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2018 Employee Benefits Webinar Series

Mid-Year Compliance Update

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Agenda

- Washington Update
- Compliance Update
- Final Rules on Association Plans
- Proposed Rules on Short-Term Limited Duration Plans

Washington Update

- **Individual Mandate Repealed as Part of Tax Cuts and Jobs Act (effective 2019)**
- Despite Trump Tweet—this Does Not Mean Obamacare is Repealed
- Political Win for Trump: Most Conservatives View Mandate as Unconstitutional
- CBO Predicts 13 Million Fewer Will Be Insured by 2027
- Do Penalties Have That Much Impact?

Unravelling the ACA

- **Texas v. United States, No. 4: l 8-cv-00167-O (N.D. Tex.)**
- 20 states and 2 individuals claim individual mandate unconstitutional
- U.S. Department of Justice (DOJ) will not defend the constitutionality of the individual mandate, and will argue that certain provisions of the ACA are inseverable from that provision
- When the Supreme Court declared the mandate constitutional in 2012, it did so on the basis that the mandate qualifies as a tax (because it provides at least *some* revenue to the government)
  - Since the Tax Cuts and Jobs Act set the penalty at $0 effective 1/1/19, the argument is that the individual mandate can no longer be described as a tax, thus rendering it unconstitutional

Texas v. United States

- The plaintiffs argue that the individual mandate is *inseverable* from the rest of the ACA, and therefore the entire statute and all of its implementing regulations should be invalidated
- Under Obama, the DOJ argued that if the individual mandate is unconstitutional, it is severable from the ACA's other provisions, except for the guaranteed issue and community rating rules
  - Current DOJ (Jeff Sessions) agrees with the prior DOJ – i.e., the court should declare the pre-existing conditions protections and other consumer protections to be unconstitutional "because otherwise individuals could wait until they become sick to purchase insurance, thus driving up premiums for everyone else"
  - Immediate relief not requested – should take effect 1/1/19 (after midterms)

Texas v. United States

- DOJ has a longstanding, bipartisan commitment to defending the law when non-frivolous arguments can be made in its defense
- Several career federal lawyers withdrew from the case shortly before it was filed, which suggests that the arguments made were meritless

Fixing the ACA

- **Undo Sabotage and Expand Affordability of Health Insurance Act**
- Introduced by the three Ranking Members of Energy and Commerce, Ways and Means, and Education and the Workforce Committees
  - Goal is to expand affordability and restore stability to the ACA Marketplaces
- Undoing Sabotage
  - The Act would rescind the proposed regulation designed to expand Association Health Plans (AHPs)
  - Protect consumers with preexisting conditions by requiring short-term limited duration insurance (STLDI) to comply with guaranteed issue, community rating, essential benefits, and other ACA rules
  - Various provisions to protect the Marketplace, ACA Navigators

Fixing the ACA

- **Undo Sabotage and Expand Affordability of Health Insurance Act**
- Expanding Affordability
  - Expand eligibility for premium tax credits (PTC) beyond 400% of the federal poverty level (FPL) and increase PTC for all income brackets
  - Expand eligibility for cost sharing reductions (CSRs) from 250% to 400% FPL and make CSRs more generous for those below 250% FPL
  - Fix the “family glitch” – i.e., base “affordability” on family coverage
- Is this ACA 2.0? Maybe a 2.0% chance of passing…

Tax Cuts and Jobs Act – Tax Credit for Family and Medical Leave

- New business tax credit for employers that offer paid FMLA-type leave
- To qualify, an employer must allow all "qualifying" FT employees at least 2 weeks of annual paid family and medical leave (pro-rata for PT employees)
  - Must provide at least 50% of employee's regular wages
  - Vacation leave, personal leave, or other medical or sick leave would not be considered family and medical leave, nor would state-mandated leave
- Employee is "qualifying" if he/she has been employed for at least 1 year, and who, for the preceding year, had compensation not in excess of 60% of the compensation threshold for highly-compensated employees ($120,000 for 2018)
  - Credit equals to 12.5% of the amount of wages paid, increased by 0.25% for each point over 50% (but not to exceed 25% of the wages paid)
  - Up to 12 weeks of leave taken into account per year
- Effective for wages paid in 2018 and 2019 (provision sunsets after 2019)

