CHAPTER 7 – TAX TREATMENT OF WELFARE BENEFIT PLANS

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AMERICAN BAR ASSOCIATION
SECTION OF LABOR AND EMPLOYMENT LAW
EMPLOYEE BENEFITS COMMITTEE

SUBMITTED BY:

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SCHUCHAT, COOK & WERNER
ST. LOUIS, MO
UNION CO-CHAIR

CONTRIBUTORS:

CHRISTOPHER BANGS
O’DONOGHUE & O’DONOGHUE
WASHINGTON, DC
II. Employee and Beneficiary Tax Treatment

A. General Rules

C. Health Reimbursement Arrangements

The 21st Century Cures Act established a new type of HRA called the Qualified Small Employer Health Reimbursement Arrangement (QSEHRA), effective for years beginning after December 31, 2016.¹ In October 2017, the Internal Revenue Service (IRS) published guidance on the requirements for providing a QSEHRA to eligible employees under Code Sec. 9831(d) in Notice 2017-67.²

On October 29, 2018, the Department of Treasury, Labor and Health and Human Services (the “Departments”) released a proposed rule regarding Health Reimbursement Arrangements and Other Account-Based Group Health Plans.³ If finalized, the proposed rule would allow for integrating Health Reimbursement Arrangements (HRAs) with individual health insurance coverage, if certain conditions are met. It also sets forth conditions under which certain HRAs would be recognized as limited excepted benefits. The proposed rule also addresses issues regarding premium tax credit eligibility for individuals offered coverage under an HRA integrated with individual health insurance coverage.

E. Flexible Spending Arrangements

For the taxable years beginning in 2019, the dollar limitation on voluntary employee salary reductions for contributions to health flexible spending arrangements is $2,700.⁴

F. Health Savings Accounts

1. Eligibility

The Main Volume explains that tax-qualified contributions to HSAs may be made only for “eligible individuals,” i.e., those enrolled in high-deductible health plans (HDHPs) with defined minimum annual deductibles and allowable annual out-of-pocket limits. For 2018, the minimum annual deductibles for an HDHP are $1,350 for individual coverage and $2,700 for family coverage.⁵ The allowable annual out-of-pocket limits (excluding premiums) for 2018 are $6,650 for an individual and $13,300 for family coverage.⁶

The Main Volume also explains that contributions to HSAs are subject to contribution limits. For calendar year 2018, the maximum annual contribution to an HSA for an individual with self-only coverage under an HDHP is $3,450 with an additional $1,000 catch-up contribution for individuals 55 and older.⁷ The maximum annual contribution to an HSA for an individual with HDHP family coverage is $6,850 with an additional $1,000 catch-up contribution for individuals 55 and older.⁸ Revenue Procedure 2018-18 (dated March 5, 2018) lowered the HSA contribution

¹ Pub. Law 114-255, Section 18001, amending Sections 106 and 9831 of the Internal Revenue Code.
⁶ Id.
⁷ Id.
⁸ Id.
limit for individuals with family HDHP coverage to $6,850. Revenue Procedure 2018-27 (dated April 26, 2018) raised that limit back to $6,900.  

G. Archer Medical Savings Accounts

8. High-Deductible Health Plans

As explained in the Main Volume, participation in an Archer medical savings account is conditioned on coverage under a high-deductible health plan. For 2018, this means a plan that provides

1. Individual coverage with an annual deductible that is not less than $2,250 and not more than $3,350, and a maximum annual out-of-pocket limitation of $4,500; or

2. Family coverage with an annual deductible that is not less than $4,500 and not more than $6,750, and a maximum annual out-of-pocket limitation of $8,250.

H. Code Section 132 Benefits

6. Qualified Transportation Fringe Benefits

For taxable years beginning in 2018, the adjusted maximum monthly excludable amount for the aggregate of transportation in a commuter highway vehicle and any transit pass is $255 and the adjusted maximum monthly excludable amount for qualified parking is $255.

For amounts paid or incurred after December 31, 2017, individuals may still elect to defer salary on a pre-tax basis for qualified transportation benefits. However, the employer deduction for expenses for qualified transportation benefits (parking, transit passes and vanpools) in IRC Section 274 was suspended for tax years beginning in January 2018, through 2025 in the Tax Cuts and Jobs Act of 2017. Employers may still deduct expenses if they are necessary to ensure employee safety.

Entities that are tax-exempt under IRC Section 501 (and state colleges and universities) will be taxed on the value of providing qualified transportation benefits by treating the funds used to pay for the benefit as unrelated business taxable income (UBTI).

The Internal Revenue Service provided interim guidance in Notice 2018-99 for taxpayers to determine the amount of parking expenses for qualified transportation fringe benefits and for tax-exempt organizations to determine the corresponding increase in the amount of UBTI. The Notice provides guidance as to how to determine the nondeductible amount of parking expenses. The equation depends on whether the taxpayer pays a third party to provide employee parking or it owns or leases a parking facility for employees.

