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HSA Inflationary Adjustments for 2019

In Revenue Procedure 2018-30, the Internal Revenue Service released the 2019 cost of living adjustments relating to health savings accounts (HSA). For 2019, the individual and family contribution limits and out-of-pocket (OOP) limits will increase. The annual high deductible health plan (HDHP) deductible limits remain the same.

	Individual/Self Only		*Family*	
	2019	2018	2019	2018
HDHP Annual Deductible	$1,350	$1,350	$2,700	$2,700
HDHP Annual Out-of-Pocket Limit*	$6,750	$6,650	$13,500	$13,300
Contribution Limit	$3,500	$3,450	$7,000	$6,900

**Note: The out-of-pocket (OOP) limits applicable to high deductible health plans used in conjunction with HSAs differ slightly from the Affordable Care Act's imposed OOP limits, which for 2018, the OOP is $7,350 for self-only; $14,700 for other than self-only coverage. In 2019, the OOP limits increase to $7,900 for self-only, $15,800 for other than self-only coverage. Also important to remember that under the Affordable Care Act, for a family plan, no individual can be subject to an OOP greater than the individual OOP limit.*

General reminders about HSA limits:

- ✓ 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.
- ✓ With regard to the family deductible, any embedded deductible can be no lower than the minimum family statutory deductible limit.

Fiduciary Responsibility, Despite the Chaos

Fiduciary responsibility is one of the most important aspects for individuals engaged in welfare and qualified pension benefits plan sponsorship. A fiduciary is one who exercises discretionary authority or control regarding management of the plan, as well as disposition of plan assets. Certain positions in administering or managing a plan are always fiduciary roles, such as a named fiduciary or specific person, entity or corporation designated in the plan document, or an investment plan committee.

Generally, with the exception of named fiduciaries, fiduciary status is a functional test based on the role the individual plays in conjunction with the plan. To this end, over the recent years and as discussed in our prior *Benefit Beat* and *At Issue* articles, much ado has been made about the fiduciary status of investment advisers.

Most recently, in response to the Fifth Circuit Court of Appeals decision to vacate the Department of Labor's Employee Benefits Security Administration (EBSA) fiduciary investment advice rules (see *Fiduciary Rules Vacated, Benefit Beat,* 4/5/18), the DOL issued **Field Assistance Bulletin (FAB) 2018-02** on May 7, 2018. This FAB suggests that as long as a fiduciary is working diligently and in good faith to comply with the law, neither the Department of Labor nor the Internal Revenue Service will take corrective action against the fiduciary. What this means is that given the revocation of the investment advice rules, the path to future rulemaking is uncertain.

Similarly, the Securities and Exchange Commission (SEC) recently issued **proposed regulations** addressing fiduciary standards for investment advisers. More will be said about these regulations if and when they are finalized.

The state of chaos notwithstanding, it is important to be reminded of fiduciary responsibility. Specifically, a plan fiduciary must have undivided loyalty in its role, and act solely in the best interest of plan participants and beneficiaries. Further, a fiduciary can only use plan assets for the exclusive purpose of providing benefits for participants and beneficiaries and to pay reasonable expenses of plan administration. Where applicable, the fiduciary must diversify investments related to the plan. And finally, the fiduciary must follow the terms of the plan, unless it the plan is inconsistent with the law. This obligation extends to oversight of plan operation, correction of plan errors, satisfying reporting and disclosure requirements, and maintaining a solid record retention process.

It is also important to carry out these duties with the utmost attention to detail given the high standard imposed on a plan fiduciary.

Paid Sick Leave Updates: San Francisco, New York City, City of Duluth and Rhode Island

Following are highlights of revisions and changes made to paid sick leave ordinances applicable to employers in the City and County of San Francisco and New York City.

In addition, the City of Duluth, Minnesota recently enacted an earned sick and safe leave ordinance.

And finally, the Rhode Island Department of Labor and Training released final rules to implement the state-wide paid sick leave law that takes effect on July 1, 2018.

Updated Rules: San Francisco Paid Sick Leave Ordinance

San Francisco's paid sick leave ordinance has been in effect since 2007. In 2016, San Francisco voters passed amendments to the paid sick leave ordinance to be compatible with the state sick leave law (see *A Steady Flow of Paid Sick Leave Laws, Benefit Beat*, 7/7/16).

