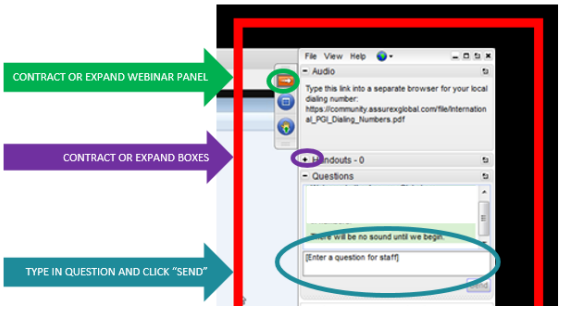
SUMMIT
Compliance Institute

Employee Benefits Compliance Update

May 29, 2018

- Welcome! We will begin at 3 p.m. Eastern
- There will be no sound until we begin the webinar. When we begin, you can listen to the audio portion through your computer speakers or by calling into the phone conference number provided in your confirmation email.
- You will be able to submit questions during the webinar by using the "Questions" box located on your webinar control panel.
- Slides can be printed from the webinar control panel – expand the "Handouts" section and click the file to download.



Agenda

- Speed Updates
- Executive Orders
- More …
- Judicial Opinions

Speed Updates

Contraceptive Coverage Exemption

Background

- ACA requires all non-grandfathered plans to offer preventive coverage with no cost-sharing. This includes contraceptive coverage.
- ACA originally included exemptions for religious employers and "accommodation process" for certain nonprofit and closely held entities with religious objections.

What has changed?

- HHS released guidance in October 2017 providing a complete exemption for non-governmental employers with a religious objection and non-governmental employers (not publicly traded) with a moral objection.
- **Fact Sheet:** https://www.hhs.gov/sites/default/files/fact-sheet-religious-exemptions-and-accommodations-for-coverage.pdf

Individual Mandate

Penalty goes to zero, beginning in 2019

- Tax Reform and Jobs Act
- Employer mandate (and employer reporting) remains

Implications

- Higher premiums (10% hikes per CBO estimates) and turmoil on individual markets/exchanges
- More pressure on employer plans, e.g., COBRA, change in status, special enrollment, Medicare Secondary Payer

Individual Mandate

Implications (continued)

- Cash-out options, spousal carveouts are more popular
- Employer plans might be used as a way to attract employees
- Get creative with Section 125 arrangements
- Some states (California, Connecticut, Minnesota, Rhode Island and Vermont) are considering adding individual mandates
- Section 1332 waivers (Alaska, Hawaii, Minnesota, and Oregon) and perhaps Wisconsin – mostly for State reinsurance programs

Transportation Fringe Benefits

- Employers may no longer deduct the cost certain employer provided transportation benefits (e.g. transit passes for parking) effective 1/1/18
- Employee exclusion remains for qualified transportation benefits (other than bikes) remains
- Salary deductions may continue (other than for bikes)
- Tax exempt entities may have UBIT if they provide qualified transportation fringe benefits that are excluded from employee income

Health FSA and HSA Limits

- Method for determining adjustments to limits has been changed to make them go up more slowly
- 2018 HSA: $6,900 (family) – after some drama
- 2018 FSA: $2,650

Cadillac Tax

- Keeps rolling down the road
- 40% excise tax on “rich” plans
- Delayed to 2022, thanks to spending bill

Health Insurer Tax (HIT)

- Annual tax imposed on health insurers (fully insured plans) beginning in 2014
- Based on insurers proportionate chare of aggregate fee
- Generally passed along via rates
- 2017 — suspended
- 2018 — effective
- 2019 — suspended, thanks to spending bill

PCORI Fee

- Patient-Centered Outcomes Research Institute (PCORI)
- Due by July 31, 2018 for plan years ending in 2017
- Not assessed for plan years ending after September 30, 2019
- That means 2018 is last year for calendar year plans

Executive Orders

Association Health Plans -- Background

- AHPs are a form of Multiple Employer Welfare Arrangement (MEWA)
  - A MEWA is formed when unrelated employers (i.e., they aren't in a controlled group) share a single health plan
  - States can generally regulate self-funded MEWAs
- ACA made it harder for groups of unrelated employers to join together to form AHPs that would be treated as single, large employers plans
- Proposed rules released in January 2017 do not eliminate MEWA issues but do make it easier to be a single, large plan

