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In This Edition:

EEOC Wellness Rules Back in Court

Once again, the EEOC's wellness regulations relating to the Americans with Disabilities Act, particularly those relating to wellness incentives, are being scrutinized.

Following last month's *Benefit Beat* article (see *Wellness Rule Review Fast Track)*, the Equal Employment Opportunity Commission (EEOC) filed a motion with the U. S. District Court for the District of Columbia requesting reconsideration of several matters; in particular, the specific timeframe set by the Court to issue proposed clarifying rules.

In response to the EEOC's motion, the Court modified its position, saying that the EEOC is not compelled to issue proposed regulations by August 31, 2018. However, the Court affirmed that the incentive portion of the regulation remains vacated, effective as of January 1, 2019. What this means is that unless EEOC guidance is provided between now and then, any wellness incentive based on the collection of medical information derived from a disability-related inquiry or medical examination will not be permitted beginning January 1, 2019.

In the interim, employers should begin reviewing their wellness program to identify whether any of the wellness program's components require the collection of medical information or require a physical exam. These are the components of a wellness program that will be impacted. If any aspect of the wellness program is contingent upon the collection of medical information or a medical exam, the employer should look at options to ensure voluntariness, i.e., make sure no incentive is tied to the collection of medical information or imposition of a medical exam, including biometric testing.

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Wellness programs such as a tobacco-cessation program that requires attestation from the participant of abstaining from tobacco products without requiring the related blood testing for the presence of nicotine or tobacco; or, a health risk assessment that asks questions such as, *how many times a week do you eat broccoli?*; or, an activity-based program such as a walking program, will not be implicated by the vacating of this segment of the EEOC rules. However, the HIPAA and Affordable Care Act wellness program rules would continue to apply to these matters.

MARYLAND ENACTS EARNED SICK AND SAFE LEAVE LAW

During the 2017 legislative session, the General Assembly of Maryland passed the *Healthy Working Families Act* (SB 230/HB 1), which was vetoed by the Governor. One of the first actions of the 2018 legislative session was to override the Governor's veto, thus, allowing the law (now Chapter 1 of the 2018 Session Laws) to take effect. The law becomes effective on February 11, 2018; though, the legislature is considering a short delay and possibly, modification. Following is a summary of this law.

Employers subject to the law. An employer subject to the earned sick and safe leave law is one who directly or indirectly acts in the interest of an employee, including state and local governments.

Eligible employees. Employees eligible for the earned sick and safe leave benefit are those who work 12 or more hours a week for the employer. Individuals who are ineligible for the benefit include individuals under the age of 18, independent contractors, real estate salespersons or brokers, individuals employed in the agricultural sector or those employed by a temporary services agency.

Type of leave. Whether the earned sick and safe leave is paid or unpaid is contingent upon employer size. Employers employing 15 or more employees must provide *paid* earned sick and safe leave. Employers employing 14 or fewer employees may provide *unpaid* earned sick and safe leave. For determining whether an employer is required to provide paid or unpaid leave, the number of employees of an employer is calculated based on the average number of monthly employees employed, including full-time, part-time, temporary or seasonal, during the preceding year.

Amount of leave. Employees are entitled to accrue one hour of earned sick and safe leave for every 30 hours worked.

Accrual, Frontload, Cap and Carryover. Under the law, the amount of accrued sick and safe leave is capped at 40 hours a year. Employees are entitled to carryover up to 40 hours of unused sick and safe leave to next year. Employers can limit an employee's accrual and use of sick and safe leave to 64 hours per year. Alternatively, in lieu of accrual or carryover, an employer can frontload the full amount of paid or unpaid leave at the beginning of the year.

Employees begin to accrue sick and safe leave on the later of 1) the date of hire, or 2) February 11, 2018 (unless the effective date of the law is delayed); and can begin to use the leave following 106 days from date of hire. Sick and safe leave does not accrue in certain instances where the employee works fewer than 24 hours within a particular pay period.

In lieu of receiving paid sick and safe leave, the employee in mutual agreement with the employer, could work an equal number of alternative hours within a given pay period. Special rules apply for restaurant workers and mental health facility workers.

