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SPD Failure: An Expensive Lesson

A recent case, *Snitselaar v. UNUM Life Insurance Company of America* (1:17-cv-00014-LRR-MAR District Court, N.D. Iowa), provides a good reminder to employers of the importance of providing a summary plan description (SPD). The SPD is a summary of the plan document highlighting eligibility, benefits, plan operations, funding, claims procedures, as well as other general terms, conditions and exclusions of the plan. The SPD is required to be provided to each participant covered by a plan subject to ERISA. Generally, a plan subject to ERISA includes employer-sponsored welfare benefit plans, as well as retirement plans. Excepted from ERISA are plans sponsored by state and local governments and plans sponsored by churches.

Pursuant to ERISA's reporting and disclosure requirements, the plan sponsor must provide the SPD to the participant within 90 days of the individual becoming covered by the plan. Further, the SPD must be provided every 5 years, unless no changes have been made to the plan, in which case, it need only be provided every 10 years. For changes made to the plan that occur prior to the time a full SPD is provided, a summary of material modification (SMM) must be provided. The SMM must be provided to plan participants within 210 days following the close of the plan year in which the change takes effect. However, prior litigation has shown that it is important to provide the SMM prior to the plan change taking effect in order to ensure that the participant has information that he or she needs in order to make informed plan decisions.

In the above-referenced matter, a married couple, covered under a group life insurance plan, divorced. Three months later, the plaintiff's ex-spouse dies without converting the life insurance as a result of the divorce. The plaintiff argued that the couple did not know about the conversion rights because they were not provided the SPD by the employer/plan sponsor which would have contained such information.

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As a result, the plaintiff's claim to the death benefit was denied by the insurer because under the terms of the contract, coverage terminated upon the date of the divorce. It was argued that if the couple initially been provided with the SPD that contained information about the right of conversion, such right could have been effectuated and thus, the surviving spouse could have received the death benefit. The Court agreed, compelling the employer to pay $60,000 to the plaintiff, which reflects the amount of dependent life insurance available under the group policy had the conversion been effectuated.

Recovering Mistaken HSA Contributions

Generally, an employer contribution to an employee's health savings account (HSA) is immediately fully vested, and the employer *cannot* re-coup the contribution under any circumstances. An IRS pronouncement released 10 years ago (**Notice 2008-59**) provides two instances in which the employer *can* recover a mistaken contribution:

- *Accountholder Ineligibility*
  - If an employer makes an HSA contribution to an individual's account, and if the individual is not HSA-eligible, the employer can recover the contribution based on the theory that an HSA never existed. The employer can recover the contribution by advising the account trustee of the mistake and asking for reimbursement. If this is not accomplished by the end of the tax year, the employer must show the mistaken contribution as taxable compensation on the employee's Form W-2.
  - Employer contribution when an individual becomes ineligible. If an individual is HSA-eligible, but later becomes HSA-ineligible, employer contributions made after the individual becomes ineligible cannot be recovered by the employer.
- *Excess Contributions.* If an employer mistakenly makes a contribution in excess of the HSA statutory limit (for 2019, the contribution limit to an HSA is capped at $3,500 for individuals or $7,000 for family), then the employer can re-coup the excess, as described above; or if this is not accomplished by the end of the tax year, the excess amount would be reflected on the individual's Form W-2. It is important to note that if an employer mistakenly makes a contribution in excess of what the employer intended to make, but the contribution is not in excess of the statutory limit, then no refund would be available.