Association Health Plans – Proposed Rules

- AHPs may be formed by employers in same trade, industry, profession or geographic area
- AHPs may be formed for purpose of providing health insurance
- AHPs will not be subject to most small group rules (e.g. Essential Health Benefits) even if small employers participate
- States will continue to have authority to regulate self-funded MEWAs
- The proposed rule prohibits premium differences between individual employers based on health status
- Rules currently under review at Office of Management and Budget

Health Reimbursement Arrangements (HRAs) — Executive Order

- Order requires regulatory agencies to develop new regulations to expand health reimbursement arrangements (HRA's)
- Order suggests changes "to increase the usability of HRA's, to expand employers ability to offer HRA's to their employees, and to allow HRA's to be used in conjunction with non-group coverage)
- No rules issued yet, but expected soon

Health Reimbursement Arrangements (HRAs) — Current Background

- HRAs are self-funded health plans, subject to rules like ERISA, COBRA, PCORI fees, IRC 105(h) and ACA
- HRAs may not be funded by employee contributions
- Reimbursements allowed only for substantiated IRC 213(d) medical expenses not reimbursed by other plan
- Reimbursements generally not allowed for individual health insurance premiums
- Partners, s-corp 2% shareholders, sole-proprietors ineligible

Health Reimbursement Arrangements (HRAs) — Current Background (continued)

- Current guidance prohibits employers from offering standalone HRA's to pay for individual health insurance coverage (narrow exception for QSHRAs)
- HRAs that cover two or more employees must be integrated with a group health plan
  - Employer must also offer group health plan
  - Employee in HRA must be enrolled in a group health plan
  - Employee must be annually permitted to waive future HRA reimbursements
  - Amounts must be forfeited or be subject to "opt-out" at termination of employment
  - HRA may only reimburse for individuals enrolled in group health plan

Health Reimbursement Arrangements (HRAs) — Qualified Small Employer HRAs

- Narrow exception to general rule that HRA's may not reimburse premiums for individual health insurance
- Allows small employers (less than 50 FTEs) who do not offer group health insurance to provide tax-free reimbursements to employees to pay for individual health insurance and other IRC section 213(d) medical expenses
- Maximum tax-free reimbursement is $4,950 per year for employee only coverage and $10,000 per year for family coverage

Health Reimbursement Arrangements (HRAs) — Possible Changes in Regulations

- Rules will likely make it easier for employers to use an HRA to pay for individual health insurance premiums
- Integration requirements may be removed or relaxed
- Lots of questions
  - Impact of ERISA and other federal laws
  - Employer mandate
  - Internal Revenue Code nondiscrimination rules
  - Etc.

Short Term Health Insurance — Proposed Rules

- Proposed in February 2018
- Maximum duration will move from 3 months to 12 months
- Individual underwriting allowed
- No guaranteed renewability
- May impact individual market

But wait … There's more!

§1557 Nondiscrimination Rules

- Statute prohibits exclusion or denial of benefits using a justification that would be prohibited under various civil federal rights laws (i.e., race, color, national origin, sex, age or disability)
- §1557 only applies to a health program or activity that is receiving federal financial assistance
- Some of the regulations regarding transgender services that were proposed under §1557 have been enjoined (put on hold) by federal court in Texas
- Recent case in Wisconsin, Boyden v. Conlin, is allowing §1557 case brought by transgender plaintiffs to proceed

IRS / SSA / CMS Data Match Program Suspended

- Launched by CMS in 2016 to help identify Medicare eligible individuals who were also eligible for employer-sponsored coverage
- Employers who received letter from CMS were required to report detailed employee enrollment data to CMS
- Without much fanfare, the program has been suspended

AARP v. EEOC

- Tangled-up mess
- Wellness programs are primarily regulated by two different federal laws — HIPAA and Americans with Disabilities Act (ADA)
- General rules say that discrimination based on health status is illegal
- Wellness rules are exceptions to the general rule
- They provide a safe harbor for employers to implement voluntary wellness programs that some might describe as discrimination

AARP v. EEOC — Background

- HIPAA rules issued by Departments of Treasury, Labor and HHS have been in place since 2013
- EEOC issued final rules under the ADA in 2016
- AARP sued EEOC saying that maximum incentives (30%) allowed under EEOC rules were more like a penalty, making the programs involuntary
- Federal Court has said the rules will be “vacated” as of January 1, 2019 and giving EEOC time to propose changes
- EEOC doesn’t seem too motivated

AARP v. EEOC — What to do?

