Winter 2016

2017 Updates to IRS Limits

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The Future of Cost-Sharing Reduction Payments under the ACA Now in Trump's Hands

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Significant Changes to the Determination Letter Program and the Effect on EPCRS

As of January 1, 2017, employers will no longer be able to submit applications to the IRS for determination letters for existing individually designed plans. In addition, the remedial amendment cycles for individually designed plans will no longer apply. These changes will have a significant effect on the compliance status of qualified plans, as well as eligibility to participate in the Employee Plans Compliance Resolution System (EPCRS).

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New I-9 Form: New Possibilities and New Requirements

I-9 Form requirements were established in November 1986 when Congress passed the Immigration Reform and Control Act (IRCA). IRCA prohibits employers from hiring people, including U.S. citizens, for employment in the United States without verifying their identity and employment authorization on the I-9 Form. All U.S. employers must ensure proper completion of I-9 Form for each individual they hire for employment in the United States.

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NLRB Continues to Target Workplace Rules

The National Labor Relations Board continues to focus on the rights of employees in non-union workplaces and in situations unrelated to formal union organizing activities. The Board has undertaken an all-out assault against employers' handbooks, policies, and investigation practices by targeting those that may constrict employees' rights to engage in protected activity.

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2017 Updates to IRS Limits

The chart below highlights the annual cost of living adjustments for certain limitations in the Internal Revenue Code that impact the maximum benefits and contributions to employee benefit plans. These limits are in effect beginning January 1, 2017, and the chart indicates whether the amount is increased from 2016.

Retirement Benefits

Updated Limit	2017 Limit Amount	Change
Basic limit on elective deferral amounts	$18,000	No change
Limitation on catch-up contributions for participants over age 50	$6,000	No change
Elective deferral limit for SIMPLE plans	$12,500	No change
Limitation on catch-up contributions for participants over age 50	$3,000	No change
IRA maximum contribution limit	$5,500	No change
Limitation on catch-up contributions for participants over age 50	$1,000	No change
457 elective deferral limit	$18,000	No change
Annual dollar limit on includable compensation	$270,000	Previously was $265,000
Annual additional dollar limit on contributions	$54,000	Previously was $53,000

Additionally, with traditional IRAs, the amount that can be contributed may be reduced depending on filing status and income. Below are the phase-out ranges for 2017:

- For single taxpayers covered by an employer retirement plan, the phase-out range is $62,000 to $72,000, up from $61,000 to $71,000.
- For jointly filing married couples, where the spouse making the IRA contribution is covered by an employer retirement plan, the phase-out range is $99,000 to $119,000, up from $98,000 to $118,000.
- For an IRA contributor who is not covered by an employer retirement plan and is married to someone who is covered, the deduction is phased out if the couple's income is between $186,000 and $196,000, up from $184,000 and $194,000.

For separately filing married individuals who are covered by an employer retirement plan, the phase-out range is not subject to an annual cost-of-living adjustment and remains $0 to $10,000.

Welfare Plans and Fringe Benefits

Updated Limit	2017 Limit Amount	Change
Health FSA limit	$2,600	Previously was $2,550
DCAP limit		
Unless married and filing separately	$5,000	No change
Married and filing separately	$2,500	No change
HDHP minimum annual deductible		
Self-only coverage	$1,300	No change
Family coverage	$2,600	No change
HDHP Out-of-pocket maximum		
Self-only coverage	$6,550	No change
Family coverage	$13,100	No change
HSA maximum contribution limit		
Self-only coverage	$3,400	Previously was $3,350
Family coverage	$6,750	No change
Catch-up contribution for participants over age 50	$1,000	No change

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General Benefits Limits

Updated Limit	2017 Limit Amount	Change
Dollar limitation for definition of a "key employee"		
Officer group	$175,000	Previously was $170,000
More-than-1% owner	$150,000	No change
Dollar limitation for definition of a "highly compensated employee"	$120,000	No change

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The Future of Cost-Sharing Reduction Payments Under the ACA Now in Trump's Hands

Among all of the uncertainty and speculation as to how the advent of the Trump administration will affect the Affordable Care Act (ACA), the first sign of its potential demise came in a somewhat unexpected ruling by the U.S. Court of Appeals for the District of Columbia on December 5th to delay ruling on the constitutionality of cost-sharing reduction subsidies for qualifying low-income individuals enrolled in the Health Insurance Marketplace.

