DECEMBER

COMPLIANCE NEWSLETTER

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Making a List and Checking It Twice

Health and Welfare Plan Action Items – Closing 2018 and First Quarter 2019

This article is intended to provide employers with a checklist of action items related to their health and welfare plans that should take place at the end of 2018 through the first quarter of 2019. The checklist focuses on actions required under federal law and does not address certain actions that may be required under applicable state or local law. Where noted below, the timing requirements for certain actions may vary for non-calendar year plans.

Affordable Care Act (ACA) Employer Shared Responsibility Rules

Determine applicable large employer ("ALE")/applicable large employer member ("ALEM") status for 2019.

- For 2019, an existing employer is an ALE or ALEM and subject to the ACA's employer shared responsibility rules if: (i) it averaged 50 or more full-time equivalent employees during its 2018 months of operation; or (ii) is a member of a controlled group of related legal entities that collectively did so.
- A new employer is an ALE for 2019 if: (i) it reasonably expects to average at least 50 full-time equivalent employees during its 2019 months of operation; or (ii) is a member of a controlled group of related legal entities that collectively did so in 2018 or is reasonably expected to do so in 2019.

☐ Prepare 2018 Forms 1095-C and distribute to required individuals by **March 4, 2019**. No extension is available.

☐ File 2018 Forms 1094/1095 with the IRS by **April 1, 2019** for electronic filers (**February 28, 2019** for paper filers). Automatic and for cause extensions are available.

☐ Based upon the 2018 reporting results, determine whether any changes will be made to the measurement process to determine full-time employee (FTE) status under the ACA and/or plan eligibility rules to address potential employer shared responsibility payment penalty risk under Section 4980H of the Internal Revenue Code (IRC).

Employer Shared Responsibility Provision	Notes	2019 Amount
IRC Section 4980H(a) penalty aka the "doomsday" or "sledgehammer" penalty	Triggered when an ALE/ALEM fails to offer minimum essential coverage to at least 95% of its FTEs and at least one FTE qualifies for a subsidy in the public health insurance exchange.	This penalty is projected to be $2,500 multiplied by all of the ALE/ ALEM's ACA FTEs, pro-rated monthly ($208.33/month). An ALE may exclude 30 FTEs from the penalty calculation. This 30 FTE limit applies at the controlled group level, and an ALEM is limited to excluding its proportional share of this amount.
IRC Section 4980H(b) penalty aka the "per affected FTE" or "tack hammer" penalty	Triggered when an ALE/ALEM offers minimum essential coverage to at least 95% of its FTEs but fails to offer affordable, minimum value coverage to an FTE who qualifies for a subsidy in the public health insurance exchange (the "affected FTE").	This penalty is projected to be $3,750 per each affected ACA FTE, pro-rated monthly ($312.50/month).
Employer affordability safe harbor percentage	Applicable to Form W-2, rate of pay, and federal poverty limit safe harbor calculations.	9.86%

Written Plan Document Items

- **ERISA health and welfare plan document** – Amendments intended to be effective during a plan year generally must be adopted no later than the last day of that plan year[1]. This principle also generally applies to non-ERISA health and welfare plan documents (but see below for cafeteria plans). Changes in applicable law requiring or permitting amendments may allow for different amendment periods.
- **IRC Section 125 cafeteria plan document** – Amendments generally cannot be effective before they are adopted. In other words, an amendment intended to be effective as of the beginning of the plan year must generally be adopted before the first day of that plan year. Changes in applicable law requiring or permitting amendments may allow for different amendment periods.

1. It can be difficult to enforce an intended amendment before it has actually been adopted. It will require clear and convincing evidence that the change actually occurred and may require evidence that the change was known to the participant.

