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Who is “Disabled” under ABLE: Achieving a Better Life Experience Act

Article By:

Leonard Weiser-Varon

The recently-enacted federal ***Achieving a Better Life Experience Act (ABLE)*** statute provides a long-awaited vehicle for ***tax-exempt investing to meet future disability-related expenses of disabled individuals***. Although new ***Section 529A of the Internal Revenue Code*** is now in effect, parents and others who wish to establish tax-advantaged nest eggs for the future needs of disabled individuals will need to await state-by-state authorization and implementation of the state-sponsored ABLE programs described in the tax legislation. It appears likely that at least *some states will make ABLE programs available to their residents in the latter part of 2015*; how many will do so, and whether and when those that don’t will designate another state’s ABLE program for their residents, remains to be seen.

A core aspect of Section 529A is its definition of an "*eligible individual*” for whom an ABLE account may be established. The *Treasury* department has been tasked by *Congress* with promulgating regulations under Section 529A, but the eligibility parameters are dictated by the statutory language, and are both broader and narrower than the eligibility criteria used for other federally-authorized disability programs. ABLE account eligibility is broader in two principal respects: (1) there is no means-testing or requirement of a prior work history and (2) the disabled individual does not need to prove inability to engage in any “*substantial gainful activity*.” ABLE account eligibility is narrower in that, no matter how disabled the individual may be, the disability must have occurred before the individual reached age 26.

The Section 529A requirement that the individual’s disability have occurred before age 26 exists irrespective of the means by which disability is established. If this requirement is satisfied, the fact that an ABLE account is opened, funded or used when the account owner is 26 or older does not affect eligibility.

If the age cutoff on disability is satisfied, disability status may be established for ABLE account purposes by two alternative methods. If the individual is entitled to benefits due to blindness or disability under the ***Social Security Act’s disability insurance program (SSDI)*** or s***upplemental security income program (SSI)***, he or she is eligible for an ABLE account. Alternatively, an individual, or his or her parent or guardian, may establish ABLE account eligibility by filing with the federal government a disability certification, together with a physician‘s signed disability diagnosis. The substantive differences between these alternative methods of establishing ABLE account eligibility are described below, as well as their potential impact on the maximum amount held in an ABLE account.

1. Eligibility Based on Social Security Act Disability Benefits

The SSI program provides disability benefits based on financial need.

For purposes of SSI benefits eligibility, the definition of "disability" changes once an individual has reached age 18. A person under age 18 is disabled if he or she meets a "*severe functional limitation*" test, under which her or she must establish "a medically determinable physical or mental impairment, *which results in marked and severe functional limitations*, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." Even if this test is met, a person under 18 who engages in "substantial gainful activity" (SGA) is ineligible for SSI benefits. A person 18 years or older is disabled only if s/he "is *unable to engage in any substantial gainful activity* by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months."

In other words, an individual 18 years or older is ineligible for SSI disability benefits if s/he is capable of engaging in any SGA, whether or not s/he is so engaged. An individual under age 18 who is not actually engaged in SGA is eligible for SSI disability benefits as long as the "severe functional limitation" test is met.

In addition to satisfying the applicable "disability" test, SSI disability benefit recipients must satisfy "limited income" and "limited resources" tests. Subject to certain exclusions, SSI disability benefits are reduced, and may be eliminated, by income earned by the recipient, and an individual with more than $2,000 of unexcluded assets is ineligible for such benefits. If the individual is under 18, certain income and resources of a parent or parents with whom s/he lives are attributed to the individual. The income and resources of an individual 18 or older are based solely on that individual's financial profile.

The maximum federal SSI disability benefit is currently $773 per month. States may supplement such federal payments; the maximum state supplement is currently $205 per month.

The SSDI program provides benefits for individuals who become disabled after they began working. SSDI benefits are based on prior work-related earnings, not on financial need. SSDI recipients must satisfy a "recent work" test and, with certain exceptions, a "duration of work" test. The "recent work" test requires at least 1.5 years of work covered by the Social Security program during the three-year period ending in the quarter when the disability occurred, or, if the disability occurred after the quarter in which the individual reached age 24, work covered by the Social Security program during at least half the period of time from age 21 to the quarter in which the disability occurred. The "duration of work" test requires at least 1.5 years of work covered by the Social Security program no matter when such work occurred; an individual who was under 26 when s/he became disabled generally will meet this test if s/he meets the "recent work" test.

