

# Office Hours

2019 Year in Review:

Plus What Lies Ahead in 2020!

Audio

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# ICYMI: Recent Office Hours Library

<http://www.theabdteam.com/abd-insights/presentations/>

- **Individual Coverage HRAs:**  
The ICHRA Revolution Begins January 1, 2020
- **COBRA Continuation Coverage:**  
The Top Five Issues for Employers
- **Section 125 Cafeteria Plans:**  
The Top Five Issues for Employers
- **Go All the Way With HSA:**  
Everything HDHP/HSA You Need to Know
- **Mergers and Acquisitions:**  
The Top Five Issues for H&W Employee Benefits Plans
- **Medicare for Employers:**  
The Top Five Issues for Group Health Plans
- **Health Benefits While on Leave:**  
The Rules All Employers Need to Know
- **Health Benefits for Domestic Partners:**  
Review of the Tax and Coverage Rules for Employers

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# Agenda

## ACA

- **ACA Marches On During Appeals**
  - Court Strikes Entire ACA (Appeals Update)
  - ALE Status Reminder
  - 2020 Increased Employer Mandate Penalties
  - 2020 Increased Affordability Safe Harbors
  - Pay or Play Penalty Letters Still Incoming
  - Appealing Employer Exchange Notices
  - 2020 ACA Reporting Deadline Extended
  - Surprise! PCORI Fees Extended to 2029
  - Cadillac Tax Fully Repealed—Wow!
  - Insurance Premium Tax Repealed as of 2021
  - Insured Nondiscrim Rules Indefinitely Delayed
  - Association Health Plans Under Attack
  - 2020 Individual Coverage HRAs (ICHRAs)
  - 2020 Excepted Benefit HRAs (EBHRAs)

## Non-ACA

- **HSA Updates**
  - Preventive services list expands for HDHPs
  - Proposed Medicare fix has two major flaws
  - What is the long-term vision for HSAs?
- **401(k) Plan Quick Updates**
  - Hardship distribution changes for 2020
  - SECURE Act includes many changes
- **California State Law Updates**
  - New FSA claims submission deadline notice rule for 2020
  - New Registered Domestic Partner Definition
  - New state-based individual mandate for 2020
  - PFL expands to eight weeks in July 2020
- **San Francisco Ordinance Updates**
  - 2020 SF PPLO Updates and Limits
  - 2020 SF HCSO Updates and Limits

A person's hands are shown holding a pen over a document. The document features a bar chart with several bars of varying heights. The entire scene is overlaid with a semi-transparent pink filter. The text 'ACA Marches On' is in a light pink color, and 'What's the Latest?' is in white.

# ACA Marches On **What's the Latest?**

# ACA Still in Court: Individual Mandate Unconstitutional

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/cadillac-tax-fully-repealed>

## District Court Decision Based on Individual Mandate and Severability

- At the end of 2017, the TCJA zeroed out the individual mandate as of 2019
- 20 Republican state attorneys general, as well as the federal government DOJ in part, argued that the individual mandate is no longer constitutional without the tax
- Original 2012 U.S. Supreme Court decision upheld the individual mandate as a tax
- The federal court in this case found the individual mandate is no longer constitutional as a tax now that there is no revenue mechanism
- Further found that there is no severance clause in the ACA covering the individual mandate, and looked to 2010 Congress intent finding the individual mandate to be “essential” to the ACA as a whole
- *Therefore, the court struck the entire ACA because the individual mandate is inseverable*

## Appeals Court Remands Back to District Court for More Severability Analysis

- **The court’s decision has no effect until the appeals process is complete!**
- Fifth Circuit Court of Appeals agreed with the District Court that the individual mandate is no longer constitutional because the TCJA eliminated its ability to operate as a tax
- However, the Fifth Circuit questioned the District Court’s severability determination
- **Remanded the case back to the District Court to re-analyze whether parts of the ACA may remain by reviewing the severability of the individual mandate with greater precision**
- Just a speed bump for the case, which is almost certainly headed to the Supreme Court

# Potential Post-ACA Landscape:

## ABD Commentary

### Health Care Reform, Round 3: Third Time's the Charm

- <http://www.theabdteam.com/abd-insights/newsletter/abd-commentary-health-care-reform-round-3-third-time's-charm>
- Proposal for bipartisan route to health care reform
- Focuses on employer-sponsored coverage as consensus-builder
- Combination of employer mandate pay or play repeal, and ACA reporting repeal, paired with numerous proposed child care reforms (championed primarily by Ivanka Trump)
- Should be sufficient bipartisan support for the package to avoid reconciliation complexities

### HSAs to Lead the Way After ACA

- <http://www.theabdteam.com/abd-insights/newsletter/abd-commentary-hsas-lead-way-after-aca>
- An in-depth look at the radical HSA revolution that may be at head in the near future
- Doubling the HSA contribution limit will put intense new emphasis on the value of HSAs as a triple-tax-advantaged investment vehicle
- The ability to use HSAs to pay for premiums unlocks the potential for major individual market advancement
- Employer opt-out credit structures could lead to many employees seeking individual market coverage with large employer HSA contributions as an alternative to group coverage

# ACA After Obama: Trump Executive Order

Full Alert: <http://www.theabdteam.com/abd-insights/newsletter/compliance-alert-first-step-trump-signs-aca-executive-order>

## First Step: Trump Signs ACA Executive Order Day 1

- One of President Trump's first pen strokes upon taking office was to sign an executive order related to the ACA
- Directs all executive agencies within the new Trump administration (including the three key players with respect to ACA: The Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury) to **“minimize the unwarranted economic and regulatory burdens of the [ACA].”**
- Directs the Departments to **“exercise all authority and discretion available to them to waive, defer, grant exemption from, or delay the implementation of any provision or requirement of the [ACA] that would impose...a cost, fee, tax, penalty, or regulatory burden”** on essentially any individual or other entity that could be affected by the ACA.

## Practical Effect

- **Employers should view the executive order as primarily symbolic**
- The ACA's provisions that affect employers are almost all fully effective and implemented with final regulations at this point.
- **There is little that any executive action could do to immediately provide relief to employers with respect to the key features of the ACA that create potential liability—including the employer mandate pay or play rules and the ACA reporting requirements**

# Employer Mandate “Pay or Play” Applicable Large Employer Status

## Full Guide: ABD 2020 ACA Employer Mandate Pay or Play and ACA Reporting Guide

An employer is an applicable large employer (ALE) in the current year if it employed (along with all members of its controlled group) an average of at least **50 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year**. For purposes of determining whether an employer is an ALE, the employer must convert part-time employees into full-time equivalents. (Note: Special rules apply for seasonal workers and certain veterans.)

### ALE CALCULATION

- **Step 1:** Calculate the number of full-time employees for each calendar month in the preceding calendar year. For purposes of this calculation only, full-time employee means those who worked at least 120 hours of service in a month. (Note that for all other purposes under the pay or play rules, full-time is 130 hours of service per month.)
- **Step 2:** Calculate the number of full-time equivalents for each calendar month in the preceding calendar year as follows:
  - *Step A:* Calculate the aggregate hours of service in a month for employees who are not full-time employees for that month (i.e., did not work at least 120 hours of service in that month).
  - *Step B:* Divide the total hours of service from Step A by 120. The result is the number of full-time equivalent employees for the month.
- **Step 3:** Add the number of full-time employees and full-time equivalents obtained in Steps 1 and 2 for each month of the preceding calendar year.
- **Step 4:** Add up the 12 monthly numbers from Step 3 and divide the sum by 12. This is the average number of full-time employees (including full-time equivalents) for the preceding calendar year.
- **Step 5:** If the number obtained in Step 4 is less than 50, then the employer is not an ALE for the current calendar year. If the number obtained in Step 4 is 50 or more, the employer is an ALE for the current calendar year.