Short-Term Spending Bill

- **Extension of Continuing Appropriations Act, 2018**
- Cadillac Tax delayed until 2022
  - Previously delayed from 2018 to 2020 under the PATH Act
  - 40% tax on value of health coverage in excess of $10,200 (single) / $27,500 (fam)
- 2.3% Medical Device Tax Suspended for 2018 and 2019
  - Was also suspended for 2016 and 2017
- HIT Tax (Health Insurance Industry Tax) Suspended for 2019
  - Was suspended for 2017, in effect for 2018
  - Applies to fully insured medical, dental and vision plans

Compliance Update

2019 HSA and ACA OOP Limits

	2019 (single/family)	2018 (single/family)
Annual HSA Contribution Limit	$3,500 / $7,000	$3,450 / $6,900
Minimum Annual HDHP Deductible	$1,350 / $2,700	$1,350 / $2,700
Maximum Out-of-Pocket for HDHP (applies to all in-network benefits)	$6,750 / $13,500	$6,650 / $13,300
ACA Maximum Out-of-Pocket Limits	$7,900 / $15,800	$7,350 / $14,700

- ACA requires family plans to have an embedded individual OOP limit
- Embedded OOP limit rule applies to all non-grandfathered group health plans, including HDHPs

Interaction between HSA Rules and ACA OOP Limits

- Recap:
  - **HSA Rule**: Family HDHPs cannot have embedded deductible less than $2,700
  - **HSA Rule**: OOP limit for family HDHP coverage cannot exceed $13,500 in 2019
  - **ACA Rule**: Family coverage (whether HDHP or non-HDHP) must have an embedded individual OOP limit that does not exceed $7,900
- This means that for the 2019 plan year, an HDHP subject to the ACA out-of-pocket limit rules may have a $6,750/$13,500 out-of-pocket limit (and be HSA-compliant) so long as there is an embedded individual out-of-pocket limit in the family tier no greater than $7,900 (so that it is also ACA-compliant)

Employer Mandate and Reporting

- Safe harbor for *de minimis* errors: Forms 1095-C filed with incorrect dollar amounts on Line 15 (employee required contribution), may fall under the safe harbor for *de minimis* errors, which applies if no single amount in error differs from the correct amount by more than $100
  - If the safe harbor applies, employer is not required to correct Form 1095-C to avoid penalties
  - However, if recipient elects for safe harbor not to apply, employer must issue corrected Form
- Penalty relief for good-faith errors continues for 2017 reporting
- FPL Safe Harbor for Calendar Year 2019 Plans
  - $12,140 FPL × 9.86% ÷ 12 months = $99.75 / month
- Projected employer mandate penalties for 2019: $2,500 / $3,750

Employer Mandate Penalty Letters

- Employers are receiving penalty letters (226J) for CY2015
- Letter 226J includes:
  - Proposed penalty by month and whether it's under the "A" or "B" penalty
  - List of employees who received a subsidy each month and who were not reported as being within a "safe harbor"
  - Actions the IRS will take if the ALE does not respond timely
- Response due within 30 days of receipt
  - IRS will respond with one of five versions of Letter 227
  - Response to Letter 227 due within 30 days of receipt
  - If no response, IRS will issue a notice and demand for payment

Employer Mandate Penalty Letters

- **What should I do if I receive Letter 226J?**
  - Review the letter and its attachments carefully against the information reported on Forms 1094-C/1095-C
- **If you agree** with the proposed amount, sign and return Form 14764 and remit payment or wait for a Notice and Demand
- **If you do not agree** with the proposed amount, sign and return Form 14764 by the response date shown on the letter
  - Include a signed statement explaining why you disagree with the proposal
- Consider engaging ERISA counsel to respond

