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What to Expect in Employee Benefits in 2018 & Beyond
Liliana Salazar, HUB International Limited

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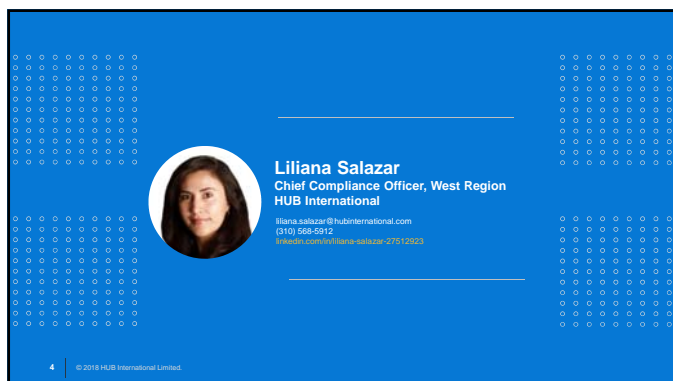


**HUB University:
 Benefits Legal
 Update**

April 27, 2018



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Liliana Salazar
Chief Compliance Officer, West Region
HUB International

liliana.salazar@hubinternational.com
310.565.5912
[linkedin.com/in/liliana-salazar-27512523](https://www.linkedin.com/in/liliana-salazar-27512523)

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Agenda

- 1 | New Tax Reform and its Impact on Employee Benefits
- 2 | Employer Shared Responsibility Update
- 3 | ACA Reporting: What to know for 2017 and 2018
- 4 | Other Federal Compliance Obligations
- 5 | Update on Oregon's Universal Healthcare Efforts
- 6 | Q&A


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1 Tax Reform and Association Health Plans

What to Expect in 2018?

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New Tax Reform: Impact on Employee Benefits



Prior to tax reform: Elimination of cost-sharing subsidies in Exchanges and Marketplaces for 2018

Eliminates

- The employer tax deductibility of transportation fringe benefits but it retains employee pre-tax deductions
 - Employer paid transportation fringe plans are no longer tax deductible
- Bicycle transportation benefit (\$20 per month)
- Individual mandate penalty as of 1/1/19
 - Individual mandate penalty is enforceable for 2017 and 2018
 - Will have an impact on the Employer Mandate ("Play or Pay Mandate") as employees will no longer feel compelled to purchase coverage from an exchange.
 - If employees do not purchase coverage from an exchange = ZERO penalties to employer under the Play or Play Mandate
 - Will further destabilize the individual and the Exchange marketplace, resulting in a rise in premiums due to adverse selection

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Proposed Regulations on Association Health Plans

January 4, 2018 - DOL issues proposed regulations on Association Health Plans (AHP)

- Allows for the creation of association health plans for the sole purpose of purchasing insurance
- May be formed by unrelated employers (small employers and "sole proprietors"/ working owners of a incorporated or incorporated business) in the same industry, trade, or geographic location
- Will be rated as a large group (pooling of risk and composite rating) based on the number of individuals covered by the plan offered by the AHP
- AHP will still be treated as a Multiple Employer Welfare Arrangement (MEWA), and be subject to state regulation
 - Many states currently prohibits AHP from being self-insured, so AHP most likely will exist only as fully-insured plans
 - State Insurance Commissioners and carriers have strongly opposed AHP. Monitor state developments closely to determine viability of AHP

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Proposed Regulations on Association Health Plans

- AHP must meet all of the following criteria to sponsor a benefit program on behalf of its members:
 - Be created by members of the same trade, industry, line of business or profession
 - Have the same principal place of business that does not exceed the same boundaries of the state or metropolitan area (may go across states, e.g. D.C, NY/NJ, etc.)
 - Have an organizational structure (by-laws) and a governing body made up of participating employers who exercise control over the group health plan
 - Participation in the plan is only extended to members (employees of employer members or owner/employees)
 - Comply with the health nondiscrimination protections- No individual underwriting of participating employers

Concerns


- Will further impact the viability of the small group market/SHOP
- Increase adverse selection in the individual market and Exchanges
- May create greater instability in the insurance market
- Opposed by insurance carriers as well as the National Association of Insurance Commissioners

Advantages

- Premiums anticipated to go down for small employers and individuals due to pooling of risk
- Greater plan design flexibility
- Comment period ends on 3/6/18 with final regulations to be issued by summer 2018

