

# EMPLOYEE BENEFITS: 2018 CHANGES AND ISSUES TO WATCH

34<sup>th</sup> Annual Labor & Employment Law Conference

Edward C. Hammond

(248) 988-1821

[ehammond@clarkhill.com](mailto:ehammond@clarkhill.com)

Charles M. Russman

(248) 988-5868

[crussman@clarkhill.com](mailto:crussman@clarkhill.com)

CLARK HILL

---

# WHERE ARE THE CHANGES COMING FROM?

- Tax reform
- Budget reconciliation
- IRS and DOL Guidance
- Best practices and industry shifts

---

# TRANSPORTATION BENEFITS

- What are transportation benefits? Paying for public transportation, commuter rail, parking and biking subsidies
- What changed?
  - Other than biking subsidies, employers can no longer deduct these costs
  - Bike subsidies are deductible for the next eight years
  - Schools are not off the hook, these benefits are now considered unrelated business taxable income (UBIT), creating parity with for-profit companies
  - Use of athletic facilities are also subject to UBIT
  - Consider increasing normal pay rather than provide a benefit with no real financial gain to you or the employees

---

# MOVING EXPENSES

- Moving expenses are increasingly common benefits, although the amount varies based on location, employer and position
- They are no longer excludable from employee income
- Still deductible to employers
- Consider offering a gross-up or additional taxable compensation rather than the benefit to make the employee whole for the costs of moving

---

## HSA CONTRIBUTION LIMITS

- Earlier this year, contribution limits for 2018 were \$3,450 for individuals and \$6,900 for families
- The IRS retroactively lowered the amount
- Now 2018 limits are \$3,450 for individuals and \$6,850 for families
- This may not seem like a significant change, but it is for those who have already contributed over \$6,850 or will during the year

---

# DISABILITY APPEALS

- ACA created the first significant changes to claims procedures in years
- Most changes are already in effect
- Disability appeals language needs to be changed, regardless of the type of plan
- The changes are primarily to avoid conflict of interest and provide more information to the person making the appeal
- If you have a fully insured plan, you may already be OK, but confirm with your insurance company and administrator

---

# EMPLOYEE ACHIEVEMENT AWARDS

- Employee Achievement Awards are tangible property for length of service or safety achievements
  - Still permissible with more clarity
  - The tangible property cannot be cash, gift cards, tickets to entertainment, vacations, meals, transportation or investments
  - Make sure the Employee Achievement Awards satisfy the newly clarified rules
  - Consider a de minimis benefit, which would not be a problem or sticking to things like watches, pens, plaques and the like
  - Other awards are permitted, but are treated as ordinary income

---

# UNREIMBURSED BUSINESS EXPENSES

- Employees cannot deduct unreimbursed business expenses
- This includes office supplies purchased at their own expense and without reimbursement
- Independent contractors can still deduct these expenses
- Consider whether pay and benefit allocation should be adjusted to reflect the loss of tax savings
- Alert employees to this change to ensure they are aware of it before filing taxes

---

# STUDENT LOAN ASSISTANCE

- This is an increasingly common benefit
- Providing it requires careful consideration and should be implemented only after the eligible employees understand the tax and loan implications
- This should always be a voluntary benefit and should not be provided through a cafeteria plan
- It will be taxable to the employee as ordinary income
- Providing this benefit can cause problems with or cancel other benefits of student loans, such as forgiveness

---

# AFFORDABLE CARE ACT PENALTIES

- Employer obligations remain the same, but liability could be reduced
  - The employer mandate to offer affordable minimum essential coverage remains in effect, as does 1094 and 1095 reporting
  - Individuals no longer have a mandate and penalty
  - Many believe fewer individuals will go to the exchange for coverage
  - If that happens, there could be a reduced penalty because fewer people are receiving the credits that trigger penalties

---

# AFFORDABLE CARE ACT LETTERS

- The IRS is issuing a lot of letters to companies claiming employer shared responsibility penalties are due
  - Receiving a letter does not mean something is wrong, but it does require prompt and careful attention
  - The penalty amount can be seem disproportionately high, well into the six and seven figures
  - Careful documentation is the best way to resolve the penalty assessments and reduce future risks

---

# AFFORDABLE CARE ACT DOCUMENTING COMPLIANCE

- With the rise of penalty letters and other audits, documentation is more important than ever
  - Affordability
  - Minimum Essential Coverage
  - When and how each employee received an offer of coverage
  - How you determine which employees are eligible
  - Waivers of coverage

---

# EMPLOYEE MEALS AND ENTERTAINMENT

- Before Tax Reform, employer could deduct 50% of the cost of meals, memberships and recreation
- Employers could also deduct 50% of meals and beverages expenses related to their business
- After Tax Reform, employers can only deduct 50% of meals and beverages expenses related to their business, not other meals, membership or recreation
- Review expense policies to determine if the tax changes warrant revision to the policies

