imposed OOP limits, which for 2017, the OOP is $7,150 for self-only; $14,300 for other than self-only coverage. In 2018, the proposed OOP limits are $7,350 for self-only, $14,700 for other than self-only coverage. As a reminder, for a family plan, no individual can be subject to an OOP greater than the individual OOP limit.*

## Sex Discrimination, at least according to the Seventh Circuit

A Seventh Circuit Court decision finds that sex discrimination, a protected right under Title VII, includes sexual orientation. As background, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on an individual's race, color, religion, sex or national origin. Over the years since the law's enactment, the issue of what constitutes sex discrimination has been the subject of much litigation.

In the matter of *Hively v. Ivy Tech Cmty Coll* (2017 WL 1230393, 7th Cir. 2017), the plaintiff-appellate began teaching as a part-time adjunct professor at Ivy Tech Community College in 2000. From 2009 to 2014, she applied for at least six full-time positions with unsuccessful results; and was finally terminated when her part-time teaching contract was not renewed in 2014. Ms. Hively then filed a charge with the Equal Employment Opportunity Commission on December 13, 2013. Her contention was based on the premise that she was denied a full-time teaching position with the College due to her sexual orientation.

On appeal, the 7th Circuit concluded that sexual orientation falls within the purview of sex discrimination, based on several theories. First, the Court utilized a comparative method of analysis in which all being seen equal, had the plaintiff been heterosexual, the promotion would have been granted. Next, the Court applied a gender-stereotyping theory pursuant to which it determined that the plaintiff was harmed because she did not carry herself in a gender-stereotypical way. And lastly, the Court applied an associational theory pursuant to which the plaintiff was denied the promotion due to her association with another woman.

Other circuit courts have determined that sexual orientation is not protected by Title VII. Given the split among the circuits, it is possible that this matter will proceed to the Supreme Court at some point. In the meantime, employers should use caution and consult with legal counsel in any matter that could be deemed to be discriminatory.

## Fiduciary Duties Include Communications

A recent District Court decision reminds plan fiduciaries of the importance of communication. In the matter of *Erwood v. Life Insurance Company of North America and Wellstar Health System, Inc. Group Life Insurance Program* (No. 14-1284 (W.D. Penn. Apr. 13, 2017), an employee participated in his employer-sponsored benefit program, including coverage under a basic and supplement life insurance plan. Notably, while the life insurance benefit was provided by the insurer, the employer was designated to carry out the administrative tasks associated with the benefit, including providing notification of continuation and conversion rights upon employment termination.

The employee developed a terminal medical problem which required a leave of absence, a reduced work schedule, and eventually sought benefits under his employer's insured long term disability plan. During his leave, the employer provided him with a packet of information relating to continuation of his medical and life insurance benefits; however, the packet lacked specific details such as materials relating to continuation and conversion of the life insurance benefit. Continuation and conversion rights were briefly mentioned in the summary plan description but failed to contain sufficient details on how to effectuate it. His benefits, then, terminated upon his death and as a result, the life insurance plan was not converted.

The Court concluded that the employer breached its fiduciary duty in the administration of the benefit and thus, required to pay $750,000, which represents the amount of life insurance benefit that would have been payable to the employee's surviving spouse had conversion been effectuated, together with attorney fees, interest and costs associated with the lawsuit.

To avoid these kinds of mistakes, it is very important for the plan fiduciary to provide clear, accurate and complete information about all benefit rights. Often forgotten is the waiver of premium of aspects of many life insurance contracts.

## On-going ADA Wellness Saga

The landscape for wellness programs and various laws with which they must comply continue to evolve. Most recently, the Equal Employment Opportunity Commission (EEOC) and Orion Energy Systems have entered into a **consent decree**, settling its on-going litigation.

As background, Orion Energy Systems' wellness program required employees to complete a health risk assessment that includes medical history inquiries and baseline blood tests, as well as satisfaction of a fitness component by the use of a range of motion machine. Failure to complete the health risk assessment and fitness component would result in the employee having to pay full cost of health coverage. This brought forth a claim by an affected employee who raised objections to the collection of medical information for non-job related reasons, in addition to paying the full cost of health coverage by refusing to participate in the wellness program. The employee was terminated from employment shortly thereafter, and then filed the complaint with the EEOC (see *EEOC Challenges Wellness Program Standards, Benefit Beat*, 9/9/2014).

In settling the matter, Orion has agreed to pay $100,000 to the terminated employee. Further, the company agreed to adhere to the EEOC's rules relating voluntary participation in wellness programs. According to these rules (see *Wellness and the ADA – More Guidance Issued, Benefit Beat*, 7/7/2016), a wellness program that includes disability-related inquiries or medical examinations (including inquiries or examinations that are part of a health risk assessment) is deemed to be voluntary as long as employees are not required to participate. For employees who elect not to participate in the program, then:

1. Any group health plan coverage or particular benefit packages cannot be denied or limited to the non-participating employees; and
2. The employer is barred from taking any adverse employment action or retaliate against the non-participating employees.

In addition, Orion agreed that it would not engage in any form of employment retaliation against an employee who raises an objection or concern as to whether the wellness program complies with the EEOC's rules. Orion also agreed to train its management and employees against retaliation and interference, as granted under the ADA, as well as provide additional training for its decision-makers in negotiating or obtaining health benefit coverage or selecting a wellness program.

The EEOC settlement in the Orion Energy Systems matter suggests that wellness programs should comply with the recently issued wellness program regulations, as well as the wellness program rules pursuant to HIPAA and the Affordable Care Act, as applicable.

## MEDICARE PART D ADJUSTMENTS FOR 2018

The Centers for Medicare and Medicaid Services have **released the 2018 adjustments** *(note Attachment VI)* for Medicare Part D prescription drug benefits. The following are select modified limits relating to the standard drug benefit and the retiree drug subsidy.

| *Standard Benefit Design* | | |
|---|---|---|
| | **2017** | **2018** |
| Deductible | $400 | $405 |
| Initial coverage limit | $3,700 | $3,750 |
| Out-of-pocket threshold | $4,950 | $5,000 |
| Maximum cost sharing in catastrophic coverage portion of benefit: | | |
| • Generic/Preferred Multi-Source Drug | $3.30 | $3.35 |
| • Other | $8.25 | $8.35 |

| *Retiree Drug Subsidy Amounts* | | |
|---|---|---|
| | **2017** | **2018** |
| Cost Threshold | $400 | $405 |
| Cost Limit | $8,250 | $8,350 |

*ABOUT THE AUTHOR:*

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