A recently released **Treasury Department Information Letter 2018-0033** expands the instances in which an employer can re-coup excess HSA contributions; they are:

- An amount withheld and deposited in an employee's HSA for a pay period that is greater than the amount shown on the employee's HSA salary reduction election;
- An amount that an employee receives as an employer contribution in which the employer did not intend to contribute, but was transmitted because an incorrect spreadsheet is accessed, or because employees with similar names are confused with each other;
- An amount that an employee receives as an HSA contribution because it is incorrectly entered by a payroll administrator (whether in-house or third-party) causing the incorrect amount to be withheld and contributed;
- An amount that an employee receives as a second HSA contribution because duplicate payroll files are transmitted;
- An amount that an employee receives as an HSA contribution because a change in employee payroll elections is not processed timely so that amounts withheld and contributed are greater than (or less than) the employee elected;
- An amount that an employee receives because an HSA contribution amount is calculated incorrectly, such as a case in which an employee elects a total amount for the year that is allocated by the system over an incorrect number of pay periods; and
- An amount that an employee receives as an HSA contribution because the decimal position is set incorrectly resulting in a contribution greater than intended.

IRS Issues Form for Employers Seeking Paid Family Leave Credit

One of the provisions of the Tax Cuts and Jobs Act (TCJA) added a new code section that provides an employer tax credit for wages paid to qualifying employees during any period in which an employee is absent from work due to a family and medical leave event. For a summary of this credit, see our October, May and January *Benefit Beat* articles from 2018.

Briefly, an employer is eligible for a general business tax credit under Code Section 45S if it has a separate written policy in place that allows all qualifying full-time employees a minimum of two weeks of annual paid family and medical leave. The policy must also allow non-

full time qualifying employees a comparable amount of leave on a pro rata basis.

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, indexed for 2017 and 2018). 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.

The credit is available to an employer without regard to whether it is subject to the federal Family and Medical Leave Act (FMLA), as long as the employer maintains the written policy that meets the wage payment criteria. The credit generally is effective only for wages paid in taxable years of the employer beginning after December 31, 2017, and before January 1, 2020.

Of interest to employers seeking the credit, the IRS released **Form 8994** and related **instructions** for purposes of computing the amount of credit for paid family and medical leave for tax years beginning after 2017. The first part of the form requires attestation by the employer of the following:

1. Whether the employer has a written policy providing for a minimum of 2 weeks of annual paid family and medical leave for qualifying employees to whom wages are paid and if so, does the policy provide paid leave of at least 50% of the wages normally paid to a qualifying employee;
2. Whether the leave was provided to at least one qualifying employee during the tax year; and
3. Whether the employer employed any employees not covered by the FMLA, and if so, whether the employer's policy contained "non-interference" type language which basically states that the employer will not interfere, restrain, or deny the right provided under the leave policy, nor take any adverse employment action against individuals pursuing leave.

The second section of the form requires the total paid family and medical leave credit computed on wages paid during the tax year to qualifying employees while on leave. The instructions provide a worksheet to assist in this process. Special computation rules apply to partnerships and S-corporations.

Once the form is completed, the amount of the credit is reported in Part III of the Form 3800, *General Business Credit.* Partnerships and S corporations report this amount on their Schedule K.

2019 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 (DOL). 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** published by the DOL's Employee Benefit Security Administration. These amounts became effective for penalties assessed on or after January 23, 2019.

	2019 Penalty Amount	2018 Penalty Amount
Failure or refusal to file the annual Form 5500 return/report	Up to $2,194 per day	Up to $2,140 per day
Failure to file Form M-1	Up to $1,597 per day	Up to $1,558 per day
Failure to provide Summary of Benefits and Coverage (SBC)	Up to $1,156 per failure	Up to $1,128 per failure
Failure to notify employees of Children's Health Insurance Program (CHIP) coverage opportunities	Up to $117 per day	Up to $114 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 $117 per day of noncompliance (up from $114 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 DOL's Wage and Hour Division of up to $173 per each separate offense (up from $169). The model FMLA work place poster is available in both English and Spanish from the DOL's Wage and Hour Division's **website**.

DOL Issues Revised Model 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, 2019. The revised notice differs from the model notice issued in July 31, 2018, as follows:

1. The state of Colorado is no longer offering premium assistance through its Health First Colorado (Colorado's Medicaid program) or Child Health Plan Plus (CHP+) program;
2. The website address and phone number for the Medicaid agency in New Hampshire has changed;
3. The website address for the Medicaid office in Georgia and Wyoming has changed.

