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Reference-Based Pricing for Self-Funded Plans

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Paid Family Leave Laws

Paid family leave has been a hot-button issue for employers and politicians across the country for some time now. As the issue has gained attention, changes at both the state and federal levels have created new compliance considerations that every employer should have on their radar. In addition to federally-protected leave under the Family and Medical Leave Act (FMLA) and new federal tax incentives to provide paid leave, states are also implementing their own paid family leave requirements.

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IRS HSA and Adoption Assistance Program Limits for 2018

In March 2018, the IRS announced that it would be reducing the limit that families may contribute to health savings accounts (HSAs) by $50, and reduced the tax exclusions for employer-sponsored adoption assistance programs. In May 2018, the HSA reduction was reversed.

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New Disability Claims Procedures Are Farther-Reaching Than Many May Realize

In 2016, the Department of Labor released a final regulation updating and adding procedural requirements for any claims to an ERISA plan involving a disability determination. At first glance, it may appear that these modified rules would only apply to plans with short-term or long-term disability benefits. However, the language of the rule is much broader.

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Was Your Business Impacted by Tax Reform?

The Tax Cuts and Jobs Act (H.R. 1), signed into law by President Trump on December 20, 2017, contains many provisions that directly impact employers. Human resources managers, in-house counsel, and business owners must familiarize themselves with the changes put into action by the new law and adapt their practices where necessary. We have summarized some of the changes most likely to impact your business.

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Was Your Business Impacted by Tax Reform? Part 2

There’s always more, when it comes to tax reform. The Tax Cuts and Jobs Act also brings changes to employee achievement awards, transportation benefits, and moving expenses.

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Reference-Based Pricing for Self-Funded Plans

What is Reference-Based Pricing?

Referenced based pricing has been in the news more lately. Reference-based pricing is a type of self-funded health benefits plan, which does not use a traditional carrier or network that negotiates costs for the employer. Employers will set a fixed limit on the amount employers will pay for certain healthcare services, some of which may have wide cost variations. The fixed limit is often based on a percentage of what Medicare would pay the provider. For example, the fixed limit may be 150 percent of the Medicare price for services.

The question then becomes whether healthcare providers will be willing to accept these fixed limits, which are often less than what a traditional carrier or network would have been able to negotiate with the healthcare provider.

Here is an example: Let's say that a plan participant needs surgery. Typically, a hospital would expect to be paid $2,000 for this type of surgery, although some insurance carriers may have contracted to pay less than $2,000 for the same type of surgery. The Medicare rate is $400, and the reference-based pricing plan's fixed limit is 150 percent of the Medicare price, which comes out to $600.

The patient is not on a network so the hospital may deny services unless the patient pays $2,000 before the hospital performs the surgery. Alternatively, the hospital may perform the service and expect payment of $2,000. When it is paid only $600 from the employer, it seeks the $1,400 balance from the patient. The patient, the employer or a third party administrator may then help negotiate who has to pay how much for the surgery.

This situation may not sound ideal because of the uncertainty regarding the amount participants or the employer will end up paying. But it can have significant cost savings, especially for procedures that may vary significantly in price depending on the healthcare provider. Some studies have found that employers do tend to pay less with reference-based pricing than other self-funded plans since hospitals frequently accept the initially offered price. It also may shift some of the responsibility onto the participant to shop around instead of going to the first provider they are referred to.

Lawsuit to Watch

Reference-based pricing has become increasingly common. Although there are undoubtedly payment disputes between employers and participants and healthcare providers over reference-based pricing, there has been little litigation over the matter. These matters are typically resolved with negotiation rather than a healthcare provider demanding tens of thousands of dollars from individual patients. Typically, the employee, not the employer will ultimately get the bill.