### EXAMPLES

- **Example 1:** Employer’s controlled group averaged 43 full-time employees (including full-time equivalents) in 2019.
- **Result 1:** Employer is not an ALE in 2020.
- **What Does Result 1 Mean?:**
  - Employer is not subject to pay or play (no potential §4980H penalties) in 2020
  - Employer is not subject to ACA reporting (§6055/ §6056 via Forms 1094-C and 1095-C) for the 2020 calendar year that is reported at the beginning of 2021. (Note: §6055 reporting via Forms 1094-B and 1095-B will apply if the employer offered a self-insured medical plan.)
- **Example 2:** Employer’s controlled group averaged 55 full-time employees (including full-time equivalents) in 2019.
- **Result 2:** Employer is an ALE in 2020.
- **What Does Result 2 Mean?:**
  - Employer is subject to potential pay or play penalties (under §4980H) in 2020
  - Employer is subject to ACA reporting (§6055/ §6056 via Forms 1094-C and 1095-C) for the 2020 calendar year that is reported at the beginning of 2021.

# The ACA's Employer Mandate “Pay or Play” §4980H Penalties

Full Guide: [ABD 2020 ACA Employer Mandate Pay or Play and ACA Reporting Guide](#)

- §4980H(a)—The “A Penalty”
  - Aka: The “Sledge Hammer Penalty”
  - **Failure to offer MEC to at least 95% of all full-time employees (and their children to age 26) in 2016 and beyond**
  - The A Penalty is triggered by at least one such full-time employee who is not offered MEC enrolling in subsidized exchange coverage
  - **2020 A Penalty liability is \$2,570 annualized (\$214.17/month) multiplied by all full-time employees**
    - **30 full-time employee reduction from multiplier in 2016 and beyond**
- §4980H(b)—The “B Penalty”
  - Aka: The “Tack Hammer Penalty”
  - Applies where the employer is not subject to the A penalty
  - **Failure to:**
    - 1) Offer coverage that’s affordable**
    - 2) Offer coverage that provides MV**
    - 3) Offer MEC to a full-time employee (where the employer has still offered at a sufficient percentage to avoid A Penalty liability)**
  - The B Penalty is triggered by any such full-time employee enrolling in subsidized exchange coverage
  - **2020 B Penalty liability is \$3,860 annualized (\$321.67/month) multiplied by each such full-time employee who enrolls in subsidized exchange coverage**
    - Note that although the B Penalty amount is higher (\$3,860 vs. \$2,570), the multiplier is generally much lower (only those full-time employees not offered affordable/minimum value coverage who enroll in subsidized exchange coverage)

# Affordability Safe Harbors

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/how-2020-aca-affordability-decrease-978-affects-employers>

The ACA employer mandate pay or play affordability safe harbors are indexed to inflation in the same manner as affordability is determined on the exchange. For 2020, the applicable percentage decreases to 9.78% (down from 9.86% in 2019).

- **2020 Federal Poverty Line Safe Harbor:** 9.78% of the Federal Poverty Line

*2019 Federal Poverty Line (Continental U.S.): \$12,490*

*2020 Monthly Employee-Share of Premium for Lowest-Cost Plan Limit: \$101.79*

- **2020 Rate of Pay Safe Harbor:** 9.78% of Rate of Pay

*Hourly Employees: 9.78% of Employee's Hourly Rate of Pay x 130*

*Salaried Employees: 9.78% of Employee's Monthly Salary*

- **2020 Form W-2 Safe Harbor (Not Recommended):** 9.78% of Box 1 Wages

*Form W-2 safe harbor provides no predictability because Box 1 unknown until January of following year*

*Box 1 does not include many forms of compensation, including 401(k) deferrals and Section 125 salary reductions for health and welfare plan coverage*

*May work if employer sets employee contribution amount at a fixed percentage of income—but most employers aren't interested in this approach*

# ACA Employer Mandate Pay or Play: Responding to Letters from the Exchange

Full Alert: <https://www.theabdteam.com/blog/when-to-appeal-covered-california-employer-notices/>

ABD Office Hours Webinar: [Section 1411 Certifications \(Notices from the Exchange\)](#)

## Employer Exchange Notices are the First Bite at the Apple!

- Notifies employers that employee has been conditionally approved by the exchange for the Advance Premium Tax Credit (exchange subsidies)
- These subsidies trigger ACA employer mandate pay or play penalties
- **Employers care:** Remove subsidy, remove §4980H penalty (no later Letter 226J)
- **Employees care:** Remove subsidy, remove need to pay it back on tax return

Employer Exchange Notice Approach	<u>Employer Offered Affordable/MV MEC</u>	<u>Employer Did NOT Offer Affordable/MV MEC</u>
<u>Full-Time Employee</u>	<p><u>Strongly Recommend Appeal</u></p> <ul style="list-style-type: none"> <li>• Prevent ACA Employer Mandate §4980H Penalties</li> <li>• Prevent Repayment of APTC</li> </ul>	<p><u>Do Not Appeal</u></p> <ul style="list-style-type: none"> <li>• Employer will receive Letter 226J with §4980H penalties</li> </ul>
<u>Part-Time Employee</u>	<p><u>Consider Appeal</u></p> <ul style="list-style-type: none"> <li>• Prevent Repayment of APTC</li> </ul>	<p><u>Do Not Appeal</u></p> <ul style="list-style-type: none"> <li>• Nothing to appeal here</li> </ul>

# ACA Employer Mandate Pay or Play: Penalties Are Real

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/abd-compliance-alert-aca-pay-or-play-penalty-letters-coming-“late-2017”>

## IRS Letter 226J

- Applicable Large Employers (ALEs) have been receiving ACA employer mandate penalty assessments since late 2017
- ALEs informed throughout 2019 of prior year penalty assessments
- Many penalties were the result of ACA reporting errors on the Forms 1094-C and 1095-C
- Explanation of reporting errors and corrected codes usually removes penalties
- Keep relevant data because Letters 226J are generally for two years prior
- Review full alert for details on how to respond to Letter 226J

Dear

We have made a preliminary calculation of the Employer Shared Responsibility Payment (ESRP) that you owe.

### **Proposed ESRP \$ [XXXXXX]**

Our records show that you filed one or more Forms 1095-C, Employer-Provided Health Insurance Offer and Coverage, and one or more Forms 1094-C, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns, with the IRS. Our records also show that for one or more months of the year at least one of the full-time employees you identified on Form 1095-C was allowed the premium tax credit (PTC) on his or her individual income tax return filed with the IRS. Based on this information, we are proposing that you owe an ESRP for one or more months of the year.

# ACA Reporting: 2020 Deadlines Extended (Yet Again)

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/2020-aca-reporting-deadline-2019-forms-extended-30-days-again>

## Identical 30-Day Extension from Prior Three Years

- 30-day extension applies only to the deadline for providing the forms to individuals
- Applies to 2019 Forms 1095-B and 1095-C provided at the beginning of 2020
- Deadlines to file with the IRS remain standard
- Also extends the good faith enforcement safe harbor for 2019 forms filed in 2020 filings to avoid penalties for incorrect or incomplete information (generally \$270 per return)
- **REMEMBER: Must provide and file timely to utilize the good faith enforcement safe harbor**

### 2020 ACA Reporting Deadlines:

#### • **2019 Forms 1095-B and 1095-C:**

##### Deadline to Furnish to Individuals

*Standard Due Date: January 31, 2020*

**Extended Due Date: March 2, 2020**

#### • **2019 Forms 1094-B and 1094-C (+Copies of Forms 1095-B/1095-C):**

##### Deadline to File with IRS by Paper

*Standard Due Date: February 28, 2020*

#### • **2019 Forms 1094-B and 1094-C (+Copies of Forms 1095-B/1095-C):**

##### Deadline to File with IRS Electronically (Required for 250 or More Returns)

*Standard Due Date: March 31, 2020*

# ACA Reporting: 2020 Relief for Carriers (Not Employers)

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/2020-aca-reporting-deadline-2019-forms-extended-30-days-again>

## IRS Provides “2019 Section 6055 Furnishing Relief” for Insurance Carriers

- The TCJA effectively repealed the ACA individual mandate by reducing penalties to zero as of 2019
  - Therefore, the Form 1095-B generally provided by the insurance carrier no longer has a clear reporting purpose under IRC §6055

IRS therefore provided that it will not assess penalties on insurance carriers for failure to furnish Forms 1095-B to individuals under two conditions:

- 1) The insurance carrier posts a notice prominently on its website stating that individuals may receive a copy of their Form 1095-B upon request; and
- 2) The insurance carrier furnishes a 2019 Form 1095-B to any individual upon request within 30 days of the date it receives the request.