As a reminder, eligible employees, whether full-time, part-time, or temporary are entitled to accrue one hour of paid sick leave for every 30 hours worked in the City of San Francisco. Accrued leave is capped at 72 hours for those employees who work for a large employer (10 or more employees); or 40 hours for employees of a small employer (less than 10 employees).

Recently, the Office of Labor Standards Enforcement (OLSE) published **updated rules** interpreting San Francisco's Paid Sick Leave Ordinance (PSLO). These rules take effect June 7, 2018. Following is a summary of the more notable rules.

New Rules Pertaining to Employers

- *Control groups*. A controlled group of corporations (in accordance with the federal law) is considered to be a single employer under the PSLO. Employees of unincorporated businesses are counted as working for one employer if the businesses are a controlled group.

- *Joint employers*. An employee may be jointly employed by two or more employers (i.e. when an employer uses a temporary staffing agency). OLSE will apply California law to determine whether an employee is jointly employed. If joint employment is found to exist, each employer must ensure compliance with the law.

- *Small employers*. PSLO defines a small business as an employer for which fewer than ten persons work for compensation during a given week. This rule provides that if the number of employees working for compensation per week fluctuates above and below 10 per week over the course of a year, OLSE will calculate business size for the current calendar year based upon the average number of persons who worked for compensation per week during the preceding calendar year.

- *New employer*. For a new employer, calculation of business size for the current calendar year will be based upon the average number of persons per week who worked for compensation for the first 90 days after its first employee(s) began work.

New Rules Pertaining to Employees

- *Eligible employee*. The PSLO applies to employees who perform work in San Francisco. The new rules provide that an employee who performs work in San Francisco is covered by the Ordinance only if he/she performs 56 or more hours of work in San Francisco within a calendar year.

- *Exempt employee*. This new rule defines an exempt employee and provides that the regular rate of pay is calculated according to state law. An *exempt employee* is one who is exempt from the overtime provisions of the federal Fair Labor Standards Act (FLSA) and the California labor law. In addition, if an exempt employee is provided no paid leave other than paid sick leave and then takes sick leave, his/her salary must continue without deduction for the absence, but the leave balance is reduced. An employee who is not *exempt* from the overtime provisions of the FLSA and state law accrue paid sick leave on all hours worked including overtime. An exempt employee accrues paid sick leave based upon a 40-hour work week unless his/her regular work week is less than 40 hours, in which case, paid sick leave accrues based upon that regular work week.

- *Rehired employee*. An employee is entitled to use accrued paid sick leave beginning on the 90th day of employment. If there is separation from employment and the employee is rehired within one year of separation by the same employer, previously accrued sick leave must be reinstated. The new rule provides that if an employee is rehired within one year of separation, the original period of employment is counted to determine whether the waiting period requirement has been satisfied. For example, an employee separates from the employer after working 45 days and is then rehired within one month. The employee must work another 45 days before he/she can use sick leave.

- *Employee notice*. An employer may require its employees to give reasonable notification of an absence from work for which paid sick leave is or will be used. The employer must establish a procedure for employees to communicate absences to the employer.

  Whether an employer's notification system is reasonable depends upon the totality of the circumstances. Policies or practices that require advance notification of a foreseeable absence, or notification as soon as practicable for an unforeseeable absence, are presumptively reasonable. An advance notification requirement of greater than two hours is presumptively unreasonable unless the employer can demonstrate by clear and convincing evidence that there is a compelling justification for the longer advance notification requirement. An employee does not explicitly need to request the use of paid sick leave when notifying his/her employer of an absence.

- *Verification/Documentation of Use of Leave*. An employer may only take reasonable measures to verify or document that an employee's use of paid sick leave is lawful. A measure is not reasonable if the employer requires the employee to disclose any more information than is necessary for the employer to determine whether the employee's absence was or will be a proper use of paid sick leave. Policies or practices that require a doctor's note or other documentation for instances in which the employee has used paid sick leave to attend an appointment are presumptively reasonable, even if the use of paid sick leave was for three consecutive work days or less.

