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TAX REFORM: IMPACT ON BENEFITS

The *Tax Cuts and Jobs Act* (**Public Law 115-97**), enacted on December 22, 2017, makes broad sweeping changes to the existing tax code in many ways. While the bulk of the law addresses a variety of topics relating to changes to individual and corporate tax matters, there are some provisions impacting employee benefits.

Benefit-related Changes Impacting Individuals

- **Repeal of Individual Shared Responsibility Penalty.** As background, beginning in 2014, all individuals residing in the United States are required to maintain a minimum level of health coverage, or be subject to a tax penalty. This tax penalty is repealed, effective for tax years beginning January 1, 2019.
- The **medical deduction threshold** is reduced from 10% to 7.5% for the 2017 and 2018 tax year.
- Beginning in 2018, up to $10,000 in tax-free distributions from a qualified tuition program, known as a **529 Plan**, can be used to pay tuition, fees, academic tutoring, special needs services, books, supplies, and other equipment expenses in connection with enrollment or attendance at elementary or secondary public, private, or religious school.

Benefit-related Changes Impacting Businesses

- **Employer Credit for Paid Family and Medical Leave**
  Under the tax law, employers subject to the Family and Medical Leave Act (FMLA) are entitled to claim a general business tax credit based on wages paid to qualifying employees during any period in which such employees are taking FMLA leave.

  Employers eligible for credit. An employer entitled to the credit is one who has a written FMLA policy in place that allows all qualifying full-time employees a minimum of two weeks of annual paid FMLA leave, and which policy also permits non-full time qualifying employees a comparable amount of leave on a pro rata basis.

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For purposes of this requirement, leave paid by a state or local government is not taken into account. Paid leave such as vacation leave, personal leave, or other medical or sick leave provided by the employer, is not to be considered leave for which the credit would be available.

For purposes of the credit, a *qualifying employee* is one who has been employed by the employer for at least one year, and whose compensation for the preceding year does not exceed 60% of the compensation threshold for highly compensated employees (less than $72,000).

Amount of credit. For leave payments of 50% of normal wage payments, the credit amount is 12.5% of wages paid on leave. If the leave payment is more than 50% of normal wages, then the credit is raised by 0.25% for each one percent by which the rate is more than 50% of normal wages. Thus, if the leave payment rate is 100% of the normal rate, i.e., is equal to the normal rate, then the credit is raised to 25% of the on-leave payment rate. The maximum leave allowed for any employee for any tax year is 12 weeks.

Effective date. The FMLA tax credit is only available for a two-year period beginning January 1, 2018 and ends December 31, 2019. It is anticipated that the IRS will issue guidance and clarifications relating to claiming the credit.

Fringe Benefit Changes

- Beginning January 1, 2018, the **qualified bicycle commuter benefit** is suspended until 2026. Under prior law, if an employer sponsors a qualified bicycle fringe benefit plan, a participating employee who uses a bicycle for traveling between his/her home and place of employment was entitled to receive a reimbursement of up to $20 per month ($240 annually) for qualified bicycle expenses.
- Under a **qualified transportation program** (IRC Section 132(f)), certain expenses such as parking, mass transit fares, and van pooling are deductible by the employer and are excludable from the employee's income. Beginning January 1, 2018, the qualified transportation deduction is no longer available to employers; however, the tax credit available to employees is retained. The tax law did not make changes to salary reduction qualified transportation programs – these types of programs remain permissible, allowing employees to make pre-tax contributions toward the benefit.

  Important to note that affected employers in jurisdictions that mandate qualified transportation benefits, such as in the District of Columbia, New York City, and San Francisco Bay Area, by way of example, must review these tax changes prior to modifying their transportation benefit programs.

