Barley Snyder

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Employers Must Document and Test Cafeteria Plan Benefits, POPs Included

By: David J. Ledermann

By offering a cafeteria plan, an employer can help employees pay various expenses, such as the employee's premium contribution for group health insurance coverage, on a pre-tax basis. A cafeteria plan provides employees the opportunity to apply a portion of their compensation toward one or more non-taxable benefits in lieu of receiving that amount in their paychecks as taxable compensation. Amounts so applied escape federal income taxation, and depending on the benefit, may also avoid FICA or state and local income taxation.

Cafeteria Plans Must be in Writing

A cafeteria plan that offers only premium conversion benefits (i.e., the opportunity to apply a portion of employee compensation toward the payment of premiums for medical, dental, vision, group term life, disability, or accidental death and dismemberment insurance) is commonly referred to as a premium only plan ("POP"). Some employers offer premium conversion to their employees, often in connection with group health insurance, outside of a cafeteria plan. Contrary to what many such employers and their employees may believe, premium conversion amounts are fully taxable in these circumstances.

A fundamental requirement of a POP or of any cafeteria plan, and of the tax benefits associated with such a plan, is that the plan be maintained pursuant to a formal written document adopted by the employer. Until a legally sufficient cafeteria plan document is in place and the employee enrolled pursuant to its terms, premium conversion amounts will be taxable to the employee, even though applied toward contributions for an otherwise non-taxable benefit such as employer-provided group health insurance. The plan document must satisfy numerous detailed requirements, as elaborated in Internal Revenue Code Section 125, its implementing regulations, and other official IRS guidance relating to cafeteria plans, most of which are beyond the scope of this article. Qualified counsel should be consulted concerning the establishment of any cafeteria plan.

Aside from premium conversion, a cafeteria plan may include features permitting, among other benefits, tax-free (i)

self-reimbursement of certain medical expenses, such as health plan deductibles, co-pays, and uninsured dental and vision expenses ("health flexible spending account" or "health FSA"); (ii) contributions to a health savings account associated with a high deductible health plan; (iii) amounts for child and dependent care expenses ("dependent care assistance program" or "DCAP"); and (iv) adoption expense amounts. Each of the various component benefit programs made available under a cafeteria plan must meet its own often elaborate documentary requirements. Additionally, to maintain the favorable tax treatment afforded such benefits, the plan, including its component benefit programs, must periodically be updated for changes in applicable law.

For example, the Patient Protection and Affordable Care Act ("ACA") established, effective January 1, 2013, a maximum amount of $2,500 that can be contributed pursuant to an employee's salary deferral election to a health FSA in any year. Cafeteria plans that contain a health FSA component, therefore, must be amended to reflect this new limit or risk losing the tax benefits associated with the health FSA (and possibly those associated with other cafeteria plan benefits, as well), even if the $2,500 limit is never exceeded. In a departure from usual procedure, which generally requires the adoption of a cafeteria plan amendment by no later than its effective date, the IRS has announced that employers may adopt retroactive amendments imposing the $2,500 health FSA limit up until December 31, 2014.

Nondiscrimination Testing of Cafeteria Plans

To the extent a cafeteria plan or a component benefit plan discriminates in favor of highly compensated or key employees, those employees will forfeit a portion, or in some cases all, of the tax benefits otherwise available to them under the arrangement. Plans are tested as to whether they discriminate in favor of highly compensated or key employees in any of the following three areas: (i) eligibility to participate; (ii) availability of benefits to participants; and (iii) actual utilization of benefits by participants. These concepts should be familiar to 401(k) plan sponsors, for whom offering plan participation to all employees and allowing everyone the same opportunity to defer compensation into their 401(k) plan accounts (thereby satisfying the eligibility and availability nondiscrimination tests) is no assurance that the plan is not discriminatory. If highly compensated employees defer on average at a substantially greater rate than the average for non-highly compensated employees, then the plan will fail the actual deferral percentage ("ADP") test, the nondiscrimination utilization test for 401(k) retirement plans.

The various nondiscrimination tests for cafeteria plans and their component benefit plans are exceedingly complex. Not only do the tests vary depending on the type of benefit program undergoing testing, this complexity is compounded by seemingly nonsensical definitional differences among the tests. For example, the DCAP testing rules look to an individual's compensation for the previous year in determining whether the individual is a highly compensated employee for purposes of current year testing. But testing for a health FSA is based on current year compensation. Further complicating matters, a plan may need to be tested across employee populations of different employers if there is sufficient commonality of ownership or a combination of joint ownership and common activity among them.