Beginning in January 2018, the Tax Cuts and Jobs Act suspends the exclusion from income for bicycle commuting expenses in IRC Section 132(f) for tax years beginning after December 31, 2017.

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12 Section 13304, Public Law 115-97 (December 22, 2017).
13 Section 13304, Public Law 115-97, adding IRC Section 274(l).
14 Section 13703, Public Law 115-97 (December 22, 2017).
2017 through 2025.¹⁶ Unlike the transportation benefit, employees cannot pay for bicycle commuting expenses on a pre-tax basis.

7. **Qualified Moving Expense Reimbursements**

Beginning in January 2018, the Tax Cuts and Jobs Act suspends the exclusion from income for employer-provided qualified moving expenses in IRC Section 132(g) for tax years beginning after December 31, 2017 through 2025, but provides an exception for members of the U.S. Armed Forces on active duty who move pursuant to a military order.¹⁷ Individuals also can no longer deduct moving expenses during the tax years 2018-2025, with an exception for members of the U.S. Armed Forces.¹⁸

8. **On-Premises Athletic Facilities**

The Tax Cuts and Jobs Act did not change the deduction for on-premises athletic facilities as contained in IRC § 132(j)(4). However, the Act amends IRC § 512(a)(7) effective for years after December 31, 2017 to provide that the unrelated business taxable income of a tax-exempt entity is increased by an amount equal to the amount for which a deduction is disallowed under Code § 274 for any on-premises athletic facility (as defined in IRC § 132(j)(4)(B)).¹⁹

L. **Adoption Assistance Programs**

2. **Limitations on Excludable Amount**

For taxable years beginning in 2018, the maximum amount that can be excluded for each child, including a child with special needs, is $13,810.²⁰ For taxable years beginning in 2018, the amount excludable from an employee’s gross income begins to phase out for taxpayers with modified adjusted gross income in excess of $207,140 and is completely phased out for taxpayers with modified adjusted gross income of $247,140 or more.²¹

M. **Other Benefits**

5. **Employer Tax Credit for Paid Family and Medical Leave [New Section]**

The Tax Cuts and Jobs Act of 2017 created a new employer tax credit for employers that pay employees who are on a leave under the Family and Medical Leave Act (FMLA), effective for wages paid in taxable years beginning in 2018 or 2019.²² Eligible employers can claim a general business credit equal to 12.5 percent of the amount of wages paid to qualifying employees on FMLA leave. Employers must provide at least two weeks of leave and pay at least 50 percent of salary during the leave. The tax credit increases if employers pay a higher rate of wage replacement during the leave. Employers must have a written policy to provide such leave. Any paid family leave required by state or local law, or provided as vacation, personal, or other

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¹⁶ Section 11047, Public Law 115-97 (December 22, 2017).
¹⁷ Section 11048, Public Law 115-97 (December 22, 2017).
¹⁸ Section 11049, Public Law 115-97 (December 22, 2017), amending IRC Section 217.
¹⁹ Section 13703, Public Law 115-97 (December 22, 2017).
²¹ Id.
²² Section 13403, Public Law 115-97 (December 22, 2017), creating new IRC Section 45S.
medical or sick leave, would not qualify for the credit. For 2018, the credit can only be taken with respect to leave provided to employees who earn less than $72,000 annually (60 percent of the compensation threshold for highly compensated employees under IRC Section 414(g)).

In Notice 2018-71, the IRS issued detailed guidance on the new tax credit and requirements for employer written leave policies.

IV. Affordable Care Act Tax Provisions

A. Shared Responsibility Requirements

1. Employer Shared Responsibility Requirements – Code Section 4980H

2. Individual Shared-Responsibility Requirements—Code Section 5000A

The Tax Cuts and Jobs Act, Public Law No. 115-97, changes the amount of the individual shared responsibility penalty for persons who do not obtain health coverage to zero.\(^2^3\) The Act amends IRC Section 5000A(c) by striking 2.5 percent and inserting “zero percent” and striking $695 and inserting “$0”. The penalty is eliminated for months beginning after December 31, 2018.

The elimination of the penalty is expected to save the government money because some low and moderate income workers would not buy health coverage; thus, they would not receive federal premium assistance tax credits. However, if fewer individuals obtain health insurance, uncompensated care costs could rise, leading indirectly to higher costs for employer plans as they subsidize these costs. In addition, the Congressional Budget Office (CBO) estimates that three million individuals could drop employer-sponsored health plans if they are not required to have coverage.

On December 30, 2018, the United States District Court for the Northern District of Texas, granted partial summary judgment that the individual mandate prescribed by the Affordable Care Act is unconstitutional and, consequently, that the entire ACA is unconstitutional.\(^2^4\) The Court subsequently granted a stay of that judgment and partial final order.