## Employers Still Required to Complete ACA Reporting Via Form 1095-C

- The ACA employer mandate still remains fully in effect
  - Therefore, employers still must furnish and file the Forms 1095-C
- Employers sponsoring a self-insured medical plan still must complete Part III of the Form 1095-C for any full-time employee
  - Still required even though that information in Part III is related to the §6055 reporting requirements
- California (2020) and New Jersey (2019) have state-based individual mandates that rely on the Form 1095-B (fully insured plan) and Part III of the Form 1095-B (self-insured plan) information
  - May eventually need to develop a state form like the Massachusetts Form MA 1099-HC) for this purpose

# The ACA: PCORI Fee Extended to 2029 (Surprise!)

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/annual-pcori-fee-deadline-coming-july-31st-0>

## Congress Extends PCORI Fee for Ten More Years (to 2029)

- 2019 was originally to be the final year PCORI fees and filings were required
- Major industry groups (AHIP, BCBSA, ERIC, NRF, US Chamber) pushed for 10-year extension to 2029—and in Q4 bipartisan draft legislation leaked providing for the 10-year extension
- That legislation was ultimately incorporated into the same massive “Further Consolidated Appropriations Act, 2020” as with several other ACA-related items
- Employers with self-insured medical plans still need to file and pay for the PCORI fee!
- **Only employers with a self-insured major medical plan and/or HRA must file for and pay the PCORI fee (the insurance carrier files/pays for fully insured plans)**

PCORI Fees	<u>July 31, 2020</u> <u>Form 720 PCORI Filing</u>	<u>July 31, 2021</u> <u>Form 720 PCORI Filing</u>
Plan Year Ends January 1 – September 30	<ul style="list-style-type: none"> <li>• Applicable rate: \$2.45 per covered individual</li> </ul>	<ul style="list-style-type: none"> <li>• Applicable rate: TBD</li> </ul>
Plan Year Ends October 1 – December 31	<ul style="list-style-type: none"> <li>• Applicable rate: TBD</li> </ul>	<ul style="list-style-type: none"> <li>• Applicable rate: TBD</li> </ul>

# The ACA: The Cadillac Tax Fully Repealed!

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/cadillac-tax-fully-repealed>

ABD Office Hours Webinar: [The Cadillac Tax Part I: Fight the Future](#)

On December 20, 2019, President Trump signed into law a massive appropriations bill that finally and mercifully put an end to the Cadillac Tax delay charade with a full repeal

The Cadillac Tax was previously delayed twice (from 2018 to 2020, from 2020 to 2022)

*The Cadillac tax would have provided that health coverage exceeding a statutory dollar limit (generally a baseline of \$10,200 for employee-only coverage, \$27,500 for family coverage) be considered an “excess benefit” subject to a 40% excise tax*

## Two Main Reasons Why Congress Previously Only Delayed the Tax:

- 1) **Political:** Preserve the argument that the ACA was fully paid for. President Obama also supported it to discourage “fancy plans that end up driving up costs.”
  - 2) **Revenue:** CBO and JCT scored the Cadillac Tax as an enormous revenue raiser (roughly \$90 billion over ten-year budget window). Previous full repeal efforts stalled because of attempts to replace the lost revenue—which ultimately did not occur.
- *Repeal of the Cadillac Tax is an enormous victory for employer-sponsored coverage*
  - Employers would have been forced to make serious benefit cuts to avoid the tax if it actually took effect—and it’s very questionable whether employers would have accounted for such benefit decreases by providing commensurate taxable cash compensation

# The ACA: Insurance Premium Tax Repealed After 2020

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/cadillac-tax-fully-repealed>

In the same massive appropriations bill that repealed the Cadillac Tax, the health insurance premium tax was also repealed effective in 2021

The repeal comes after two moratoriums of the tax in previous years

*After 2020, the ongoing saga of this on again, off again tax will finally end*

When Did the Health Insurance Premium Tax Apply?:

- **2014 – 2016: Premium tax in effect**
  - **2017: Moratorium year (tax did not apply)**
  - **2018: Premium tax in effect**
  - **2019: Moratorium year (tax did not apply)**
  - **2020: Tax in effect**
  - **2021 and Beyond: Premium tax repealed**
- Most estimates are that the premium tax added roughly 2.5% to 4% to the premium cost
  - The tax applied only to fully insured health plans (self-insured plans were not subject)
  - The tax was already incorporated into 2020 premium costs, so repeal delayed to 2021

# The ACA: Fully Insured Plan Nondiscrimination Rules Delayed Indefinitely

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/cadillac-tax-fully-repealed>

The ACA provides that insured group health plans will be subject to rules “similar to” the nondiscrimination requirements that have long applied to self-insured plans under Internal Revenue Code §105(h)

- These rules technically were scheduled to apply at the same time as the first wave of market reforms (first plan year on or after September 23, 2010)
- However, the IRS issued Notice 2011-1 at the end of 2010 confirming that employers are not required to comply until the Departments issue regulations or other administrative guidance to implement the rules

The Notice states that any such guidance will not apply until plan years beginning a specified period after issuance

- For example, they may not apply until the first plan year beginning on or after six months following the regulatory issue date
- Indications are that these rules are not a high priority and are not likely to be imminently issued
- One of the few employer-side ACA items that may actually be affected by Trump EO

# Association Health Plans

ABD Comment to DOL: <https://www.regulations.gov/contentStreamer?documentId=EBSA-2018-0001-0672&attachmentNumber=1&contentType=pdf>

In June 2018, to DOL issued new final regulations on the definition of “Employer” under ERISA. These are typically referred to as the “Association Health Plan” regulations.

## The Old Rules: Plan MEWAs (“Industry Trusts”)

### Two Components to the Test:

#### 1) Commonality of Interest:

- The association maintaining the plan and all participating employers must be tied by a common economic or representational interest
- Primary purpose of association can't be for health coverage

#### 2) Control Test:

- Requires that participating employers of the association control the activities and operations of the plan

## The New AHP Regulations: AHPs (“Regional Trusts”)

### Relaxed Commonality of Interest Standards:

- Association members can be participating employers with simply a regional connection (as broad as a state or metro area)
- Primary purpose of association can be for health coverage as long as it has at least one other substantial business purpose

### Federal Court Vacates Rule:

- On March 28, 2019, D.C. District Court rejected new AHP rules as inconsistent with ERISA definition of “employer”
- Currently on appeal in D.C. Circuit Court

### State Law Barriers:

- California and other states have already blocked all AHPs (SB 1375, APL 19-024)

# ACA Background: Prior Individual Coverage Guidance

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/final-regulations-permit-individual-coverage-hras-2020>

ABD Office Hours Webinar: ABD Office Hours Webinar: Individual Coverage HRAs (ICHRAs)

## The Friday the 13<sup>th</sup> Guidance (September 13, 2013)

*IRS Notice 2013-54; DOL Technical Release 2013-03*

- The beginning of a long series of (particularly IRS) guidance confirming the ACA prohibition of individual coverage payment/reimbursement by employers
- **Guidance provided that employers cannot directly purchase individual policies or reimburse employees for the cost of individual policies through an “Employer Payment Plan” or a “Non-Integrated HRA”**

## The IRS ACA Potluck Guidance (2015)

*IRS Notice 2015-17; IRS Notice 2015-87*

- Additional guidance reiterating the IRS prohibition of Employer Payment Plans and Non-Integrated HRAs
- Confirmed that even taxable reimbursements are prohibited, and that integration rules apply to employees, spouses and dependents

## Penalties

*IRC §4980D*

- Employers offering an Employer Payment Plan or Non-Integrated HRA for employer reimbursement of individual policies violates the ACA market reform rules
- **Penalty is \$100/day/employee excise taxes—resulting in potential penalties of \$36,500 per employee per year**

# Executive Order 13813: Direction to Issue New Regulations

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/final-regulations-permit-individual-coverage-hras-2020>

ABD Office Hours Webinar: [ABD Office Hours Webinar: Individual Coverage HRAs \(ICHRAs\)](#)

EXECUTIVE ORDERS

## Presidential Executive Order Promoting Healthcare Choice and Competition Across the United States

— HEALTHCARE | Issued on: October 12, 2017



Sec. 4. Expanded Availability and Permitted Use of Health Reimbursement Arrangements. Within 120 days of the date of this order, the Secretaries of the Treasury, Labor, and Health and Human Services shall consider proposing regulations or revising guidance, to the extent permitted by law and supported by sound policy, to increase the usability of HRAs, to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with nongroup coverage.