While under proposed regulations the nondiscrimination tests must be performed as of the last day of each plan year, it is generally advisable to also run the tests well in advance of such year-end to allow time to implement any necessary mid-year adjustments. In furtherance of this purpose, a cafeteria plan should specifically provide the plan administrator the authority to terminate an employee's salary reductions with respect to the plan and its component benefits to the extent necessary to comply with the nondiscrimination rules. Unlike in the 401(k) plan context, where an ADP testing failure can be corrected after the end of the plan year, once the cafeteria plan year is closed, it is too

late to take corrective action.www.barley.com 3

Nondiscrimination Safe Harbors

Cafeteria plan testing usually requires specialized software and the involvement of an advisor experienced in its use and with the various tests. In certain limited contexts, however, testing can be largely avoided through an available "safe harbor" (much as nondiscrimination testing for a 401(k) plan can be avoided by adopting a safe harbor plan design). Proposed cafeteria plan regulations provide that if a POP's sole benefit is premium conversion for employer-provided health insurance, then so long as the arrangement satisfies an eligibility test, it will be deemed nondiscriminatory regardless of whether benefits are disproportionately utilized by highly compensated and key employees.

The ACA provides a new safe harbor cafeteria plan for certain small employers, which mostly avoids the onerous testing required for cafeteria plans offering multiple component benefits. These "simple cafeteria plans" will be treated as satisfying the nondiscrimination rules for cafeteria plans and most component benefits (e.g., premium conversion, health FSAs and DCAPs, but not adoption assistance). Only employers with an average of 100 or fewer employees during either of the preceding two years can establish a simple cafeteria plan. Employees with at least 1,000 service hours during the preceding year must be eligible to participate, and the employer must contribute on behalf of all participants other than highly compensated and key employees, either 2% of the employee's annual compensation or a matching amount tied to the participant's salary deferral election, not to exceed 6% of compensation.

For questions concerning cafeteria plan documentation or for assistance with cafeteria plan nondiscrimination testing, please contact a member of our Employee Benefits Group.

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What the Supreme Court's DOMA Ruling Means for Immigration Benefits

By: Silas M. Ruiz-Steele and Becky W. Munscher

On June 26, 2013, the Supreme Court ruled that Section 3 of the Defense of Marriage Act ("DOMA"), which defined marriage as a union between one man and one woman, is unconstitutional, opening the door for the extension of federal benefits to same-sex legally married couples.

Following this decision, Secretary of Homeland Security, Janet Napolitano, directed U.S. Citizenship and Immigration Services ("USCIS") to immediately begin reviewing immigrant visa petitions (i.e., green card sponsorship petitions) for same-sex spouses in the same manner as petitions filed on behalf of opposite-sex spouses.

While DOMA's overruling has raised complex questions for employers regarding benefit plan administration and FMLA benefits, the implementation of this decision is clear in the federal immigration context. Companies should be aware of these new immigration benefits for same-sex couples, even if their business is located in a state that does not recognize same-sex marriage. Same-sex couples are legally married for the purposes of immigration law if the marriage took place in a U.S. state orforeign country that recognizes same-sex marriage, regardless of the couple's current place of residence.

When filing a family-based immigrant petition on behalf of a spouse, the petitioning spouse must prove the marriage is

not fraudulent or entered into for the sole purpose of obtaining immigration benefits. The USCIS will look for proof that the relationship is real, including proof that the couple live together, share finances, hold themselves out as a couple, spend holidays together, and in some cases raise children together. Current employees may ask their employers to assist in confirming the relationship's legitimacy by providing confirmation letters and benefit assignment information for the petitioning spouse.

For further information regarding DOMA and its effect on USCIS policies, please contact Attorney Silas Ruiz-Steele, Chair of Barley Snyder's Immigration Law Group, at 610-898-7153 or sruizsteele@barley.com.

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EEOC Issues Revised Publications addressing Workplace Disabilities Involving Cancer, Diabetes, Epilepsy and Intell

By: Jennifer Craighead Carey

The Federal Equal Employment Opportunity Commission ("EEOC") recently revised four publications addressing reasonable accommodations for employees or applicants with cancer, diabetes, epilepsy, or intellectual disabilities. The revisions bring the publications in line with the ADA Amendments Act ("ADAAA") and its broader definition of disability. A summary of these revisions is set forth below.

