AssuredPartners
COMPLIANCE OBSERVER

1st Quarter 2018

SAMPLE NOTICE CP 220J RELEASED BY THE IRS

If you are an employer that received a Letter 226J from the IRS indicating that you may be liable for an employer shared responsibility payment (ESRP), the IRS has just taken the next step to collect payments that it determined are actually due. On March 1, 2018 the IRS released sample Notice CP 220J, which will be used to notify applicable large employers (ALEs) that the IRS has charged them an ESRP for failing to offer adequate health coverage to full-time employees and their dependents for one or more months. Letter 226J was released by the IRS last year and was followed by the release of Form 14764 (ALE's response to proposed ESRP) and Form 14765 (list of employees receiving premium tax credit). ALEs may use Form 14765 to change information previously reported on Forms 1095-C, potentially reducing or eliminating their ESRP liability. The IRS noted in Letter 226J that it would review information submitted by ALEs and contact them, or would send non-responding ALEs a notice and demand for the proposed ESRP.

The sample Notice indicates that it is for the tax period ending December 31, 2015, and states an amount due of $0. However, it is important to note that this zero-dollar payment is just for purposes of the sample document. The Notice also states that the ALE does not owe the IRS any money. Actual notices are expected to include the dollar amount owed and instructions for making payments. The statement that money is not owed is also expected to be removed. The Notice provides summary information about the ESRP, including circumstances that can trigger liability, and it describes steps the ALE can take to challenge the ESRP. A reminder is included that the ESRP is not deductible for federal income tax purposes.

Links:

Sample Notice

Instructions for Understanding the Sample Notice

Source: EBIA Weekly

REMINDER – NEW DISABILITY CLAIMS PROCEDURES EFFECTIVE APRIL 1ST

The Department of Labor's ("DOL") Final Rule on Disability Claims Procedures ("Final Rule") was published in the *Federal Register* in December 2016. The Final Rule was originally supposed to apply to all disability claims submitted on or after January 1, 2018 allowing for a transitional period for any denial notices issued through the end of 2017. However, the DOL delayed the Final Rule's date of applicability by 90 days (to April 1, 2018). Though many in the industry thought there may be another delay of this applicability date, on January 8, 2018, the DOL announced that there would be no further delay of this Final Rule and that such disability claims procedures were to apply to all claims submitted after April 1, 2018.

As a reminder, these rules are in place to provide procedural protection to U.S. workers when dealing with plan fiduciaries and insurance providers when their disability claims are denied. Indeed, the Final Rule ensures that any worker submitting a disability claim receives a clear explanation of why any claim was

denied and his right to appeal the denial and review and respond to any new evidence the plan relied on while reviewing the claim. The Final Rule also requires that a claims adjudicator cannot be hired, promoted, terminated or compensated based on his probability of denying claims.

If your company or organization sponsors an employee benefit plan subject to the Employee Retirement Income Security Act (“ERISA”) where claims for disability benefits are made, these new procedures will apply to these plans. Such plans may include 401(k), pension and other retirement plans as well as Long Term Disability (“LTD”) and Short Term Disability (“STD”) plans. Remember, only plans subject to ERISA will have to follow these new procedures. This means, for example, if your company has a STD plan that falls under the Department of Labor’s “Payroll Practice” safe harbor and is exempt from ERISA, it will not have to follow the procedures in the Final Rule. However, if your company has an insured LTD or STD plan or a self-funded program with a Third Party Administrator (TPA”), the Final Rule likely will apply. In those cases, and for any retirement plan or other plan that makes disability determinations to provide benefits, you should verify with the carrier or TPA that they are incorporating and will follow the Final Rule and update your contracts accordingly. Also, plan documents, Summary Plan Descriptions and other documents should likewise be updated.

Sources: SHRM; EBIA Weekly

ELECTRONIC IRS RETURNS ARE DUE NOW!

The deadlines for filing ACA returns with the IRS were not extended. The due date for filing electronic returns with the IRS under Sections 6055 and 6056 remains **April 2, 2018.** Paper returns were due February 28th.