Employer Mandate Penalty Letters

- **Future of Penalties**
  - A coalition of employers has urged Treasury to stop sending Letter 226J, arguing that the enforcement efforts violate the ACA's express guarantee that employers be given "two bites of the apple" before penalties can be assessed
  - Under the ACA, before penalties can be assessed, employers must have received notice from an Exchange: (1) certifying that an employee has enrolled in a qualified health plan and has been determined eligible for a premium tax credit, (2) stating that the employer may as a result be liable for a tax assessment, and (3) explaining that the employer has the right to appeal such eligibility determinations
  - No such notices were furnished for calendar year 2015 by federal Exchanges
    - HHS did issue notices for 2016, but it is unclear whether all employers entitled to a notice received one
    - Also unclear whether notices have been issued by Exchanges for 2017 or 2018

AARP v. EEOC

- August 2017 – Federal court in Washington, DC orders EEOC to reconsider limits placed on wellness incentives under ADA and GINA
- September 2017 – EEOC advises court that anticipated effective date of further rulemaking would be 2021
- December 2017 – Court vacates 30% incentive limits effective 1/1/19
- March 30, 2018 – EEOC status update: No plans to issue revised regulations by a particular date certain

ADA Insurance Safe Harbor

EEOC v. Flambeau Inc.*, and *Seff v. Broward County, FL

- Courts in *Flambeau* and *Seff* held that the ADA's "insurance safe harbor" provision applies to wellness programs in a way that allows employers to penalize employees who do not answer disability-related questions or undergo medical examinations (e.g., employees who refuse to complete an HRA and/or biometric screening)
- EEOC believes both cases were wrongly decided
- EEOC rejects the idea that the safe harbor could apply to employer wellness programs, since employers are not using information in a manner required by the safe harbor
  - Final rules explicitly state that the safe harbor provision does not apply to wellness programs even if they are part of an employer's health plan

ADA Insurance Safe Harbor

EEOC v. Orion Energy Systems

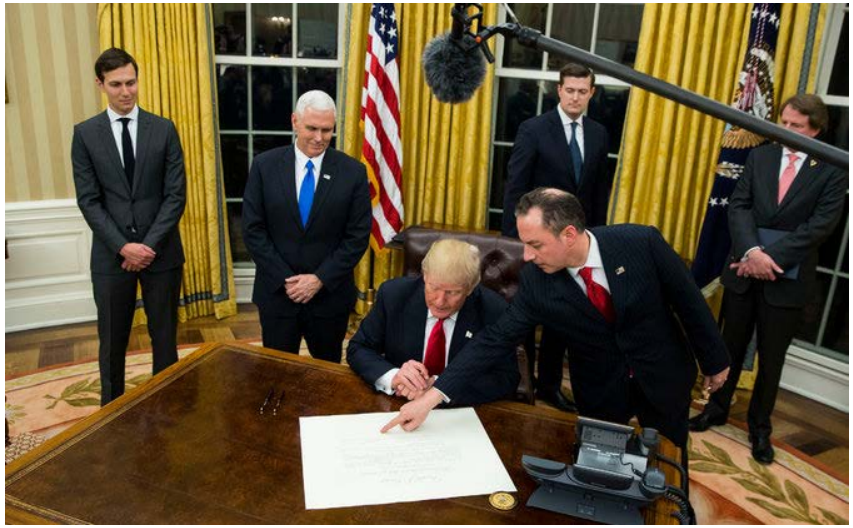
- Employees had to complete HRA and use Range of Motion machine
- Employee refused to participate and was required to pay 100% cost of medical coverage
  - If employee had participated, employer would have paid 100% of premium of coverage
  - Employee was later terminated
- In September 2016, the court in Orion agreed with the EEOC that the ADA's safe harbor did not apply to Orion's wellness program, but concluded that it was still voluntary
  - EEOC hadn't yet drafted regulations specifying 30% limits