2019 Plan Design and Administration

While plan designs are or are in the process of being finalized for 2019, we recommend employers (in their capacity as plan sponsors and plan administrators) consider a few key items related to plan design and administration:

☐ Confirm the plan design complies with applicable 2019 limits:

Plan Design Item	2019 Limits	
High Deductible Health Plans (HDHPs)		
Annual out-of-pocket maximum	$6,750 self-only	$13,500 family*
Minimum annual deductible	$1,350 self-only	$2,700 family
ACA Non-Grandfathered Group Health Plan that are not HDHPs		
Annual out-of-pocket maximum	$7,900 self-only	$15,800 family*
Health Savings Account (HSA) and Health Flexible Spending Account (Health FSA)		
Annual HSA contribution limit	$3,500 self-only	$7,000 family
Annual HSA catch-up contribution limit (age 55+)	$1,000 (unchanged)	
Annual Health FSA employee contribution limit[2]	$2,700	

**Non-grandfathered plans (including non-grandfathered HDHPs subject to the ACA) must apply an embedded self-only out-of-pocket maximum limit for each individual enrolled in family coverage*

☐ ACA non-grandfathered group health plans will be required to cover additional preventive services without cost sharing (in-network): (i) folic acid supplementation for women planning or capable of pregnancy, (ii) preeclampsia screening for pregnant women, (iii) obesity screening for children and adolescents, and (iv) vision screening for children.

Additional preventive services will apply to non-calendar year plans during 2019 as recommendations are generally effective for plan years beginning one year after the month a recommendation is issued. For example, the recommendation for skin cancer behavioral counseling was issued in March 2018 and will become effective for plan years beginning on or after April 1, 2019.

Final regulations enabling employers to object to providing mandated women's contraceptive services on religious or moral grounds were recently issued and are addressed later in this newsletter.

☐ Confirm the wellness program complies with applicable law, including the wellness rules under the Health Insurance Portability and Accountability Act (HIPAA), the Americans with Disabilities Act (ADA), and the Genetic Information Nondiscrimination Act (GINA). The wellness incentive limits under the ADA and GINA will be vacated as of January 1, 2019[3], and an increase in wellness programs challenged by participants may result.

2. Employer contributions do not count toward this limit.

3. Note: The rest of the wellness rules under the ADA and GINA remain intact, however.

- ☐ Confirm the plan complies with the Mental Health Parity and Addiction Equity Act (MHPAEA). The U.S. Department of Labor (DOL) continues to focus on parity issues under the MHPAEA. Plans tend to do well complying with the parity rules related to cost sharing and visit limits, but may still violate the MHPAEA because the administrative hurdles or limitations for mental health and substance abuse benefits are greater than those for medical and surgical benefits. MHPAEA litigation has been heavy in recent years, although liability for compliance by a fully insured plan generally lies with the insurance carrier.

Other Items

- ☐ Prepare 2018 Forms W-2 and distribute to required individuals by **January 31, 2019**. A hardship extension is available in extraordinary circumstances.
  - Ensure Forms W-2 correctly reflect the cost of group health coverage in Box 12 using Code DD as required by the ACA.
  - Ensure Forms W-2 correctly reflect HSA contributions in Box 12 using Code W.
- ☐ Employers that provide prescription drug coverage to Medicare Part D eligible individuals must file an annual disclosure with the Centers for Medicare and Medicaid Services (CMS) indicating whether the coverage is creditable with Medicare Part D. This disclosure is due 60 days after beginning of plan year, or **March 1, 2019** for calendar year plans[4].

ABOUT THE AUTHORS

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Women's Contraceptive Coverage under the Affordable Care Act (ACA) – Update

Final Regulations for Religious and Moral Objections Released

In May 2017, President Trump issued an executive order directing the Departments of Health and Human Services, Treasury, and Labor (the "Departments") to consider amending the ACA's preventive services mandate to provide conscience-based objections to the included women's contraceptive services. The preventive services mandate applies to ACA non-grandfathered group health plans, and a number of employers have maintained grandfathered status for their group health plans at great cost primarily because of objections to providing women's contraceptive services. In response to the executive order, the Departments issued interim final regulations in October 2017. In December 2017, two federal district courts granted nationwide temporary injunctions from enforcement of the interim final regulations.