HSA UPDATES

2018 Family Contribution Limit Reduced

As we advised in our Compliance Observer Alert, on March 5th, the IRS reduced the HSA contribution limit for 2018 for individuals with family HDHP coverage by $50 to **$6,850.** This change was effective January 1, 2018.

Why was the limit changed?
The IRS originally announced the inflation-adjusted limits for HSAs and HDHPs for 2018 in May 2017. However, the new tax law enacted late last year—the Tax Cuts and Jobs Act—changed the consumer price index for making annual adjustments to the HSA limits. Using the new index, the IRS had to reduce the HSA contribution limit for individuals with family HDHP coverage for 2018.

Are other limits changing?
No, all other HSA and HDHP limits for 2018 are unchanged, and remain the same as those announced by the IRS in May 2017. See chart below.

What should employers do?
Employers with HDHPs should inform employees about the reduced HSA contribution limit for family HDHP coverage. Employees may need to change their HSA elections going forward to comply with the new limit. Also, any individuals with family HDHP coverage who have already contributed $6,900 for 2018 must receive a refund of the excess contribution in order to avoid an excise tax.

The following chart shows the HSA/HDHP limits for 2018, as adjusted for the IRS' recent guidance.

Limit Type	2018 Limit
HSA Contributions	
• Self-only	$3,450
• Family	$6,850 (new)
HSA Catch-up Contribution (Age 55 or older)	$1,000
HDHP Minimum Deductible	
• Self-only	$1,350
• Family	$2,700
HDHP Maximum Out-of-Pocket	$13,300

Impact of Male Sterilization on HSA Eligibility

In Notice 2018-12 the IRS clarified that, under current guidance, individuals enrolled in health plans covering male sterilization or male contraceptives without a deductible, or with a deductible below the statutory minimum deductible for high-deductible health plans (HDHPs) are ineligible for HSA contributions.

HSA Eligibility

To be eligible for HSA contributions, an individual must:

- ✓ Be covered by an High Deductible Health Plan (HDHP);
- ✓ Not be covered by other health coverage that is not an HDHP (with certain exceptions);
- ✓ Not be enrolled in Medicare; and
- ✓ Not be eligible to be claimed as a dependent on another person's tax return.

To qualify as an HDHP, a health plan cannot pay benefits until the required minimum deductible has been satisfied—except for preventive care benefits.

Preventive Care Benefits and State Law

State insurance laws may require health insurance policies to provide certain health care benefits without a deductible or subject to a deductible that is lower than the HDHP-required minimum deductible. State law may even characterize the benefits as preventive care. However, ***for HSA purposes, only the IRS determines whether a type of benefit qualifies as preventive care. If a health plan covers a non-preventive care service before the deductible is satisfied, it will not qualify as an HDHP under the HSA rules.***

At least four states—Illinois, Maryland, Oregon and Vermont—have laws requiring health insurance plans to cover benefits for male sterilization or contraceptives without cost sharing. According to the IRS, because these benefits are not preventive care, individuals who are covered under these health plans are ineligible for HSA contributions.

Transition Relief

The IRS has provided transition relief for **periods before 2020** to individuals who are enrolled in health plans that provide benefits for male sterilization or male contraception without a deductible, or with a deductible that is lower than the HDHP-required minimum deductible. These individuals will still be considered HSA-eligible, provided they satisfy the other eligibility requirements.

DOL FIDUCIARY RULE VACATED BY FIFTH CIRCUIT

On April 7, 2017, the Department of Labor's ("DOL") Final "Fiduciary Rule" was published in the *Federal Register*. The Fiduciary Rule expands the fiduciary definition under ERISA and adopts or amends certain related prohibited transaction exemptions, among other things. After a few delays, the Fiduciary Rule went into effect on June 9, 2017 with additional transition and enforcement relief provided by the DOL until July 1, 2019. The legality of the Fiduciary Rule has been challenged at different points; the White House has directed the DOL to examine it and it has been challenged in federal courts, most recently by the Fifth Circuit Court of Appeals. In this most recent case, decided on March 13, 2018, an appellate panel vacated the DOL's Fiduciary Rule, holding that the DOL overstepped its authority by implementing it. This most recent ruling adds even more confusion to plan sponsors and others in the industry regarding if, and when, they need to begin to follow this rule.