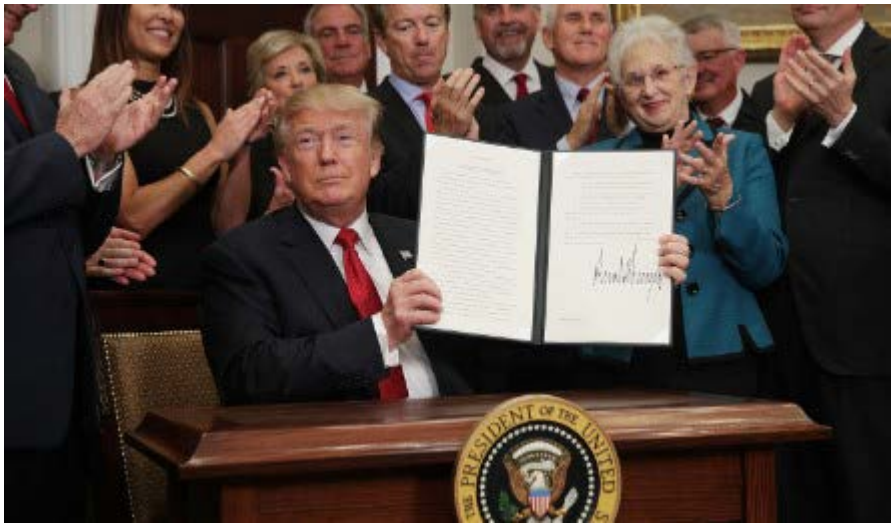
PCORI Fees Due By July 31

- PCORI fee applies to self-insured and fully insured plans
  - Paid by insurers if insured plan, plan sponsor if self-insured (Form 720)
  - Fee is $2.26 fee per member per year for plan years ending on or after October 1, 2016, and before October 1, 2017
  - Fee is $2.39 fee per member per year for plan years ending on or after October 1, 2017, and before October 1, 2018
- Applies on a per-member basis for major medical
- Applies on a per-covered employee basis for HRAs
- Examples of due dates:
  - 07/01/16 – 06/30/17 – $2.26 PMPY due by 7/31/18
  - 01/01/17 – 12/31/17 – $2.39 PMPY due by 7/31/18
- This is the second to last PCORI Fee for Calendar Year Plans!
  - Fee does not apply to plan years ending on or after October 1, 2019

Final Regulations on Association Health Plans

Promoting Healthcare Choice and Competition Across the US





Executive Order signed 1/20/17

- Encourages federal agencies to begin dismantling ACA to the extent allowable by law
- Instructs agencies to do what they can to "ease the burdens" on individuals, states and the health care industry

Executive Order signed 10/12/17

- Instructs DOL, HHS and IRS to consider expanding association health plans (AHPs), short-term limited duration insurance (STLDI) and health reimbursement arrangements (HRAs)

Final Regulations on AHPs

- **DOL's New Definition of Employer**
- *Historically*: Association had to be formed for something other than obtaining health insurance coverage
- Under final "Commonality of Interest" rules, AHP may be formed
  - Along same Geographic Area (In-State or In-Metropolitan Area)
  - Along same Trade, Industry, Line of Business, or Profession
- Sole Owners may participate in an AHP
- Must be formally established and run by employers
- Effective dates:
  - 9/1/18 - All associations may establish a fully insured AHP
  - 1/1/19 - Existing associations that sponsor an AHP may self-insure
  - 4/1/19 - All other associations (new or existing) may self-insure an AHP

Final Regulations on AHPs – Highlights of the Final Rule

- Existing bona fide associations may continue to rely on prior DOL guidance
  - Final rule provides an ***additional*** mechanism for AHPs to sponsor a single ERISA-covered group health plan
- AHPs may self-insure under the final rule; however, the DOL anticipates that many AHPs will be subject to state benefit mandates
  - States retain the authority to adopt minimum benefit standards, including standards similar to those applicable to individual and small group insurance policies under the ACA, for all AHPs
- AHPs must limit enrollment to current employees (and their beneficiaries, such as spouses and children), or former employees of a current employer member who became eligible for coverage when the former employee was an employee of the employer
- Working owners must work an average of 20 hours per week or 80 hours per month (proposed rule: 30 hours per week or 120 hours per month).