In 2014, the majority-Republican U.S. House of Representatives filed suit against the Obama Administration claiming that the funds paid to health insurers under the ACA's cost-reduction sharing program were never appropriated by Congress and were, therefore, unconstitutional. The District Court of the District of Columbia ruled in favor of the House of Representatives and directed that no further payments be made to health insurers under the cost-sharing reduction program. As expected, the Obama Administration appealed this ruling. In consideration of the potential changes to the ACA by a Trump administration, the U.S. Court of Appeals granted a motion by the House of Representatives to suspend the matter until after President-Elect Trump takes office. Once in office, President-Elect Trump could instruct the Department of Justice to forego the appeal. In that event, the government may no longer be permitted to reimburse insurers for those cost-reduction sharing subsidies based on the lower court's decision.

As background, the ACA requires health insurers to provide cost-sharing subsidies to eligible individuals (determined based on income) and provides for reimbursement for those subsidies with federal funds. The cost sharing reduction subsidies lower out-of-pocket costs (i.e., deductibles and copayments) for low-income individuals who purchase health insurance in a Health Insurance Marketplace to assist in making the coverage more affordable. The ACA also provides for a premium tax credit for eligible low-income individuals who purchase individual coverage in a Health Insurance Marketplace. This ruling does not affect the availability of the premium tax credit as those amounts were properly appropriated as part of the ACA.

We expect that this ruling by the appeals court will be the end of the cost-sharing subsidies under the current version of the ACA as it is very unlikely the Trump administration will continue an appeal of the Republican victory. This may be viewed in hindsight as the first step in the unraveling of the ACA, and many questions remain for insurers entitled to the subsidies and low-income individuals enrolling in the Healthcare Insurance Marketplace. Employers will want to stay tuned for the latest developments on changes impacting their group health programs and bottom line!

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Significant Changes to the Determination Letter Program and the Effect on EPCRS

As of January 1, 2017, employers will no longer be able to submit applications to the IRS for determination letters for existing individually designed plans. In addition, the remedial amendment cycles for individually designed plans will no longer apply.

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These changes will have a significant effect on the compliance status of qualified plans, as well as eligibility to participate in the Employee Plans Compliance Resolution System (EPCRS).

Currently, an existing individually designed plan may apply for a determination letter regarding its qualified status. A favorable determination letter is generally required to set up a trust account for a plan, hire a third party administrator and invest in certain classes of mutual funds or other investments. In addition, a favorable determination letter is required for a plan to be eligible to participate EPCRS. Under the existing rules, a determination letter expires five years following the date of issue, and employers must submit their plans and any amendments to the IRS to receive a new determination letter.

Effective, January 1, 2017, employers will only be able to submit a determination letter application for an individually designed plan upon initial plan qualification, plan termination, and in certain other limited circumstances. The IRS has indicated that circumstances that may be considered in future years are significant law changes, new approaches to plan design and the inability for an individually designed plan to convert to a prototype or volume submitter plan. Determination letters will no longer contain an expiration date and employers may continue to rely on a favorable determination letter with respect to plan provisions that have not been amended or affected by a change in the law. With the elimination of the remedial amendment cycle, interim amendments will no longer be required. The new deadline for remedial amendments to address disqualifying provisions will depend on whether the plan is a new plan, an existing plan, or there is a change that affects the plan's qualification. The IRS will issue a "Required Amendments List" and an "Operational Compliance List" on an annual basis for all plans to assist employers with ensuring their plan documents and plan operation are compliant.