# Individual Coverage HRAs: The New Landscape in 2020

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/final-regulations-permit-individual-coverage-hras-2020>

ABD Office Hours Webinar: [ABD Office Hours Webinar: Individual Coverage HRAs \(ICHRAs\)](#)

## Final Rules Effective Plan Years Beginning On or After January 1, 2020: Individual Coverage HRAs (ICHRAs) Permitted With Seven Conditions

1

### **Employees Covered by ICHRA Must Be Enrolled in an Individual Policy**

- Employees who lose coverage under the individual policy forfeit the HRA

2

### **Employees Must Not Be Eligible for Both ICHRA and Traditional Plan**

- Must exclude employees eligible for the ICHRA from eligibility for the traditional employer-sponsored major medical group health plan (GHP)
- Specific class rules on which employees can be offered the ICHRA vs. the traditional GHP
- Specific class size rules to ensure that the classes are legitimate
- Employers may also set any date on or after January 1, 2020 for which new hires as its own separate class are offered the ICHRA, while still offering the traditional GHP to employees hired prior to that date

3

### **Employers Must Offer the ICHRA on Same Terms to Each Employee Class**

- Cannot offer a more generous ICHRA based on adverse health conditions
- Can increase ICHRA allocation based on age or number of dependents
- Larger allocations of up to 3x the youngest participant permitted for older employees (no set limit on dependent adjustment allocations)

# Individual Coverage HRAs

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/final-regulations-permit-individual-coverage-hras-2020>

ABD Office Hours Webinar: ABD Office Hours Webinar: Individual Coverage HRAs (ICHRAs)

## Final Rules Effective Plan Years Beginning On or After January 1, 2020: Individual Coverage HRAs (ICHRAs) Permitted With Seven Conditions

4

### Opt-Out Required

- Employees must have the option to opt-out of the HRA coverage to maintain eligibility for subsidies on the Exchange (the §36B premium tax credit)

5

### Employee Pre-Tax Contributions Permitted Off Exchange

- ACA added §125(f)(3) prohibiting employee pre-tax salary reduction contributions toward coverage on the Exchange
- However, employer may permit employees to use Section 125 cafeteria plan to contribute on a pre-tax basis to non-Exchange individual market coverage
- Important because ICHRA may not cover the full cost of the premium

6

### Substantiation and Verification of Individual Coverage Required

- ICHRA must have reasonable procedures in place to verify that employees are actually enrolled in individual policy
- Can include third-party (carrier) documentation or employee attestation
- Model attestation forms (annual and monthly) available from the DOL

7

### Notice Requirement

- Employer must provide written notice to eligible employees at least 90 days prior to the start of each plan year describing the ICHRA terms
- Model notice available from the DOL

# Excepted Benefit HRAs:

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/final-regulations-permit-individual-coverage-hras-2020>

ABD Office Hours Webinar: [ABD Office Hours Webinar: Individual Coverage HRAs \(ICHRAs\)](#)

## Final Rules Effective Plan Years Beginning On or After January 1, 2020: Excepted Benefit HRAs (EBHRAs) Permitted With Four Conditions

*Another new option in 2020 allowing employers to offer an HRA of up to \$1,800 that is not integrated with individual market (or any other) coverage. Expands the current definition of “excepted benefits” not subject to ACA market reform provisions for EBHRA.*

1

### **EBHRA is Not Integral to Part of the Plan (Eligibility for Traditional GHP)**

- Only employees eligible for traditional GHP can be eligible for EBHRA
- Employees do not have to actually enroll in the traditional GHP

2

### **EBHRA Must Provide Benefits That Are Limited in Amount**

- Amounts made newly available for a plan year cannot exceed \$1,800
- Indexed for inflation for plan year 2021 and beyond (C-CPI-U)

3

### **EBHRA Cannot Reimburse Premiums (Individual or Group)**

- The only permitted premiums would be excepted benefits like dental or vision coverage, COBRA premiums, and in some cases STLDI premiums

4

### **EBHRA Must Be Available Under Same Terms to All Similarly Situated**

- The EBHRA must be available to all similarly situated individuals on the same terms regardless of any health factor



**HSA Updates**  
**New Preventive Services**  
**(Optional)**

# New Preventive Services Permitted

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/irs-expands-definition-preventive-care-hdhrs>

## IRS Expands List of First-Dollar Preventive Care to Chronic Conditions

- President Trump issued an executive order in June 2019 directing the IRS to issue guidance expanding the list of HDHP preventive services
- In July 2019, the IRS issued Notice 2019-45 to add certain medical services and items, including prescription drugs, relating to preventing exacerbation of a chronic condition (or the development of an associated secondary condition)
  - The Notice highlights that the Treasury Department and IRS are aware that cost barriers for care related to chronic conditions can result in some individuals failing to seek or utilize effective and necessary care that would prevent exacerbation of the chronic conditions

## Reminder: Preventive Care Not Subject to Minimum Deductible

- HDHPs may (and typically do) provide first-dollar coverage for preventive care
  - These items and services are not subject to the minimum statutory deductible of \$1,400 for single coverage and \$2,800 for family coverage (2020)
- “Preventive care” already included:
  - Periodic health evaluations, including annual physicals
  - Routine prenatal and well-child care
  - Child and adult immunizations
  - Tobacco cessation programs
  - Obesity weight-loss programs
  - Screening services (long list in IRS Notice 2004-23)
  - All ACA preventive services required to be provided without cost sharing for non-grandfathered health plans
  - **New for 2020: Items and services related to exacerbation of a chronic condition**

# New Preventive Services Permitted

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/irs-expands-definition-preventive-care-hdhrs>

## Reminder: New (and Old) Preventive Services are Not Required

- The new guidance simply permits HDHRs to offer these new chronic condition-related preventive services as first-dollar coverage (i.e., not subject to the deductible)
- Each plan is taking a different approach to if/when it will adopt these optional new services
  - Check your plan terms for more details!

## The New Chronic Condition Preventive Services (IRS Notice 2019-45)

<u>Preventive Care for Specialized Conditions</u>	<u>For Individuals Diagnosed with:</u>
ACE Inhibitors / Beta Blockers	<i>Congestive Heart Failure and/or Coronary Artery Disease</i>
Inhaled Corticosteroids / Peak Flow Meter	<i>Asthma</i>
Insulin and Other Glucose Lowering Agents / Glucometer / Retinopathy Screening / Hemoglobin A1c Testing / Statins	<i>Diabetes</i>
LDL Testing / Statins	<i>Heart Disease</i>
Anti-Resorptive Therapy	<i>Osteoporosis and/or Osteopenia</i>
INR Testing	<i>Liver Disease and/or Bleeding Disorders</i>
SSRIs	<i>Depression</i>
Blood Pressure Monitor	<i>Hypertension</i>

# HSAs and a Bipartisan Medicare Fix?

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/hsa-bills-increasing-contributions-and-expanding-access-pass-house>

## H.R. 3766: Health Savings For Seniors Act

- Two Democrat and two Republican cosponsors
- Rep. Bera (D-CA), Rep. Smith (R-MO), Rep. Roybal-Allard (D-CA), Rep. Kelly (R-PA)
- **Would permit individuals enrolled in Medicare to be HSA eligible**
- Currently enrollment in any part of Medicare blocks individuals from making or receiving HSA contributions
- **See our post for full details: <https://www.theabdteam.com/blog/how-medicare-affects-hsa-eligibility/>**
- *Govtrack.us estimates a 1% chance of being enacted*