There is, however, a lawsuit before a Circuit Court over a reference-based pricing dispute, *Glenn Davis v. Memorial Hospital of Martinsville & Henry County*. The case was decided by the Supreme Court of Virginia, but that decision has been appealed. Depending on how the Court determines the issue, it may be instructive for employers who are contemplating using reference-based pricing but are uncomfortable with the uncertainty.

In this case, the employer used a reference-based pricing plan. When an employee went to a hospital for a heart attack, the employer did not have a negotiated contract with the hospital. After his treatment, the employee received a bill in excess of $100,000. The employee and the plan paid approximately 25 percent of the bill and encouraged the hospital to accept that as payment in full, in part because the hospital had accepted that amount as full payment for other uninsured patients. The hospital accepted the payment, but continued to seek payment for the remainder.

The hospital argues that the employee signed an agreement consenting to the full price of the services, so the patient is contractually required to pay the full amount despite the fact the hospital had accepted lesser amounts from other uninsured patients. The issues upon review likely will be whether the employee did form a binding contract with the hospital and whether the hospital should be required to accept the amount of payment that was offered to it as payment in full.

Regardless of the outcome of the case, employers who are intrigued by reference-based pricing should do their research when searching for service providers to learn more about how reference-based pricing will work for their workforce. Moreover, employers may also have to think about how they will explain reference-based pricing to their employees since the concept is so different from insurance pricing employees are accustomed to, and some of the cost savings is dependent on employees being discerning consumers.

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Paid Family Leave Laws

Paid family leave has been a hot-button issue for employers and politicians across the country for some time now. As the issue has gained attention, changes at both the state and federal levels have created new compliance considerations that every employer should have on its radar. In addition to federally-protected leave under the Family and Medical Leave Act (FMLA) and new federal tax incentives to provide paid leave, states are also implementing their own paid family leave requirements.

Federal Paid Leave Credit

Although paid family leave is not mandated at the federal level, the Trump administration recently introduced an incentive to employers that voluntarily provide paid family leave. Section 13403 of the Tax Cuts and Jobs Act (H.R. 1), signed into law by President Trump on December 20, 2017, extends a tax credit to businesses that offer up to 12 weeks of paid family leave to certain eligible workers. Eligible employers must have a written policy that provides at least two weeks of annual paid family and medical leave for full-time employees, a pro-rata amount provided at the same ratio for part-time employees, and payment at a rate equal to at least 50 percent of the wages normally paid to employees on leave. The policy must also specifically state that the employer will not interfere with, restrain, or deny the exercise of or the attempt to exercise, any paid leave right, and will not discharge or in any other manner discriminate against any individual for opposing any practice prohibited by the policy.

The tax credit is based on how much of a worker's regular earnings the benefit replaces and rewards employers that maintain more generous paid leave policies. The tax credit will cover 12.5 percent of the compensation paid to employees while on leave if workers receive half of their regular earnings, rising incrementally up to 25 percent if workers receive their entire regular earnings. The tax credit only applies to employees employed for at least one year with an annual compensation no more than $72,000 (for 2018). Also, unless extended by Congress, the credit will only apply to leave compensation paid in 2018 and 2019.

New York's Paid Family Leave Benefits Law

Effective January 1, 2018, New York joined California, Rhode Island and New Jersey as the four U.S. states providing paid family leave benefits. The New York Paid Family Leave Benefits Law (PFLBL) guarantees job protected, paid family leave for virtually all private sector employees and will gradually phase in over a four-year period (by January 1, 2021). Each year, benefits will increase in both maximum duration of leave and the amount of weekly paid benefits. Employees' weekly benefit entitlement will be based on a percentage of their average weekly wage, capped by the corresponding percentage of the New York state average weekly wage. Wage replacement benefits will generally be funded through payroll deductions.