Cancer

Cancer is marked by out of control growth of abnormal cells. Since the ADAAA covers medical conditions that substantially limit the major life activity of normal cell growth, cancer is easily a covered disability under the ADAAA. Furthermore, since those in remission would experience this same limitation if the cancer were to reoccur, individuals with a history of cancer are also readily covered under the ADAAA.

The EEOC's Guidance makes clear that job applicants are not required to disclose they have cancer. But after a conditional job offer is made, an employer may ask additional questions of an applicant who has disclosed his/her cancer, such as whether s/he is undergoing treatment or experiencing any side effects that might interfere with the ability to do the job or that might require reasonable accommodation. The employer may also ask the applicant to submit documentation from his/her doctor answering questions specifically designed to assess the applicant's ability to perform the job's functions safely.

The Guidance identifies examples of accommodations that may be required for employees with cancer, including:

- leave for doctors' appointments or to seek (or recuperate from) treatment;
- periodic breaks or a private area to rest or take medication;
- modified work schedule or shift change;
- permission to work at home;
- modification of office temperature;
- permission to use work telephones to call doctors, if the employer usually prohibits personal calls;
- reallocation or redistribution of marginal tasks to another employee;
- reassignment to a vacant position when the employee is no longer able to perform his/her current job.

Diabetes

The EEOC's Guidance makes clear that diabetes is easily a covered disability since individual's with diabetes are substantially limited in the major life activity of endocrine function. An employee's ability to control the condition with insulin or other medication makes no difference, because an employer cannot consider the positive effects of mitigating measures when determining whether the employee's condition constitutes a disability.

The Guidance provides that applicants are not required to voluntarily disclose they have diabetes. But if an applicant discloses the condition after receiving a conditional job offer, the employer may ask how long the applicant has had diabetes, whether the applicant uses insulin or oral medication, whether and how often the applicant experiences hypoglycemic episodes, and whether the applicant will need assistance if his/her blood sugar level drops while at work. The employer may also ask the applicant to submit documentation from his/her doctor answering questions about the applicant's ability to perform the jobs' functions safely.

The Guidance provides examples of reasonable accommodations employers may be required to provide to an individual with diabetes, while making clear that an employer has no obligation to monitor an employee to make sure s/he is regularly checking his/her blood sugar levels, eating, or taking medication as prescribed. Examples of reasonable accommodations for diabetics, as highlighted in the Guidance, include:

- a private area to test blood sugar levels or to administer insulin injections;
- a place to rest until blood sugar levels become normal;
- breaks to eat or drink, take medication, or test blood sugar levels;
- leave for treatment, recuperation, or training on managing diabetes;
- modified work schedule or shift change;
- allowing a person with diabetic neuropathy to use a stool in lieu of standing;
- reallocation or redistribution of marginal tasks to another employee;
- reassignment to a vacant position when the employee is no longer able to perform his/her current job.

The Guidance also addresses concerns about safety. In making a direct threat assessment under the ADA, the employer is required to consider whether a significant risk of substantial harm exists. Factors to consider include the duration of the risk, nature and severity of potential harm, and the likelihood imminence of potential harm. For example, at a post-offer medical examination, an applicant for a machine operator position admits he often does not take his insulin as prescribed, does not monitor what he eats, and sometimes feels confused when his glucose levels drop too low. The job requires the applicant to climb high ladders and operate dangerous machinery in a high temperature plant. Based on the applicant's admitted history of noncompliance, the doctor concludes the applicant would lose consciousness or become disoriented. According to the Guidance, these facts could support rescinding the conditional job offer.

The Guidance also addresses the issue of whether an employer may require an employee who has an insulin reaction at work to submit periodic notes from his doctor confirming his diabetes is under control. The Guidance states the employer may request such documentation if it has a reasonable belief the employee will pose a direct threat.

Epilepsy

Individuals with epilepsy readily meet the definition of disability under the ADAAA because they are substantially limited in neurological functions. An epileptic applicant does not have to disclose the condition. But if an employer learns that an applicant has epilepsy after a job offer is made, the employer may ask the applicant additional questions about the condition, such as whether the employee has held the same or similar job since the diagnosis, whether s/he takes any medications, whether s/he still has seizures and, if so, what type and how long it takes to recover after a seizure, and whether s/he will need assistance if s/he has a seizure at work. An employer cannot withdraw a job offer if the applicant can perform the essential functions of the job with or without reasonable accommodation and without a direct threat to safety.

