



Did You Know? The Latest in ERISA & Employee Benefits

Hinckley Allen Employee Benefits & Executive Compensation

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President Trump signs executive order aimed at minimizing burdens of the Affordable Care Act (ACA).

President Trump's executive order calls for federal agencies to "exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden," on individuals or businesses. This reflects the President's determination to eliminate the mandates that require individuals to carry health insurance, and for businesses with more than 50 employees to offer it. However, President Trump lacks the authority to eliminate those requirements without congressional approval. "In terms of specifics, nothing changes now, and it [the Executive Order] makes it clear that some changes may take longer than others because of the regulatory process to revise existing regulations," says Steve Wojcik, vice president of public policy at the National Business Group on Health. From an employer's perspective, "every regulation they need to comply with, they still need to until they hear differently," Wojcik notes. So, for now, employers should continue current compliance with the ACA until additional and more definitive guidance is issued. Thus, applicable large employers must be ready to timely file Forms 1094 and 1095 and maintain continued compliance with the Employer Mandate.

Certain expenses paid to, or on behalf of, fiduciaries may be paid from plan assets.

Qualified retirement plans are typically drafted to include reasonable administrative expenses as eligible to be paid by the plan. For example, such expenses include expenses relating to: (i) plan record keeping, (ii) plan accounting, (iii) legal services relating to plan fiduciary issues that are not settlor functions (i.e. services that relate

to creating, terminating and amending a plan, decisions about plan design, etc. would be considered settlor functions), (iv) custodial services, (v) investment related services, and/or (vi) processing of Qualified Domestic Relations Orders.

The regulations under ERISA permit a fiduciary to receive reimbursement from plan assets for expenses that are “properly and actually incurred, in the performance of his/her duties with the plan ...”; provided the plan authorizes payment. This means that a plan may reimburse for direct and reasonable travel-related expenses incurred by a fiduciary that benefit the plan. For example, if a plan trustee must travel to attend a trustee’s meeting relating to the plan and the trustee stays overnight in a hotel and incurs airline expenses, these expenses are generally reimbursable. Also, certain educational programs may be paid from plan assets; provided that plan participants benefit from the fiduciary having attended the program.

In order to be able to make such payments from your plan, it is essential that the plan document itself permit payment of such expenses or you adopt a separate Expense Policy, specifying which expenses can be paid from plan assets and outlining procedures for documenting expenses and submitting them for reimbursement. In fact, the Enforcement Manual referred to during a Department of Labor audit, specifically refers to such a policy, stating auditors should expect to find one and should use it as a benchmark when reviewing plan expenses.

The Department of Labor (DOL), Internal Revenue Service (IRS) and Pension Benefit Guaranty Corp (PBGC) have jointly proposed major changes to Form 5500.

The proposed changes would affect retirement, health, and other welfare plans, and are intended to improve employee benefit plan reporting by requiring more detailed information on issues such as group health plan compliance, plan investments, and service provider fees. Most significantly, the proposal would expand the scope of required filers to **all** group health plans – even those that are currently exempt from filing. A new Schedule J would be required which would identify the types of health benefits offered and the funding method, include information about participant and employer contributions and whether the plan is insured, use of a trust, or pays benefits from the employer’s general assets. Additional changes would apply to 401(k) plan filings, such as requiring additional data about participant accounts, contributions, and distributions. Changes are also being proposed to the existing schedules that are required to be filed by all plans. The proposed changes are targeted to take effect with the 2019 plan year filings.

Cities can sponsor retirement plans for private sector employees.

The DOL recently granted cities and municipalities authority to sponsor private-sector retirement plans for private-sector employees whose employer do not offer a qualified plan. These plans are exempt from ERISA, including ERISA's reporting and disclosure, fiduciary, participation, and vesting requirements. States may also establish payroll-deduction savings programs for private-sector employees, including programs with automatic enrollment. Finally, some cities, like New York and Philadelphia, are exploring whether 401(k) marketplaces and 401(k) multiple employer plans are possibilities. The net impact of these changes is to provide opportunity for a predictable stream of lifetime income for those individuals currently not covered at no cost to taxpayers, while taking the compliance burden off small business owners.

