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### **The Importance of Properly Executed Plan Documents**

A recent IRS Chief Counsel Memorandum provides a very important reminder about an essential element required in plan sponsorship, specifically, plan documentation. As a reminder, all plans subject to ERISA must be memorialized by a written plan document. Further, it is important that the plan document be signed by an individual with authority to bind the sponsoring company.

While this IRS Chief Counsel’s advice does not break new ground by any means, it is, nevertheless, a vital reminder. As we are on the threshold of a new year and a new decade, it would be prudent for plan sponsors to review their welfare and retirement benefit plans subject to ERISA to ensure that their plan documents and related amendments are appropriately executed.

### **Are Genetic Testing Services a Deductible Medical Expense?**

A recent IRS Private Letter Ruling (PLR 201933005) provides a clarification about what types of services qualify as a deductible medical expense under IRC Section 213(d). Important to note that a Private Letter Ruling (PLR) is only binding on the taxpayer requesting it; but a PLR indicates, to the general public, the IRS’ position on a particular fact situation.

In this PLR scenario, the taxpayer is seeking to use health FSA monies to reimburse costs associated with genetic testing services that includes a DNA collection kit to provide results for purposes of medical care which includes some services reflecting ancestral traits.

In its analysis, the IRS reiterates that to qualify as a deductible medical expense under IRC Section 213(d), the expense incurred must be for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.

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Generally, medical, laboratory, surgical, dental, and other diagnostic and healing services qualify as Section 213(d) medical expenses.

While part of the costs relating to genotyping in this scenario would be considered medical care under Section 213(d), the reports providing general information of ancestry traits to the individual are not. Thus, the IRS determined that the taxpayer would have to allocate the price paid for the DNA collection kit between the medical services, such as the lab testing fee, and the non-medical services, such as the reports providing general information.

### DOL Clarifies Perks and Benefits for FLSA Purposes

Almost coincident with the effective date of the DOL's Wage and Hour Division's overtime rules, which took effect on January 1, 2020 (see our prior [Benefit Beat article](#)), the Department of Labor issued another set of **final rules**, together with a **Fact Sheet**, on December 16, 2019, to clarify what constitutes a "regular rate of pay".

As a reminder, the Fair Labor Standards Act (FLSA) generally requires that nonexempt employees be paid overtime of at least one and one-half times their regular rate of pay for any hours worked in excess of 40 hours per workweek. An employee's regular rate generally includes all remuneration for employment, with certain exceptions.

The newly released FLSA rules, which take effect January 15, 2020, clarify the types of benefits and perks that are excludable in the "time and one-half" calculation when determining overtime rates. Accordingly, following are types of benefits and other miscellaneous payments that are excludable in an individual's regular rate of pay:

- ✓ Cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance;
- ✓ Payments for unused paid leave, including paid sick leave or paid time off;
- ✓ Payments of certain penalties required under state and local scheduling laws;
- ✓ Reimbursed expenses such as cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred "solely" for the employer's benefit;

- ✓ Bonuses, including certain discretionary, sign-on and longevity bonuses;
- ✓ Cost of office coffee and snacks to employees as gifts; and
- ✓ Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.

Employers should work closely with their compensation advisers to ensure proper implementation of these rules.

### Unsettled "Use it or Lose It" Vacation Rules in Colorado

Under Colorado's wage law, employers are not required to provide a vacation benefit. To the extent an employer does establish a vacation policy, such terms must be set forth in an agreement between the employer and employee. Under such policy, the law prohibits forfeiture of accrued but unused vacation, or a "use-it-or-lose it" provision, i.e., accrued unused vacation time is deemed to be wages and must be paid to an employee upon separation of employment.

Several years ago, the Colorado wage law was amended to provide that calculation of such accrued unused vacation pay is deemed earned and determinable pursuant to the employer-employee agreement. This provision was deemed ambiguous and left many matters undefined. Litigation commenced; of particular note, in the matter of *Nieto v. Clark's Market, Inc.*, 2019 COA 98 (Colo. App. June 27, 2019), the Colorado Court of Appeals opined that the binding employer-employee agreement defines these parameters.

