

WHAT YOU NEED TO KNOW



Compliance Recap

May 2018

May was a relatively busy month in the employee benefits world.

The Internal Revenue Service (IRS) released the indexed threshold that employers will use in 2019 to determine coverage affordability. The IRS also issued inflation adjusted amounts that will apply to health savings accounts for 2019.

The IRS released guidance on its play-or-pay penalty response acknowledgement letters. The IRS published a proposed rule that would expand mandatory electronic filing of information returns. The IRS also released a tax reform tip, frequently asked questions about the family and medical leave credit, and a fact sheet on determining whether an employer is a large employer.

The Equal Employment Opportunity Commission filed a status report in a wellness program court case. The U.S. Department of the Treasury released its updated priority guidance plan. The U.S. Department of Health and Human Services released a blueprint for lowering drug prices and reducing out-of-pocket costs. The U.S. Securities and Exchange Commission issued a bulletin on health savings accounts.

UBA Updates

UBA released four new advisors:

- [Proposed FAQs About Mental Health and Substance Use Disorder Parity](#)
- [IRS Changes HSA Limit for 2018](#)
- [Understanding Your IRS Play-or-Pay Assessment Letter](#)
- [IRS Issues Proposed Rule to Expand Mandatory Electronic Filing](#)

UBA updated existing guidance:

- [2018 Annual Benefit Plan Amounts card](#)
- [Federal Tax Credit for Employer-Provided Paid Family and Medical Leave](#)
- [Understanding Wellness Programs and their Legal Requirements](#)
- [Court Modifies Order Regarding EEOC Wellness Rules](#)
- [The Play-or-Pay Penalty and Counting Employees under the ACA](#)
- [Nondiscrimination Rules for Cafeteria Plans](#)
- [HRAs, HSAs, and Health FSAs – What's the Difference?](#)

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IRS Releases ACA Indexed Affordability Threshold for 2019

The Internal Revenue Service (IRS) released its [Revenue Procedure 2018-34](#) that makes an indexing adjustment to the required contribution percentage that is used to determine whether employer-sponsored health coverage is affordable. For 2019, the percentage will be 9.86 percent.

This means that if an employer is using the federal poverty level (FPL) affordability safe harbor, then the maximum monthly self-only contribution will be \$99.75. [9.86% of \$12,140 (the 2018 contiguous U.S. FPL for one person), divided by 12, equals \$99.75.]

IRS Releases 2019 Limits on Health Savings Accounts

The Internal Revenue Service (IRS) released its [Revenue Procedure 2018-30](#) that provides the 2019 inflation adjusted amounts for health savings accounts (HSAs).

For 2019, the annual limitation on deductions for an individual with self-only coverage under a high deductible health plan is \$3,500. For 2019, the annual limitation on deductions for an individual with family coverage under a high deductible health plan is \$7,000.

For 2019, a “high deductible health plan” is defined as a health plan with an annual deductible that is not less than \$1,350 for self-only coverage or \$2,700 for family coverage, and the annual out-of-pocket expenses (deductibles, co-payments, and other amounts, but not premiums) do not exceed \$6,750 for self-only coverage or \$13,500 for family coverage.

IRS Releases Guidance on its Play-or-Pay Penalty Response Acknowledgment Letters

In late 2017, the Internal Revenue Service (IRS) started mailing [Letter 226J](#) to inform large employers of their potential liability for an employer shared responsibility payment (ESRP) for the 2015 calendar year. The IRS’ determination of an employer’s liability and potential payment is based on information reported to the IRS on Forms 1094-C and 1095-C and information about the employer’s full-time employees that were allowed the premium tax credit.

The letter contains [Form 14764](#) (ESRP Response) which is the form that the employer must use to file its response by the deadline listed in the letter. The employer uses Form 14764 to indicate that it agrees or disagrees with the IRS’ letter. If an employer disagrees with the proposed liability, then it must provide a full explanation of its disagreement using [Form 14765](#).

The IRS will acknowledge the employer’s response with a Letter 227 that describes the further actions that an employer can take. The IRS’ recently released [Understanding Your Letter 227](#) describes the versions of Letter 227 that an employer may receive:

- [Letter 227-J](#) acknowledges receipt of the signed agreement Form 14764, ESRP Response, and that the penalty will be assessed. After the IRS issues this letter, the case will be closed. No response is required.
- [Letter 227-K](#) acknowledges receipt of the information provided and shows the penalty has been reduced to zero. After the IRS issues this letter, the case will be closed. No response is required.