Starting Date	Maximum Leave	Percentage of Average Weekly

	Period	Pay Replaced
1/1/2018	8 weeks	50%
1/1/2019	10 weeks	55%
1/1/2020	10 weeks	60%
1/1/2021	12 weeks	67%

Leave under the PFLBL may be used to care for a family member with a serious health condition, to bond with a child during the first year after the child's birth, adoption or foster care placement, or to assist with family obligations when a family member is called to active military service. Leave taken for an employee’s own serious health condition is not covered. An employee’s use of other types of paid leave can count against his or her paid family leave entitlement (that is, can run concurrently), including federal FMLA leave, vacation or paid time off policies, or an employer’s private paid leave policy.

Both full-time and part-time employees are eligible for paid family leave benefits. Full-time employees become eligible after 26 consecutive weeks of work, and part-time employees become eligible on the 175th day of work in a 52-consecutive-week period. Under final regulations adopted by New York’s Workers’ Compensation Board last July, a “full-time” employee is defined as an employee working 20 or more hours per week. Leave must be permitted in daily or weekly increments. Employers that fail to provide coverage for paid family leave benefits will be subject to a penalty up to 0.5 percent of the employer's total weekly payroll for the period of non-compliance, plus an additional fine not to exceed $500.

Washington’s Paid Family & Medical Leave Program

Starting in 2020, Washington will be the fifth state in the nation to require paid family and medical leave benefits for workers. The new law enacted last summer creates an insurance fund to which both employers and employees will pay premiums. The initial premium rate is set at 0.4 percent of wages. Employers may deduct from employees’ wages 100 percent of the premiums due for the family leave, and up to 45 percent of the premiums due for the medical leave portion. The employer is responsible for 55 percent of the medical leave premium, though an employer may also elect to pay all of the premiums. The amount of wages subject to a premium assessment is capped at the maximum wages subject to Social Security tax. Small employers (fewer than 50 employees) are exempt from paying the employer share of the premiums. Payroll deductions will begin on January 1, 2019, and benefits will become available to employees on January 1, 2020.

Employees are eligible for family and medical leave benefits after working at least 820 hours during the qualifying period. Like New York’s leave program, Washington’s insurance program will allow workers to take up to 12 weeks off for bonding after the birth or placement of a child, a family member’s serious health condition, or certain military assignments. However, unlike New York’s leave program, employees in Washington may also take 12 weeks of paid medical leave benefits annually for their own serious health conditions (as defined in the FMLA). If an employee is subject to both situations in a given year, the employee may receive up to 16 weeks of combined benefits (with an additional two weeks available in cases involving pregnancy complications that result in incapacity).

How Employers Should Prepare

Employers should review existing leave policies and practices, including existing FMLA policies, to achieve compliance with new laws and determine compatibility with existing policies. Employers that operate in multiple jurisdictions should be especially careful in carving out these benefits for employees in states with their own family leave laws. It’s important to specifically designate individuals as responsible for compliance. These individuals can also coordinate with your payroll function to ensure that resources are in place to comply with state paid leave deductions. Finally, and importantly, employers should not forget about the end users of any family leave benefit. Make sure employees are educated about the applicable laws, including their benefits entitlement and any new payroll deductions. This will help smooth any transition and reduce misunderstandings that could drain resources and create unnecessary conflicts.

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IRS HSA and Adoption Assistance Program Limits for 2018

Health Savings Accounts

In May 2017, the IRS announced that individuals with self-only coverage would be able to contribute up to $3,450 and individuals with family coverage would be able to contribute up to $6,900 to their health savings accounts (HSAs).

In March 2018, the IRS announced that it would be reducing the limit that families may contribute to HSAs by $50 to $6,850. The limit for self-only HSAs did, however, not change.

A number of stakeholders apparently informed the IRS that this midyear change in limits would impose a number of administrative and financial burdens. A change to family HSA limits could have had real implications for employees who already reached the 2018 family contribution limit by March because those employees would have needed to seek a $50 refund to avoid excess contribution excise taxes. Additionally, some employees may have used the previous limit to determine the amount they would contribute to their HSA each paycheck. These employees would have needed to be informed of this change to modify their prospective contributions to avoid having to seek a refund at the end of the year.