Final Regulations on AHPs – Highlights of the Final Rule

- The primary purpose of the association may be to offer health coverage to its members; however, it also must have at least one substantial business purpose unrelated to providing health coverage or other employee benefits
  - A “substantial business purpose” is considered to exist if the group would be a viable entity in the absence of sponsoring an employee benefit plan
- Employer members of an association must control its functions and activities, and the employer members that participate in the group health plan must control the plan, both in form and in substance:
  - Do employer members regularly nominate and elect the governing body of the association and the plan?
  - Do employer members have authority to remove a member of the governing body with or without cause?
  - Can employer members approve or veto decisions relating to the plan?

Final Regulations on AHPs

- **AHP Nondiscrimination Requirements**
- AHP cannot condition employer membership on any health factor
  - Eligibility and premiums must comply with HIPAA/ACA nondiscrimination rules
  - AHP may not treat different employer members as distinct groups of similarly-situated individuals
    - Intent is to prohibit AHPs from “employer-by-employer risk-rating”
  - While AHPs cannot deny eligibility or charge higher premiums based on health factors, they can vary premiums based on other factors, such as gender, age, industry or occupation, or business size
  - Final rule adds examples to clarify that employees of participating employers may be charged different premiums based on their industry subsector or occupation (e.g., cashier, stockers, and sales associates) or full-time vs. part-time status

Final Regulations on AHPs

- **Potential Limits Based on State Regulation**
- All AHPs are MEWAs and will need to ensure compliance with existing federal regulatory standards governing MEWAs (such as M-1 filings)
  - DOL intends to reexamine existing reporting requirements for AHPs/MEWAs, including the Form M-1 and possibly the Form 5500
- Final rule confirms that states may continue to regulate MEWAs
- Final rule does not preempt state insurance law, nor does it create an exemption from existing state regulation for self-insured MEWAs
  - Many states regulate self-insured MEWAs as commercial insurance companies and others prohibit them altogether
  - States may regulate fully insured MEWAs with respect to establishing reserve and contribution levels to ensure the solvency of the MEWA; however, states are free to regulate the underlying insurance contacts or policies

Final Regulations on AHPs

- **In the past, states have opposed AHPs due to consumer protection concerns**
- *Adverse selection*: AHPs will be subject to large group rating rules (no EHB requirement) – they could be marketed toward healthier/younger individuals, which could undermine the individual and small group marketplaces
- Other concerns relate to fraud protection from unscrupulous promoters
- States may impose standards to protect consumers and guard against adverse selection, which may cause AHPs to be less attractive to employers
- Some states already prohibit small group members of an association from being rated as large group

Short Term Limited Duration Insurance (STLDI) – Part II of the October Executive Order

- Order directs agencies to consider the expansion of short-term limited duration insurance (STLDI)
- Currently STLDI is limited to 3-month non-renewal gap insurance
- Order directs agencies to allow for longer coverage periods and renewability
- States may challenge this aspect as well

Short Term Limited Duration Insurance (STLDI)

- **Proposed rules change duration of STLDI from <3 months to <12**
- STLDI is designed to fill temporary gaps in coverage
- STLDI is not MEC and is not subject to ACA Market Reform
  - STLDI plans may impose annual limits, have preexisting condition exclusions, and are not required to cover essential health benefits
- STLDI is generally less expensive than ACA-compliant plans
  - DOL projects that approximately 100,000 to 200,000 individuals would shift from the individual market plan to STLDI in 2019
  - DOL estimates that only about 10% of these individuals would have been subsidy-eligible if they maintained their Exchange coverage

Short Term Limited Duration Insurance (STLDI)

- **Proposed rules change duration of STLDI from <3 months to <12**
- Allowing STLDI to run for a longer duration reduces the risk of a gap in coverage for people with short-term coverage who become seriously ill while covered
- Under current rules, an individual who becomes ill likely would not qualify for another STLDI plan due to medical underwriting and would need to wait until Marketplace open enrollment to gain coverage

HR Professional Credits

Activity ID: 18-LEYL8

Title: Mid-Year Compliance Review
Start Date: June 21, 2018
End Date: June 21, 2018
Professional Development Credits: 1

Program ID: 333141

Title: Mid-Year Compliance Review
Start Date: June 21, 2018
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Recertification Credit Hours Awarded: 1.0
Specified Credit Hours: General

Questions?