The district court concluded that the individual mandate must be found to be unconstitutional as a result of the elimination of the tax penalty, but not the individual Mandate, by the Tax Cuts and Jobs Act of 2017. The remaining individual mandate, without any accompanying exercise of Congress’s taxing power, led the court to conclude that it must be found to be an unconstitutional law as the Supreme Court had earlier determined that the individual mandate could only be maintained as part of the exercise of the taxing power. \textit{NFIB v. Sebelius}, 567 U.S. 519 (2012). Recognizing that “many Americans would otherwise face a great uncertainty during the pendency of appeal,” the court stayed its Order.

\(^{2^3}\) \textit{Section 11081, Public Law 115-97 (December 22, 2017).}

B. Informational Reporting Requirements

1. Information Reporting by Applicable Large Employers – Code Section 6056

In Notice 2018-94, the Internal Revenue Service (IRS) announced an extension of the deadline for providing 2018 health coverage information Forms 1095-B (sent by the health plan) or 1095-C (sent by the employer) to individuals. The new deadline is March 4, 2019. (The old deadline was January 31, 2019).

However, the IRS has not changed the due dates for filing 2018 information returns with the IRS. Those deadlines remain February 28, 2019 for paper filers and April 2, 2019 for electronic filers. Employers or plans may file a request for a 30-day extension from the IRS filing deadline using Form 8809.

Notice 2018-94 also extends relief from penalties under sections 6721 and 6722 to health plans and employers that can show that they have made good-faith efforts to comply with the information-reporting requirements for incorrect or incomplete information reported on the return or statement. The relief applies to missing and inaccurate taxpayer identification numbers and dates of birth, as well as other information required on the return or statement, but does not provide relief for failure to file or late filing.

The Tax Cuts and Jobs Act (Public Law 115-97), enacted December 22, 2017, effectively repealed the Affordable Care Act individual shared responsibility penalty beginning in January 2019. However, for years prior to 2019, individuals must be able to demonstrate that they have health coverage or meet an exception, or pay the individual mandate penalty. Individuals may demonstrate that they have employer coverage by using a variety of methods of proof, including an insurance card or explanation of benefits (EOB) form. The Internal Revenue Service has stated that individuals do not need to wait until they receive their Forms 1095-B or 1095-C to file their individual taxes, and they do not need to attach the forms to their Form 1040.

D. Excise Taxes and Fees

2. Excise Tax on High-Cost Employer-Sponsored Health Coverage—Code Section 4980I

In January 2018, Code Section 4980I was amended to extend the effective date of the excise tax from January 1, 2020 to January 1, 2022.25

3. Patient-Centered Outcomes Research Trust Fee

As discussed in the Main Volume, fees to fund the Patient-Centered Outcomes Research Institute (PCORI) are imposed on insured and self-insured health plans and certain governmental entities. For plan and policy years that end on or after October 1, 2017, and before October 1, 2018, the fee will be $2.39 per covered life.26 For plan and policy years that end on or after October 1, 2018, and before October 1, 2019, the fee will be $2.45 per covered life.27

26 IRS Notice 2017-61.
27 IRS Notice 2018-85.
VI. Tax Treatment of Code Section 501(c) Organizations

E. Voluntary Employees’ Beneficiary Associations

New Association Health Plans for Small Employers

In January 2018, the Department of Labor issued proposed rules for "small business health plans," sometimes referred to as association health plans.\(^{28}\) The rule modified the definition of "employer" under ERISA allowing entities, such as associations, to sponsor group health coverage based on a commonality of interest on the basis of industry (members are either: In the same trade, industry or profession throughout the United States) or geography (within the same state or a common metropolitan area, even if the metro area extends across state lines). After notice-and-comment, the Department issued a final rule on June 21, 2018.\(^{29}\)

The Final Rule provides two pathways for groups or association of employers to sponsor a single association health plan for employees of its members. One pathway retains the previous requirements issued in the Department’s subregulatory guidance. The new second pathway retains the framework from the prior guidance but makes certain alterations: (1) sole proprietors without any employees can join an AHP, (2) the group or association of employers have at least one substantial business purpose unrelated to offering and providing health coverage, even if the primary purpose is to offer coverage, (3) the commonality of interest among the employers can be based on geography, and (4) the AHPs must abide by the HIPAA nondiscrimination rules. The regulation is applicable on September 1, 2018 for fully insured AHPs, on January 1, 2019, for self-insured plans that existed prior to this Rule, on April 1, 2019, for any new self-insured AHPs newly formed under this Rule.

8. Permissible Benefits

d. Other Benefits

Footnote 1031 in the Main Volume is corrected to: Priv. Ltr. Rul. 81-01-003 (Oct. 15, 1980).

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\(^{29}\) 83 Fed. Reg. 28912 (June 21, 2018); 29 C.F.R. § 2510.3-5.