

UNDERSTANDING THE ABLE ACT

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Overview

On December 23, 2014, President Obama signed into law the Achieving a Better Life Experience (ABLE) Act, which promises to help individuals with disabilities and their families save for disability-related expenses and proactively plan for their futures. The Act allows individuals to hold a significant amount of money – much more than currently permitted – without forfeiting their eligibility for Medicaid, Supplemental Security Income (SSI), or other means-tested public benefits programs.

The ABLE Act authorized states to set up state-specific programs. This overview details the ABLE Act, its mechanics, and how it may be incorporated into traditional special needs planning, which remains necessary.

As of October 2016, the IRS has only issued proposed regulations for ABLE accounts. The IRS did notify the states that they could begin implementing the ABLE Act and be held harmless for reliance on the draft IRS rules.

In the spring of 2016, Social Security issued new guidance under its Program Operations Manual System (POMS). This new guidance instructed the agency on how ABLE accounts would be treated under the Social Security Act for receipt of SSI. While not the law, the POMS is instructive and persuasive for state agencies in making decisions about means-tested public assistance. Ohio will follow the POMS as it applies to the Ohio ABLE program.

Ohio enacted its ABLE statute in the summer of 2015. Ohio's program is known as STABLE. It is codified at Ohio Revised Code §§113.50-56.

As of October 2016, four states have opened ABLE programs: Ohio, Florida, Nebraska, and Tennessee. The Florida program is not open to nonresidents.

As of December 15, 2016, there are 1,650 active STABLE Accounts set up in Ohio, with total deposits already over \$4.4 Million.

Who can be the beneficiary of a STABLE Account?

STABLE accounts are established (and “owned”) by a “designated beneficiary.” A designated beneficiary is a person who has a disability that began before age 26 and is receiving or is otherwise eligible for Social Security benefits based on having a disability. To show that one is otherwise eligible, they must certify that they meet the Social Security definition of disability.

Who can establish a STABLE Account?

STABLE accounts can be established by those people having signature authority for the designated beneficiary. They include the beneficiary, parent, legal guardian, or an agent acting under a power of attorney.

To open an account, one must go to the STABLE web portal stableaccount.com managed by the Treasurer of State. The process is fairly simple and takes only about 15 minutes. Once money is transferred into the fund, the person establishing the account has an option of multiple mutual fund accounts to choose. There are five options at this time, ranging from an FDIC insured money market account (almost no risk) to a growth fund (with a little more risk). The Treasurer of State may in the future add or subtract funds depending on consumer demand. There is a \$50.00 minimum initial deposit required to open a STABLE account.

A beneficiary can only have one STABLE account (this includes any accounts established under the ABLE Act such as those that may be established in other states). One should be careful that multiple accounts don't get opened by well-meaning family members.

The person opening the account must swear under penalty of perjury that the beneficiary meets the eligibility requirements. If the person is not an actual recipient of Social Security benefits, a signed physician's statement confirming the disability diagnosis must be held by the beneficiary of the STABLE account and be available to the account administrator or the IRS.

Who Can Contribute to a STABLE Accounts?

Any "person" can make contributions to an established STABLE Account. Because STABLE is based on tax law, it draws on the tax code definition of "person" to identify those who may contribute to STABLE accounts. Thus, any individual, trust, estate, partnership, association, company, or corporation can make contributions to STABLE accounts. As addressed below, this is an especially important distinction as it applies to trusts.

Annual (tax year) contributions to a STABLE account are limited to \$14,000 (2016) *in the aggregate*. This limitation is the annual gift tax exclusion for estate tax purposes. It will increase as the gift tax exemption increases. Caution should be taken where multiple people may be contributing to a STABLE account.

The maximum balance for STABLE accounts is the state's limit on 529 college saving accounts. In 2016, the number was \$414,000. This limitation will increase as the 529 limitation increases. This limitation also varies from state to state.

At this time, rollovers from 529 college savings accounts to STABLE accounts are not permitted. Contributions to a STABLE account are not qualified education distributions from 529 accounts. However, one can rollover the money from one STABLE account to another STABLE account, but only between family members.

The STABLE account contributor's tax identification number is not required. However, states must have a means to reject contributions that exceed the annual contribution limit. Excess contributions must be returned to the contributor or incur a 6% penalty.