## Two Major Downsides

- The bill's pay-for provisions arguably make the bill a net negative overall for HSAs
- 1) **Eliminates the ability to use the HSA to pay for Medicare premiums on a tax-free basis**
  - Currently you can use accumulated HSA funds to pay for any Medicare premium on a tax-free basis (other than Medicare supplement premiums, such as Medigap)
- 2) **Eliminates the exemption from the 20% additional tax when you reach age 65**
  - Currently upon reaching age 65 you can use accumulated HSA funds for non-medical distributions and only pay ordinary income tax (in the same manner as a traditional 401(k) or IRA distribution)

# HSA's and the (Post-ACA) Future?

## Graham-Cassidy Bill Was the Last ACA Repeal/Replace Attempted

- Bill focused on state block grants to provide more flexibility for states to address health care reform
- Came close to receiving enough support in September 2017 despite lingering quietly for most of the year, but ultimately came up just short when three Senators announced they could not support the bill
- **President Trump's proposed budget for FY 2020 proposes ACA repeal and replaces with Graham-Cassidy**

## HSA Changes Proposed in Graham-Cassidy

### 1) **Doubling the Contribution Limit**

- Increasing the HSA annual contribution limit to match the HDHP OOPM (2020: \$6,900 / \$13,800)

### 2) **Return to 10% Additional Tax**

- Additional tax for non-medical distributions prior to age 65 would decrease from ACA 20% level to 10%

### 3) **Spousal Catch-Up Contributions**

- Permits both catch-up eligible spouses to make the \$1,000 additional contribution to the same HSA

### 4) **HSA Establishment Grace Period**

- Tax-free distributions of expenses incurred prior to HSA establishment (within 60 days of HDHP enrollment)

### 5) **OTC Medicines and Drugs**

- Eliminates ACA Rx requirement for tax-free distribution of OTC medicine or drug (other than insulin)

### 6) **HSAs Grow Up (to Age 26)**

- Incorporates §105 ACA definition of dependent to include children to age 26 (replacing §152 definition)

### 7) **HSAs for Premiums**

- Permits tax-free distributions for any individual market policy premium (potential similar effect as ICHRAs)

# HSA's and Crystal Ball Predictions

## HSA's to Lead the Way After ACA

<http://www.theabdteam.com/abd-insights/newsletter/abd-commentary-hsas-lead-way-after-aca>

- An in-depth look at the radical HSA revolution that may be down the road
- Doubling the HSA contribution limit would put intense new emphasis on the value of HSA's as a triple-tax-advantaged investment vehicle
- The ability to use HSA's to pay for premiums unlocks the potential for major individual market advancement
- Employer opt-out credit structures could lead to many employees seeking individual market coverage with large employer HSA contributions as an alternative to group coverage

*ABD Commentary*

## HSA's to Lead the Way After ACA



**The Large HSA Opt-Out Approach:** It is fairly common now for employers to offer a small opt-out credit to employees with access to other coverage (e.g., through a spouse, domestic partner, or parent) to avoid the cost of coverage where possible.

However, what if the opt-out credit becomes an enticement to join the individual market?

For example, assume an employer offers three medical plan options. The employer offers an opt-out credit equal to the employer-share of the premium for the lowest-cost plan option for employees who verify HDHP enrollment in the individual market. This opt-out credit is deposited directly in an HSA—not as taxable cash.

The employee uses this large HSA deposit to pay the premium for the individual market HDHP coverage on a tax-free basis. Employees may choose a lower actuarial value plan (e.g., 58% based on previous proposals) that

# HSA FTW?





# Annual Limits 2020's Inflation Adjustments

# 2020 Employee Benefit Limits: Inflation Adjustments

Employee Benefit Limit	2019	2020
HSA Individual	\$3,500	\$3,550
HSA Family	\$7,000	\$7,100
HSA Catch Up (55+)	\$1,000	\$1,000
HDHP Maximum Out of Pocket	\$6,750 / \$13,500	\$6,900 / \$13,800
HDHP Minimum Deductible	\$1,350 / \$2,700	\$1,400 / \$2,800
Health FSA Salary Reduction	\$2,700	\$2,750
Dependent Care FSA	\$5,000 <small>(\$2,500 married filing separately)</small>	\$5,000 <small>(\$2,500 married filing separately)</small>
Highly Compensated Employee	\$125,000	\$130,000
Mass Transit/Vanpooling	\$265/month	\$270/month
Qualified Parking	\$265/month	\$270/month
401(k) Elective Deferral	\$19,000	\$19,500
401(k) Catch Up (50+)	\$6,000	\$6,500
FICA Wage Base (SS Only)	\$132,900	\$137,700



# 401(k) Plans 2020 Quick Updates

# Bipartisan Budget Act of 2018: Hardship Distributions

## SEC. 41113. MODIFICATION OF RULES GOVERNING HARDSHIP DISTRIBUTIONS. 26 USC 401 note.

(a) IN GENERAL.—Not later than 1 year after the date of the enactment of this Act, the Secretary of the Treasury shall modify Treasury Regulation section 1.401(k)-1(d)(3)(iv)(E) to— Deadline.

(1) delete the 6-month prohibition on contributions imposed by paragraph (2) thereof, and

(2) make any other modifications necessary to carry out the purposes of section 401(k)(2)(B)(i)(IV) of the Internal Revenue Code of 1986.

(b) EFFECTIVE DATE.—The revised regulations under this section shall apply to plan years beginning after December 31, 2018.

## SEC. 41114. MODIFICATION OF RULES RELATING TO HARDSHIP WITHDRAWALS FROM CASH OR DEFERRED ARRANGEMENTS.

(a) IN GENERAL.—Section 401(k) is amended by adding at the end the following: 26 USC 401.

“(14) SPECIAL RULES RELATING TO HARDSHIP WITHDRAWALS.—For purposes of paragraph (2)(B)(i)(IV)—

“(A) AMOUNTS WHICH MAY BE WITHDRAWN.—The following amounts may be distributed upon hardship of the employee:

“(i) Contributions to a profit-sharing or stock bonus plan to which section 402(e)(3) applies.

“(ii) Qualified nonelective contributions (as defined in subsection (m)(4)(C)).

“(iii) Qualified matching contributions described in paragraph (3)(D)(ii)(I).

“(iv) Earnings on any contributions described in clause (i), (ii), or (iii).

“(B) NO REQUIREMENT TO TAKE AVAILABLE LOAN.—A distribution shall not be treated as failing to be made upon the hardship of an employee solely because the employee does not take any available loan under the plan.”

(b) CONFORMING AMENDMENT.—Section 401(k)(2)(B)(i)(IV) is amended to read as follows:

“(IV) subject to the provisions of paragraph (14), upon hardship of the employee, or”.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after December 31, 2018. 26 USC 401 note.

# Final Regulations: Hardship Distributions

## **Six-Month Suspension of Contributions Eliminated (Effective 2019, Required 2020)**

- BBA directed the IRS to issue new regulations for this purpose
- Plans could eliminate this as of first plan year beginning on or after 1/1/19, but not mandatory
- Final regulations provide that plans cannot impose six-month suspension for hardship distributions made on or after January 1, 2020

## **No Longer Required to Take Loan for Hardship Distribution (Effective 2019, Not Req'd)**

- BBA handles this directly via statute, but final regulations also address
- Loan requirement eliminated as of 2019, but plans may choose to continue requiring it into perpetuity

## **New “Necessary to Satisfy the Financial Need” Test (Effective 2019, Required 2020)**

- Final regulations eliminate the relevant facts and circumstances “lack of resources” test to determine whether the distribution is necessary to satisfy the immediate and heavy need
- Replaced with a three-part “necessary to satisfy the financial need” standard:
  - 1) Hardship distribution does not exceed the amount of the employee’s need (including any amount needed to pay federal, state, or local income taxes or penalties anticipated from the distribution)
  - 2) The employee first obtains all other currently available distributions under all other deferred comp plans of the employer (qualified or nonqualified)
  - 3) The employee represents (in writing, electronically, or recorded phone line) that the employee has insufficient cash or other liquid assets to satisfy the need for hardship distribution
- Employer may rely on the employee’s representation unless it has actual knowledge to the contrary

# The SECURE Act of 2019: Laundry List of Changes

## DIVISION O—SETTING EVERY COMMUNITY UP FOR RETIREMENT ENHANCEMENT

### SEC. 1. SHORT TITLE, ETC.

(a) **SHORT TITLE.**—This Act may be cited as the “Setting Every Community Up for Retirement Enhancement Act of 2019”.