Presumably in response to this decision, the Colorado Department of Labor and Employment adopted **rules** that took effect on December 19, 2019 to clarify how to determine accrued unused vacation in these agreements. According to these rules, an employer-employee agreement could set forth provisions to specify:

- 1) *whether there is any vacation pay at all;*
- 2) *the amount of vacation pay per year or other period;*
- 3) *whether vacation pay accrues all at once, proportionally each week, month, or other period; and*
- 4) *whether there is a cap of one year's worth (or more) of vacation pay. Thus, employers may have policies that cap employees at a year's worth of vacation pay, but that do not forfeit any of that year's worth.*



For example, an agreement for ten paid vacation days per year: (a) may provide that employees can accrue more than ten days, by allowing carryover of vacation from year to year; (b) may cap employees at ten days; but (c) may not diminish an employee's number of days (other than due to use by the employee).

The Colorado Supreme Court may, perhaps, review this matter. This leaves the landscape of vacation pay quite unsettled in the state of Colorado. Employers with employees in Colorado should work with their legal counsel to address how best to manage accrued vacation upon separation of employment.

### Pittsburgh Paid Sick Leave: Implementation Guidelines and Effective Date

The City of Pittsburgh passed a Paid Sick Days Ordinance in August, 2015. The ordinance was challenged and the courts ruled against the City. On July 17, 2019, the Supreme Court of Pennsylvania overturned the lower courts' rulings, and concluded the Ordinance stands (see our prior *Benefit Beat* article, *Return of Paid Sick Day Requirements in City of Pittsburgh*, 8/1/19).

The City of Pittsburgh subsequently issued **updated guidelines** for the Paid Sick Days Act, which will take effect March 15, 2020. Following is a brief summary of these guidelines.

**Covered employers.** An employer subject to the law includes any person, partnership, limited partnership, association, corporation, institution, trust, or a government body, unit, agency or other entity situated or doing business in the City, who employs one or more persons for a salary, wage, commission or other compensation. The federal government and the State of Pennsylvania are not subject to the law.

**Covered employees.** Full-time and part-time individuals who work for a covered employer within the geographic boundaries of the City of Pittsburgh are covered employees. An employee who works for an employer located outside of the geographic boundaries of the City of Pittsburgh but performs work within the City boundaries is considered a covered employee once he/she performs at least 35 hours of work in a calendar year within the City boundaries.

Independent contractors, state and federal employees, employees covered by a bona fide collective bargaining agreement, or seasonal employees are not eligible for the benefit.

### Amount, Accrual, Carryover and Frontloading of sick time

Employees accrue one hour of sick time for every 35 hours worked in the City of Pittsburgh.

The amount and type of leave is based on employer size:

- ◆ Employers employing 15 or more employees must provide up to 40 hours of paid sick time per calendar year
- ◆ Employers with 14 or fewer employees must provide up to 24 hours of unpaid sick time for the first year following the Ordinance's effective date. Thereafter, the employer must provide up to 24 hours of paid sick time per year.

Employees will begin to accrue paid sick time on March 15, 2020, or date of hire, whichever is later. Employees may begin to use accrued paid sick time beginning on the 90<sup>th</sup> calendar day following commencement of employment; after which time, employees may use paid sick time as it is accrued.

Employees are eligible to carry over either 40 hours (or, 24, hours) of unused sick time to the following calendar year unless the employer front-loads the 40 (or 24 hours) of paid sick time at the beginning of each calendar year.

If an employee terminates employment and is rehired within six months of separation from the same employer, any previously accrued sick time that was not used must be reinstated and available for immediate use. An employer is not required to pay out the balance of unused sick time upon separation from employment. However, if an employer chooses to pay out the balance of sick time and the employee is rehired, the employer is not required to reinstate any sick time upon rehiring of the employee.

**Use of sick time.** Sick time can be taken for one's own needs, or for the needs of a family member, for the diagnosis or treatment of a physical or mental condition including preventive care services. In addition, sick time can be taken due to closure of a place of business, school or day care due to a public health emergency. For this purpose, *family member* includes:

- ◆ A biological, adopted or foster child, stepchild or legal ward, a child of a domestic partner, or a child to whom the employee stands in loco parentis;
- ◆ A biological, foster, adoptive, or step-parent, or legal guardian of an employee or an employee's spouse or domestic partner or a person who stood in loco parentis when the employee was a minor child;
- ◆ A spouse or domestic partner;



- ◆ A grandparent or grandchild; and
- ◆ A biological, foster, or adopted sibling.