Pension and Retirement-related Changes

- **Elimination of rule allowing re-characterization of IRA contributions**. Under current law, individuals are permitted to re-characterize a contribution to his/her traditional or Roth IRA to another type of IRA by making a trustee-to-trustee transfer prior to the due date of the individual's tax return. This rule is repealed effective for tax years beginning January 1, 2018.
- **Extended rollover period for rollover of plan loan offset amounts**. Currently, if an individual ceases making payments toward a loan from a qualified retirement plan, such as a 401(k) plan, prior to repaying the loan, the balance of the loan is generally treated as a distribution and subject to the 10% early distribution tax penalty unless the unpaid loan balance or offset is rolled over into an eligible retirement plan within 60 days. The tax reform law extends the deadline of the plan loan offset from 60 days to the due date, including extensions, of the participant's tax return for the year the distribution occurs.
- **Relief from the early withdrawal tax for qualified disaster distributions**. Generally, early distributions from a qualified retirement plan, including a tax-sheltered annuity plan or IRA, is subject to a 10% early withdrawal penalty. This penalty is waived for distributions made between January 1, 2016 and December 31, 2017 for Presidentially-declared disasters occurring in 2016. The amount can either be includible as income ratably over 3 years, or can be contributed back to the plan over three years. The qualified plan can be amended to provide for this, as long as the amendment is adopted by the last day of the end of plan year that begins in 2018.

Change in Computation of Cost of Living Adjustments

Currently, cost of living adjustments applicable to income, as well as certain benefit-related tax code provisions, such as health flexible spending account salary reduction contributions, wage limits applicable to the small business tax credit, dollar limits under a qualified transportation program, and the like, are based on the Consumer Price Index for all Urban Consumers ("CPI-U") computation formula.

The tax reform law requires such computation indexing based on a chained CPI-U ("C-CPI-U") index. This will likely result in a slower increase in the cost of living adjustments in the future.

Additional Information. More highlights of this law are included in our December, 2017 edition of *At Issue*. The Accounting and Tax Division of CBIZ also have several articles and analysis of this tax reform law available on the CBIZ.com website. In addition, as part of our 2018 CBIZ B&I webinar series, we will be hosting a webinar on February 27th to discuss the changes made by the *Tax Cuts and Jobs Act*. To sign up for this webinar, please visit the webinar webpage on CBIZ.com.

WELLNESS RULE REVIEW FAST TRACK

Wellness programs are governed by many laws, two of which, the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA), have been under the microscope recently.

As background, the ADA and GINA require that any collection of medical information be voluntary unless the collection is used in conjunction with a bona fide medical plan and employees are neither required to participate nor penalized for non-participation. In 2016, the Equal Employment Opportunity Commission (EEOC) issued final regulations governing wellness programs; specifically, these rules address what constitutes the voluntary collection of medical information, and the use of financial incentives based on the collection of medical information. According to these rules, the use of incentives, such as a reward or penalty, is permissible but cannot exceed 30% of the cost of coverage.

The American Association of Retired Persons (AARP) challenged whether these EEOC standards comply with the spirit of the voluntary aspect of the ADA and GINA. In August, 2017, Judge D. John Bates for the U.S. District Court for the District of Columbia determined that the EEOC had not adequately proven a basis for the up to 30% risk reward (see *Wellness Rules Under Scrutiny, Benefit Beat,* 9/11/17). He directed the EEOC to further consider its rules, specifically for validation of the 30% standard. In the initial Court Order, Judge Bates did not vacate the rules as requested by the AARP; his position was that it would be too disruptive to employer plans and participants to vacate the rules at that time.

Following the court decision, the EEOC indicated that it intended to issue a proposed rule addressing the voluntary standards by August, 2018, and final regulations in late 2019, with an anticipated effective date of the change to be sometime in 2021.

On December 20, 2017, Judge Bates modified the initial court order based on the painfully slow progress being made by the EEOC. Judge Bates determined that a year would be ample time for employers to make modifications to their plans. Thus, according to his **revised order**, the current EEOC regulations allowing up to 30% risk or reward would be vacated on January 1, 2019. In the meantime, he suggested the EEOC to issue proposed regulations by August 31, 2018, and requested a progress report toward that end by March 31, 2018.

This state of uncertainty places employers sponsoring wellness programs that collect medical information in a bit of a quandary. Calendar-year plans should begin reviewing how they want to address their programs, based on the fact that this portion of the EEOC regulations will be vacated as of January 1, 2019.