Due to the complaints, in May 2018, the IRS changed the family coverage limit back to $6,900.

Adoption Assistance Programs

In the same March 2018 Revenue Procedure which reduced the 2018 limits for HSAs, the IRS went on to similarly reduce the tax exclusions for employer-sponsored adoption assistance programs. Below is a chart with the applicable changes.

	Original 2018 Limit	New 2018 Limit	Change
Maximum exclusion per adoption	$13,840	$13,810	- $30
Adjusted gross income phase-out	Begins at $207,580	Begins at $207,140	- $440
	Completes at $247,580	Completes at $247,140	- $440

The May 2018 Revenue Procedure that increased the family coverage limit did not mention adoption assistance programs. Unless and until the IRS releases a similar modification to adoption assistance program limits, employers and employees should assume that the new reduced limits are applicable for the 2018 tax year.

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New Disability Claims Procedures Are Farther-Reaching Than Many May Realize

In 2016, the Department of Labor (DOL) released a final regulation updating and adding procedural requirements for any claims to an ERISA plan involving a disability determination. Initially, the rule was scheduled to apply to any claims filed on or after January 1, 2018, but in late 2017, the DOL postponed the rule for 90 days so that it would apply to any claims filed on or after April 1, 2018.

Who needs to make changes?

At first glance, it may appear that these modified rules would only apply to plans with short-term or long-term disability benefits. However, the language of the rule is much broader. It applies to any claim *involving a disability determination*. As such, this could apply to a retirement plan or a deferred compensation agreement. Often, such arrangements provide for benefits upon a determination that the participant is disabled. If this is the case, then it is important that your retirement plan or deferred compensation agreement reflect updated claims and appeals procedure information.

Are there any special considerations for changing plans?

With respect to deferred compensation agreements, there may be a business case for postponing amendments.

The Tax Cuts and Jobs Act ("Tax Act") added a new law that limits the amount of deductions a publicly-held corporation can take with respect to compensation paid to certain officers to $1 million. There is an exemption to this law for any amounts paid under a written contract that was in effect before November 2, 2017, and has not been materially modified after November 2, 2017. There is not much specific guidance on what constitutes a material modification, but it is quite possible that an amendment to include disability claims and appeals language could be considered material and any compensation which could have previously been exempt from the new deductibility limit may now be included. For this reason, it is important to seek legal or tax advice prior to adding disability claims and appeals language to a deferred compensation agreement for certain officers.

What documents will need to be changed?

Plan documents and summary plan descriptions (SPDs) should be revised to reflect the new claims and appeals language if the plan involves a benefit determination. Additionally, any template or form denial letters may also need to be changed.

How will documents need to be changed?

The new rule expands on the disclosure requirements for disability denials. Adverse benefit denials must include the following:

- An explanation of the basis for disagreeing with a Social Security Administration disability determination provided by the participant or the views of a treating physician or a vocational professional who evaluated a claimant even if the plan did not rely on that piece of evidence in reaching its conclusion.
- If the adverse benefit determination is based on medical necessity or an experimental treatment or a similar exclusion, either an explanation of the scientific or clinical judgment for the determination or a statement that an explanation must be provided free of charge.
- Specific internal rules, guidelines, protocols or other criteria the plan relied on when denying the claim.
- A statement that the claimant is entitled to receive documents relevant to the claim, upon request.

Additionally, plans must provide any new or additional evidence or rationale the denial relied upon as soon as possible to give the claimant a reasonable opportunity to respond to the new or additional information. This information must be provided free of charge and prior to the adverse benefit determination. If this information is not provided to the claimant before the appeal is determined, the plan cannot rely on the evidence or rationale in denying its appeal. If the claimant responds to the information, that response must be considered.

