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**RETIREE HEALTH COVERAGE:  
A TALE OF SLOPPY COMMUNICATION**

A recent Ninth Circuit Court decision (*King v. Blue Cross and Blue Shield of Ill.*, 2017 WL 3928339 (9th Cir. 2017)) confirms that a retiree-only health care plan can continue to impose annual and lifetime limits.

As a reminder, the Affordable Care Act prohibits the imposition of annual and lifetime limits on essential health benefits provided under a plan. There is an exception for health plans covering fewer than two active participants, i.e., a retiree-only plan. Critical to this analysis is that there be no active employees participating in the plan, including a retiree who returns to work.

Importantly, however, the appellate court has returned the matter to the trial court for further scrutiny in determining whether the plan properly communicated the lifetime limits imposed under the retiree-only plan to the participants. The plan did have a summary plan description and several summaries of material modification, but the Court ascertained a remaining issue as to whether these documents clearly delineated the limitations imposed under the retiree-only plan. The significant lesson here is that plan communications be clear and accurate, and easily understood by the average reader.

**CYBERSECURITY: NOT JUST FOR HEALTH PLANS**

Recent cyberattacks, not the least of which is the Equifax breach, affords a good occasion to consider the importance of identity protection and protection of personal information, not just in health plans arena, but in all benefit plans, and, in fact, for all employment purposes. While the HIPAA administrative simplification rules provide a specific set of governance that must be followed by covered entities, including health plans, the matters are equally important for other benefit plans.



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The U. S. Attorney Office for the Southern District of Indiana recently [announced sentencing](#) of a woman for crimes involving bankruptcy fraud, perjury, wire fraud and aggravated identity theft. In this case, the woman fraudulently transferred money from her husband's 401(k) account into her own personal bank accounts, made multiple calls to the 401(k) service center purporting to be her husband to secure a hardship withdrawal, as well as took loans from the account, all without her husband's consent, knowledge, or authorization. She was sentenced to five years imprisonment and ordered to pay \$112,354 in restitution

Finally, it is a matter of fiduciary responsibility to ensure that the personal identifiable information of all plan participants is protected. Plan sponsors should obtain assurance from their record keepers and third party administrators that security measures are 'in place' to guard against cyberattacks and potential fraudulent activity. Another best practice is to communicate to plan participants the importance protecting their information by ensuring that passwords are kept secure and not shared. Disposal of paper information containing personal identifiable information should always be shredded.

## GOVERNMENT ASSISTANCE CONTINUES IN HURRICANE AFTERMATH

### Special Enrollment Periods for Individuals Impacted by Recent Hurricanes

The Centers for Medicare and Medicaid Services [announced special enrollment periods](#) for individuals impacted by Hurricanes Harvey, Irma, and Maria.

- ◆ Under the Medicare program, hurricane-impacted individuals are allowed special enrollment periods to enroll, dis-enroll or switch Medicare health or prescription drug plans beginning at the start of the incident period through the end of the calendar year. Individuals can contact 1-800-MEDICARE to request enrollment using this special enrollment opportunity.
- ◆ In the federal marketplace, individuals who need to enroll in a 2017 plan or make changes to their existing 2017 plan are eligible for a special enrollment period wherein individuals could apply for coverage during a period of 60 days prior to the incident through December 31, 2017. Impacted individuals can contact the call center at 1-800-318-2596 to enroll in a plan.

### Benefit Plan Assistance

As follow up to last month's [Benefit Beat](#) article relating to Hurricane Harvey, several government agencies including the Internal Revenue Service (IRS) and Department of Labor (DOL) are continuing to provide assistance and guidance to assist individuals and businesses affected by the Hurricanes Irma and Maria.

The Department of Labor's Employee Benefit Security Administration (EBSA) provides guidance and assistance for both employers and participants:

- ◆ Employers and plan sponsors can obtain guidance on the [EBSA Disaster Relief webpage](#) specific to Hurricanes Irma and Harvey.
- ◆ Information relating to retirement and health benefits, including publications, tools and videos for affected workers and their families is available from EBSA's [Disaster Relief webpage](#), as well as from [updated FAQs](#).

In addition, the [IRS' Disaster webpage](#) has updated information relating to certain tax filing extensions, including Form 5500, as well as retirement plan loans and hardship distributions.

