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What's Next: The ABLE Act in 2016

Marty Ford

The Arc of the United States

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The ABLE Act is Law

The Stephen Beck, Jr. Achieving a Better Life Experience (ABLE) Act

- Became federal law on December 19, 2014
- Creates a new option for *some* people with disabilities and their families to save for the future, while protecting eligibility for public benefits

What's New?

Since the law passed in 2014:

- Department of Treasury and Internal Revenue Service (IRS) proposed regulations and issued guidance twice
- Social Security Administration (SSA) has issued POMS
- Federal ABLE Act law has been amended once
- States have passed laws
- Accounts will soon be available
- Individuals and families may be looking for help

This presentation is based on what we know now – much is still evolving

Putting it all together…

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State ABLE Programs Can Move Forward Without Final Federal Regulations

IRS sent a notice to the states in March 2015 indicating:

- Treasury/IRS do not want to impede progress or delay access to ABLE accounts for people with disabilities
- Therefore, states moving ahead with legislation would get "transition relief" and sufficient time to enact necessary changes, and
- Individuals with accounts would receive benefits of the program

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Treasury and IRS Guidance

- The Treasury Department and the IRS do not want the lack of guidance to discourage states from enacting their enabling legislation and creating their ABLE programs, which could delay the ability of the families of disabled individuals or others to begin to fund ABLE accounts for those disabled individuals. Therefore, the Treasury Department and the IRS are assuring states that enact legislation creating an ABLE program in accordance with section 529A, and those individuals establishing ABLE accounts in accordance with such legislation, that they will not fail to receive the benefits of section 529A merely because the legislation or the account documents do not fully comport with the guidance when it is issued. The Treasury Department and the IRS intend to provide transition relief with regard to necessary changes to ensure that the state programs and accounts meet the requirements in the guidance, including providing sufficient time after issuance of the guidance in order for changes to be implemented.

Notice 2015-18, March 2015

What is an ABLE Account?

- ABLE accounts are authorized in the tax code:
  - Established in the new **Section 529A** Qualified ABLE Programs
  - Qualified savings accounts that receive preferred federal tax treatment, similar to Section 529 college savings accounts
  - Enable eligible individuals to save for “qualified disability expenses” (QDEs)
- In general:
  - Account assets and spending (distributions) for qualified disability expenses will be disregarded or given special treatment in determining eligibility for federal means-tested benefits, including Supplemental Security Income (SSI) and Medicaid
  - Spending (distributions) from ABLE accounts for qualified disability expenses will not count as income to the beneficiary

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What are some important requirements of an ABLE account?

- Each “eligible individual” may have only one ABLE account - no longer required to be in beneficiary’s state of residence
- “Designated beneficiary” is the eligible individual who establishes the account and is the owner of the account.
- Designated beneficiary as the account owner – significant difference from college savings plan accounts
- If an eligible individual is unable to establish an ABLE account on his or her own behalf, the account may be established on behalf of the eligible individual by his/her agent under a power of attorney or, if none, by a parent or legal guardian.
- A person other than the designated beneficiary with signature authority over the account may not have or acquire any beneficial interest in the account and must administer the account for the benefit of the designated beneficiary of the account.

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Contributions to ABLE Accounts

- Multiple individuals may make contributions to an individual's ABLE account
- Total annual contributions per account may not exceed the federal annual gift tax exclusion amount, which is $14,000 in 2016 (this is periodically adjusted for inflation, although not always *annually* adjusted)
- Aggregate (cumulative) contributions over time may not exceed the state limit for Section 529 college savings accounts, but an individual's account may be replenished when expenditures bring it below the state's aggregate limit

Other Important Features

- The ABLE account can retain its protected status if the person is no longer disabled and can be reinstated for use if the individual becomes disabled again.
- Rollovers and program-to-program transfers are allowed to a “family member” (sibling, half-sibling, step-sibling) who is an eligible individual.
- The designated beneficiary may maintain his/her ABLE account in a state after s/he has moved to another state. (no longer as critical given elimination of residency requirement)

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Who is eligible to be an ABLE account beneficiary?

Eligible individuals must meet two requirements:

1) Age: Must be disabled before age 26
2) Severity of disability:
   - Must have been determined to meet the disability requirements for Supplemental Security Income (SSI) or Social Security disability benefits

     OR

   - Must submit a "disability certification" that s/he meets statutory criteria (essentially equal to Social Security "listings" level of disability), including a physician's diagnosis and signature

Disability Certification

A disability certification is signed under penalties of perjury by the individual, the person establishing the account, or the person with signature authority, that:

1. The individual:
   - A. Has a medically determinable physical or mental impairment that results in marked and severe functional limitations and that—
     1. Can be expected to result in death; or
     2. Has lasted or can be expected to last for a continuous period of not less than 12 months; or
   - B. Is blind within the meaning of the SSI program
2. The blindness or disability occurred before the age of 26
3. The individual will be expected to declare that s/he has a signed physician's diagnosis and that s/he will retain that diagnosis and provide it to the IRS upon request.

