Employee benefits policy year in review: What changed, what didn't and what you can expect in the year ahead

By Carolyn Smith and John Hickman, Alston & Bird, LLP

Quite a few health and other employee benefits policy changes developed in 2018. The full list includes some welcome regulations and legislative changes, but also new restrictions on some popular tax-favored benefits. This advisory highlights key policy changes as well as upcoming deadlines in the year ahead.

NEW EMPLOYEE BENEFIT LEGISLATION

The Tax Cuts and Jobs Act (TCJA) contained the most sweeping changes to federal tax laws in decades.

Enacted at the tail end of 2017, most of the provisions were first effective starting in 2018. In many respects, the law lives up to its name by significantly reducing tax rates for businesses and individuals. However, in order to help pay for reduced rates and other tax relief, the law also cut back on and repeals some prior tax credits and deductions. Key changes made by the TCJA with respect to employee benefits included the following:

- **A new tax credit was made available to employers who provided qualifying employees with paid family and medical leave.** The new credit is currently available only for 2018 and 2019. The IRS recently provided guidance on the credit in Notice 2018-71. Additional information may be found in our November advisory.
- **Qualified transportation benefits were no longer deductible by the employer.** Starting in 2018, employers could no longer take a deduction for qualified transportation benefits (i.e., transit passes, parking, and transportation to and from work in a commuter highway vehicle, unless the transportation is necessary to ensure the safety of the employee). According to the IRS, this deduction denial applies regardless of whether the employer pays the expenses directly or reimburses the employee through a qualified reimbursement arrangement or if the expenses are paid through a compensation reduction arrangement. Qualified transportation expenses remain excludable from the employee's income and wages.

- **Tax benefits for qualified moving expenses were suspended.** Prior to the TCJA, qualified moving expenses paid or reimbursed by an employer were excludable from employees' income and wages. In addition, individuals were entitled to an above-the-line deduction for any unreimbursed qualified moving expenses. Both of these tax benefits were suspended starting in 2018 and continuing through 2025. The suspension doesn't apply with respect to active duty members of the armed forces. The employer's deduction for moving expenses wasn't affected by the suspension.
- T**he exclusion for qualified bicycle commuting reimbursement was suspended.** Such reimbursements were taxable to the employee starting in 2018 and continuing through 2025.
- **The ACA Individual Mandate was repealed:** Starting Jan. 1, 2019, individuals who don't have qualifying health coverage will no longer face a tax penalty. The IRS is studying whether the related reporting requirements for self-funded employers, insurers and others providing MEC should be changed for 2019 and future years.

In addition to these changes, TCJA included a variety of other provisions that reduced tax benefits for certain common arrangements, including changes to the tax rules for meals and entertainment and significant changes to the deductibility of certain executive compensation.

The Bipartisan Budget Act relaxed rules for hardship distributions from 401(k) plans.

The main purpose of the Bipartisan Budget Act (BBA), enacted in February 2018, was to provide funding for the federal government. A few employee benefit plan changes went along for the ride, including the relaxation of rules related to hardship distributions from 401(k) plans and similar arrangements. Under the BBA, qualified nonelective contributions (QNECs), qualified matching contributions (QMACs), and earnings on QNECs, QMACs and 401(k) elective contributions may be distributed on account of hardship. A participant is not required to take out a loan before taking a hardship distribution. Both these changes applied to plan years beginning after Dec. 31, 2018. The BBA also directed the IRS to revise regulations relating to hardship distributions to eliminate the requirement under the IRS safe harbor that a participant cannot make 401(k) contributions for six months following a hardship distribution. In November, the IRS published proposed regulations making that change, as well as a variety of other changes to the hardship distribution rules.

NEW EMPLOYEE BENEFIT REGULATIONS

The president's executive order on health: Two final rules and one proposed rule were issued in 2018 in response to the president's October 2017 executive order on promoting health care choice and competition.