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- [Letter 227-L](#) acknowledges receipt of the information provided and shows the penalty has been revised. The letter includes an updated Form 14765 and revised calculation table. The employer can agree or request a meeting with the manager and/or appeals.
- [Letter 227-M](#) acknowledges receipt of information provided and shows that the penalty did not change. The letter provides an updated Form 14765 and revised calculation table. The employer can agree or request a meeting with the manager and/or appeals.
- [Letter 227-N](#) acknowledges the decision reached in appeals and shows the penalty based on the appeals review. After the IRS issues this letter, the case will be closed. No response is required.

If, after receiving Letter 227, the employer agrees with the proposed penalty, then the employer would follow the instructions to sign the response form and return it with full payment in the envelope provided.

If, after receiving Letter 227, the employer disagrees with the proposed or revised shared employer responsibility payment, the employer must provide an explanation of why it disagrees or indicate changes needed, or both, on Form 14765. Then the employer must return all documents as instructed in the letter by the response date. The employer may also request a pre-assessment conference with the IRS Office of Appeals within the response date listed within Letter 227, which will be generally 30 days from the date of the letter.

If the employer does not respond to either Letter 226J or Letter 227, the IRS will assess the amount of the proposed employer shared responsibility payment and issue a notice and demand for payment.

[Read more about the play-or-pay penalty assessment letters.](#)

IRS Issues Proposed Rule to Expand Mandatory Electronic Filing

The Internal Revenue Service (IRS) published a [proposed rule](#) that would affect most employers who are required to file information returns, such as Forms W-2, Forms 1095-B, Forms 1095-C, and forms in the 1099 series.

Currently, employers are not required to electronically file their returns with the IRS unless they are required to file at least 250 returns during the calendar year. The IRS uses a non-aggregation rule in applying this 250-return threshold. Essentially, it uses a separate total for each type of information return filed and each type of corrected information return filed. This means that if an employer files 150 Forms W-2 and 100 Forms 1095-C this year, then the employer is not required to file electronically.

Under the proposed rule, the IRS would determine whether an employer meets the 250-return threshold by aggregating its information returns. Using the example above, under the proposed rule, the employer would meet the 250-return threshold and would be required to electronically file its information returns.

Corrected returns would not be included in the calculation of whether an employer meets the 250-return threshold. However, the proposed rule would require an employer to electronically file its corrected returns if the original returns were electronically filed.

If finalized, these regulations will apply to employers' information returns filed after December 31, 2018.

[Read more about the proposed rule.](#)

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IRS Releases Tax Reform Tax Tip and FAQs Regarding Family and Medical Leave Credit

The Internal Revenue Service (IRS) released its [Tax Reform Tax Tip 2018-69: How the Employer Credit for Family and Medical Leave Benefits Employers](#) and its updated [Section 45S Employer Credit for Paid Family and Medical Leave FAQs](#) that primarily reiterates the [Tax Cuts and Jobs Act](#)'s provisions that provide a new federal credit for employers that provide paid family and medical leave to their employees.

In its Tax Tip, the IRS explains that an employer must reduce its deduction for wages or salaries paid or incurred by the amount determined as a credit. Also, any wages taken into account in determining any other general business credit may not be used in determining this credit.

In its FAQs, the IRS indicates that, in the future, it will address when the written policy must be in place, how paid family and medical leave relates to an employer's other paid leave, how to determine whether an employee has been employed for one year or more, the impact of state and local leave requirements, and whether members of a controlled group of corporations and businesses under common control are treated as a single taxpayer in determining the credit.

[Read more about the federal tax credit](#) for employer-provided paid family and medical leave.

IRS Releases Fact Sheet on Determining Whether an Employer is a Large Employer

The Internal Revenue Service (IRS) released [Publication 5208 – Affordable Care Act: Determining if you are an applicable large employer](#) that provides a three-step process for employers to determine whether they are an applicable large employer for purposes of the employer shared responsibility provisions.