An individual who became disabled prior to age 22 also may qualify for SSDI disability benefits based on a parent's work history if the parent is dead or is receiving Social Security retirement or disability benefits.

To qualify for SSDI benefits, an individual must meet the SGA disability definition described above, i.e. the individual's physical or mental impairment must preclude "any substantial gainful activity" and be expected to result in death or have lasted or be expected to last for a continuous period of not less than twelve months.

Eligibility for, and the amount of, SSDI benefits is not means-tested. The amount of benefits is based on the individual's earnings history for work covered by the Social Security program. Average SSDI benefits are currently $1,165 per month; the actual benefit amount would likely be lower for an individual who meets the ABLE eligibility requirement that disability have occurred prior to age 26, because the work-related earnings history would be relatively short.

2. Eligibility Based on Disability Certification

Section 529A includes an alternative method of establishing ABLE account eligibility that is more liberal than the tests for disability benefits under the Social Security Act. Under this alternative method, a person can establish and contribute to an ABLE account if s/he or his or her parent or guardian files with the federal government a certification that the individual meets the "severe functional limitation" test, or is blind as defined under the Social Security Act, and that such disability or blindness occurred before age 26. Such certification must be accompanied by a diagnosis of the applicable disability signed by a qualified physician.

Notably, this alternative methodology is based exclusively on the "severe functional limitation" test, irrespective of age. Actual or potential "substantial gainful activity" is irrelevant to qualification for an ABLE account under the certification methodology. Accordingly, an individual who is employed or employable may be eligible for an ABLE account although ineligible for SSI or SSDI disability benefits. Similarly, the absence of financial need or a work-related earnings history, which would be disqualifying for SSI or SSDI disability benefits, does not affect ABLE account eligibility under the certification methodology.

3. Frequency of Disability Determinations

Section 529A requires that an ABLE account beneficiary be eligible during each tax year in which a contribution is made to the applicable ABLE account. If ABLE account eligibility is based on entitlement to SSI or SSDI benefits at the time the account is opened, subsequent action by the account owner to reconfirm eligibility may be unnecessary. SSI and SSDI benefit recipients are required to notify the federal government if they cease to be disabled, and the federal government may sporadically seek to confirm that a recipient remains disabled, but there is no annual reconfirmation of eligibility, and disability status is presumed to continue.

If ABLE account eligibility is based on the certification methodology, however, Section 529A requires the filing of a new disability certification during each tax year in which a contribution is made to an ABLE account. The details of this potentially annual recertification process will need to be fleshed out in IRS regulations. Section 529A does not state that the physician's diagnosis accompanying the updated certification must itself be updated, and one hopes that IRS regulations will confirm that no such annual update from a physician will be necessary.

4. Potential Impact of Source of Eligibility on ABLE Account Size

Section 529A contains three limitations on the size of an ABLE account: (i) an annual aggregate contribution limit equal to the annual gift tax inclusion (currently $14,000); (ii) a $100,000 limit on the

ABLE account balance if the account is to be disregarded for purposes of SSI disability benefits eligibility; and (iii) a limit on further contributions to an ABLE account that would cause the account balance to exceed the analogous limit on Section 529 college savings accounts (this limit varies by state, but is over $350,000 in some states.)

The $100,000 limit is irrelevant to ABLE accounts for which eligibility is based on the account owner's receipt of SSDI disability benefits or on a disability certification. In the case of ABLE accounts for which eligibility is based on receipt of SSI disability benefits, the $100,000 limit may encourage withdrawals when the account balance gets close to that amount in order to avoid suspension of SSI disability benefits. As noted above, maximum SSI disability benefits are currently approximately $12,000 per year. An SSI disability benefit recipient, or his or her guardian, would need to evaluate the relative financial benefits of (1) managing an ABLE account so that the balance does not exceed $100,000 while maintaining eligibility for up to $12,000 in annual SSI benefits, versus (2) permitting the ABLE account to grow over time, tax-free, to a balance that may exceed $350,000, plus earnings thereon.

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