Coordination with other laws. This ordinance must be coordinated with the terms and conditions of other applicable laws such as the Healthy Workplaces, Healthy Families Act of 2014. When multiple laws apply, the individual is entitled to benefits that is most generous. For example, San Francisco's ordinance allows employees to begin using sick leave on the 91st day of employment, while California law allows employees to begin using sick leave on the 90th day of employment.

Additional information relating to the San Francisco paid sick leave ordinance is available on the OLSE's dedicated webpage.

New York City's Sick and Safe Leave: Revised Employee Notice

Last November, New York City's Earned Sick Time Act was amended to allow employees to use paid sick leave for safe leave purposes such as an absence from work due to domestic violence or other offense matters. This amendment, which took effect on May 5, 2018, does not increase or change any other provisions under the City's paid sick leave law other than allowing paid sick leave to be used as safe leave.

As background, an employer with five or more employees who work more than 80 hours in a calendar year in New York City must allow an employee to use safe leave for an absence from work due to any of the following reasons.

Safe leave is available in the event the employee or his/her family member is a victim of a family offense matter, sexual offense, stalking, or human trafficking:

1. To obtain services from a domestic violence shelter, rape crisis center, or other shelter;
2. To participate in safety planning such as seeking relocation;
3. To meet with legal counsel or social service provider relating to a criminal or civil proceeding;
4. To file a complaint or domestic incident report with law enforcement;
5. To enroll children in a new school; or
6. To take other actions necessary to maintain or restore the physical, psychological, or economic health or safety of the employee or his/her family member.

Reasonable documentation of the need and use of safe leave may be required for absences of work exceeding three consecutive work days.

Among the employer obligations is a requirement to provide a Notice of Employee Rights to its workforce. This Notice has recently been revised and released by the New York City Department of Consumer Affairs. The revised notice must be provided to all new hires, and well as current employees by June 4, 2018.

The New York City Department of Consumer Affairs (DCA) enforces the provisions of this law. Additional paid sick and safe leave information for employers including rules, guides, FAQs is available on DCA's dedicated webpage.

Minnesota: City of Duluth Enacts Earned Sick and Safe Time Ordinance

The City of Duluth, Minnesota joins the ever-growing list of jurisdictions requiring paid sick leave and passed an Earned Sick and Safe Time Ordinance (No. 10571) on May 29, 2018.

This Ordinance requires employers with five or more employees to provide up to 64 hours of earned sick and safe leave time per year, accrued at a rate of one hour for every 50 hours worked.

For purposes of determining employer size, all employees are counted, not just those working in the City's geographical boundaries. The Ordinance does not apply to federal, state or local governments with the exception of the City of Duluth.

Earned sick and safe leave can be used to attend to one's own physical or mental needs, or to attend to the needs of a family member, or, to obtain services relating to domestic violence, sexual assault, or stalking.

Accrued sick leave carries over from year-to-year, subject to a 40-hour per year limit. Alternatively, at least 40 hours can be frontloaded at the beginning of each year. An employee can begin using accrued earned sick leave following 90 calendar days of employment.

The Ordinance contains numerous employer obligations relating to notification requirements, record retention, and confidentiality. Further, penalties and administrative enforcement provisions are in place to ensure compliance and prevent employment-related retaliation.

The Ordinance becomes effective on January 1, 2020. It is anticipated that further implementation information will become available.

Rhode Island: Implementation Rules for State-wide Paid Sick Leave Law

Last September, Governor Raimondo signed into law the Healthy and Safe Families and Workplaces Act (see *Rhode Island Joins the Paid Sick Leave Train, Benefit Beat*, 10/9/18). The provisions of this law take effect July 1, 2018. For purposes of clarifications and implementation of the law, the Rhode Island Department of Labor and Training recently issued final rules, which took effect on May 31, 2018.

Following are highlights of the final rules:

- The law requires employers employing 18 or more employees to provide paid sick leave benefit. Employers must count all employees who work a majority of their time in the state of Rhode Island without regard to the employer's location.
- With regard to accrual of leave, employees are entitled to accrue one hour of sick leave for every 35 hours worked. Notably, accrual continues for hours worked both in and outside of Rhode Island as well as during periods of paid time off such as holiday, sick leave, vacation and the like.
- Employers are required to provide certain information in its written policy relating to the paid sick leave benefit. The final rules clarify the types of information that an employer must include in in its written notification provided to employees.

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