If a plan fails to strictly adhere to all procedural requirements when processing a disability claim, the failure may permit the claimant the right to file suit before the plan's procedures are exhausted. If this happens, the plan will not be deemed to have exercised discretion, and the decision will not be entitled to an abuse of discretion standard, even if the plan explicitly confers discretion upon the plan.

The rule also expands the definition of an adverse benefit decision to include any retroactive recession of a disability benefits coverage except if the recession is due to failure to pay premiums.

Another important feature of the rule is that any adverse benefit determination must be provided in a culturally and linguistically appropriate manner. Culturally and linguistically appropriate means that for certain counties where 10 percent or more of the population is literate in the same non-English language, there has to be a statement informing the claimant about the availability of language services upon request.

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Was Your Business Impacted by Tax Reform?

The Tax Cuts and Jobs Act (H.R. 1), signed into law by President Trump on December 20, 2017, contains many provisions that directly impact employers. Human resources managers, in-house counsel, and business owners must familiarize themselves with the changes put into action by the new law and adapt their practices where necessary. We have summarized some of the changes most likely to impact your business.

Discouraging Confidential Sexual Harassment Settlements

Under the new law, businesses can no longer take a tax deduction for any sexual harassment settlement that contains a confidentiality provision or a nondisclosure agreement (NDA). Section 13307 of the law provides that no deduction shall be allowed for "(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorneys' fees related to such a settlement or payment." This change applies to any amounts paid or incurred after December 20, 2017.

In the midst of highly-publicized sexual harassment allegations and the escalating "Me Too" movement, this change is intended to discourage employers from entering into confidential settlements that involve allegations of sexual harassment, which some believe played a significant role in allowing bad actors to continue engaging in harassing conduct.

New Paid Leave Credit

Section 13403 of the Act offers businesses a tax credit if they offer up to 12 weeks of paid family leave to certain eligible workers. Eligible employers must have a written policy that provides no less than two weeks of annual paid family and medical leave for full-time employees, and a pro-rata amount provided at the same ratio for part-time employees. The policy must provide payment at a rate equal to at least 50 percent of the wages normally paid to employees on leave. Further, the leave must specifically state that the employer will not interfere with, restrain, or deny the exercise of or the attempt to exercise, any paid leave right, and will not discharge or in any other manner discriminate against any individual for opposing any practice prohibited by the policy.

The tax credit ranges from 12.5 percent to 25 percent of the cost of each hour of paid leave, depending on how much of a worker's regular earnings the benefit replaces, and only applies to employees employed for at least one year with an annual compensation of no more than $72,000 (in 2017). The tax will cover 12.5 percent of the compensation paid to employees while on leave if workers receive half of their regular earnings, rising incrementally up to 25 percent if workers receive their entire regular earnings. At this time, the credit only applies to leave compensation paid in 2018 and 2019, unless extended by Congress.

Restricting Incentives for Providing Fringe Benefits

Employers will find that certain fringe benefit deductions are repealed or changed, including deductions for benefits often used to recruit new hires. Section 13304 lowers the amount that businesses can deduct relating to the cost of food and beverages provided to their workers. Also, Section 13703 removes tax incentives that employers can provide for commuter and parking benefits. Businesses currently can provide up to $255 per month for such fringe benefits and write them off as business expenses. However, the incentives will be eliminated for amounts paid or incurred after December 31, 2017.

Reeling in the Affordable Care Act

The Tax Cuts and Jobs Act repealed the individual mandate imposed under the Patient Protection and Affordable Care Act (ACA). However, notably, the new law *did not* repeal the employer mandate or any of the employer reporting obligations required by the ACA. Reporting obligations for Applicable Large Employers (ALEs) continue for 2018, and ALEs remain obligated to offer affordable minimum essential coverage to all full-time employees.

Congress also further suspended the ACA's infamous Cadillac tax. In January, Congress passed and President Donald Trump signed into law a two-year delay on the 40 percent excise tax on high-value health care plans. The provision was part of a measure to restore funding to the federal government through February 8, ending a partial government shutdown. The new Act pushes the Cadillac tax's effective date to 2022.