An employer is not required to provide compensation to an employee for accrued, unused sick and safe leave upon separation from employment. If an employee is rehired within 37 weeks of separation by the same employer, previously accrued sick and safe leave must be reinstated.

Use of leave. Earned sick and safe leave can be taken for:

- One's own needs, or to attend to the needs of a family member's mental or physical illness, injury, medical diagnosis or treatment, including preventative medical care;
- For maternity or paternity leave purposes; or
- To obtain services or care as a result of domestic violence, sexual assault, or stalking.

For this purpose, a *family member* includes:

- A spouse;
- A child without regard to age or dependency status, whether biological, adopted, foster or stepchild, a legal ward, or a child to whom the employee stands in loco parentis;
- A biological, adoptive, or foster parent, stepparent, a legal guardian of an employee, or a person who stood in loco parentis when the employee or his/her spouse was a minor child;
- A grandparent, grandchild, or sibling, including biological, adoptive, step, and foster care relationships.

Coordination with employer's existing PTO policy. An employer's existing paid time off policy that is at least as generous as the requirements of the Maryland law will be deemed to satisfy the law.

Notice Obligations

- **Employee Notification**. When the need for leave is *foreseeable*, an employer may require an advanced 7-day notification of the need for leave. When the need is *unforeseeable*, the employee must notify the employer as soon as practicable, in accordance with the employer's policy or procedures for requesting leave. An employer may deny leave if the employee fails to give notice of the leave, or the absence would be deemed to be disruptive to the employer. An employer may require documentation that the employee's use of sick leave was for an authorized purpose in certain circumstances.

- **Employer notice and workplace posting obligations.** Employers are required to notify employees of their right to earned sick and safe leave. Such notification must include a statement of how leave is accrued, the permitted uses of leave, a statement that the employer will not retaliate against employees for using leave, together with information about the employee's right to file a complaint. Employers must also provide employees with a written statement of accrued earned sick and safe leave each time wages are paid, or maintain an online system where employees may access their own earned leave balances.

  The Maryland Commissioner of Labor and Industry is delegated to create and make available a poster and model notice for employer's use, as well as provide a model sick leave policy that an employer may use in its employee handbook or other policy.

Prohibition of Retaliation and Discrimination. An employer is generally prohibited from taking any employment-related action or retaliation against employee's right to use accrued earned sick and safe leave. This would include discharging, demoting or suspension of employment, or in the event an individual files a complaint with the Maryland Commissioner of Labor and Industry.

Record retention. Employers are required to keep earned sick and safe leave records, including each employee's accrual and use of the leave, for a minimum of three years.

Coordination with Maryland's local government paid sick leave ordinances. This law includes a provision that prohibits local jurisdictions from imposing additional paid sick leave provisions on employers, other than the local jurisdiction itself, beginning on or after January 1, 2017; however, amendments to existing sick leave laws enacted prior to January 1, 2017 remain permissible. Therefore, the state law must be coordinated with Montgomery County's paid sick leave ordinance, unless the County government modifies or amends its ordinance. It remains to be seen whether this law will need to be coordinated with Prince George's paid safe leave ordinance, which takes effect on May 24, 2018 (see last month's *Benefit Beat article* for a summary of this ordinance).

HSA Eligibility: A Cautionary Tale

In recent years, a number of state legislatures have enacted health insurance mandates that are creating potential challenges for HSA eligibility.

A health savings account (HSA) is an investment account that can be used in conjunction with a qualifying high deductible health plan (qualifying HDHP). By its design, the HSA provides a triple tax advantage in that money contributed to the HSA is tax-favored, interest accrues on a tax-favored basis, and as long as the funds are used to pay qualified medical expenses, the funds are paid out on a tax-favored basis.

In order to be entitled to this triple tax advantage, the individual must meet several criteria. In particular, the individual must be covered by a qualifying HDHP. One of the requirements of a qualifying HDHP is that it must meet a statutory deductible standard, which, for 2018 is $1,350 for single coverage; $2,700 for family coverage.

Medical expenses, with the exception of preventive health services, cannot be reimbursed by any health plan until the minimum statutory deductible of an HDHP is satisfied. Some state laws require insured plans to cover items and services on a first dollar basis, i.e., prior to satisfaction of the deductible. If the particular expense does not constitute preventive health services, then this causes the plan to be unqualified as an HSA-compatible plan.