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Funding Federal Government- New Surprises




- Delay of Cadillac Plan Tax- Two year delay, now **effective 2022**
 - 40% tax was expected to go into effect on 1/1/2020
 - Tax applies to aggregate cost of health insurance that exceeds specified thresholds
 - Tax calculated on a monthly basis and applicable to cost of : medical, health FSAs, HRAs, employer contributions to HSAs, pre-tax contributions to HSAs, and fixed indemnity plans if acquired with pre-tax dollars
- Health Insurance Tax (HIT)
 - Not applicable for 2019, tax applicable to all insured medical plans (3.1%-3.5% of premiums)
- Provides funding for Children's Health Insurance Program (CHIP) for another six years
- Medical device manufacturing tax- Tax not applicable for two years

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2 Pay or Play Mandate

Abridged Summary




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Employer Shared Responsibility



What to do next? Be prepared to Comply!



- **Applicable Large Employer (ALE) Determination**
 - Controlled group rules (identifying a parent/sister company)
 - FT and FTE calculations
- **FT Employee Determinations**
 - Implementation of measurement periods
 - Employee classifications
- **ACA Play or Pay (Internal Revenue Code Section 4980H)**
 - Offer of Minimum Essential Coverage (MEC) to 95% of FT employees
 - Assess actuarial value of plans (MVP: 60%)
 - Assess affordability
- **ACA Reporting & Appeals (IRC 6055 & 6056)**
 - Preparation and distribution of forms 1095/1094-C
 - Filing Forms with IRS
 - Appeal Exchange-Subsidy Notices
 - Letter 226J and supporting Forms

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Pay or Play Mandate

What are the penalties for failure to comply?
Employer Mandate Penalty Adjustment: The employer shared responsibility provisions provide for an inflation adjustment beginning in calendar years after 2014.

2015	2016	2017	2018
Adjusted penalty amount under IRC 4980H(a): \$2,060	Adjusted penalty amount under IRC 4980H(a): \$2,160	Adjusted penalty amount under IRC 4980H(a): \$2,260	Adjusted penalty amount under IRC 4980H(a): *\$2,320
Adjusted penalty amount under IRC 4980H(b): \$3,120	Adjusted penalty amount under IRC 4980H(b): \$3,240	Adjusted penalty amount under IRC 4980H(b): \$3,390	Adjusted penalty amount under IRC 4980H(b): *\$3,480 <small>* Projected amounts</small>

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Pay or Play Mandate

What's New for 2018?
Affordability of employee only coverage: Lowest cost plan that is minimum value – **decreases from 9.69% to 9.56%** based on one of the three safe harbors:

- 1 Rate of Pay:** (Hourly rate of pay x 130) 9.56% maximum amount to charge for employee only coverage would be less in 2018 than 2017.
Example: Employee earning \$11.00/hr, in 2017 cannot pay more than \$138.56 per month if the plan is to be deemed affordable, however in 2018, that same employee cannot pay more than \$136.70.
- 2 100% of Federal Poverty Level (FPL):** Calendar year plans must use 2017 FPL x 9.56%/12 to assess affordability (\$12,060 x 9.56%/12) \$96.07 per month.
Non-calendar year plans may use 2018 FPL guidelines which are \$12,140 X 9.56%/12 or **\$96.71** per month.
- 3 W-2 Safe Harbor:** Use box 1 of employee's W-2 earnings
 Must use projected 2018 income; amount cannot change throughout the year.
 Box 1 = gross earnings MINUS pre-tax deductions under a Cafeteria Plan and a 401(k) plan

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IRS Enforcement of the Play or Pay Penalty: 2015

Letter 226J issued to employer based on information found in Form 1094/1095-C

2015 Calendar Year - As of now primary enforcement of IRC 4980H(a)

IRS will issue Letter 226J notifying employer of penalty amount due under IRC 4980H(a) or (b)

Penalty triggered if one or more FT employees received a tax credit from an Exchange/Marketplace

ESRP Summary Table & Form 14765

- ESRP Summary: Lists violation and amount due for each month of the year
- Form 14765: Identifies employees who received a tax credit for each month and codes used in employee's Form 1095-C