## UPDATES: SAN FRANCISCO'S HEALTH CARE SECURITY ORDINANCE (HCSO)

The San Francisco Office of Labor Standards Enforcement released final administrative rules relating to the Health Care Security Ordinance (HCSO), together with the 2018 expenditure rates.

Several changes to the HCSO have been made over the years. In an effort to consolidate these changes, [final implementation rules](#) were issued on September 29, 2017. The rules take effect on October 29, 2017. In large part, these regulations clarify matters that have evolved over the years such as who qualifies as employee, who is deemed to be an employer for purposes of the HCSO, including some clarifications relating to control groups and joint employers.

As background, the HCSO requires covered employers to contribute to the health care costs of its covered employees, either through private means, or through the City's Option program known as "Healthy San Francisco". An employer is subject to the HCSO for any calendar quarter if it meets the following three conditions:

1. Employs one or more workers within the geographic boundaries of the City and County of San Francisco;

2. Is required to obtain a valid San Francisco business registration certificate; and
3. Is a for-profit business with 20 or more persons, or a nonprofit organization with 50 or more persons performing work in the geographic boundaries of San Francisco.

For purposes of determining employer size, all persons performing work for compensation for the employer should be counted. This includes:

- ✓ Persons who work in San Francisco and those who work outside of San Francisco.
- ✓ All employees, regardless of their status or classification as seasonal, permanent or temporary, full-time or part-time, contracted (whether employed directly by the employer or through a temporary staffing agency, leasing company, professional employer organization, or other entity) or commissioned.
- ✓ Owners who perform work for compensation.

An employee is covered by the HCSO if the individual works for a covered employer, is entitled to be paid the minimum wage, has been employed by the employer for at least 90 calendar days, and performs at least 8 hours of work per week within the geographic boundaries of San Francisco.

Each quarter, covered employers are required to make health care expenditures to or on behalf of their covered employees. The required minimum health care expenditure is calculated by multiplying the total number of “hours paid” to that employee by the applicable expenditure rate, which for 2017 and 2018 are:

EMPLOYER SIZE	NUMBER OF EMPLOYEES	2017 EXPENDITURE RATE	2018 EXPENDITURE RATE
LARGE	All employers with 100+ employees	\$2.64 per hour payable	\$2.83 per hour payable
MEDIUM	<ul style="list-style-type: none"> <li>◆ Businesses with 20-99 employees</li> <li>◆ Nonprofits with 50-99 employees</li> </ul>	\$1.76 per hour payable	\$1.89 per hour payable
SMALL	<ul style="list-style-type: none"> <li>◆ Businesses with &lt;19 employees</li> <li>◆ Nonprofits with &lt;49 employees</li> </ul>	Exempt	Exempt

*Types of Expenditures.* Beginning in 2017, all health care expenditures must be made irrevocably. An irrevocable health care expenditure is an expenditure that has not been retained by and cannot at any time be recovered by or returned to the employer. This means that the employer cannot recover any portion of the funds, even if the employee leaves the job or if the business ceases to operate. A few examples of irrevocable expenditures as clarified in the final rules include:

- ◆ Payments to a third party to provide health care services for a covered employee, such as health, dental, or vision insurance premiums;
- ◆ Expenditures made by self-insured and/or self-funded insurance programs;
- ◆ Expenditures made to a union trust fund, counting only the part contributed for healthcare;
- ◆ Irrevocable contributions to medical reimbursement accounts, such as a health savings account;
- ◆ Costs incurred in the direct delivery of health care services for a covered employee; and
- ◆ Payments on behalf of a covered employee to the City Option.

Following are some additional clarifications relating to health care expenditures contained in the final rules:

- ◆ *Allotment of health care expenditures when an individual is on paid parental leave.* Specifically, the rules provide a means to calculate any supplemental compensation received by an individual under the City’s Paid Parental Leave Ordinance and the California Paid Family Leave law as it corresponds to the percentage of the employee’s normal gross weekly wages.
- ◆ Financial incentives to “opt out” of employer health benefits do not count as health care expenditures.
- ◆ Should an employee decline to participate in an employer’s health plan, even if it meets the spending requirement but requires employee contributions, the covered employer would not be deemed to have satisfied its obligation to make the required health care expenditures.
- ◆ An employer subject to the employer shared responsibility provisions under the Affordable Care Act (employs 50 or more employees), could be at risk for excise tax penalties imposed by the IRS if it fails to offer minimum essential coverage to its full time employees at an affordable rate. Should an employer be required to pay such tax, the payments would not constitute health care expenditures under the HCSO.