**Coordination with employer's existing policy.** An employer's existing paid time off plan will satisfy the requirements of this Ordinance if it meets or exceeds all of the requirements of the Ordinance.

**Notice requirements**

- ◆ **Employee notice obligations.** The employee may request sick time in advance orally, or in writing. The request must include the anticipated duration of the absence. The employer may require up to a 7-day advanced notice of the need for leave. If the need for leave is unforeseeable, the employee is required to notify the employer as soon as possible. If the need to use sick time is more than three consecutive days, the employer may require reasonable documentation of the need for leave; however, the employer cannot require the documentation to explain the nature of the illness.
- ◆ **Employer notice obligations**
  - Employers are required to post a written notice in a conspicuous and accessible place in each establishment where employees are employed. The notice must be posted in English, Spanish, and any other primary language of the employees at the particular workplace. The Mayor's Office of Equity has prepared a [sample notice](#) for an employer's use.
  - In addition, employers must provide notification of available accrued sick time with an employee's pay stub or by maintaining an online system where employees can access the information.

**Record retention.** Employers must retain records documenting hours worked by employees and paid sick time taken by employees for a minimum of two years.

**Enforcement.** The Mayor's Office of Equity will administer and enforce the provisions of the Paid Sick Days Act.

**District of Columbia: Paid Medical and Family Leave Posting**

The District of Columbia's Universal Paid Leave Act imposes a notice obligation on employers. For background about this law, see our prior *Benefit Beat* articles from July and May, 2019.

The Department of Employment Services (DOES), who enforces the provisions of this law, has issued a **model notice** that can be used to satisfy the employer's notice obligation. An employer is required to provide this notice to its employees at the following times:

1. Posted in worksites along with other labor law posters by February 1, 2020;
2. Provided once between February 1, 2020 and February 1, 2021, and annually thereafter;
3. Provided to a new employee at the time of hire; and
4. Provided upon learning of an employee's right or need to take leave.

The notice can be provided physically or electronically. If provided electronically, the employer is required to retain the email receipt or signed statement by each employee acknowledging delivery of the notice.

As a reminder, DOES began collecting the 0.62% payroll tax to fund the paid family leave benefit on July 1, 2019. Paid leave benefits begin July 1, 2020.

**Seattle Mandates Commuter Benefits**

Beginning January 1, 2020, Seattle employers with twenty or more employees worldwide must provide transit benefits to their Seattle employees.

**Employers subject to ordinance** if they employ twenty or more employees worldwide, including part-time, seasonal, and temporary employees. Tax-exempt organizations and government agencies are excluded from the requirement.

An **eligible employee** is one who works an average of ten hours or more per week in Seattle in the previous calendar month.

**Types of transit benefits.** Employers must provide the benefit by either:

1. Offer a pre-tax election option for transit or vanpool expenses (up to \$270 per month, indexed for 2020). Employers need to make the offer of the pre-tax benefits in writing and within 60 calendar days of an employee commencing employment. Employers are strongly encouraged to provide this offer in the employee's primary language.
2. Provide a partially or fully subsidized transit pass. A fully subsidized transit pass must cover the fares for King County Metro and Sound Transit Link Light Rail service.



An employer may satisfy the requirements for a partially subsidized transit pass by either:

- ✓ Providing a transit pass with a monthly subsidy amount that is equal to or greater than 30% of a retail monthly transit pass that will cover fares for King County Metro and Sound Transit Link Light Rail service; or,
- ✓ Providing a transit pass through the ORCA Business Passport program, or substantially similar program offered by a local transit agency, with an employer contribution of at least 50% of a transit pass.

**Notice requirement.** Employers are required to display a workplace poster in a conspicuous and accessible place at any workplace or job site where any of their employees work. The workplace posting must be displayed in English, and in the primary language(s) of the employee(s) at the particular workplace. The Seattle Office of Labor Standards is charged with developing a model workplace poster for an employer's use.

**Enforcement.** The Seattle Office of Labor Standards (OLS) administers and enforces the ordinance. However, the OLS will not begin enforcement until January 1, 2021.

**Additional information.** The OLS provides additional information regarding the commuter benefits ordinance on its [website](#), including proposed rules and FAQs.

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