Another area impacted by the new determination letter procedure is EPCRS. EPCRS allows employers to correct errors or failures related to the operation or compliance of a qualified retirement plan by self-correction under certain circumstances or by submission of an application and payment of a fee or sanction under the Voluntary Compliance Program (VCP) or the Audit Closing Agreement Program (Audit CAP). Under the existing rules, a plan must have a current favorable determination letter to be eligible to participate in the EPCRS programs. In addition, employers were permitted to submit a determination letter application for the plan as amended through the correction process. Under the new EPCRS issued October 17, 2016 (Rev. Proc. 2016-51), a plan may rely upon a favorable determination letter from its initial qualification or from its last remedial amendment cycle for purposes of EPCRS. In addition, a determination letter application will no longer be allowed in conjunction with the EPCRS programs in order to ensure the plan, as corrected, meets the qualification requirements. Employers may not rely upon any compliance statement issued to a plan under VCP or Audit CAP as a favorable determination that the plan, as corrected, is qualified as to its terms.

Although the IRS will provide annual compliance information, employers need to be vigilant with respect to plan operation and compliance because they can no longer rely on the determination letter process to ensure that their plan is qualified. Employers should consider periodic internal and external review of their plan documents and procedures with legal counsel to ensure that their plans remain qualified.

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Impact of FSA Grace Periods and Carryovers on HSA Eligibility

Health savings account (HSA) programs have become an increasingly popular option for employees. An HSA allows employees who are also covered by a high-deductible health plan (HDHP) to defer pre-tax income to cover qualified medical expenses. Employers offering an HSA program in conjunction with an HDHP, as well as a general-purpose health flexible spending account (FSA) should consider whether the structure of these programs would prevent an employee from

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contributing to the HSA. Two FSA features that may create issues related to an employee's participation in an HSA are (1) the existence of a grace period following the end of the plan year, and (2) permitted carryovers of unused FSA balances to subsequent plan years.

Generally, employees contributing to a general-purpose health FSA (one that reimburses ***all*** qualified medical expenses) in a plan year are not eligible to contribute to an HSA in the same plan year. However, employees who are otherwise eligible to participate in an HSA may be permitted to contribute to both an HSA and an HSA-compatible FSA if the employer maintains both programs. An HSA-compatible FSA is (1) a limited-purpose FSA which only reimburses for certain permitted expenses such as preventative care and dental and vision care, (2) a post-deductible FSA which only reimburses expenses incurred after the HDHP minimum annual deductible has been met, or (3) some combination of a limited-purpose FSA and a post-deductible FSA.

Grace Periods

Cafeteria plans may provide a grace period of up to three and one-half months following the end of a plan year during which employees may be reimbursed from unused benefits for qualified expenses incurred during that grace period. Any employee covered by a grace period who would otherwise be eligible to make HSA contributions in that plan year is not permitted to make contributions to the HSA until the first day of the month following the end of the grace period, even if the employee has no unused benefits in his or her FSA account. In this instance, the employee would only be permitted to contribute a pro-rated amount to the HSA for that plan year. To avoid this result, an employer could amend the plan to provide for conversion of an employee's general-purpose FSA into a limited-purpose FSA or post-deductible FSA during the grace period. If the FSA is converted to a limited-purpose or post-deductible FSA, the employee covered by the grace period would be eligible to participate in the HSA program for the entire plan year. While some employers may choose to do a mandatory conversion, this approach could create issues for participants who may have counted on the grace period to use FSA funds for a major medical expense.

Carryovers

If the FSA permits employees to carry over unused FSA balances to subsequent plan years, employees with carryover balances would be ineligible to contribute to an HSA for the entire subsequent plan year, even if the employee does not elect to make new FSA contributions for that year. One way to avoid this result is to amend the plan to allow employees to decline the carryover before the beginning of the next plan year. Another solution is to amend the plan to allow unused balances in general-purpose FSAs to be carried over to an HSA-compatible FSA. If an unused balance from a general-purpose FSA is carried over to an HSA-compatible FSA, the unused balance may still be used during the general-purpose FSA's runout period to reimburse expenses covered under the general-purpose FSA that were incurred during the previous plan year.