Important Points Regarding Disability Certification

- "Marked and severe functional limitations" means a level of severity of disability that meets, medically equals, or functionally equals the severity of any listing in SSA's listing of impairments.
- Disability Certification – Requiring the individual to retain the paperwork and provide it to the IRS upon request means that eligible individuals with disabilities will not need to submit extensive medical information when opening an ABLE account, and ABLE programs will not need to receive, retain, or evaluate detailed medical records. [More details on this are expected in final IRS regulations.]

Eligibility and Re-Certification

The proposed regulations provide that:

- Eligibility should be determined for each taxable year, and that the determination applies for the entire year
- A qualified state ABLE program may impose different periodic recertification requirements for different types of impairments.

How may funds from an ABLE account be used?

From the IRS Notice of Proposed Rulemaking (NPRM):

- "Qualified disability expenses".
  - Qualified disability expenses are expenses incurred that relate to blindness or disability of the designated beneficiary of the ABLE account and **are for the benefit of that designated beneficiary in maintaining or improving his or her health, independence, or quality of life**. Such expenses include, but are not limited to, expenses related to the designated beneficiary's…(see list next slide)
  - Qualified disability expenses include **basic living expenses** and are *not limited* to items for which there is a medical necessity or which **solely** benefit a disabled person.

[From the *preamble* to the IRS proposed regulations: "the term "qualified disability expenses" should be broadly construed to permit the inclusion of basic living expenses and should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to the eligible individual."]

Qualified Disability Expenses

Distributions (spending) from an ABLE account may be used for "qualified disability expenses" related to the individual's disability or blindness and made for his/her benefit, including:

- Education
- Housing
- Transportation
- Employment training and support
- Assistive technology and related services
- Personal support services
- Health, prevention, and wellness
- Financial management and administrative services
- Legal fees
- Expenses for oversight and monitoring
- Funeral and burial expenses
- Basic living expenses (added by IRS NPRM)
- Other expenses approved by the Secretary of the Treasury under regulations consistent with the purpose of the program and/or published in future guidance published in the Internal Revenue Bulletin

How do ABLE account assets impact eligibility for federal benefits?

- Account Funds Disregarded for Purposes of Certain Other Means-Tested Federal Programs.--Notwithstanding any other provision of Federal law that requires consideration of 1 or more financial circumstances of an individual, for the purpose of determining eligibility to receive, or the amount of, any assistance or benefit authorized by such provision to be provided to or for the benefit of such individual, any amount (including earnings thereon) in the ABLE account (within the meaning of section 529A of the Internal Revenue Code of 1986) of such individual, any contributions to the ABLE account of the individual, and any distribution for qualified disability expenses (as defined in subsection (e)(5) of such section) shall be disregarded for such purpose with respect to any period during which such individual maintains, makes contributions to, or receives distributions from such ABLE account, except that, ...[goes on to discuss SSI and Medicaid]

[*emphasis added*]

Special Rules for SSI

- **Supplemental Security Income**: For SSI, only the first $100,000 in ABLE account assets will be disregarded
  - SSI cash payments will be suspended if the beneficiary's ABLE account balance goes over $100,000 - but SSI eligibility will not be terminated. **However**: Funds above $100,000 will be treated as resources according to SSI's normal rules for counting resources
    - SSA's Program Operations Manual System (POMS)
  - Since ABLE accounts are owned by the designated beneficiary, housing expenses for the beneficiary will not be treated the same as housing costs paid by outside sources. New SSA instructions (POMS) will treat housing expenses as resources only if distributed in one month and held until the following month.

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Special Rules for Medicaid

- **Medicaid**: ABLE assets are disregarded in determining Medicaid eligibility
  - Medicaid benefits are NOT suspended if the ABLE account balance goes over $100,000
  - Medicaid Payback: After outstanding qualified disability expenses are paid, any assets remaining in the ABLE account when a beneficiary dies will be used to reimburse a state for Medicaid payments made for the beneficiary after the creation of the ABLE account. [This is the full extent of the payback obligation]
  - The State is a creditor of the ABLE account, not a beneficiary [Purpose: Since the State is not a "future beneficiary", it should not get involved in decisions about account expenditures]
  - Where the beneficiary has lived in multiple states, pooled trusts have ample relevant experience in apportioning payments

Highlights of SSA's POMS

Program Operations Manual System (POMS) – Instructions to SSA staff on how to handle ABLE funds for SSI beneficiaries

- SSA will count ABLE account balance amounts over $100,000
  - A special rule applies when the balance of an SSI beneficiary's ABLE account exceeds $100,000 by an amount that causes him/her to exceed the SSI resource limit--whether alone or in combination with other resources
  - When this happens, the individual is put into a special SSI suspension period where:
    - SSA suspends the beneficiary's SSI benefits without time limit (as long as he or she remains otherwise eligible);
    - the individual continues eligibility for Medicaid; and
    - the individual's SSI eligibility does not terminate after 12 continuous months of suspension. (Without this special suspension period, SSI would normally be terminated after 12 months.)

