

2016 EMPLOYEE BENEFITS UPDATE: WHAT EMPLOYERS NEED TO KNOW TO STAY COMPLIANT

Arizona Labor & Employment Conference

Kristi R. Gauthier

(480) 684-1300

kgauthier@clarkhill.com

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AGENDA

- Healthcare Reform Update for 2016
- Same sex spousal benefits
- Wellness Programs
- Fiduciary Responsibility

ACA EMPLOYER SHARED RESPONSIBILITY COMPLIANCE FOR 2016

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ACA EMPLOYER SHARED RESPONSIBILITY

- Employers with 50 or more full-time and/or full-time equivalent employees must offer “affordable” and “minimum value” coverage to full-time employees and their dependent children or face penalties
- Don't forget...employer size is based on controlled groups!
- Remember that full-time employee = 30 hours per week / 130 hours per month!
- *Marin v. Dave & Busters, Inc.* – class action suit alleging ERISA Section 510 Interference with benefits claim
- Make sure plan documentation updated to reflect eligibility

ACA REPORTING REQUIREMENTS

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OVERVIEW OF ACA REPORTING REQUIREMENTS

	Fully Insured <50 FTEs	Self Insured <50 FTEs	Fully Insured 50 + FTEs (ALE)	Self Insured 50 + FTEs (ALE)
Forms to Employees:	1095-B Return Form	1095-B Return Form	1095-B Return Form, plus 1095-C Offer and Coverage Form sections 1 & 2	All sections on 1095-C Offer and Coverage Form
Completed by:	Health Insurance Issuers	Plan sponsors (employers)	1095-B: by health insurance issuers 1095-C: by plan sponsors (employers)	Plan sponsors (employers)
Used to:	Reports on tax return that MEC existed to avoid the individual shared responsibility payment	Report on tax return that MEC existed to avoid the individual shared responsibility payment	1095-B: Report on tax return that MEC existed to avoid the individual shared responsibility payment 1095-C: contains info on insurance offer, premium share and info on employer shared responsibility	1095-C: Contains info on insurance offer, premium share and info on employer shared responsibility
Forms to IRS:	1094-B Transmittal Form	1094-B Transmittal Form (with copies of all 1095-Bs)	1094-B Transmittal Form plus copies of all 1095-Bs, plus 1094-C with copies of all 1095-Cs	1094-C Transmittal Form plus copies of all 1095-Cs
Completed by:	Health Insurance Issuers	Plan sponsors (employers)	1094-B and 1095-Bs; Health Insurance issuers 1094-C and 1095-Cs Plan sponsors (employers)	Plan sponsors (employers)
Used to:	Verify that MEC existed and employers that are not subject to the employer shared responsibility provisions still need to file report about covered individuals	Verify that MEC existed and employers that are not subject to the employer shared responsibility provisions still need to file report about covered individuals	Report about individuals who are covered by MEC and not liable for the individual shared responsibility payment and to report information required about offers of health coverage and enrollment in health coverage for employees	Report about individuals who are covered by MEC and not liable for the individual shared responsibility payment and to report information required about offers of health coverages and enrollment in health coverage to employees

Source: Employee Benefits Advisors, LLC

DEADLINES

- Reporting required for calendar years starting with 2015
- IRS extended reporting deadlines for 2016:
 - Reporting to IRS due by **May 31st** (June 30th if filing electronically)
 - For 2016 filing and beyond due by February 28th of the following year, or March 31st if return is filed electronically
 - Statements to employees were due by March 31st – For 2016 filing and beyond due by February 1st of following year
- Reporting is on a calendar year basis regardless of actual plan year

PENALTIES

- The penalty for failure to file generally is \$100 for each return not to exceed \$1,500,000 per calendar year
- The penalty for failure to provide a correct payee statement is \$100 for each statement, not to exceed \$1,500,000
- Special rules apply that increase the per-statement and total penalties if there is intentional disregard of the requirement to furnish a payee statement

HRAS AND PREMIUM REIMBURSEMENT

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HEALTH REIMBURSEMENT ARRANGEMENTS

- Stand-alone HRAs for active employees violate PPACA provisions regarding dollar limits and preventive service requirements
- Going forward HRAs must be “integrated” with a group health plan – two permissible methods
- Cannot be used to purchase individual coverage
- Effective for plan years on and after January 1, 2014
- Does not impact retiree only HRAs

INDIVIDUAL PREMIUM REIMBURSEMENTS

- Arrangements that provide cash reimbursement for purchase of individual policies are prohibited because they fail to comply with the ACA market reform provisions which cannot be integrated with individual policies
- Prohibited regardless of pre-tax or post-tax basis
- Can trigger penalties such as excise taxes under Code section 4980D (\$100 per violation, per day)
- Solution....offer taxable compensation with “no strings attached”!

NON-DISCRIMINATION

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CODE SECTION 105(H)

- Internal Revenue Code Section 105 – general rule is that self-funded plans cannot discriminate in favor of highly compensated individuals (five highest paid officers, shareholders owning more than 10% of the employer's stock, or the highest paid 25% of all employees) in terms of benefits offered, waiting period, eligibility, etc.
- Complex rules and tests, historically not highly enforced by IRS
- ACA extends nondiscrimination rules to insured health plans...exact requirements and effective date unknown at this time
- Steep penalties for non compliance
- Employers should examine current arrangements with executives and former executives to prepare once these new rules take effect

CADILLAC TAX

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CADILLAC TAX

- ACA imposes a 40% excise tax on the cost of certain employer-provided health care plans that exceed a standard cap of \$10,200 for annual individual coverage and \$27,500 for all other categories of coverage
- Implementation date has been extended until 2020 (originally 2018)
- Recent legislation also provides that any payments of the tax will be tax-deductible
- Significant opposition to this provision of the ACA, will ultimately be repealed?