Employers that sponsor HSAs and FSAs should evaluate the features of these programs to ensure that they are compatible with one another and do not put employees at risk for any negative consequences associated with their participation in those programs.

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New I-9 Form: New Possibilities and New Requirements

I-9 Form requirements were established in November 1986 when Congress passed the Immigration Reform and Control Act (IRCA). IRCA prohibits employers from hiring people, including U.S. citizens, for employment in the United States without verifying their identity and employment authorization on the I-9 Form. All U.S. employers must ensure proper completion of I-9 Form for each individual they hire for employment in the United

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States. Both employees and employers (or authorized representatives of the employer) must complete the form. On the form, an employee must attest to his or her immigration status. The employee must also present his or her employer with acceptable documents evidencing identity and employment authorization. The employer must examine the employment eligibility and identity document(s) to determine whether the document(s) reasonably appear to be genuine and to relate to the employee and record the document information on the I-9 Form.

On November 14, 2016, U.S. Citizenship and Immigration Services (USCIS) released a revised version of Employment Eligibility Verification, I-9 Form. The previous I-9 Form (revision date of 03/08/2013) may be used until January 21, 2017. After that time, only the new I-9 Form is acceptable. The new version of the form should only be used for new hires, re-hires, and reverifications. No action is required on previously completed I-9 forms. The new form comes with 15 pages of updated instructions providing detailed guidance for completing the form. USCIS made the formatting more consistent with other forms by separating the instructions from the form itself.

While the new I-9 form does not require substantially different information or documentation from the previous version, USCIS made significant changes to the format and accessibility of the new form. One notable change to the form is in Section 1 where the form asks for “other last names used” rather than “other names used.” USCIS also made formatting changes to increase the visibility of the section of the form requiring the employee to certify his/her current citizenship or immigration status in the United States.

Additionally, the form now requires the employee to make a declaration regarding the use of a preparer of translator. The form allows the employee the opportunity to utilize more than one preparer and/or translator to complete the form. For multiple preparers and/or translators, a supplement is required and each preparer and/or translator must complete, sign, and date a separate certification portion.

Section 2, which must be completed by the employer, also has some notable changes. The employer must now list the employee’s Last Name, First Name, Middle Initial, ***and*** Citizenship/ Immigration status (as provided by the employee in Section 1) at the beginning of Section 2. There is also a designated area to make additional notes regarding the documentation provided by the employee which should reduce or eliminate the need to make notes in the form’s margins.

For employers accessing the I-9 form electronically, notifications are available to help ensure information is entered appropriately when completing the form on a computer. The online version of the form provides drop down menu lists and calendars for filling in data and dates. The form also provides on-screen instructions for each field and provides access to the full instructions. If the employer completes the electronic pdf of the I-9 Form, a quick response (QR) code will be generated on the form when printed.

The changes to the I-9 form should make the form easier to complete on a computer. Utilizing the electronic version will help the employee and the employer avoid common data entry mistakes. However, completing the online version of the form will require training to guarantee that the form is filed out properly and completely. Employers should take this opportunity to review their current I-9 compliance processes and procedures to ensure they are prepared for the changes that will occur with the new I-9 Form.

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NLRB Continues to Target Workplace Rules

The National Labor Relations Board (NLRB) continues to focus on the rights of employees in non-union workplaces and in situations unrelated to formal union organizing activities. The Board has undertaken an all-out assault against employers’ handbooks, policies, and investigation practices by targeting those that may constrict employees’ rights to engage in protected activity. One aspect of this effort that is especially concerning for employers is

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that the NLRB has the authority to require employers to post notices indicating that an illegal policy in a handbook has been maintained. Importantly, postings may be required at each location where the policies were in place, regardless of whether the policy was ever applied. In other words, if an employer has a single handbook for all of its locations, the posting will be required at each location. The NLRB also has the authority to order reinstatement with full back pay for any employees discharged for violating the unlawful policy and require that the employer include an announcement of the reinstatements in the posting.