(b) **TABLE OF CONTENTS.**—The table of contents of this Act is as follows:

Sec. 1. Short title, etc.

#### TITLE I—EXPANDING AND PRESERVING RETIREMENT SAVINGS

- Sec. 101. Multiple employer plans; pooled employer plans.
- Sec. 102. Increase in 10 percent cap for automatic enrollment safe harbor after 1st plan year.
- Sec. 103. Rules relating to election of safe harbor 401(k) status.
- Sec. 104. Increase in credit limitation for small employer pension plan startup costs.
- Sec. 105. Small employer automatic enrollment credit.
- Sec. 106. Certain taxable non-tuition fellowship and stipend payments treated as compensation for IRA purposes.
- Sec. 107. Repeal of maximum age for traditional IRA contributions.
- Sec. 108. Qualified employer plans prohibited from making loans through credit cards and other similar arrangements.
- Sec. 109. Portability of lifetime income options.
- Sec. 110. Treatment of custodial accounts on termination of section 403(b) plans.
- Sec. 111. Clarification of retirement income account rules relating to church-controlled organizations.
- Sec. 112. Qualified cash or deferred arrangements must allow long-term employees working more than 500 but less than 1,000 hours per year to participate.
- Sec. 113. Penalty-free withdrawals from retirement plans for individuals in case of birth of child or adoption.
- Sec. 114. Increase in age for required beginning date for mandatory distributions.
- Sec. 115. Special rules for minimum funding standards for community newspaper plans.
- Sec. 116. Treating excluded difficulty of care payments as compensation for determining retirement contribution limitations.

#### TITLE II—ADMINISTRATIVE IMPROVEMENTS

- Sec. 201. Plan adopted by filing due date for year may be treated as in effect as of close of year.
- Sec. 202. Combined annual report for group of plans.
- Sec. 203. Disclosure regarding lifetime income.

#### H. R. 1865—605

- Sec. 204. Fiduciary safe harbor for selection of lifetime income provider.
- Sec. 205. Modification of nondiscrimination rules to protect older, longer service participants.
- Sec. 206. Modification of PBGC premiums for CSEC plans.

#### TITLE III—OTHER BENEFITS

- Sec. 301. Benefits provided to volunteer firefighters and emergency medical responders.
- Sec. 302. Expansion of section 529 plans.

#### TITLE IV—REVENUE PROVISIONS

- Sec. 401. Modification of required distribution rules for designated beneficiaries.
- Sec. 402. Increase in penalty for failure to file.
- Sec. 403. Increased penalties for failure to file retirement plan returns.
- Sec. 404. Increase information sharing to administer excise taxes.

#### TITLE V—TAX RELIEF FOR CERTAIN CHILDREN

- Sec. 501. Modification of rules relating to the taxation of unearned income of certain children.

#### TITLE VI—ADMINISTRATIVE PROVISIONS

- Sec. 601. Provisions relating to plan amendments.

# SECURE Act:

## Laundry List of 401(k) Plan Changes

### Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act)

- The SECURE Act was in the massive appropriations bill that included the Cadillac Tax repeal
- Culmination of a long-term effort to make several important revisions to retirement plans for the first time since the Pension Protection Act (PPA) in 2006
- No single change is revolutionary, but whole is greater than the sum of its parts

### List of SECURE Act Changes to Retirement Plans

- **Permits open multiple employer plans (MEPs), now called Pooled Employer Plans (PEPs)**
  - *Effective plan years beginning on or after January 1, 2021*
- Permits automatic enrollment safe harbor default deferral increase up to 15% (up from 10%)
  - *Effective plan years beginning on or after January 1, 2020*
- Safe harbor plan notice, amendment, and effective date simplification
  - *Effective plan years beginning on or after January 1, 2020*
- Increase of under 100 employee small employer plan startup credit to up to \$5,000/year for three years, and creates credit of up to \$500/year for three years for adding automatic enrollment
  - *Effective plan years beginning on or after January 1, 2020*
- IRA change to include graduate and postdoctoral study payments as IRA compensation
  - *Effective tax years beginning on or after January 1, 2020*
- IRA change to permit traditional IRA contributions at any age (previous 70 ½ cap removed)
  - *Effective tax years beginning on or after January 1, 2020*

# SECURE Act:

## Laundry List of 401(k) Plan Changes

### List of SECURE Act Changes to Retirement Plans (Cont'd)

- Prohibits 401(k) plan loans made through credit cards
  - *Effective December 20, 2019 (date of enactment)*
- Permits rollover of lifetime income options (e.g., annuities) no longer authorized by the plan
  - *Effective plan years beginning on or after January 1, 2020*
- Permits in kind distribution of 403(b) plan custodial accounts upon plan termination
  - *Effective plan years beginning on or after January 1, 2009*
- Clarification of church plan rules re definition of employee for 403(b) plans
  - *Effective plan years beginning before, on, or after December 20, 2019*
- Requires 401(k) plans to permit part-time employee deferrals upon completion of at least 500 hours in three consecutive 12-month periods (employer contributions not required)
  - *Effective tax years beginning on or after January 1, 2021*
- Permits penalty-free plan withdrawals of up to \$5,000 of expenses upon birth or adoption
  - *Effective for distributions made on or after January 1, 2020*
- **Increases the Required Minimum Distribution (RMD) start date from age 70½ to 72**
  - ***Effective for individuals who reach age 70½ on or after January 1, 2020***
- Special minimum funding standards for community newspaper defined benefit pension plan
  - *Effective plan years beginning on or after January 1, 2018*

# SECURE Act:

## Laundry List of 401(k) Plan Changes

### List of SECURE Act Changes to Retirement Plans (Cont'd)

- Certain foster care payments treated as compensation for plan or IRA purposes
  - *Effective plan years beginning on or after January 1, 2016*
- Permits plans to be adopted for the prior year by the deadline of the employer's tax return
  - *Effective for taxable years beginning on or after January 1, 2020*
- Consolidated Form 5500 filing for members of a group of plans meeting set requirements
  - *Effective plan years beginning on or after January 1, 2022*
- Requires participant statements to include estimate of lifetime monthly income balance provides
  - *Effective for statements provided more than 12 months after DOL regulations or model disclosures*
- Fiduciary safe harbor from selection of plan lifetime income investment provider
  - *Effective December 20, 2019*
- Modified nondiscrimination rules for older employee in defined benefit pension plans
  - *Effective December 20, 2019*
- Reduced PGGC premiums for cooperative and small employer charity (CSEC) plans
  - *Effective plan years beginning on or after January 1, 2019*
- Special rules for volunteer firefighters and emergency medical responders
  - *Effective plan years beginning on or after January 1, 2020*

# SECURE Act:

## Laundry List of 401(k) Plan Changes

### List of SECURE Act Changes to Retirement Plans (Cont'd)

- **529 plan distributions (to \$10,000) for apprenticeship and student loan repayments**
  - *Effective for distributions made on or after January 1, 2019*
- **Requires plan/IRA beneficiary to distribute the account within ten years of the participant's death—eliminates the “stretch IRA” that permitted distributions over beneficiary's life**
  - *Effective for distributions made by reason of participant's death on or after January 1, 2020*
- **Increases minimum penalty for failure to timely file tax return from \$330 to \$435 per day**
  - *Effective for returns with due dates on and after January 1, 2020*
- **Increases IRC Form 5500 late filing penalty from \$25/day to \$250/day (max \$150,000)**
  - *Effective for returns with due on or after January 1, 2020*
- **Additional interdepartmental information sharing to enforce penalty excise taxes**
  - *Effective December 20, 2019*
- **Tax relief for parents with unearned income of minor children of military members and first responders who died in the line of duty**
  - *Effective tax years beginning on or after January 1, 2018*
- **Remedial amendment period for SECURE Act providing until the end of 2022 plan year to adopt conforming amendments (end of 2024 plan year for government and CBA plans)**

A hand holding a pen over a document with a bar chart, overlaid with a red gradient.