- Keep January 1, 2019 in mind
- Follow HIPAA rules
- Keep plan designs conservative
- Remove all incentives tied to biometric testing or Health Risk Assessments
- Talk to your lawyer

226J Letters — 4980H penalties

- §4980H(a) penalty
  - Applies to ALEs who fail to offer minimum essential coverage (MEC) to at least 95% of full-time employees (70% in 2015)
  - Annual amount is $2,320 / year times number of full-time employees (not counting first 30)
  - Calculated and assessed monthly
- §4980H(b) penalty
  - applies to ALEs who fail to offer coverage that is minimum value AND affordable
  - Penalty is $3,480 for each full time employee who obtains health insurance on an exchange and receives a tax subsidy
  - Calculated and assessed monthly

226J Letters — Highlights Reel

- The first letter is a “proposed assessment”
- Figure out who signed your Form 1094 Report and watch for their mail
- Don’t panic – many of the letters are based on filing mistakes
- But take it seriously because some of the letters describe legitimate assessments
- Act quickly & get help
- 226jsupport.com

Massachusetts Assessment Letters

- EMACs = Employer Medical Assistance Contribution Supplement
- This is Massachusetts’ way of collecting tax from employers whose employees are enrolled in MassHealth or receiving subsidized coverage through the Massachusetts ConnectorCare Program
- Fee is paid through unemployment compensation tax program
- Confusing letters to employers regarding possible ”agents” for collection
- Sign of things to come?

Telehealth / Telemedicine

- States are starting to regulate telemedicine
- Examples
  - Pennsylvania proposal allowing establishment of patient-provider relationship through audio only
  - Connecticut proposal mandating certain reimbursement rates for telemedicine
- ERISA preemption will not provide much of a roadblock to these efforts
- Multi-state employers implementing telemedicine should discuss State regulation with vendors before implementing plans

Judicial Opinions — Here comes the judge

Employee Classification — Background

- Think of "employee" as a label that determines whether a law (e.g. income tax withholding) will apply
- The big challenge is that different laws define "employee" in different ways
  - Federal civil rights laws tend to use broader definitions that will identify more than one employer for a single employee
  - Laws that impose liability for collection of tax tend to identify only one employer for each employee
- The landscape is continuing to evolve

Employee Classification — California Case

- Dynamex Operations v. West Superior Court
- Defining "employee" for state wage and hour laws, i.e., who is an "employee" entitled to minimum wage, rest breaks, etc.
- Adopts a rule that seems to assume worker is an employee unless shown otherwise by demonstrating that:
  - A — Worker is free of control and direction by hiring entity
  - B — The work performed is outside of the usual course of hiring entity's business
  - C — The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as work that he/she is performing for the hiring entity

Plan Documents – Anti-Assignment Language Upheld

- Healthcare providers often attempt to sue payers to obtain disputed amounts
- Providers have a better posture in litigation if they can bring claims as the patient's "assignee"
- Benefit plans have been fighting this by including "anti-assignment" provisions in plan documents
- These "anti-assignment" provisions have been upheld by a number of federal Circuit Courts recently
- The latest decision comes from the Ninth Circuit in Eden Surgical Center v. Cognizant Technology Solutions Corp. and is especially good news for those with "anti-assignment" provisions

Enrollment Platforms — don't be a cheapskate

- Frye v. Metropolitan Life Insurance Company (E.D. Arkansas 2018)
- Dependent life insurance plan
- Plaintiff purchased coverage for her dependent son
- Enrollment was "evergreen" and stayed in place beyond son's eligibility
- Son died and insurer refused to pay death benefit
- The Court found the employer had violated its fiduciary duty of prudence in connection with its enrollment platform (e.g., no age verification) and was liable to pay death benefit

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Questions