How can your policies be illegal? Section 7 of the National Labor Relations Act (NLRA) protects the right of workers to engage in “concerted activity” for “mutual aid or protection.” The NLRB defines “concerted activity” as “two or more employees acting together to improve wages or working conditions.” Traditionally, this is what has constituted employee activity protected by Section 7 of the NLRA. But the NLRB has recently expanded these rights beyond traditional organizing activity by broadly defining “working conditions” as everything from complaints about wages and benefits to safety issues and seemingly insignificant factors such as temperature in the workplace. Even if a workplace rule or handbook policy does not explicitly ban protected worker activity, it is unlawful if: (1) the rule’s language could reasonably be construed by employees to prohibit Section 7 activity, (2) the rule was created in response to Section 7-protected activity, or (3) the rule has been applied to restrict Section 7-protected activity. With this expanded definition of what constitutes employer interference with employees’ Section 7 rights, the NLRB has found longstanding boilerplate workplace policies unlawful for violating Section 7 of the NLRA.

To provide guidance, the NLRB Office of General Counsel issued an employer guidance memorandum in March 2015. The guidance included the following instruction regarding workplace conduct rules: “A rule that prohibits employees from engaging in ‘disrespectful,’ ‘negative,’ ‘inappropriate,’ or ‘rude’ conduct towards an employer or management, absent sufficient clarification or context, will usually be found unlawful.” The memo added, “(E)mployee criticism of an employer will not lose the Act’s protection simply because the criticism is false and defamatory,” meaning that even false complaints and accusations against employers may be protected. To illustrate the fine line between illegal and legal policies, the memorandum cites the following “illegal” handbook provision: “[Be] respectful to the company, other employees, customers, partners and competitors.” By contrast, the memo cited the following as an example of a “legal” policy: “Each employee is expected to work in a cooperative manner with management/supervision, co-workers, customers and vendors.” To most, these two provisions are effectively identical, but the NLRB is scrutinizing the policy’s language closely. Also, NLRB scrutiny is not limited to certain kinds of policies. The NLRB has found violations based on many types of workplace policies, including social media policies prohibiting criticism of employers online, off-duty access policies that could be interpreted to prohibit protected activity in non-working areas when the employee is not on duty, mandatory complaint procedures that require complaints to be directed through internal mechanisms, class action waivers, and at-will employment policies.

The NLRB is also scrutinizing polices that relate to issues beyond wages, hours and other terms of employment, such as internal investigation policies. Investigation policies (and practices) often include a confidentiality provision to protect against rumors or collaboration among co-conspirators that may undermine the integrity investigations. The NLRB has found in every case that such policies (and practices of giving confidentiality instructions) violate Section 7. The Board reasons that such instructions infringe on employees’ rights to discuss terms and conditions of employment, which include the subject matter of most internal investigations

Given the NLRB’s position, employers have to tread carefully when attempting to maintain the

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confidentiality of internal investigations. Employers should not maintain a policy that mandates confidentiality in every investigation nor give confidentiality instructions in every investigation. Instead, employers should decide whether to give the instruction on a case-by-case basis. The Board's decisions have clearly shouldered employers with the burden of demonstrating that the special needs of a particular investigation require confidentiality and that those needs trump employees' protected rights. Specifically, employers must show "objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality" and that "feared consequences would likely occur without confidentiality."

So, what should you do to avoid a Board Charge that may result in mandatory workplace postings and the costly reinstatement of employees terminated for violating such policies? If you have not reviewed your policies and procedures in recent months, now is the time to do so. Scrutinize them carefully for any language broadly restricting group discussion or action, mandating advance management approval, or otherwise broadly proscribing "unprofessional" or "inappropriate" conduct. Take steps to ensure that all general restrictions are accompanied by narrower terms defining the scope of improper misconduct. Avoid ambiguity in favor of specific examples where possible, and consider adding a proper disclaimer.

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