State laws expanding contraceptive-related services are particular culprits for creating problems in this arena. Many contraceptive-related services, such as those required to be covered in accordance with the Affordable Care Act (ACA), constitute covered preventive services; however, it is uncertain whether other services qualify.

Of particular note, some states require insured plans to cover male sterilization; however, whether these types of services are deemed to be preventive health services remains unclear. Clarity on this matter from the Internal Revenue Service is currently being pursued by impacted individuals and entities.

This is just one example of a state mandate that could jeopardize HSA eligibility. It is important that every effort be made to ensure that a plan offered in conjunction with an HSA is, in fact, HSA-qualifying.

MASSACHUSETTS: EMPLOYER MEDICAL ASSISTANCE CONTRIBUTION UPDATES AND NEW ANNUAL REPORTING OBLIGATION

In 2017, Massachusetts passed a law that temporarily increased the amount of the Employer Medical Assistance Contribution (EMAC), and imposed a new penalty ("EMAC supplement") on employers. This temporary increase in the EMAC is anticipated to be an offset, at least to some degree, of a suspension in the scheduled increases of the unemployment insurance rates for 2018 and 2019. The law is scheduled to sunset on December 31, 2019.

In late 2017, the Massachusetts Department of Unemployment Assistance (DUA) released **final regulations** relating to the EMAC supplement, together with a **set of FAQs**.

In addition, Governor Baker signed a law (HB 4008, **Chapter 110** of 2017 Session Laws), which includes a provision that requires Massachusetts employers to submit a health insurance responsibility disclosure (HIRD) form, on an annual basis.

EMAC Requirement

As background, the EMAC was enacted in 2014 following the repeal of the Massachusetts fair share contribution requirement. Its purpose is to help fund health coverage for the uninsured. The contribution requirement applies to employers employing six or more employees in the Commonwealth, including state and local governments, non-profit entities, and those employers subject to the Massachusetts unemployment insurance provisions.

Currently, the amount of the EMAC is 0.34 percent on the first $15,000 of each employee's wages paid during the calendar year. Beginning January 1, 2018, the EMAC contribution fee increases to 0.51 percent of the employee's wages, which results in an increased per person liability amount from $51 to $77.

EMAC Supplement. An employer is liable for payment of an EMAC Supplement at the point it employs six or more employees in the first calendar quarter of 2018. The number of employees in a calendar quarter is calculated by dividing the total number of employees employed during the quarter, by three. For determining the number of employees, all employees who work or receive wages for any part of the pay period that includes the 12th of the month are counted.

An employer is liable for payment of the EMAC supplement in the amount of 5 percent of annual wages, up to the annual wage cap of $15,000, or $750 for each non-disabled employee who obtains health insurance coverage from MassHealth (excluding the premium assistance program), or who receives subsidized coverage through ConnectorCare for a continuous period of at least 56 days. EMAC Supplement payments are due quarterly, by the last day of the month following the end of the applicable quarter.

The EMAC Supplement would not apply in the event an employee has MassHealth coverage (available to individuals whose income falls below 138 percent of the federal poverty level) as a secondary payer, and employer-sponsored coverage as primary payor. If an individual obtains coverage through ConnectorCare (available to individuals whose income falls below 300 percent of the federal poverty level), then the EMAC Supplement would not be assessed, as long as he/she is eligible for adequate and affordable employer-provided coverage.

In the event an employer disputes its liability for the EMAC Supplement based on a determination made by the DUA, it has the right to request a hearing on the matter, as long as the request is made within 10 days of receiving the DUA's determination of liability. Failure to pay the EMAC Supplement could result in penalties, together with interest on the amount due.

HIRD Form

The Massachusetts Department of Unemployment Assistance (DUA) is delegated to develop a health insurance responsibility disclosure (HIRD) form. The required contents of the HIRD form would include verification of whether the employer offered to pay, or arrange, for the purchase of health insurance, as well as insurance-related information, such as premium cost, types of benefits offered, cost sharing details, eligibility criteria, and any other information deemed necessary by the DUA.