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Was Your Business Impacted by Tax Reform? Part 2

The Tax Cuts and Jobs Act ("Tax Act"), signed into law by President Trump on December 20, 2017, contains many provisions that directly impact employers. The previous article discussed the inability to take a tax deduction of a sexual harassment settlement amount if there is a nondisclosure agreement, newly available tax credits for employers who offer paid family leave to eligible employees, reduction of fringe benefit deductibility for employers, and the end of the Affordable Care Act's (ACA's) individual mandate penalties and further delay of the ACA's Cadillac tax. Below, we have summarized some of the additional changes likely to impact your business.

Employee Achievement Awards

Under the Tax Act, there were new rules for the service and achievement award exception. Awards given to an employee for recognition for their length of service can be excluded from taxation provided that they do not appear to be a payment disguised as compensation and the award is of "tangible personal property." The award must be provided to the employee for a length of service or safety achievement award and should be awarded as part of a meaningful presentation. An award will not be excluded from taxation if it is received during the recipient's first five years of service.

The IRS defines tangible personal property by explaining what it is not. Among other things, tangible personal property explicitly does not include cash, gift cards, gift certificates, and vacations. If an employer provides items like gift cards or vacations to an employee, they are not excludable from an employee's income and are taxable, and employers are prohibited from taking a deduction for the value of these items.

Transportation Benefits

Employers were previously able to take deductions for amounts they either paid directly to employees for qualified transportation benefits, other than qualified bicycle commuting benefits, or amounts they permitted employees to take through salary reduction arrangements unless the amounts are paid to ensure the safety of employees. Qualified transportation benefits can include transit passes, parking expenses, commuter highway vehicles, and bicycle commuting benefits. Previously, employers were permitted to take deductions up to $255 per month for qualified transportation benefits. Employers are no longer able to take those deductions for qualified transportation benefits, other than qualified bicycle commuting benefits, beginning in 2018.

From 2018 to 2026, amounts for qualified bicycle commuting reimbursements are no longer excluded from employees' income, but employers will still be able to deduct those amounts. These reimbursements are limited to $20 a month.

Employers in certain geographic areas may be required by local laws to permit employees to pay for transportation benefits with salary deferrals or to provide employees money for transportation benefits. Even if local laws require employers to provide these types of benefits, it does not impact whether the employer can take a deduction on these amounts at a federal level.

Tax-exempt employers may assume that this change will not impact them, but the Tax Act requires tax-exempt employers to treat amounts used to pay for qualified transportation benefits as unrelated business taxable income. For that reason, even tax-exempt employer should be aware of this change.

Moving Expenses

Before the Tax Act, qualified moving expenses paid to employees could be excluded from an employee's income while remaining deductible for employers. A qualified moving expense reimbursement had to be for reasonable expenses to move from a former residence to a new residence and for travel expenses incurred during the move, excluding meals. Further, if an individual was not reimbursed by his or her employer for qualified moving expenses incurred during the move, the employee was previously able to make an above-the-line deduction for moving expenses incurred due to a change in employment, subject to certain limitations.

Under the Tax Act, employers may still offer moving expenses reimbursements to employees, but those amounts would need to be included in employees' income unless the moving expenses are reimbursed to Armed Forces members on active duty. Additionally, between 2018 and 2026, individuals may not take an above-the-line deduction for moving expenses incurred during a move, unless the individual is a member of the Armed Services on active duty.

Since they can no longer take deductions, employers may want to consider giving employees additional wages instead of requiring them to produce receipts for reimbursement because (1) it will be less of an administrative burden than a reimbursement policy, (2) there are no additional tax benefits for the employee for reimbursement, and (3) wages are still tax-deductible expenses.

As more guidance is released, we will keep you updated on the implications of the Tax Act for your business.

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