Wellness incentives are taxable.

Wellness incentive cash payments and cash equivalents, ranging from gift cards to subsidized gym memberships, are not excluded from taxation as a medical benefit unless they are deemed to be de minimis. There is no safe harbor dollar threshold for this determination. A de minimis award is one of nominal value and is provided infrequently. Thus, it would be a mistake for an employer to assume that, for example, a \$25 gift card is de minimis. It depends on the facts and circumstances. However, logo-branded t-shirts and other items that are administratively burdensome to value generally do qualify as de minimis. Benefits, services and non-cash rewards or incentives that are medical care, such as biometric screenings, smoking cessation programs and health risk assessments, are specifically excluded from taxable income.

With the elimination of the five-year Remedial Amendment Cycle, the Internal Revenue Service (IRS) will publish two lists annually—a “Required Amendments List” and an “Operational Compliance List”.

The “Required Amendments List” will be issue after October 1st of each year. All amendments necessary for an individually designed plan to retain its qualified plan status will be identified, and plan sponsors must generally adopt a required amendment by the end of the second calendar year following the year in which the requirement is announced. For example, an amendment included in the 2017 “Required Amendments List” must be adopted on or before December 31, 2019.

The “Operational Compliance List” will identify the effective date of a required amendment. That is, the date by which a plan sponsor must operationally comply with

the amendment, irrespective of whether the plan sponsor has adopted the conforming amendment. Continuing with the example above, plan sponsors must comply in practice with an amendment included in the 2017 “Required Amendment List” on the effective date of the amendment. But, plan sponsors will have until December 31, 2019 to formally adopt a plan amendment reflecting that operational change.

The amendment deadline for discretionary amendments has not changed. Amendments not related to qualification requirements must generally be adopted by the end of the plan year in which the amendment is operationally effective.

Deadlines are rapidly approaching for compliance with Affordable Care Act (ACA) reporting obligations and the new Fiduciary Rule.

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| February 28, 2017 | 2016 ACA Reporting to IRS (Paper Filing): Employers filing less than 250 returns must file with the IRS Form 1094-B (Transmittal of Health Coverage Information Returns) along with copies of Form 1095-B, and Form 1094-C (Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns) along with copies of Form 1095-C. |
| March 2, 2017 | 2016 ACA Reporting to Employees: The IRS extended the deadline to deliver ACA reporting forms to employees from January 31, 2017 to March 2, 2017. Form 1095-C (Employer Provided Health Insurance Offer and Coverage) and Form 1095-B (Health Coverage) must be distributed to employees and covered individuals. |
| March 31, 2017 | 2016 ACA Reporting to IRS (Electronic Filing): Employers filing 250 or more returns must file with the IRS Form 1094-B (Transmittal of Health Coverage Information Returns) along with copies of Form 1095-B, and Form 1094-C (Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns) along with copies of Form 1095-C. |
| April 10, 2017 | The DOL is phasing in compliance with its new fiduciary rule. As a first step, firms and advisors servicing retirement accounts must notify retirement investors of their fiduciary status and any material conflicts of interest, designate someone to address material conflicts of interest and monitor advisors’ adherence to impartial conduct standards, and must comply with the impartial conduct standards of the new rules. Full compliance is required by January 1, 2018. While there is discussion of delay and/or full repeal of this rule, employers should continue compliance efforts until there is an official change. |

At this point, and particularly with the above mentioned ACA and fiduciary laws, we are advising clients and suggest continued efforts towards compliance with the current laws

despite the possibility that certain benefit laws may be impacted by the actions taken by President Trump.

Our [Employee Benefits & Executive Compensation](#) practice is available to help you bring your retirement plans, health and welfare plans into compliance. We can also identify potential issues regarding your employer-sponsored employee benefit plans. Contact us for more information.

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