What is the Impact of STABLE Funds on Needs-Based Public Assistance?

Funds in a STABLE account are not countable resources for the purposes of determining eligibility for SSI, Medicaid, Supplemental Nutrition Assistance ("food stamps"), and Section 8 rental assistance. Once a STABLE account reaches \$100,000, the designated beneficiary's Supplemental Security Income (SSI) benefits are suspended. They are not terminated. When the account drops below \$100,000, SSI benefits are resumed. Notably, there is no effect on other benefits. Therefore, Medicaid eligibility (including waiver eligibility) continues uninterrupted.

What Distributions Are Allowed From STABLE Accounts?

Distributions from STABLE accounts can be made for "qualified disability expenses" (QDEs). Qualified disability expenses are those that relate to the disability of the beneficiary, are made for the benefit of the beneficiary in order to maintain or improve his or her health, independence, or quality of life. They include, but are not limited to, distributions made for:

- Education
- Housing
- Transportation
- Employment training and support
- Assistive technology and related services
- Health
- Prevention and wellness
- Financial management
- Legal fees
- Funeral and burial
- Basic living expenses

No distribution from a STABLE account is countable income for SSI purposes. The distributions may have consequences as a resource in coming months. Distributions for QDEs will not count as a resource beyond the month of receipt if the beneficiary maintains a STABLE account, the distribution is unspent, and the distribution is not commingled with other non-countable funds. Failure to meet any of these conditions will cause the QDE to be counted as a resource available to the beneficiary and may result in ineligibility for SSI and other means-tested programs.

What if a Distribution is Not a QDE?

The Social Security Administration views distributions from STABLE accounts as a conversion of one non-countable asset (the STABLE account) to another non-countable asset (i.e. income in the month of receipt). In the month following receipt, however, any distribution or a nonqualified disability expense, if retained by the beneficiary, will be analyzed as a resource

under the Social Security resource counting regulations. Distributions for food are not qualified disability expenditures.

Is There a Requirement to “Pay back” the State for Public Assistance Benefits?

Yes. At the death of the beneficiary, funds remaining in a STABLE account must be used to pay back the state in an amount equal to the amount of Medicaid assistance provided to the beneficiary since the time the STABLE account was opened. Note that the payback is not for all Medicaid benefits received, just those benefits received while the STABLE Account was open. This is a potentially significant departure from other payback devices such as a Special Needs Trust.

Are There Special Rules for Housing Expense Distributions?

Yes. The definition of a housing expense is the same definition as a “shelter” expense under the Social Security rules. Shelter expenses are those made for mortgages, real estate taxes, rent, heating fuel, gas, electricity, water, sewer, or garbage removal. These expenses, if made on the behalf of a recipient of means tested public assistance, are typically considered in-kind support and maintenance (ISM). The beneficiary receiving ISM will have their benefits reduced.

But, the Social Security Administration has determined that distributions from a STABLE account for housing expenses are not income and do not incur ISM. Like nonqualified disability expenditures, any distributions for housing expenses retained beyond the month of distribution will be considered a resource under the Social Security resource counting regulations.

What Are the Income Tax Implications of STABLE Accounts?

Contributions to STABLE accounts are not tax-deductible. Distributions for QDEs are not gross income to the beneficiary. Gains on STABLE accounts are earned free of tax. Distributions that are not a qualified disability expenses are gross income and subject to a 10% penalty. The beneficiary must categorize distributions as qualified or nonqualified on their federal tax returns. The program administrator will issue 1099s to beneficiaries.

Can a Special Needs Trust (Medicaid payback trust) contribute to a STABLE account?

Under a plain reading of the law, a Special Needs Trust drafted pursuant to 42 USC § 1396(d)(4)(A) may make a contribution to a STABLE account because a trust is a person under the statute. As of October 2016, the Social Security Administration has not raised any objection to contributions by Special Needs Trusts into accounts established pursuant to ABL Act. There is indication that they believe this is a question that should be addressed by the IRS in its final regulations. There is no indication that the IRS will prohibit such a transaction. Caution should be exercised in making such distributions, but, they are appropriate and legal distributions from a Special Needs Trust.