Responding to Letter 226J

Employer confirms or contests penalty - Form 14764

- Respond within 30 days (date listed in Letter 226J) or request extension to reply
- Complete Form 14764, if agrees with penalty and submit payment
- Disagrees, completes form 14764, includes letter describing reason of disagreement, includes Form 14765 (if applicable) and other supporting documentation

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Common Reporting Mistakes Triggering Letter 226J



<p style="text-align: center;">1</p> <p style="text-align: center;">Form 1094-C Filing Errors</p> <ul style="list-style-type: none"> • Failure to check box C, Line 22 of Form 1094-C- Employers who qualify for transition relief must check box C, failure to check box C (transition relief) will result in the issuance of Letter 226J, even if the employer offered MEC to 70% of its FT employees for one or more months in 2015 [Line 23 column (a)] • Part III, Column (e)- If the employer qualified for transition relief, the employer should reflect Code A (50-99 relief) or B (non-calendar year relief for employers with 100 or more FT and FTE employees) 	<p style="text-align: center;">2</p> <p style="text-align: center;">Form 1095-C Filing Errors</p> <ul style="list-style-type: none"> • Failure to reflect a Code for Line 16: <ul style="list-style-type: none"> • If employee waives coverage, identify affordability safe harbor that applies (2F, 2G, 2H) • If coverage was not offered, was the employee on a Limited non-assessment period (2D) • If an employer qualifies for transition relief under 4980H (Line 22, box C Form 1094-C), Line 16 should reflect Code 2I for applicable months • Employee not employed for that month should use Code 2A • Employee terminated employment mid-month and lost coverage, or was offered coverage on the first pay period of 2015 – Code 2B 	<p style="text-align: center;">3</p> <p style="text-align: center;">ACA Reporting System Glitches</p> <ul style="list-style-type: none"> • If returns were e-filed, boxes were transposed, <ul style="list-style-type: none"> • Form 1094-C reflects that MEC was not offered for all 12 months • Wrong codes reported or no codes reported on Forms 1095-C • Forms 1095-C were issued to employees who were not FT employees in 2015 • IRS AIR system reflects a different number of employees than the information reported by the employer in Form 1094-C
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Recommendations for 2015 and Beyond



<ul style="list-style-type: none"> • Review 2015/2016 Forms 1094-C/1095-C to identify filing errors <ul style="list-style-type: none"> • Wrong code combinations for lines 14 and 16 of Form 1095-C • Columns were left blank in Form 1094-C/1095-C • Confirm Forms 1095-C were issued only to FT employees • Returns can be amended at any time by filing amended returns with the IRS/reissue Forms 1095-C to participants/employees • Ensure you are retaining records that reflect an offer of coverage was made to FT employees- signed waiver form, gather information as to why employees waive coverage 	<ul style="list-style-type: none"> • Review affordability of lowest cost plan offered to employees, define at the beginning of calendar year which affordability safe harbor will be used and ensure safe harbor is met for all employees • Retain copies of Summary of Benefits and Coverage and contributions • Conduct random audits of systems to ensure that coverage is being offered on a timely basis to newly eligible employees
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OSHA Retaliation Rules: ACA Section 1558



Whistleblower Protections

Grants protection to employees against employer retaliation for:


- Reporting ACA violations
- Cooperating with federal investigations
- Participating and/or cooperating in proceedings associated with alleged/actual violation of ACA Title I
- Refusing participation in policies/practices that would violate the ACA
- Receiving premium tax credits or cost sharing reductions for enrolling in qualified health plan

All of the following are deemed to be retaliatory actions under Section 1558:

- Firing or laying off
- Reducing pay or hours
- Blacklisting
- Demotion
- Denying overtime or promotion
- Denying benefits
- Failure to hire or rehire
- Intimidation
- Making threats
- Reassign affecting prospects for promotion

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OSHA Retaliation Rules: ACA Section 1558



Complaint Filing Process

- Employee must file complaint with Secretary of Labor within 180 days of the violation
- Secretary will review to determine if complaint meets certain basic requirements
- If the complaint meets the basic requirements, the Secretary must provide employer with notice of complaint, including allegations and evidence
- Employer has 60 days to respond to complaint, and meet with investigator to present evidence and witnesses
- After conducting investigation, the Secretary issues written findings
 - If findings establish "reasonable cause" the Secretary may issue preliminary order, including:
 - Full reinstatement including back pay and employee benefits
 - All attorneys' fees and costs
 - Compensatory damages
 - Affirmative action to abate the violation
- The employer or employee has 30 days after notification of findings to file objection. Objecting party may request a full hearing before administrative law judge of the Department of Labor.