Although this one-page fact sheet doesn't provide new information about counting employees, it may be a helpful guide for those employers who have fewer than 50 full-time or full-time equivalent employees and who are growing their staff numbers.

Wellness Program Court Case Update

In August 2017, the United States District Court for the District of Columbia [held](#) that the U.S. Equal Employment Opportunity Commission (EEOC) failed to provide a reasoned explanation for its decision to adopt 30 percent incentive levels for employer-sponsored wellness programs under both the Americans with Disabilities Act (ADA) rules and Genetic Information Nondiscrimination Act (GINA) rules.

In December 2017, the court [vacated](#) the EEOC rules under the ADA and GINA effective January 1, 2019, and ordered the EEOC to promulgate any new proposed rules by August 31, 2018.

In January 2018, the EEOC asked the court to reconsider the portion of the court's order that required the EEOC to promulgate new proposed rules by August 31, 2018. The court [vacated](#) that portion of its order. The EEOC recently reported that it had not decided whether to promulgate new regulations. The court's order to vacate the portions of the EEOC's wellness rules under the ADA and GINA as of January 1, 2019, remains.

For 2019 and until the EEOC issues final rules regarding incentive limits, risk-averse employers should consider discontinuing wellness programs that require a medical exam, biometric screening, or health risk assessment for participants to receive an incentive. When the ADA and GINA incentive limits are vacated, the less restrictive ACA-amended HIPAA regulations will continue to apply. However, using

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these less restrictive incentive limits may be risky because these regulations predated the EEOC's wellness regulations.

Read more about this [court case](#) and [wellness programs](#).

Treasury Releases its Updated Priority Guidance Plan and Opens Public Comment for Next Priority Guidance Plan

The U.S. Department of the Treasury (Treasury) released its third quarter update to its [2017-2018 Priority Guidance Plan](#) (Plan). The Plan identifies projects that the Treasury and the Internal Revenue Service (IRS) intend to complete during the 12-month period ending on June 30, 2018.

The Plan's "Executive Compensation, Health Care and Other Benefits, and Employment Taxes" section lists the following items among its projects:

- Guidance on issues under §4980H (the employer shared responsibility provisions)
- Regulations under §4980I regarding the excise tax on high cost employer-provided coverage ("Cadillac tax")
- Guidance on qualified small employer health reimbursement arrangements (QSEHRAs)

The Treasury and IRS also issued [Notice 2018-43](#) that invites public comment on recommendations for items that should be included on the agencies' 2018-2019 Priority Guidance Plan. Although public comments may be submitted throughout the year, comments submitted by June 15, 2018, will be considered for inclusion on the original 2018-2019 Priority Guidance Plan.

HHS' Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs

The U.S. Department of Health and Human Services (HHS) published its [policy statement](#) and released its [American Patients First blueprint](#) to lower drug prices and reduce out-of-pocket costs (collectively, the Blueprint).

Although most of the Blueprint focuses on reducing government health programs' costs, some of the Blueprint's goals may affect employers' group health plans in the future. The Blueprint strives to:

- Create incentives for pharmaceutical companies to lower list prices and reduce consumer out-of-pocket spending at the pharmacy and other case settings
- Increase price transparency
- Apply a substantial portion of rebates at the point of sale
- Have a site-neutral payment policy for drug administration procedures
- Have pharmacy benefit managers (PBMs) act solely in the interest of the employer (or consumer) for whom they are managing pharmaceutical benefits
- Restrict the use of rebates
- Prohibit contracted pharmacy gag clauses

SEC Issues Bulletin on Health Savings Accounts

The U.S. Securities and Exchange Commission (SEC) issued [Investor Bulletin: Health Savings Accounts \(HSAs\)](#) that provides investors with information about HSAs. Although the Internal Revenue Service (IRS)

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primarily regulates HSAs, the SEC's bulletin addresses the savings, investment, and distribution options that may be available to an HSA accountholder.

Question of the Month

Q. For a high deductible health plan (HDHP) to qualify for health savings account (HSA) eligibility, what is the minimum amount that an embedded individual deductible can be?

A. For 2018, the embedded individual deductible must be at least \$2,700. For an HDHP to qualify for HSA eligibility, an individual with family coverage would need to satisfy the required minimum annual deductible for family HDHP coverage (which is at least \$2,700 for 2018) before any amounts are paid from the HDHP.

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