



## **Implementing the ABLE Act**

**By John Ariale, Esq., Guest Blogger**

One year ago, the chances for passage of the Achieving a Better Life Experience (ABLE) Act seemed bleak. However, for those of us advocating for its passage, our lame duck strategy worked, and the ABLE Act was signed into law on December 19, 2014. The intent behind ABLE was simple: assist families with children with a developmental disability diagnosis to save resources tax-free. [ABLE accounts would be easy to open](#), have low operating costs, provide for tax-free investing and allow for savings to accumulate while the family got a better handle on what future expenses would be. More importantly, ABLE was designed to provide families with limited resources an affordable way to protect whatever assets were available for the child's benefit.

ABLE accounts are not silver bullets for families having children with disabilities, nor will they come close to assisting those families in saving for all the costs associated with raising a child with special needs. However, the ABLE Act does give families another weapon for battling the challenges they face. [Many people have compared this new tool to special needs trusts](#) and that comparison can be misleading—special needs trusts are estate planning tools, while ABLE accounts are savings vehicles.

As ABLE programs are rolled out around the country, full implementation will be complicated by the fact that regulations governing the development of ABLE accounts have not yet been finalized, despite the fact that over 40 states have passed or considered an ABLE bill. While several key concerns have surfaced as a result of the draft rules, I have highlighted three that I wanted to bring to your attention:

### **Disability Determination and Re-Certifications**

The responsibility of determining eligibility, primarily for those seeking qualification through the “disability certification” process, may establish an unreasonable obligation on program administrators unfamiliar with this type of determination. Under draft IRS rules, the ABLE program administrator would need to determine that the account owner's certification is valid. The proposed rules would also allow for an individual to maintain their ABLE account even in a circumstance wherein their disability or condition may be temporarily changed. This provides greater flexibility than anticipated, but there is some concern that these rules could establish unreasonable obligations on program administrators unfamiliar with how to differentiate between severity and longevity of various conditions. Additionally, for

individuals with disabilities, frequent and periodic re-certifications would be both burdensome and unnecessary.

### **Rollovers**

Perhaps one of the greatest disappointments in the proposed regulations is that funds from a 529 college saving account will not be allowed to be rolled over to a 529A account (ABLE) without penalties and tax implications. This is directly against the intent of the bill's sponsors. The legislation envisioned a situation where a disability might not be determined or identified until well after birth. In those situations, families who established traditional 529 accounts should have the ability to roll these assets to an ABLE account in the case where a disability was later identified. This issue will most likely require some additional legislative correction in the future.

### **Qualified Disability Expenses**

The proposed rule is consistent with the legislative intent in that it stipulates that the disability- related expenses should be construed broadly, may be attributed to the designated beneficiary's health, independence and quality of life, should not be limited to items for which there is a medical necessity, and may include expenses which could benefit individuals in addition to benefiting the designated beneficiary. The regulation also states that the administrative entity is responsible for establishing "safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions...."

This administrative burden on the program administrator could increase the fees and costs of opening and maintaining an ABLE account. Generally, these determinations are highly fact-intensive determinations that would add expense to the program. In addition, the Social Security Administration already has in place robust self-reporting requirements by SSI benefit recipients to which the receipt and application of ABLE account withdrawals could readily be added. Such duplicative reporting by administrators should be eliminated from the proposed ABLE regulations.

Regulations are being finalized in Washington and a solid majority of states have passed an ABLE Act. I hope that the lasting legacy of ABLE is an awareness of the fact that people with disabilities are forced to live in deep poverty and there is no choice for too many of these individuals but to remain impoverished. ABLE is a step in the right direction, but we must continue to build upon the momentum and good work of the ABLE Act by removing restrictions that leave people with disabilities trapped in poverty.

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