» **Association Health Plans (AHPs):** A final rule published Jan. 5, 2018, made it easier for otherwise unrelated employers to group together to form a single large group health plan, thus avoiding certain ACA rules applicable to small-group insured plans. While AHPs are also of interest to large employers (e.g., franchisors offering a health plan to franchisees), barriers still exist in many states that discourage cooperation between these employers. Read more here.

» **Short-Term Limited Duration Insurance (STLDI):** A final rule published Aug. 3, 2018, allowed STLDI to have a total coverage period (including any insurer approved renewals) of up to 36 months. A discussion of STLDI and how it differs from other common types of insurance is here.

» **Health Reimbursement Arrangements (HRAs):** A proposed rule published Oct. 29, 2018, would expand the ability of employers of all sizes to use HRAs by creating two new types of HRAs. The proposed rules are expected to be finalized in the early part of 2019. The new HRA types include:

1. **Premium reimbursement HRA:** If certain requirements are satisfied, an employer could establish an HRA that helps pay an employee's premiums for individual market coverage (other than excepted benefit or short-term coverage) and other unreimbursed medical expenses. Premium reimbursement HRAs are considered minimum essential coverage (MEC) for purposes of the ACA employer penalties. Among other requirements, an employer wouldn't be able to offer a traditional group health plan and a premium reimbursement HRA to the same class of employees.

2. **Excepted benefit HRA:** This new HRA would satisfy four requirements (similar to requirements that apply to excepted benefit FSAs):

   » The maximum annual contribution would be $1,800 (indexed and without regard to any carryovers).

   » The employee would also be offered traditional health insurance from the same employer, but the employee wouldn't have to enroll in that coverage.

   » The employee couldn't also be offered a premium reimbursement HRA.

   » The terms and conditions would be the same for all "similarly situated" classes of employees.

EEOC wellness plan rules: In 2017, the EEOC issued comprehensive rules governing wellness program compliance under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). These rules added a number of new compliance obligations and established somewhat of a safe harbor (30 percent) for the value of wellness program incentives. In AARP v. EEOC, the incentive safe harbor portion of these rules has been set aside. For 2019, employers with wellness programs that include incentives should review the impact of this decision on their programs.

On the retirement side: The Department of Labor took the first formal step in fulfilling the directives of the president's August 2018 executive order on retirement plans and issued proposed rules on multiple employer plans (MEPs). Similar to the goals of the AHP rules, the proposed MEP rules would clarify the circumstances under which an employer group or association or a professional employer organization (PEO) could sponsor a workplace retirement plan. The rules are expected to be finalized in early 2019.

The president also directed the DOL and IRS to make retirement plan notices more understandable and useful for plan participants, while also reducing the costs on employers. Finally, the IRS was directed to review the life expectancy and distribution tables currently used for determining required distributions from tax-qualified plans. The objective was to bring the tables up to date so that retirement funds can be drawn out more slowly, rather than forcing larger distributions earlier on. So, stay tuned, as there will be more to come on retirement plans.

2019 COST-OF-LIVING ADJUSTMENTS FOR POPULAR BENEFITS

BENEFIT	2018	2019
Health savings account contribution max (including employee and employer contributions)	$3,450 ($6,900 family)	**$3,500 ($7,000 family)**
Health savings account additional catch-up contributions	$1,000 (this is not indexed)	**Same**
High-deductible health plan annual deductible minimum	$1,350 ($2,700 family)	**Same**
Limit on out-of-pocket expenses for high-deductible health plans	$6,650 ($13,300 family)	**$6,750 ($13,500 family)**
Limit on out-of-pocket expenses for Affordable Care Act-compliant plans	$7,350 ($14,700 family)	**$7,900 ($15,800 family)**
Flexible spending account salary reduction max	$2,650	**$2,700**
Qualified small-employer health reimbursement account max reimbursement	$5,050 ($10, 250 family)	**$5,150 ($10,450 family)**
Transit and parking benefits	$260	**$265**
401(k) employee elective deferral max	$18,500 (Catch-up contributions $6,000)	**$19,000 (Catch-up limit unchanged)**
Highly compensated employee compensation threshold	$120,000 (applies for 2019 plan year under lookback rule)	**$125,000 (applies for 2020 plan year under lookback rule)**