Important to note, this Court decision impacts the ADA and GINA wellness regulations. It does not impact the HIPAA-Affordable Care Act wellness rules except to the extent that a particular wellness program would be impacted by both sets of regulations. What this means is that an HIPAA-ACA wellness program that does not involve the collection of medical information or physical exam is not impacted by this Court decision. By way of example, activity-based wellness programs such as one that requires walking a certain amount each week, or a health risk assessment that asks how much broccoli or quinoa you eat each week, can continue uninterrupted. Of course, reasonable alternatives must be made available, in accordance with the HIPAA-ACA rules in appropriate circumstances.

As part of our 2018 CBIZ B&I webinar series, we will be hosting a webinar on June 19th to discuss compliance issues surrounding wellness programs. Hopefully, by that time, additional guidance and clarifications will be available. To sign up for our June 19th webinar, please visit the webinar webpage on CBIZ.com.

MSP MINEFIELD

A recent decision from the U. S. District Court, N.D. Indiana, Fort Wayne Division, offers an opportunity to reflect on the Medicare secondary payor (MSP) rules. The MSP rules require, in certain instances, that a group plan pay primary to Medicare.

In *Renal Care Grp. Indiana, LLC v. City of Fort Wayne* (2017 WL 4990618 (N.D. Ind. 2017)), a retiree was receiving dialysis for his end-stage renal disease (ESRD).

Such treatment had been covered under his former employer's group health plan until he became entitled to Medicare due to the ESRD, at which point, the employer then terminated the group coverage.

The dialysis center initiated a legal challenge against the City on the basis that the immediate termination of coverage violated the MSP rules relating to ESRD, which require the group coverage to pay primary during a 30-month coordination period.

As background, the ***MSP rule relating to end-stage renal disease (ESRD)*** applies without regard to:

- Employer size;
- Current employment status (active or inactive status); or
- Source of the health coverage (coverage through the individual's employer or through the employment of a parent or spouse).

Employer-provided health coverage is the primary payer and Medicare is the secondary payer during the coordination period for individuals who have Medicare solely on the basis of ESRD. Specifically, for items or services furnished on or after August 5, 1997 for periods beginning on or after February 5, 1996, the group health plan is the primary payer for the first 30 months. After the initial 30-month period, Medicare is the primary payer.

In this case, the Court found that the City violated the MSP rules since the ESRD rules apply regardless of active employment status, and that the employer's group plan is required to pay primary during the first 30 months of the coordination period for the retiree's treatment.

In addition to the MSP rules relating to end-stage renal disease, there are separate rules applicable to the working aged and in the event of disability, as follows:

MSP rule relating to Working Aged

The working aged MSP rule is applicable to employers with at least 20 full and/or part-time employees on each working day in each of 20 or more calendar weeks in the current or preceding calendar year. It should be noted that the 20 weeks need not be consecutive. It should further be noted that if the threshold had been met for the preceding calendar year, the law applies for all of the current calendar year. Conversely, if the threshold had not been met for the preceding calendar year, but is met part way through the current calendar year, the law applies to the remainder of the current calendar year.

For purposes of determining employer size, leased employees, as defined in IRC §414(n), are counted as employees of the employer.

For a multi-employer plan or multiple employer plan, if all participating employers have fewer than 20 employees, Medicare is the primary payer. If all participating employers have 20 or more employees, the MSP rule is applicable. If a multi-employer plan or multiple employer plan includes both employers with 20 or more employees and employers with fewer than 20 employees, then the MSP rule generally applies. The plan can, however, exempt small employers from the MSP rule.

Employer-provided health coverage is the primary payer and Medicare is the secondary payer for the working aged. For purposes of the MSP rules, the "working aged" are:

- Individuals in current employment status, aged 65 and over.
- A spouse, aged 65 or older, of an individual who has current employment status.

For purposes of the MSP rules, *current employment* means an individual, including a self-employed person, who is actively working as an employee. Current employment also includes an individual who is on an approved leave of absence, furlough, or comparable status, during which time employment has not been terminated.

MSP rule relating to Disability

Medicare is the secondary payer for currently employed disabled individuals under age 65 with coverage through a large group health plan. A large group health plan is defined as a plan sponsored by an employer who employs at least 100 full or part-time employees on at least 50 percent of the regular business days in the preceding calendar year.