4. Interestingly, there are no fines for failing to file this disclosure.

On November 7, 2018, the Departments released final regulations in two parts: (1) objections for religious beliefs; and (2) objections for moral convictions (collectively, "the Rules"). The Rules are substantially similar to the interim final regulations but make certain technical changes for clarity. It is worth noting that the Rules do not affect government programs that provide free or subsidized contraceptive coverage to low income women, such as through community health centers. The Rules also do not ban any contraceptive drugs or devices nor prohibit any employer or insurer from covering contraceptives.

The Rules take effect **January 14, 2019**. In the short term, it seems likely there will be a legal skirmish over whether the previously issued nationwide injunctions will remain in effect or if the states challenging the religious and moral objections will be required to file new lawsuits. We expect the parties will be permitted to adapt the existing lawsuits to the Rules and the nationwide injunctions will be allowed to stand while the lawsuits proceed. In the meantime, this means employers will be unable to claim a religious or moral objection to providing the mandated women's contraceptive services.

Objections for Religious Beliefs and Moral Objections

The objection for religious beliefs provides relief from the contraceptive coverage mandate to employers that object to contraceptive services on the basis of sincerely held religious beliefs. The objection for moral convictions is intended to provide similar relief for employers that lack a basis to claim a religious objection to providing women's contraceptive services.

Relief is available in two forms:

- **Exemption** – The employer objects to any coverage for some or all women's contraceptive methods.
- **Accommodation** – The employer is willing to allow coverage for some or all women's contraceptive methods through a third party but objects to providing directly through its plan or paying for services.

Employer	Religious Exemption or Accommodation Available	Moral Exemption or Accommodation Available
Church	Yes	No
Other nonprofit	Yes	Yes
Closely held for-profit	Yes	Yes
Other for-profit	Yes	Yes/No*
Other non-government	Yes	No
Government	No	No
Higher education	Yes	Yes
Insurance carrier**	Yes	Yes

** A moral objection is not available to publicly traded entities.*

*** An insurance carrier is sheltered by the employer/plan sponsor's objection.*

Exemption and Accommodation Processes

Surprisingly, there is no filing requirement to claim an exemption. That said, employers claiming an exemption should consider keeping a written record of the basis for its exemption in the event of a challenge.

An employer claiming an accommodation shifts the responsibility (and cost) for providing women's contraceptive services to the employer's plan participants to the insurance carrier or third party administrator (TPA)[5]. An employer claiming an accommodation must either file EBSA Form 700 (a previous version based on the interim final regulations is available here) or provide other written notice to HHS of its objection to coverage of all or a subset of contraceptive services. Obviously, an accommodation also requires coordination between the employer and its insurance carrier or TPA. Employers who previously self-certified or filed other written notice do not need to file a new self-certification or notice.

Employers that object to covering some, but not all, contraceptive methods may only claim an exemption or accommodation for those methods to which they object.

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Slowly Filling in the Blanks

IRS Releases Guidance on Qualified Transportation Fringe Benefits for Tax-Exempt Organizations

The Tax Cuts and Jobs Act (the "Act"), enacted in December 2017, eliminated the business deduction employers received for providing qualified transportation fringe benefits ("fringe benefits") to their employees beginning January 1, 2018. The Act did not affect the employee exclusion, which enables the amount of qualified transportation fringe benefits provided by employers to be excluded from employee gross income up to specified monthly limits ($260 in 2018; $265 in 2019). Since the loss of the business tax deduction would not affect a tax-exempt organization, Congress included a provision in the Act that requires tax-exempt organizations to add the amount of these fringe benefits provided to their employees to its unrelated business taxable income (UBTI). However, the Act didn't specify exactly how to calculate the disallowed deduction or UBTI amount, particularly for qualified parking expenses.

The Internal Revenue Service released Notice 2018-99 that fills in this gap by describing how to calculate the disallowed deduction amount for taxable organizations or UBTI for tax-exempt organizations. The Department of the Treasury

> We believe the ultimate result is that employers will move away from or limit providing reserved parking spaces to employees for reasons that will become clear later in this article.