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
Florida	Nebraska	South Dakota
Georgia	Nevada	Texas
Indiana	New Hampshire	Utah
Iowa	New Jersey	Vermont
Kansas	New York	Virginia
Kentucky	North Carolina	Washington
Louisiana	North Dakota	West Virginia
Maine	Oklahoma	Wisconsin
Massachusetts	Oregon	Wyoming

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.

Penalty for failure to provide notice. Beginning January 23, 2019, failure to notify employees of premium assistance opportunities could result in a penalty assessment of up to $117 per day, per employee.

Some Reminders are Worth Repeating

A couple reminders about annual **health plan reporting obligations** mentioned last month bear repeating. Specifically:

- ✓ Multiple employer welfare arrangement (MEWA) including an association health plan (AHP) are required to annually file the **Form M-1** with the Department of Labor. The 2018 Form M-1 annual report is due by **March 1, 2019**.
- ✓ Group health plans, whether insured or self-funded, must annually complete and file a **Creditable Coverage Disclosure Form** to the Centers for Medicare and Medicaid Services (CMS). The 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, 2019**.

2019 Federal Poverty Level Guidelines

The federal poverty level (FPL) guidelines for 2019 have been **published** by the Department of Health and Human Services. 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.

Further, for employer shared responsibility purposes applicable to employers employing 50 or more full-time equivalent employees, use of the FPL guidelines is one of three safe harbor methods that can be utilized to determine the employer's affordability standard. Coverage under an employer-sponsored plan is deemed affordable if the employee's required contribution to the plan does not exceed 9.86% (indexed for 2019; 9.56% in 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.

As a reminder, if an employer is using the FPL as its affordability standard, it is allowed to use the FPL guidelines in effect six months prior to beginning of the plan year.

In addition, these FPL guidelines are used to determine 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.

These FPL guidelines are effective as of January 11, 2019 (unless an office administering a program using the guidelines specifies a different effective date for that particular program). Below is a chart reflecting the 2019 and 2018 levels.

2019 Poverty Guidelines for the 48 Contiguous States and District of Columbia *Note: The FPL limits vary slightly in Alaska and Hawaii*		
Persons in family/household	*2019 Poverty Guidelines*	*2018 Poverty Guidelines*
1	$12,490	$12,140
2	$16,910	$16,460
3	$21,330	$20,780
4	$25,750	$25,100
5	$30,170	$29,420
6	$34,590	$33,740
7	$39,010	$38,060
8	$43,430	$42,380
For families/households with more than 8 persons:	*Add $4,420 for each additional person*	*Add $4,320 for each additional person*

Additional poverty guidelines are available from the HHS Office of The Assistant Secretary for Planning and Evaluation (http://aspe.hhs.gov/poverty-guidelines).

IRS Updates Publications 502 and 503

The IRS has recently updated two publications (for use in preparing 2018 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.

Quick Reminders for San Francisco Employers

Employers subject to the San Francisco's Health Care Security Ordinance (HCSO) are required to annually report their health care expenditures to the Office of Labor Standards Enforcement (OLSE). The 2018 Employer Annual Reporting Form is scheduled to be made available on the **OLSE's website** by April 1, 2019 and is due by April 30, 2019. Employers who fail to submit an annual report on time may be subject to penalties of $500 for each quarter the violation occurs.

As background, a business is subject to the HCSO if it engages in business within the City of San Francisco and employs 20 or more employees per week. Nonprofit employers with fewer than 50 employees, and small employers with fewer than 20 employees, are exempt from the HCSO. For 2019, the applicable health care expenditure rate for large businesses employing 100-plus employees is $2.93 per hour; the rate for businesses with 20-99 employees and nonprofits employing 50-99 employees is $1.95 per hour

The OLSE provides a new **2019 HCSO Poster** for employers to download or request by mail. This workplace posting is made current as of January 1, 2019, and must be placed at each job site or workplace in a location where employees can easily read it.

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