---

# DATA PROTECTION

- Employers can now provide credit monitoring as a tax free benefit
- It should be provided on a voluntary basis
- Explaining the scope of the benefit and what (if any) information the employer receives
- Can only be provided tax free if no data breach has already occurred
- Popular with employees who do not want to worry about lapses in protection from other providers

---

# RETIREMENT PLAN LOAN REPAYMENT

- Plan loans are repaid through salary reductions, much like other contributions
- When an employee terminates, there is normally a default, but if a rollover occurs repayment may continue
- The old rule was the rollover had to occur 60 days after termination
- The new rule is the rollover can occur anytime before the income tax due date, with extensions
- Review your loan policy and decide how you want to address this
- Plan amendment should not be necessary, but training and revision of the procedures may be
- If you have standard paperwork provided to terminated employees, it should be reviewed
- Coordinate with third-party processors

---

# RETIREMENT PLAN HARDSHIP DISTRIBUTIONS

- Most plans permit hardship distributions using a Treasury Regulation safe harbor
- Hardship distributions are fairly restrictive, requiring loans to be taken first and other means of addressing the financial need are taken
- If a hardship distribution was taken, contributions to the plan were ceased for six months
- Hardship distributions have been made much easier to obtain
- Employees no longer need to take plan loans before taking a hardship distribution
- Treasury will be amending the Regulations to eliminate the requirement for contributions to cease for six months
- The changes apply to 401(k) and 403(b) plans starting with the next plan year (2019) and will likely require a plan amendment. Plan now to avoid compliance issues.

---

# TAX LEVY

- Previously, when an employee withdrew funds to pay a tax levy, the withdrawal was taxable, even if the levy turned out to be in error
- Beginning this year, individuals are permitted to recontribute the assets taken out because of a tax levy that was determined to be in error
- By allowing employees to recontribute, they are made whole for IRS errors
- Applies to 401(k), 403(b), 457(b) plans and IRAs
- Changes go into effect this year and may require a plan amendment. Discuss implementing this change at your next board or benefits committee meeting.

---

# AUTO-ENROLLMENT AND AUTO-ESCALATION

- These are not new matters, but they do require annual attention
  - If employees are being automatically enrolled, they should be provided with notice (including how to opt out), how to cancel or cease enrollment and other relevant information
  - Auto-escalation is not as popular, but can be very useful to you and your employees
  - Make sure you have an acceptable Qualified Default Investment Arrangement (QDIA)

---

# FIDUCIARY DUTIES

- Uncertain economic conditions are ripe for fiduciary breach claims
  - Review the scope of your fiduciary duties and who is sharing them with you
  - Conduct reviews of services providers and major products to ensure you are satisfying ongoing duties
  - Have clear documentation supporting fiduciary roles, decisions and processes
  - Fiduciary duties carry personal liability, making compliance all the more important

---

# MULTIEMPLOYER PLANS

- Multiemployer plan solvency has become increasingly concerning
- Recent estimates project PBGC funding to be insufficient for the defaults likely to occur over the next 10-12 years
- A Joint Select Committee has been appointed with 16 members of Congress with equal representation by party and house
- The goal is to provide recommendations and proposed language to help the PBGC and plan solvency

---

# RECHARACTERIZATION OF ROTH CONVERSIONS

- This is not an employer or school issue, but it is was increasingly common for individuals
- You can still convert a Roth IRA to a Traditional IRA and a Traditional IRA to a Roth IRA
- However, you can no longer switch back and forth

---

## **\$1 MILLION DEDUCTION LIMIT CHANGES**

- Historically, publicly traded companies were limited to a deduction of \$1 million for compensation to the CEO and the highest paid officers, unless the compensation was performance based (and met other criteria)
- These rules now apply to the CEO, CFO and three highest paid officers, whose compensation must be reported to shareholders
- Once the rules apply to an individual, they continue to apply, even if the individual is no longer in one of those roles
- The exemption for performance based compensation was eliminated
- If you have existing compensation that was subject to or exempt from the rule, it is critical to reassess that compensation to ensure compliance

---

# WITHHOLDING

- Tax Reform created new tax brackets that will impact many employees and their withholding
- The IRS recently released a new W-4 to reflect these changes
- There is also an updated calculator on the IRS website to use for determining the right amount of withholding
- A new W-4 is not required, but changes to your withholding should occur as soon as possible, if not already in effect
- Notify employee that due to tax changes they may want to change their withholding election (depending on their circumstances) and that if they want a change, to complete a form (available at the IRS website) and submit it to you
- 22% is now the default withholding rate on supplemental wages

---

## QUESTIONS?



Edward C. Hammond

(248) 988-1821

[ehammond@clarkhill.com](mailto:ehammond@clarkhill.com)



Charles M. Russman

(248) 988-5868

[crussman@clarkhill.com](mailto:crussman@clarkhill.com)

# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

CLARK HILL