5. In theory, the absorbed costs will be offset by a reduction in fees paid to participate in the public health insurance exchange, but this doesn't benefit insurance carriers/TPAs that do not participate. Those insurers/TPAs may pass those costs on elsewhere.

and the IRS will eventually publish proposed regulations but, in the meantime, IRS Notice 2018-99 may be relied upon for fringe benefit amounts paid or incurred after December 31, 2017. Essentially, the calculation will depend upon whether the employer pays a third party for parking, or if the employer owns or leases a parking facility.

Employer Pays a Third Party for Parking Space

If an employer pays a third party so their employees may park in the third party's garage or lot, the disallowed deduction or UBTI amount is generally the total annual cost paid to the third party. Keep in mind that if the amount exceeds the monthly exclusion limit ($260 in 2018; $265 in 2019), the excess amount must also be treated as taxable compensation to the employee. Fortunately, this excess amount will not be included in the UBTI calculation.

Employer Owns or Leases All or Part of a Parking Facility

Until further guidance is released, employers may use any reasonable method to calculate the disallowed deduction or UBTI amount if the employer owns or leases a portion of a parking facility. The IRS specifically noted that "using the value of employee parking to determine expenses allocable to employee parking in a parking facility owned or leased by the taxpayer is not a reasonable method."

If the employer owns or leases more than one parking facility in a single geographic location, the employer may aggregate the number of spaces in those parking facilities using this process. If the parking facilities are in multiple geographic areas, the employer cannot aggregate the spaces. For those who prefer firmer guidance, Notice 2018-99 provided steps an employer may follow to calculate that amount. Yes, this is really what the guidance says.

Step 1: Reserved Employee Spaces

The employer must first calculate the amount attributable for reserved employee spaces. This is done by determining the percentage of reserved employee spaces in relation to total parking spaces and multiplying that by the employer's total parking expenses for the parking facility. "Total parking expenses" is defined in the Notice and does not include a deduction for depreciation or expenses paid for items near the parking facility, such as landscaping or lighting. The resulting amount is the disallowed deduction or the amount that will be added to a tax-exempt organization's UBTI. The IRS will allow employers that have reserved employee spots until **March 31, 2019** to change their parking arrangements to decrease or eliminate the number of reserved employee spots retroactive to January 1, 2018.

Step 2: Primary Use Test

The employer must next identify the remaining spaces and determine whether they are primarily used for the general public or for its employees. The IRS defines "primary use" as greater than 50% of actual or estimated usage during normal hours on a typical work day. If parking space usage significantly varies, the employer

can use any reasonable method to determine the average usage. The portion of expenses not attributable to the general public's use is the disallowed deduction or amount included in a tax-exempt organization's UBTI.

Step 3: Reserved Non-Employee Spots

If the primary use of the employer's remaining parking spaces is not for the general public, the employer must identify the number of spaces exclusively reserved for non-employees (such as "Customer Only" parking). Spaces reserved for partners, sole proprietors and 2% shareholders are also included in this category. If the employer has reserved non-employee spaces, it needs to determine the percentage of reserved non-employee spaces in relation to the remaining total spaces. That amount is multiplied by the employer's remaining total parking expenses. This is the amount of the disallowed deduction or amount included in a tax-exempt organization's UBTI.

Step 4: Determine Remaining Use and Allocable Expenses

If there are any leftover parking expenses left over, the employer must reasonably determine employee use (either actual or estimated usage) of the remaining spaces during normal work hours and the related expenses for those spaces. The amount of expenses attributable to employee use is the disallowed deduction or amount included in in a tax-exempt organization's UBTI.

IRS Notice 2018-99 does provide some helpful examples of this four step process illustrating how the calculation works in different situations. If tax-exempt organizations have $1,000 or more of UBTI they will need to report using Form 990-T. Those tax-exempt organizations with less than $1,000 in UBTI are not required to file and are not subject to the tax.

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