More on SSA's POMS

- A distribution (withdrawal) from an ABLE account is not income, but is a conversion of a resource from one form to another.
  - Normal SSI rules will apply regarding resource counting and items purchased with ABLE funds.

- SSA will exclude a qualified distribution (non-housing) from the beneficiary's *countable resources* if it is held beyond the month received. This exclusion applies for as long as:
  - the designated beneficiary maintains, makes contributions to, or receives distributions from the ABLE account;
  - the distribution is unspent; and
  - the distribution is identifiable.

(This allows a beneficiary to withdraw funds from an ABLE account for a qualified purpose and place the funds in a regular bank account, for example, until ready to make the purchase.)

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More on SSA's POMS

Special Rules for Qualified Housing Expenditures or Non-qualified Expenditures

- Qualified disability expenses (QDE) for housing include: mortgage (including property insurance required by the mortgage holder), real property taxes, rent, heating fuel, gas, electricity, water, sewer, or garbage removal

- SSA will count as a resource "retained distributions" (held from one month to the next) for *housing-related* QDEs or expenses that are not QDEs (non-qualified expenditures)
  - If funds are withdrawn from the ABLE account for a housing-related QDE or for an expense that is not a QDE and the funds are held over from one month until the next (retained distribution), the funds will be counted as a resource.
  - If the distribution is spent within the month of receipt, it has no effect on eligibility.
  - Again, normal SSI rules will apply regarding resource counting and items purchased with ABLE funds.

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Tax Implications

- **Contributions** to an ABLE account are made with after-tax dollars.
- **Federal taxation**: Distributions (withdrawals or spending) from ABLE accounts for qualified disability expenses are tax exempt. With certain exceptions, ABLE funds used for non-qualified disability expenses are taxable and subject to an additional 10% tax penalty.
- **State taxation**: State tax consequences will vary. Currently, some states provide tax incentives for contributions to 529 college savings plans and may provide similar incentives for contributions to ABLE accounts.

When will ABLE accounts be available?

- To create ABLE programs, States must pass authorizing legislation to establish a qualified ABLE program. Some have enacted legislation; others are considering legislation now.
- Federal regulations have been proposed but are not yet final. The Treasury Department/IRS will allow states with ABLE programs time to adjust their programs to comply with the new federal regulations, if needed.
- The timing of ABLE program availability will vary from state to state. Many are working on implementation and will be rolling out programs sometime in 2016.
- Due to the elimination of the residency requirement, eligible individuals may be able to enroll in a program as soon as the first program is up and running.

Some Implementation Concerns for Development of State ABLE Programs

Key Issues:

- Reduction of administrative burden on the state agencies/program administrators to ensure affordable ABLE programs and low fees.
- Ensuring that state ABLE programs are not required to collect sensitive personal and medical information about designated beneficiaries. [Advocates and program administrators believe that the IRS guidance of November 20 addresses this concern.]

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Potential Area of Concern

- The proposed regulations give states (and their ABLE programs) authority to develop documentation procedures for determining eligibility and periodic redeterminations of eligibility and recertification.
  - Advocates believe that, over time, varying procedures could effectively result in different eligibility criteria from state to state.
  - It is possible that the IRS November 2015 guidance has also removed much of the basis for this concern.
  - Advocates believe that the federal ABLE program should establish federal criteria, creating simple federal forms, to ensure uniformity nationwide.
  - This may happen through cooperation among the various state plans if they develop common disability certification and recertification forms.

State Programs or National?

- Alabama
- Alaska x
- Arizona x
- Arkansas
- California (anticipate national)
- Colorado (national)
- Connecticut
- Delaware
- District of Columbia
- Florida (state, *initially*)
- Georgia x
- Hawaii
- Idaho x
- Illinois
- Indiana x
- Iowa
- Kansas
- Kentucky x
- Louisiana
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Mississippi x
- Missouri
- Montana
- Nebraska (national)
- Nevada
- New Hampshire x
- New Jersey
- New Mexico
- New York
- North Carolina
- North Dakota
- Ohio (national)
- Oklahoma x
- Oregon (national)
- Pennsylvania x
- Rhode Island
- South Carolina x
- South Dakota
- Tennessee (national)
- Texas
- Utah
- Vermont
- Virginia
- Washington
- West Virginia
- Wisconsin
- Wyoming x