For purposes of determining employer size, leased employees, as defined in IRC §414(n), are counted as employees of the employer. The MSP rule relating to disability applies to an actively working employee, including a self-employed individual, or a disabled dependent of a currently employed individual.

Quick Chart of the MSP Rules. The MSP rules have evolved over the past several years. The current status of the MSP rules is as follows:

MSP Rules – Group Health Plans

	Condition	Who Pays First	Who Pays Second
Working Aged (65+) and Covered by: 1) Employer's Group Health Plan or 2) Working Spouse's Group Health Plan	Employer employing <20 Employees	Medicare	Group health plan
	Employer employing 20+ Employees	Group health plan	Medicare
Disabled and Covered by: 1) Large Employer's Group Health Plan or 2) Working Family Member's Plan	Employer employing <100 Employees (and not part of a multi-employer plan where any employer has 100+ employees)	Medicare	Group health plan
	Employer employing 100+ Employees ("large group health plan")	Large group health plan	Medicare
End Stage Renal Disease and Group Health Plan	First 30 months of Medicare entitlement or eligibility	Group health plan	Medicare
	After 30 months	Medicare	Group health plan

Sick and Family Leave Updates: California, Maryland, New York and Washington

Following are summaries of updates to paid sick leave laws in the states of California, New York and Washington, and in the local jurisdictions of San Francisco and Prince George County, Maryland.

California

- ***State-wide Unpaid Parental Leave.*** As a reminder, beginning January 1, 2018, small employers employing at least 20 employees in the state of California are required to provide their employees up to 12 weeks of job protected, unpaid parental leave. For a summary of this law, see the November *Benefit Beat* article, *Parental Leave Comes to Small Employers in California*.

  This law must be coordinated with other existing state laws such as the Pregnancy Disability Leave Law, the Paid Family Leave Law, as well as the California Family Rights Act (CFRA) and federal Family and Medical Leave Act (FMLA). It is also important to note that these state-wide leave law(s) must be coordinated with any local paid or unpaid sick and family leave laws in the cities of Berkeley, Emeryville, Los Angeles, Oakland, San Diego, San Francisco and Santa Monica.

- ***City of San Francisco – Updated Workplace Postings***
  The San Francisco Office of Labor Enforcement (OLE) administers several employment-related ordinances including the Health Care Security Ordinance, the Paid Parental Leave Ordinance and the Family Friendly Workplace Ordinance. Each of these laws require a specific workplace posting to advise employees of their rights. These postings have been updated and should be used by affected employers beginning January 1, 2018:
  - Health Care Security Ordinance
  - Paid Parental Leave Ordinance
  - Family Friendly Workplace Ordinance

Maryland: Prince George County

On December 12, 2017, Prince George County Council passed the *Earned Safe Leave* law which requires eligible employees to accrue and use paid leave for absences connected with events resulting from domestic violence, sexual assault and stalking. Important to note that this law does not require employers to provide sick leave. This law becomes effective on May 24, 2018.

For purposes of this law:

- *Employer* is defined as any person or entity operating and doing business within the Prince George County boundaries who employs 15 or more persons within the County, in addition to the owners. The law also applies to the County government, but does not apply to any federal, state, or other local government.
- An employee entitled to accrued paid leave is any person working for an employer in the County. Employee does not include individuals under the age of 18, or independent contractors.

Reasons for leave. Leave may be taken for medical attention for a physical or psychological injury, victim advocacy services, legal services, or relocation services due to domestic violence, sexual assault, or stalking against the employee or the employee's family member.

For purposes of this law, a *family member* includes a child or parent (whether biological, adopted, foster, or step), spouse, grandparent, grandchild, or sibling.

Accrual and carryover. Eligible employees are entitled to accrue at least one hour of safe leave for every 30 hours worked in the County, up to 40 hours in a calendar year. Carryover of up to 40 hours must be allowed, though an employer can limit usage to no more than 64 hours in a calendar year. Alternatively, an employer may frontload the full amount of safe leave at the beginning of each calendar year.

The law includes both *employee and employer notification requirements*:

- An employee is required to request safe leave as soon as practicable. The individual must also comply with the employer's reasonable notice procedures, and notify the employer of the absence's anticipated duration, if known. An employer could deny leave if the employee fails to provide notice, or the absence would cause a disruption to the employer.