**Additional Employer Obligations.** Covered employers have several mandatory reporting and disclosure obligations, as well as workplace posting and record keeping requirements. Often overlooked is the **annual reporting** of health care expenditures that must be filed with the San Francisco Office of Labor Standards Enforcement by April 30<sup>th</sup> of the year following the reporting year. Failure to complete this form could result in a \$500 per quarter/per penalty violation and other corrective action.

The final regulations clarify that records relating to payroll documentation, health care expenditures and related employment records be kept for a minimum of four years, as well as increase the amount of potential penalties for failure to do so. Penalties have also increased for failure to make the required health care expenditures.

Additional information about the HCSO, including required reporting forms, waivers of coverage, workplace postings and other information is available on the [dedicated HCSO webpage](#).

## RHODE ISLAND JOINS THE PAID SICK LEAVE TRAIN

On September 28, 2017, Governor Raimondo signed into law the *Healthy and Safe Families and Workplaces Act* (Chapter Numbers 347/357) requiring employers in Rhode Island to provide paid sick leave to their employees. The paid sick leave law goes into effect July 1, 2018. With the Governor's signature, Rhode Island joins seven other states and the District of Columbia in requiring paid sick leave.

The law requires employers employing 18 or more employees in Rhode Island to provide paid sick leave beginning July 1, 2018. For this purpose, an *employer* is defined as any individual or entity such as partnerships, corporations or associations.

Individuals entitled to paid leave are those employed by the covered employer. Paid leave need not be extended to certain individuals, such as those under age 21, independent contractors, work study participants, apprenticeships or interns, health care facility employees working on a per diem or intermittent basis, among others.

**Use of leave.** Leave can be taken for 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.

For this purpose, a *family member* includes a child, parent, spouse, parents-in-law, grandparents, grandchildren or, domestic partner, sibling, care recipient, or member of the employee's household.

In addition, leave may be taken to obtain services or care as a result of domestic violence, sexual assault, or stalking; or, to care for a family member due to the closure of a school or business for public health or safety reasons.

**Amount of leave, Caps, Accruals and Carryovers.** Employees are entitled to accrue one hour of paid sick leave for every 35 hours worked. Leave is capped at 24 hours in calendar year 2018; 32 hours in calendar year 2019; and 40 hours per year thereafter, unless the employer chooses to provide a higher annual limit in both accrual and use.

Employees begin to accrue sick leave on the later of the date of hire, or July 1, 2018. A ninety-day waiting period may be imposed for newly hired employees, during which time leave can accrue but not be used. Temporary and seasonal employees have extended wait times for using accrued leave.

Employees are permitted to carryover unused sick leave from year to year, subject to the capped limits. In the alternative, the employer could pay the employee any unused paid sick leave at the end of a year, and then frontload the amount the individual is expected to accrue at the beginning of the next year.

**Coordination with employer's leave plan.** An employer's paid time off policy that meets the minimum requirements of this paid sick leave law would not be obligated to provide additional leave.

## Employee and Employer Notice Obligations

- ◆ When the need for leave is *foreseeable*, the employee must request the leave by oral, written or electronic means, together with the expected duration of leave, prior to the time of taking leave. Further, employees must make a reasonable effort to schedule the leave in a manner that would not unduly disrupt the employer's operations.
- ◆ For instances of *unforeseeable* leave, the employer's workplace policy governs the notification procedures to be followed by the employee. Requests for leave cannot be denied if employees are not provided with a written copy of the employer's policy.



For absences exceeding three consecutive work days, an employer may require supporting documentation of the need for leave.

*Enforcement.* The Rhode Island Department of Labor and Training is charged with enforcing the law and will be preparing various publications and tools to assist in implementing the law. Failure to comply with the law could result in penalties ranging from \$100 to \$500 per violation.

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