The HIRD form is required to be filed on an annual basis by employers employing 6 or more employees in the Commonwealth. In addition, the law establishes penalties, ranging from $1,000 to $5,000 per violation, for failure to file the form, or falsifying information contained on the form. As of the date of this writing, the HIRD form is not yet publicly available, but will likely be due later this year, or immediately following the close of the calendar year, perhaps in early 2019.

GROUP HEALTH PLAN REPORTING AND DISCLOSURE REMINDERS; EEOC WORKPLACE POSTING PENALTIES

Following are some reporting and disclosure reminders. Also important to note that the EEOC recently increased the penalty for failure to post the required workplace posting.

Annual 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 2, 2018. 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 2017, make certain that you file the **2017 Form M-1 annual report** by March 1, 2018. Failure or refusal to file a completed or accurate Form M-1 could result in penalties of up to $1,558 per day (indexed for 2018). As a reminder, the Form M-1 can only be submitted electronically through the DOL's Online Filing System (http://www.askebsa.dol.gov/mewa).

  In addition, all welfare benefit plans required to file a Form M-1 are required to file the Form 5500 regardless of the plan size or type of funding.

Annual Disclosure Reminder: 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 Department of Labor's Employee Benefit Security Administration (EBSA).

The model Medicaid/CHIP notice has been revised and is current as of January 31, 2018. Following are the changes to the revised notice, when compared to the August 10, 2017 version:

- Both the website address and phone number for the Medicaid agency in New Hampshire have changed;
- There is a different website address for the Medicaid office in Nevada; and
- The phone number for the Medicaid office in West Virginia has changed.

Model notice. The revised model 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**).

Who gets the notice? 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 health plan is situsued:

States with Premium Assistance		
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		

Method of distributing notice. The Medicaid/CHIP premium assistance notice can be included in other plan materials, such as open enrollment materials, or a summary plan description. Alternatively, it can be provided as a separate document. If the notice is to be included with other plan material, it must be clearly delineated as a unique document.

The notice can be provided in written form; or, electronically, as long the DOL's electronic disclosure rules are followed. Employers are welcome to modify the model notice; though, it is very important that the document provided to affected individuals clearly explains the right to premium assistance; and most importantly, provides at least minimal information about how to contact the relevant state Medicaid or CHIP office.

Increased penalty for failure to provide notice. The penalty for failure to provide this notice is adjusted on a periodic basis. Beginning January 2, 2018, failure to notify employees of premium assistance opportunities could result in a penalty assessment of up to $114 per day, per employee.

EEOC Workplace Posting: Increased Penalty for Failure to Post

The Equal Employment Opportunity Commission (EEOC) **announced** an increase in the penalty for failure to post the EEOC notice from $534 to $545 per violation, beginning February 20, 2018.

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 2018 Federal Poverty Guidelines

The **federal poverty guidelines for 2018** have been issued by the Department of Health and Human Services (HHS). 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 9.56 percent (indexed for 2018) 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.

These FPL guidelines are effective as of January 13, 2018 unless an office administering a program using the guidelines specifies a different effective date for that particular program. Below is a chart reflecting the 2018 and 2017 levels.

2018 Poverty Guidelines for the 48 Contiguous States and District of Columbia*		
Persons in family/household	*2018 Poverty Guidelines*	*2017 Poverty Guidelines*
1	$12,140	$12,060
2	16,460	16,240
3	20,780	20,420
4	25,100	24,600
5	29,420	28,780
6	33,740	32,960
7	38,060	37,140
8	42,380	41,320
For families/households with more than 8 persons	Add $4,320 for each additional person	Add $4,180 for each additional person

**Note: The FPL limits vary slightly in Alaska and Hawaii.*

Additional poverty guidelines is available from the HHS Office of The Assistant Secretary for Planning and Evaluation **website.**

IRS Updates Publications 502 and 503

The IRS has recently updated two publications (for use in preparing 2017 forms) that may be of interest to employers:

- **Publication 502,** *Medical and Dental Expenses.* For certain purposes, this publication can be used to determine expenses that are reimbursable from plans such as flexible medical spending accounts and health savings accounts; though, it is important to note that there are differences between deductible expenses and those reimbursable from such plans.

- **Publication 503**, *Child and Dependent Care Expenses.* Note: exercise caution when relying upon this publication, because the dependent care credit is different from the dependent care assistance credit.

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