X = no signed legislation

States Implementing in 2016
18 of 37 (nearly 50 percent)

Alabama
Arkansas
Delaware
Florida
Iowa
Kansas
Louisiana
Massachusetts
Michigan
Minnesota
Missouri
Nebraska (national)
Nevada
North Carolina
North Dakota
Ohio (national)
Tennessee (national)
West Virginia

Additional Implementation Dates

- Late 2016/Early 2017
  - Colorado (national)
  - Illinois
  - Oregon (national) (1/1/17)
  - Virginia
- 2017
  - California (anticipate national)
  - Connecticut
  - District of Columbia
  - Utah
  - Washington
- Undetermined Dates
  - Hawaii
  - Maryland
  - Montana
  - New Jersey
  - New Mexico
  - New York
  - Rhode Island
  - Texas
  - Vermont
  - Wisconsin

Which ABLE program will best meet an individual's needs?

- Some Considerations:
  - Program structure, ease of use, fees
    - For example, "debit card" available for withdrawals which keeps electronic records of expenditures
  - Aggregate limit on contributions
  - Investment choices
  - Are there state tax benefits?
  - Are there state means-tested benefit protections?
  - Where an individual uses an out-of-state account, will the state of residency protect state benefits programs or offer state tax incentives?

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What are some advantages of ABLE accounts?

- Intended to be easy to set up and administer
- Designated beneficiary is the owner
- More individual choice and control over spending
- Allow SSI beneficiaries to have more assets to use for disability related needs
- Preferred tax treatment of distributions
- Another tool to use in a broader planning context

What are some considerations to be aware of about ABLE accounts?

- Age limitation (disabled before age 26) disqualifies many people with disabilities
- Contribution limits – both annual and aggregate
- Limitation on distributions to disability related expenses
- Because designated beneficiary is the owner of the account, all contributions to the account become subject to Medicaid payback (these are/become 1st party funds)
- Designated beneficiaries may need ongoing advice and assistance on expenditures and rules

Additional Considerations

- Although initial decisions have been very positive, it is too early to know how the ABLE program will be fully implemented
- Still need interpretations from Centers for Medicare and Medicaid Services (CMS), Department of Housing and Urban Development, Dept. of Education, and other federal agencies
- ABLE accounts may work for some, not others
- Some people may benefit from using ABLE accounts along with a special needs/pooled trust
- Some designated beneficiaries of ABLE accounts will need ongoing advice and assistance on expenditures and rules
  - Will chapters of The Arc and others be able to assist?
  - Ongoing information and education will be key

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Special Needs Trusts

How do ABLE accounts relate to special needs trusts, including pooled trusts, for SSI and Medicaid beneficiaries?

- ABLE accounts can be used in conjunction with trusts – nothing prohibits a person from using both
- Trusts can be set up as 1st party (with beneficiary's own funds, subject to Medicaid payback) or 3rd party (with another person's funds, not subject to Medicaid payback, if properly constructed and managed)
- Trusts cannot be managed or controlled by the beneficiary
- Trust administrators must ensure compliance with SSI and Medicaid rules, including regarding the beneficiary access to cash, etc.
- Trusts can hold more assets and some different assets (although some pooled trusts my choose to limit what they are willing to hold in assets). For instance, a trust can own a house in which a beneficiary lives; contributions to ABLE accounts must be in cash
- Individuals and families need to consider all options in planning

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Resources

- Achieving a Better Life Experience Act of 2014, Public Law 113-295, Division B: https://www.congress.gov/113/plaws/publ295/PLAW-113publ295.pdf

- Internal Revenue Service, Tax Benefit for Individuals with Disabilities: IRC Section 529A – This summary has links to the 2015 statutory change to remove the residency requirement for establishment of accounts. It also links to the guidance issued by the IRS to state agencies (March and November 2015) and a link to the proposed regulations (June 19, 2015): https://www.irs.gov/Government-Entities/Federal,-State-&-Local-Governments/Tax-Benefit-for-Disability-IRC-Section-529A IRS indicates that final regulations for Section 529A will be issued later this year.

- Social Security Administration Program Operations Manual System: https://secure.ssa.gov/apps10/poms.nsf/lnx/0501130740

More Resources

- Chart on **state legislation** with links: http://www.thearc.org/what-we-do/public-policy/policy-issues/able-legislation-by-state
- Chart on **state implementation efforts**, including program administrators, expected implementation dates, and current status with links: http://www.thearc.org/what-we-do/public-policy/issues/able-program-implementation
- Other info available here under “ABLE Act Resources”: http://www.thearc.org/what-we-do/public-policy

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More Resources

- **The Arc's Center for Future Planning™: https://futureplanning.thearc.org/**
- **ABLE National Resource Center (ANRC): http://www.ablenrc.org/**
- National Policy Matters – coming soon!

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Questions?

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