A settlement agreement may be entered at any time during the complaint and response process. If the Secretary does not issue a final decision within 210 days after complaint has been filed, the employee may file in federal court.

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3

ACA Reporting

New Developments

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ACA Reporting



What's New for 2017 Reporting?
New reporting deadlines, IRS released draft instructions and draft forms!

<p>*March 2, 2018 Employees and covered participants</p> <ul style="list-style-type: none"> May request a 30-day extension to file returns by filing a request with the IRS <p><small>* IRS granted a 30-day automatic extension to distribute Form 1095-C /B to employees/covered participants</small></p>	<p>IRS Filing Deadlines remain unchanged</p> <ul style="list-style-type: none"> February 28, 2018: Paper submissions, if issuing less than 250 Forms April 2, 2018: Electronic submissions, either voluntary or required if issuing more than 250 Forms Form 8809: Automatic 30-day extension if filed by original due date 	<p>E-filing Still be performed via AIR System; advance IRS registration required to obtain a TC</p>
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Good faith compliance will extend to 2017 returns, penalties may be waived if failure was due to reasonable cause and not willful neglect

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AARP v. EEOC and the Future of Wellness Programs

Overview

- D.C. Court rules in favor of AARP (AARP was suing the Equal Employment Opportunity Commission).
- Court deems GINA and ADA final regulations, as *currently written*, did **not** adequately justify a wellness program (subject to the EEOC regulations) "being truly voluntary, where it imposes a 30% penalty."
 - D.C. Court did not hold that the final regulations in-fact made these plans "non-voluntary;" merely that the EEOC has not, to this point, provided enough "evidence" that these plans are truly voluntary.

Next Steps

- Final (current) GINA and EEOC rules are enforceable until at least 1/1/19 (at which time, rules are invalidated)
- Unknown if the EEOC will issue proposed regulations in the summer, creates uncertainty in wellness front
- Until further notice, final GINA and ADA rules are enforceable

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Fixed Indemnity Plans and IRS Guidance

Overview

IRS Issued a Memorandum in late January 2017 providing that:

- Fixed indemnity plans paid for by an employer or an employee on a pre-tax basis (via a Section 125 Plan) **MUST** be treated as wages (taxed) at the time the benefit is reimbursed to the employee
- Fixed indemnity plans include: hospital confinement, critical illness, or similar plans that pay a fixed amount per occurrence (for hospital care or physician services rendered)

May 2017- IRS issued additional guidance indicating that only expenses that are not adequately substantiated are treated as taxable income

Next Steps

- Identify how insurance carriers in the fixed indemnity market will accommodate taxation of benefits
 - Will they tax benefits paid to participants?
 - Notify employer's of tax liability and request that reimbursements be included in employee's income (W-2)?
- Employers can amend Cafeteria plan documents to exclude fixed indemnity plans (allow employees to pay for benefits on an after-tax basis)
 - Notify employees that indemnity plans can only be paid with after-tax dollars
- If benefits are being funded by employer, employer must either include premiums paid in employee's income, or notify employees they must now pay for premiums on an after-tax basis

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Final Disability Claims Procedures

Overview

Effective for disability claims filed on/after April 1, 2018 (effective date delayed 90 days from 1/1/2018)

- Establishes new claims procedures for disability plans subject to ERISA
 - Independence and impartiality in determination of claims and appeals
 - Enhanced disclosure requirements
 - Right to review and respond to new information before final decisions
 - Non-compliance = right of participant to file suit under ERISA

Next Steps

- Amend plan documents and summary plan descriptions to include new claims procedures
- Plan sponsors/administrators: understand the manner in which third-party service providers compensate/reward individuals who might be involved in deciding disability claims
- Plan administrators: carefully consider and document criteria used to select particular medical experts to opine on disability claim
- Review forms used to notify claimants of adverse benefit determinations to ensure all required topics are addressed
- Provide relevant information in proper languages if employees live in counties where at least 10% of residents are solely literate in a non-English language

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