It is important to understand that although this case made headlines because it this is the first court to come to the decision to vacate the Fiduciary Rule, the future of the rule is still unclear and will face many more hurdles and challenges before there is an ultimate decision. For example, the case may be reviewed again by the Fifth Circuit, this time, by all of the judges in that Circuit (this case was only heard and voted on by three of the judges, with the Chief Justice dissenting). The case may also be otherwise appealed or end up in front of the Supreme Court by certain processes. Additionally, Fiduciary Rule challenges have seen different outcomes in other Federal Courts, are still being reviewed in others, and such rule is still under review by the Department of Labor at the direction of the President.

Since there is currently so much uncertainty in this area, industry experts suggest continuing with "business as usual" and doing what is in the best interest of your plan participants. It is likely that most retirement plan advisors, recordkeepers, and others affected by this rule have already begun the movement towards complying with the Fiduciary Rule and it would be difficult to scale back or reverse their efforts at this point. Since no one knows the fate of the Fiduciary Rule at this point, the best advice is to comply, and ensure your advisors and others are compliant, until there is an official ruling stating that the Fiduciary Rule is, in fact, void.

Link:

DOL's Final Fiduciary Rule

Fifth Circuit Decision

Sources: Employee Benefit Advisor; EBIA Weekly

PCORI Fees

PCORI fees for all plan years ending in 2017 are due to the IRS in **July 2018**.

Applicable Fee Amounts

$2.26 – Plans ending January 1, 2017 to September 30, 2017
$2.39 - Plans ending October 1, 2017 to December 31, 2017

Self-insured health plans are responsible for paying this fee. For fully insured health plans, the issuer is responsible for paying this fee.

DOL INCREASES CIVIL PENALTIES

Each year the DOL is required to adjust civil monetary penalties for inflation. New civil penalties that may be imposed on employers by the DOL became effective on January 2, 2018 and may apply for any violations occurring after November 2, 2015. New penalty amounts, related to employee benefits include:

REQUIREMENT	2017 PENALTY AMOUNT	2018 PENALTY AMOUNT
Failure to file an annual report (form 5500) with the DOL (unless a filing exemption applies)	Up to $2,097 per day	Up to **$2,140** per day
Failure of a multiple employer welfare arrangement (MEWA) to file an annual report (Form M-1) with the DOL	Up to $1,527 per day	Up to **$1,558** per day
Failure to furnish plan-related information requested by the DOL ***Under ERISA, administrators of employee benefit plans must furnish to the DOL, upon request, any documents relating to the employee benefit plan.**	Up to $149 per day, but not to exceed $1,496 per request	Up to **$152** per day, but not to exceed **$1,527** per request
Failing to provide the annual notice regarding CHIP coverage opportunities (applies to employers with group health plans that cover residents of states that provide a premium assistance subsidy under a Medicaid or CHIP program)	Up to $112 per day for each failure (each employee is a separate violation)	Up to **$114** per day for each failure (each employee is a separate violation)
For 401(k) plans, failure to provide blackout notice or notice of right to divest employer securities	Up to $133 per day	Up to **$136** per day
Failure to provide Summary of Benefits and Coverage (SBC)	Up to $1,105 per failure	Up to **$1,128** per failure

FRINGE BENEFITS AFFECTED BY TAX CUTS & JOBS ACT

The Tax Cuts and Jobs Act (TCJA) made sweeping changes to the tax code. Most of these changes took effect January 1, 2018. The IRS recently released the 2018 version of Publication 15-B-Employer's Tax Guide to Fringe Benefits, which includes the new tax law's changes to fringe benefits. This article summarizes the impact on some common employer-provided fringe benefits; however, you should review Publication 15-B in its entirety and work with your tax advisor to implement any required changes.

- **Qualified transportation fringe benefits (QTFBs)** —QTFBs include transit passes, qualified parking, transportation in a commuter highway vehicle, and qualified bicycle commuting reimbursements by an employer to an employee on a tax-free basis for purposes of commuting between the employee's residence and workplace.