WHAT TO EXPECT NEXT: UPCOMING DEADLINES AND EFFECTIVE DATES

Health Coverage Reporting Deadlines for 2018 Minimum Essential Health Coverage (MEC)

The Affordable Care Act (ACA) requires employers, insurers and certain other providers of minimum essential coverage (MEC) to provide health coverage information to individuals and the IRS. Here's a reminder of what's required:

- Applicable large employers (generally, those with 50 or more full-time employee equivalents as defined under the employer penalty provisions in Code section 4980H), are required to provide individuals with information on health insurance offers and coverage using Form 1095-C (Employer-Provided Health Insurance Offer and Coverage). Form 1095-C must also be sent to the IRS with Form 1094-C.
- Other providers of MEC, including self-funded non-ALEs, are required to provide information to individuals using IRS Form 1095-B (Health Coverage). Form 1095-B must also be sent to the IRS along with Form 1094-B. These forms are provided on a retrospective basis (i.e., health offers and coverage for 2018 are reported in 2019).

The IRS recently announced the deadlines for providing the 2018 forms, including an extended due date for furnishing the forms to individuals. There is no extension of the time for filing with the IRS. The IRS also provided some penalty relief for good faith compliance. The filing deadlines are below. For more information see IRS Notice 2018-94.

DEADLINE	DETAILS
Feb. 28, 2019	Deadline for filing Forms 1094-B, 1095-B, 1094-C and 1095-C with the IRS for Forms that are not filed electronically.
March 4, 2019	Deadline for providing Forms 1095-B and 1095-C to individuals (this is an extension of the original due date of Jan. 31, 2019).
April 1, 2019	Deadline for filing Forms 1094-B, 1095-B, 1094-C and 1095-C with the IRS for electronic filing. In general, persons who file 250 or more information returns a year are required to use electronic filing.

PCORI Fee:

The Patient-Centered Outcomes Research Institute (PCORI) fee was imposed under the ACA for plan years ending on or after Oct. 1, 2012, and before Oct. 1, 2019. These dates follow the fiscal year of the federal government, which ends on Sept. 30 of each calendar year. The fee is paid once each year and is due on the July 31 following the end of the plan year. For example, for a calendar-year plan, the fee for 2018 is due on July 31, 2019.

The fee was imposed on specified health insurance and is payable by the employer or other plan sponsor of a self-funded plan and by the insurer with respect to fully insured coverage. The fee is based on the average number of lives covered under the plan. Special rules apply for health reimbursement arrangements (HRAs) required to report.

For plan years ending on or after Oct. 1, 2018, and before Oct. 1, 2019 (e.g., in the case of the 2018 plan year for calendar-year plans), the fee is $2.45 per participant. More information can be found on the IRS PCORI Fee website.

"Cadillac Plan" tax delay: The so-called "Cadillac Plan" tax is a 40 percent excise tax on the cost of employer sponsored health coverage that exceeds specified dollar thresholds. The tax was originally scheduled to go into effect in 2018 but has been delayed several times, most recently by legislation enacted in January 2018. The tax is scheduled to go into effect in 2022, unless it is further delayed by Congress.

Is there more to come?

Late in 2018, a federal district court judge in Texas ruled that the repeal of the Affordable Care Act's individual mandate makes the entire law unconstitutional. The ruling is not a final order and doesn't stop the enforcement or need to comply with the ACA. However, the ruling will be appealed and, ultimately, the case may end up in the Supreme Court. If so, it would be the third time the Court has addressed the ACA. Policy will continue to evolve, and we'll likely see more changes in the new year.