  Employers cannot require employees to disclose details of the mental or physical illness, injury, or condition of the employee or family member when requesting leave. If an employee uses more than three consecutive days of leave, an employer may require the employee to provide reasonable documentation to verify leave was used for a covered purpose. An employer must allow an employee to use leave in the smallest amount of time tracked by the employer's payroll system provided such increment is not more than one hour.

- Employers are required to notify employees of their right to safe leave including a statement about how leave is accrued, the permitted uses of leave, the prohibition of employment related retaliation, and the right to file a complaint. Notice may be given by posting the notice in a conspicuous and accessible area at each work location, in an employee handbook, or distributing the notice when an employee is hired. In addition, employers must also provide a written statement with the amount of available leave with each paycheck.

Record retention. Employers are required to keep records for at least three years of each employee's accrual and use of leave.

New York Paid Family Leave: More Compliance Tools Released

As a reminder, the New York Paid Family Leave law took effect on January 1, 2018. This law requires private employers in New York to provide paid family leave benefits to their eligible employees. For a summary of the paid family leave law, see our *August, September* and *November Benefit Beat* articles.

Employers subject to this law are required to provide information to employees about their paid family leave rights, either in an employee handbook or other written materials. To assist in this process, the State's Workers' Compensation Board recently released two additional documents:

1. *Model Language for Employee Materials.* While this document provides a useful starting point for developing a workplace policy, it is still incumbent upon the employer to tailor the language of the policy to the employer's particular circumstances. Note, in particular, that the appendix provides guidance on design choices that employers may have.
2. A *Statement of Rights for Paid Family Leave* must be provided to employees whenever they take paid qualifying family leave, or in the event an individual takes time off from work for a paid family leave event but had not requested the leave.

Washington – State-wide Paid Sick Leave

The state of Washington enacted a paid sick leave law (Initiative 1433) in the fall of 2016. For a summary of this law, see *The Paid Sick Leave Crazy Quilt Continues to Grow* (*Benefit Beat*, 12/7/16). The law requires an employer to provide one hour of paid sick leave for every 40 hours worked by its employees beginning January 1, 2018.

To assist in implementing the law, the Washington Department of Labor and Industries issued final rules on October 25, 2017. The Department established a dedicated webpage of **Employer Resources** to assist employers in meeting their obligations. Specifically, the Department has developed model notices that employer could customize and make available to employees for purposes of requesting leave, sample workplace policies and posting, fact sheets to provide to employees, as well as training and webinar resources for employers.

Important to note that this state-wide law must be coordinated with any applicable local jurisdiction that has paid sick leave laws within the state, such as **Seattle** and **Tacoma**.

The paid sick leave law in Spokane sunset on December 31, 2017; thus, employers doing business in this jurisdiction will follow the state-wide paid sick leave law beginning January 1, 2018.

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 Department of Labor. 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*. Below are select inflationary adjustments announced by the Department of Labor that become effective January 2, 2018, as compared with the inflationary adjustments in effect last year (see *Reporting and Disclosure Reminders; Increased Penalties for Violations*, *Benefit Beat*, 2/15/17):

	2018 Penalty Amount	2017 Penalty Amount
Failure or refusal to file the annual Form 5500 return/report	Up to $2,140 per day	Up to $2,097 per day
Failure to file Form M-1	Up to $1,558 per day	Up to $1,527 per day
Failure to provide Summary of Benefits and Coverage (SBC)	Up to $1,128 per failure	Up to $1,105 per failure
Failure to notify employees of Children's Health Insurance Program (CHIP) coverage opportunities	Up to $114 per day	Up to $112 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 $114 per day of noncompliance (up from $112 per day).

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 $169 per each separate offense (up from $166). The model FMLA work place poster is available in both English and Spanish from the DOL's Wage and Hour Division's website.

About the Author:

Karen R. McLeese is Vice President of Employee Benefit Regulatory Affairs for CBIZ Benefits & Insurance Services, Inc., a division of CBIZ, Inc. She serves as in-house counsel, with particular emphasis on monitoring and interpreting state and federal employee benefits law. Ms. McLeese is based in the CBIZ Kansas City office.

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