  Effective for 2018, no employer deduction is allowed for qualified transportation benefits. IRS Publication 15-B clarifies that an employer deduction is disallowed when the qualified transportation benefits are paid directly by the employer, through a bona fide reimbursement arrangement or through a compensation reduction agreement. Thus, you cannot deduct the wages that employees choose to contribute on a pre-tax basis for qualified transportation benefits.

  Employees, on the other hand, still may elect to take a pre-tax salary deduction and/or exclude from income employer-provided transit passes, qualified parking, or transportation in a

commuter highway vehicle. However, the tax exclusion for qualified bicycle commuting reimbursements is suspended for tax years beginning after Dec. 31, 2017, and before Jan. 1, 2026.

- **Moving Expenses -** Qualified moving expenses generally include the expenses incurred by moving personal belongings and persons from one's former residence to one's new residence.

  The tax exclusion for qualified moving expense reimbursements is suspended for tax years beginning after Dec. 1, 2017, and before Jan. 1, 2026. Now any amount that you pay or reimburse an employee for these expenses must be reported as compensation for services and taxes withheld (except with respect to certain active duty members of the armed forces).

- **Employee Meals and Entertainment** - Prior to the TCJA, employers could deduct 50 percent of expenses for business-related meals and entertainment, such as meals provided for the convenience of the employer or entertainment related to or associated with business.

  Effective January 1, 2018, the 50 percent deduction on entertainment expenses is repealed, regardless of whether the entertainment is business-related.

  The TCJA extended the 50 percent deduction limitation to meal expenses that are excluded from an employee's income due to the de minimis fringe benefit rules. The tax exclusions for employees for employer-provided meals are unchanged by the TCJA. The TCJA also does not impact your ability to deduct 50 percent for meal expenses incurred by employees on work travel. Food or beverage expenses related to employee recreation, such as holiday parties or annual picnics, are not subject to the 50 percent limit on deductions when made primarily for the benefit of employees, other than certain highly compensated employees.

- **Employee achievement awards -** Prior to the TCJA, employers could, within limits, provide certain types of employee achievement awards (e.g., pins, pendants, jewelry, plaques, or pre-selected catalog items after five and ten years of service) on a tax-free basis.

  The TCJA maintains the current exclusion, with a minor change. You may continue to exclude the value of tangible personal property that is given to an employee as an award for either length of service or safety achievement. However, the new tax law clarifies that the tax exclusion does not apply to awards of cash, cash equivalents, gift cards, gift coupons or gift certificates (other than arrangements in which the employee selects from a limited array of items preselected and preapproved by the employer). The tax exclusion also does not apply to vacations, meals, lodging, tickets to theater or sporting events, stock, bonds, other securities and similar items.

  Sources: IRS; Zywave

Individual Mandate Penalties are Still in Effect for 2018

The Tax Cuts and Jobs Act repealed the individual mandate tax penalty but not until 2019. ***Individuals are still required to have health coverage in 2018 or pay the penalty, unless an exemption applies.***

DID YOU KNOW?

In general, the detailed coverage document (or certificate of coverage) provided by an insurance carrier for a welfare benefit does not contain all of the information required by ERISA for a plan document or summary plan description (SPD). For example, while carrier certificates include detailed benefit information, they generally do not designate plan fiduciaries or provide procedures for amending or terminating the plan. Thus, the carrier's certificates, on their own, are not ERISA-compliant plan documents. Benefit booklets provided by TPAs for self-insured welfare benefits may also fail to include the ERISA-required information for plan documents.

Employers may use wrap documents in conjunction with the insurance certificate or benefit booklet to satisfy ERISA's requirements. This document is called a "wrap document" because it essentially wraps around the insurance certificate or benefit booklet to fill in the missing ERISA-required provisions. When a wrap document is used, the ERISA plan document or SPD is made up of two documents— the insurance certificate or benefit booklet and the wrap document.

Should you have any questions or concerns about any of the topics addressed in this Newsletter, please contact a member of your AssuredPartners' Benefits Team

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