California Laws  
**2020 Updates in the  
Most Complicated State**

# New CA FSA Claims Submission Deadline Notice Requirement

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/california's-new-fsa-claims-submission-deadline-notice-requirement>

California enacted AB 1554 in August 2019 requiring employers to notify FSA participants of any deadline to submit claims before the end of the plan year

The law requires the notice be provided by two different forms, one of which may be electronic

Permitted methods of notice include (but are not limited to):

- **Email**
- **Phone**
- **Text**
- **Mail**
- **In-person**
- The law purports to apply to dependent care FSAs and health FSAs
- However, the health FSA is an ERISA benefit, and therefore the application of AB 1554 to health FSAs is almost certainly preempted by ERISA
- Many unanswered questions remain with this very brief new law
- The office of California state Assemblywoman Lorena Gonzalez (D-San Diego) who authored the bill discussed a number of the law's unclear provisions here:  
<https://www.theabdteam.com/abd-insights/newsletter/california's-new-fsa-claims-submission-deadline-notice-requirement>

# CA Registered Domestic Partners

## Pre-2020 Rules

ABD Office Hours Webinar: ABD Office Hours Webinar: Health Benefits for Domestic Partners

In California, a Registered Domestic Partner (RDP) has all of the same rights and obligations (including community property) as those granted and imposed upon spouses. The relationship must meet the requirements set forth in California Family Code §297 and be registered with the Secretary of State.

### Same-Sex RDPs

- Neither person married or in an RDP relationship with another
- Not related by blood in a way that would prevent marriage
- Generally must be at least 18 (unless court order permitting younger RDP status)
- Both persons are capable of consenting to the domestic partnership (mentally competent)
- Complete Form NP/SF DP-1 and file with Secretary of State

### Pre-2020:

### Opposite-Sex RDPs

- Same requirements as same-sex RDPs
- Plus at least one of the partners must be age 62 or older
  - Generally understood as a measure to provide all the state rights and responsibilities of marriage without compromising the ability to claim Social Security benefits based on a former spouse's work record

# CA Registered Domestic Partners Rules Effective January 1, 2020

ABD Office Hours Webinar: [ABD Office Hours Webinar: Health Benefits for Domestic Partners](#)

On July 30, 2019, Governor Newsom signed into law SB 30, which took effect January 1, 2020.

The new law **eliminates the requirement that at least one of the partners in an opposite-sex RDP relationship be at least age 62 years of age.** As a result, the same rules now apply to opposite-sex and same-sex RDP relationships.

<https://www.sos.ca.gov/registries/domestic-partners-registry/>

## Domestic Partners Registry

# Domestic Partnerships

### Important Announcement

#### Senate Bill No. 30 (Wiener)

Effective January 1, 2020, **all couples regardless of age or sexual orientation** that are eligible to be married may register with the California Secretary of State as domestic partners.

As a result of this law change, new domestic partnership declaration forms are available now.

For more information, refer to [SB 30](#).

# CA Registered Domestic Partners Rules Effective January 1, 2020

ABD Office Hours Webinar: ABD Office Hours Webinar: Health Benefits for Domestic Partners

On July 30, 2019, Governor Newsom signed into law SB 30, which took effect January 1, 2020.

The new law **eliminates the requirement that at least one of the partners in an opposite-sex RDP relationship be at least age 62 years of age.** As a result, the same rules now apply to opposite-sex and same-sex RDP relationships.

## Effective January 1, 2020: Same-Sex and Opposite-Sex RDPs

- Neither person married or in an RDP relationship with another
- Not related by blood in a way that would prevent marriage
- Generally must be at least 18 (unless court order permitting younger RDP status)
- Both persons are capable of consenting to the domestic partnership (mentally competent)
- Complete Form DP-1 and file with Secretary of State

*In California, a Registered Domestic Partner (RDP) has all of the same rights and obligations (including community property) as those granted and imposed upon spouses. The relationship must meet the requirements set forth in California Family Code §297 and be registered with the Secretary of State.*

# CA SDI/PFL Changes for 2018

Full Alert: <http://www.theabdteam.com/abd-insights/newsletter/compliance-alert-california-sdi-and-pfl-benefits-set-increase-january-1-2018>

In April 2016, Governor Jerry Brown signed AB 908 into law increasing the benefits paid under SDI and PFL beginning in 2018, and eliminating the PFL waiting period.

## Increased Benefits: 60% or 70% (Income Dependent)

### Specifics:

- Pre-2018 SDI/PFL benefit was 55% wage replacement for all beneficiaries
- New approach depends on income level during the base period (prior four quarters):
- **Sixty Percent (60%):** Individuals who earned one-third or **more of the state's average quarterly wage**
- **Seventy Percent (70%):** Individuals who earned **less than one-third of the state's average quarterly wage**

## Elimination of Waiting Period: For PFL Only (Not SDI)

### Specifics:

- Prior to 2018, there was a seven-day waiting period to receive benefits under both SDI and PFL programs
- The PFL waiting period is waived for new mothers transitioning from SDI to PFL (which remains the same)
- **Under the new approach, the seven-day waiting period for (non-SDI transition) PFL claims is eliminated**
- Seven-day waiting period remains for SDI claims

# Individual Mandate and PFL Changes for 2020

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/california-enacts-individual-mandate-and-paid-family-leave-expansion>

In June 2019, Governor Gavin Newsom signed into law his first budget for 2019-2020. The budget created a California state individual mandate and an expansion of California's PFL benefit to eight weeks.

## California Individual Mandate: Effective January 1, 2020

### Specifics:

- The TCJA effectively repealed the federal ACA individual mandate
- California joins Massachusetts, New Jersey, D.C., Rhode Island in creating a state-based individual mandate
- **Requires state residents to maintain health coverage or pay a tax penalty**
- Penalty is generally the greater of \$695 or 2.5% of income over the filing threshold (similar to prior ACA penalty)
- Employer reporting requirements still to be determined

## PFL Expansion to Eight Weeks: Effective July 1, 2020

### Specifics:

- PFL limit for new child bonding or to care for a seriously ill family member was six weeks
- **PFL limit extends to eight weeks as of July 2020**
- Adds up to four months total PFL for new child bonding for both parents combined
- Task force reviewing further expansion
- Stated goal is to expand further in 2021-2022 to 12 weeks (six months total for both parents combined)

# Tax Cuts and Jobs Act: ACA Individual Mandate Tax Penalty

Full Alert: <http://www.theabdteam.com/abd-insights/newsletter/abd-compliance-alert-final-tax-cuts-and-jobs-act-bill-passes-congress>

## Effectively Eliminated the ACA Individual Mandate Tax Penalty

- Was effective January 1, 2019
- Reconciliation rules prevent full repeal, **but zeroing out all penalties is the functional equivalent for all practical purposes**
- No more tax penalty for failure to maintain minimum essential coverage (MEC)
- Employees may choose to go uninsured without tax consequences
- **May eliminate Part III of Form 1095-C for self-insured plans eventually**

## The Individual Mandate Tax Penalty: ACA after the TCJA

	<u>ACA: 2018</u>	<u>TJCA: 2019 and Beyond</u>
<u>Percentage Amount</u>	2.5% of Income Above Filing Threshold	0% of Income Above Filing Threshold
<u>Flat Dollar Amount</u>	\$695/Adult \$347.50/Child \$2,085 Family Max	\$0/Adult \$0/Child \$0 Family Max

A person's hands are shown holding a pen over a laptop. The laptop screen displays a bar chart with several bars of varying heights. The entire scene is overlaid with a semi-transparent red filter. The text is centered on the image.