The Guidance highlights examples of reasonable accommodations that may be offered to an individual with epilepsy, including:

- breaks to take medication;
- leave to seek or recuperate from treatment or adjust to medication;
- a private area to rest after a seizure;
- a rubber mat or carpet to cushion a fall;
- work schedule adjustments;
- a consistent start time or a schedule or shift change;
- a checklist to assist in remembering tasks;
- permission to bring a service animal to work;
- someone to drive to meetings and other work-related events;
- permission to work at home;
- reassignment to a vacant position, if the employee is no longer able to perform the current job.

The Guidance also addresses the issue of driving duties. The Guidance states that the employer is not required to eliminate an epileptic employee's driving duties if the employee loses his/her driver's license because of the condition, provided driving is an essential job function. If driving is a marginal function, however, the employer must eliminate the function for the epileptic employee.

An employer may require an employee who has had a seizure at work to submit periodic notes from his/her doctor regarding whether the condition is under control. For example, if an x-ray technician has been seizure-free for ten years, but has four seizures at work in six months, each time hitting his head or biting his tongue and cheek, the employer can ask for periodic documentation to make sure the employee does not pose a direct threat to himself or others.

Intellectual Disabilities

Formerly termed mental retardation, the ADAAA made clear that persons with intellectual disabilities are covered by the ADA because they are substantially limited in brain function and other major life activities such as learning, reading, and thinking. The Guidance provides examples of the types of reasonable accommodations that may be offered to applicants or employees with intellectual disabilities such as:

- providing someone to read or interpret application materials for a person with limited ability to read or to understand complex information;
- demonstrating, rather than describing, to the applicant what the job requires;
- modifying tests, training materials, or policy manuals;
- reallocation of marginal tasks to another employee;
- providing work instructions at a slower pace;
- allowing additional time to finish training;
- breaking job tasks into sequential steps required to perform the task;
- providing training or detailed instructions using charts, pictures, or colors;
- providing a tape recorder to record directions as a reminder of steps in a task;
- using detailed schedules for completing tasks;
- providing additional training when necessary;
- a job coach to assist the employee in learning the job;
- modified work schedule or shift change;
- permitting the employee to bring someone to job evaluations or disciplinary meetings to help the employee ask questions and to explain the job evaluation results or purpose of the meeting;
- acquisition or modification of equipment or devices;
- work station placement to help the employee better concentrate;
- reassignment to a vacant position.

Importantly, the Guidance makes clear there may be circumstances when an employer must ask whether a reasonable accommodation is needed even though the person with an intellectual disability has not requested one. Specifically, the employer may be required to make such an inquiry if the employer knows the employee has a disability requiring an accommodation and knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

Barley Snyder's Employment Law Group frequently provides counseling to employers on reasonable accommodations in the workplace. We also provide training to companies to assist them with ADA compliance. Please contact a member of our Employment Law Group should you require assistance or desire training.

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Federal Contractors Required To Use Census Data Beginning January 1, 2014

By: Jennifer Craighead Carey and Melissa K. Falk

Beginning January 1, 2014, federal contractors required to prepare written affirmative action plans must rely on the

new Census data when preparing their plans. Specifically, data collected through the American Community Survey ("ACS") through 2010 was released in a Special EEO File late 2012. This file contains a roll up of ACS data collected between 2006 and 2010. Rather than the 2000 data currently being used, federal contractors must refer to this new data file beginning on January 1, 2014 when preparing Affirmative Action Plans.

A few noteworthy points for contractors to consider regarding the new Census data include:

- A handful of new Standard Occupational Classification ("SOC") codes are available when organizing job groups for purposes of Affirmative Action planning.
- Although there was not much change in the overall percentage of available males vs. females in the workforce between the 2000 and the 2010 data, the distribution of males and females throughout the United States has changed.
- In most regions of the United States, and particularly in the Eastern United States, the 2010 data reflects a higher availability of minorities in the workforce as compared to the 2000 data, which may result in higher or additional minority placement goals in specified job groups.

Barley Snyder works with government contractors in the preparation and review of affirmative action plans. If you would like assistance with the preparation or review of your plan, please contact any member of our Employment Law Group.

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