San Francisco Ordinances  
**2020 Updates in the  
Most Complicated City**

# SF Paid Parental Leave Ordinance

Effective Dates: Even Small 20+ Employers Now Subject to PPLO

Full Guide: [ABD 2020 San Francisco Paid Parental Leave Ordinance \(PPLO\) Guide](#)

**Number of Employees  
Regardless of Location:**

**(Includes Entire Controlled Group)**

**50+ Employees**

**January 1, 2017**

**35+ Employees**

**July 1, 2017**

**20+ Employees**

**January 1, 2018**

# SF PPLO Covered Employees

Full Guide: [ABD 2020 San Francisco Paid Parental Leave Ordinance \(PPLO\) Guide](#)

Any person (including part-time or temp) employed by a Covered Employer who meets all of the following four requirements:

- 1. Commenced employment with the Covered Employer at least **180 days** prior to the start date of the leave**
  - Re-hires must start over upon gap in employment of one year
- 2. Performs at least **8 hours of work per week** in San Francisco**
  - Includes work from home!
- 3. At least **40% of the employee's total weekly hours** for the employer are in San Francisco**
  - Different from SF HCSO!
- 4. Eligible for California Paid Family Leave for **new child bonding****
  - Note that period of PDL/SDI for birthing mother prior to receiving PFL does not count

# PPLO Applies for Parental Leave

## Does Not Apply for All Forms of CA PFL

Full Guide: [ABD 2020 San Francisco Paid Parental Leave Ordinance \(PPLO\) Guide](#)

### Three Events Where SF PPLO Applies as Qualifying Leave:

**A**

**Birth**

**B**

**Adoption**

**C**

**Foster Care Placement**

# Payment Amount

Full Guide: [ABD 2020 San Francisco Paid Parental Leave Ordinance \(PPLO\) Guide](#)

The maximum benefit is based of the PFL cap at an annual salary of **\$122,909 in 2020**.

**Calculation Instructions and Worksheets:** <https://sfgov.org/olse/paid-parental-leave-calculations>

**Calculation Excel Spreadsheet:** [https://sfgov.org/olse/sites/default/files/2020%20PPLO%20Employer%20Calculator\\_1.xlsx](https://sfgov.org/olse/sites/default/files/2020%20PPLO%20Employer%20Calculator_1.xlsx)

	2020 Weekly Amount	2020 (Pre-7/1) 6-Week Maximum	2020 (Post-7/1) 8-Week Maximum
<b>California PFL Payment Amount</b>	<u>Maximum Benefit:</u> \$1,300 (\$122,909 / 52 x 55%)	<u>Maximum Benefit x 6:</u> \$7,800	<u>Maximum Benefit x 8:</u> \$10,400
<b>San Francisco PPL Payment Amount</b>	<u>Maximum Amount:</u> <b>\$867</b> (\$1,300 / 60% - \$1,300)	<u>Maximum Amount x 6:</u> <b>\$5,202</b>	<u>Maximum Amount x 8:</u> <b>\$6,936</b>
<b><u>Maximum Total Payment Amount (PFL+PPL)</u></b>	\$2,167 Per Week	\$13,002 Per 6-Week New Child Bonding Leave	\$17,336 Per 8-Week New Child Bonding Leave

# San Francisco Health Care Security Ordinance

## 2020 Health Expenditure Rates

Full Guide: [ABD 2020 San Francisco Health Care Security Ordinance \(HCSO\) Guide](#)

Full Alert: <https://www.theabdteam.com/abd-insights/newsletter/fall-health-plan-updates-new-sf-hcso-amounts-annual-legal-notice-and-aca>

The HCSO generally requires employers with 20 or more employees (50 or more for non-profits) to make a minimum level of health care expenditures for employees performing at least eight hours of work per week in San Francisco.

Employer Size	2019 Rate	2020 Rate	172 Hours/Month 2020 Maximum
<b>Large:</b> 100+ Employees	\$2.93/hour payable	\$3.08/hour payable	\$529.76/month \$1,589.28/quarter
<b>Medium:</b> Business w/ 20-99 Nonprofit w/ 50-99	\$1.95/hour payable	\$2.05/hour payable	\$352.60/month \$1,057.80/quarter
<b>Small:</b> Business w/ 0-19 Nonprofit w/ 0-49	Exempt	Exempt	Exempt

# San Francisco HCSO: Voluntary Waiver Form Best Practices

Full Guide: [ABD 2020 San Francisco Health Care Security Ordinance \(HCSO\) Guide](#)

Full Alert: <http://www.theabdteam.com/abd-insights/newsletter/abd-compliance-alert-new-sf-hcso-waiver-form-updated-november-1>

Providing the HCSO Employee Voluntary Waiver Form to employees at two regular intervals is considered best practice:

- 1) **New Hires:** Provide the HCSO Employee Voluntary Waiver Form to new hires if they waive the employer's group health plan
- 2) **Open Enrollment:** Provide the HCSO Employee Voluntary Waiver Form annual at open enrollment for employees who waive the employer's group health plan
  - Employees must complete the form annually to ensure it is always in effect (because it lasts for only a period of one year)
  - Providing upon hire and each year at open enrollment ensures all periods are covered by the waiver for employees who choose to waive

# SF HCSO: The City Option

Make contributions to the City Option at the “Employer Portal”:

<http://sfcityoption.org/employers/employerportal/>

## SF MRA Overview

Employer contributions to the City Option will in almost all cases fund a San Francisco Medical Reimbursement Account (SF MRA) on the employee’s behalf

- Think of the SF MRA as the equivalent of an **irrevocable** HRA maintained by the City (and administered by a TPA) that is designed to reimburse any out-of-pocket medical expenses incurred by the employee
- Searchable list of eligible SF MRA expenses:  
<http://sfcityoption.org/employeeresources/medical-reimbursement-accounts/mraexpenseguide/>

There is no annual use-it-or-lose-it rule or loss of coverage upon termination of employment that applies to the SF MRA

- All contributions are **irrevocable** and will never be returned to the employer
- There is a \$2.75/month administrative fee charged to the SF MRA
- Employees must file at least one claim every 24 months to keep the account open—but can reinstate the account in full upon request to the City

# SF HCSO: The City Option

Make contributions to the City Option at the “Employer Portal”:

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## City Option Contribution Overview

Employers subject to the SF HCSO must make quarterly contributions to the City Option for covered employees

- Required where the employer is not satisfying the required hourly health care expenditure through the group health plan (and no exemption applies)
- Payments are due within 30 days after the end of each quarter

## Most Common Scenario

- Required where the employee waives the group health plan **and**
  - Is not a manager/supervisor with compensation in excess of threshold **and**
  - Does not complete the Employee Voluntary Waiver Form

## How to Pay

- Employers must make quarterly payments to the City Option via the Employer Portal
- Payments made via mailed check or EFT online payment

# SF HCSO: The City Option

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## Useful Links

### Payment Process

- <http://sfcityoption.org/employers/makeapayment/>

### Searchable List of SF MRA Eligible Expenses

- <http://sfcityoption.org/employeeresources/medical-reimbursement-accounts/mraexpenseguide/>

### Overview of the SF MRA

- <http://sfcityoption.org/employeeresources/medical-reimbursement-accounts/>

### How to Access SF MRA Funds

- <http://sfcityoption.org/employeeresources/medical-reimbursement-accounts/how-to-access-your-mra-funds/>

### How to Access SF MRA Funds

- <http://sfcityoption.org/employeeresources/medical-reimbursement-accounts/submit-a-claim/>



# Wrap Up Takeaways

# 2019 Year In Review: Takeaways

## Three Key Points to Remember:

A

A federal court threw out the entire ACA because of the unconstitutionality of the individual mandate that can no longer act as a tax. However, the appeals court remanded for a more precise severability analysis, and the ACA remains in effect pending the appeals process. Wait for the Supreme Court's final word.

B

Employers should continue to pay close attention to the ACA employer mandate pay or play rules as the IRS assesses very large penalties via Letters 226J. Appealing letters from the Exchange at the time a subsidy is granted to an employee is the most effective way to head off potential penalties. And don't forget ACA reporting is due soon (with another extended deadline).

C

Despite the Cadillac Tax repeal, the future holds some potentially radical changes for the traditional employer role as sponsor of a major medical group health plan. Key among them are the ICHRA option effective 1/1/20 and the continued GOP legislative push to expand HSAs.

**Long-term:** *Will these 401(k)-style defined contribution approaches cause the traditional GHP go the way of the traditional defined benefit pension plan?*

# Content Disclaimer

## 2019 Year in Review

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# Thank you!

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