SAME-SEX SPOUSAL BENEFITS

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SAME-SEX SPOUSAL BENEFITS

- *U.S. v. Windsor* (June 2013) – U.S. Supreme Court ruled that Section 3 of DOMA was unconstitutional in June of 2013. Section 3 of DOMA provided that, for purposes of federal law, “marriage” meant only a legal union between one man and one woman as husband and wife, and that references to “spouse” in federal law refers only to a person of the opposite sex.
- *Obergefell v. Hodges* (June 2015) – Supreme court ruled that states must recognize the right of same-sex couples to marry and must also recognize any same-sex marriage legally performed in other states

SAME-SEX SPOUSAL BENEFITS

Impact of *Windsor* on health plans:

- Tax Treatment – same-sex spouses qualify for same income tax exclusion for health coverage provided under employer sponsored health coverage. Employers no longer have to impute income.
- COBRA Beneficiaries – Covered same-sex spouses are considered “qualified beneficiaries” under COBRA
- HIPAA Special Enrollment Rights – Same-sex spouses can be added to an employer’s group health plan mid-year
- Reimbursements by a health FSA, HRA or HSA – Medical care expenses of same-sex spouses may be reimbursed on a pre-tax basis

SAME-SEX SPOUSAL BENEFITS

Impact of *Windsor* on retirement plans:

- Surviving-spouse annuities – Sponsors of retirement plans that are required to provide surviving-spouse annuities will be required to recognize same-sex spouses for purposes of determining such annuities. Same-sex spouses must also consent to any payment of their deceased spouse's pension benefits in a form other than a 50% joint and survivor annuity, with the same-sex spouse as the beneficiary.
- Determining death benefits – Sponsors of ERISA and tax-qualified plans will have to recognize same-sex spouses for purposes of determining death benefits
- Spousal consent to beneficiary designation – Retirement plan sponsors must obtain spousal consent for beneficiary designations other than spouse

SAME-SEX SPOUSAL BENEFITS

Impact of *Obergefell* decision on health plans:

- Insured Plans – Insured plans must follow state insurance regulations. Given all states are now required to recognize same-sex marriages, insured plans must extend coverage to same-sex spouses
- Self-Funded Plans – Technically not required to extend benefits to same-sex coverage because governed by ERISA/federal law. But...
 - EMPLOYERS not currently offering benefits to same-sex spouses on the same level as opposite-sex spouses could risk potential discrimination claims under Title VII and EEOC charges being brought against them

SAME-SEX SPOUSAL BENEFITS

So now what?

- Review plan procedures to make sure treating same-sex spouses the same as opposite-sex spouses
- Update plan documents, if needed, to remove any language relating to “opposite-sex” spouses
- Communicate any changes or new policies with employees
- If require proof of marriage, make certain that the requirement is the same for all spouses
- If offer coverage to domestic partners, do you continue in light of this ruling?

SAME-SEX SPOUSAL BENEFITS

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WELLNESS PROGRAM COMPLIANCE

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WELLNESS PROGRAMS

- What is a wellness program?
 - No specific definition; come in all shapes and sizes
 - Educational seminars
 - Health club membership reimbursement
 - Office weight-loss “competitions”
 - Health questionnaires and/or biometric screenings
 - Disease management programs
 - Annual physical requirements
 - Many are offered in connection with a group health plan
 - May include incentives for participation
- Why offer a wellness program?

WELLNESS PROGRAMS

Current Legal Landscape:

- Final HIPAA wellness program rules took effect 1/1/14 to incorporate changes mandated by the Affordable Care Act subjecting programs to more rules and regulations
- Americans with Disabilities Act (“ADA”) issues in the spotlight
 - EEOC continues to scrutinize and has filed several lawsuits against employers claiming violations of the ADA
 - EEOC issued proposed rule providing guidance on how wellness programs can comply with both HIPAA and ADA requirements
 - Focus has been on mandatory nature of wellness programs

WELLNESS PROGRAMS

- Wellness programs are subject to a host of other laws, including:
 - Genetic Information Nondiscrimination Act (“GINA”)
 - Internal Revenue Code
 - HIPAA Privacy
 - ERISA
- Employers should consult with legal counsel to ensure compliance!

FIDUCIARY RESPONSIBILITY

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WHO IS A FIDUCIARY?

- A person is a fiduciary if he/she:
 - Exercises any discretionary authority or control over the management of the plan or disposition of plan assets; or
 - Exercises discretionary authority or responsibility in the administration of the plan
- Based on functions, not title
- There must be at least one named fiduciary in the plan (can be the president, board of directors, administrative committee, etc.)

FIDUCIARY DUTIES

General Rule - A fiduciary must discharge his/her duties:

- For the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan (duty of loyalty)
- With care, skill, prudence and diligence that a prudent man acting in like capacity and familiar with such matters would use (duty of prudence)

FIDUCIARY RESPONSIBILITIES INCLUDE...

- Discharging duties in accordance with plan documents and ensuring documents are compliant with ERISA and other laws
- Diversifying plan investments
- Committee structure and operation
- Hiring and monitoring of service providers and vendors
- Employee contributions
- Reasonableness of fees
- Establishment and maintenance of plan's claims procedures
- Ensure no prohibited transactions, self-dealing or kick-backs

FOCUS ON FIDUCIARY RESPONSIBILITY

- DOL has increased its focus on fiduciary matters in recent years
- Fiduciary rules apply to any retirement or health/welfare plan subject to ERISA and the Code
- Plaintiff's lawyers are increasingly bringing ERISA fiduciary claims and class actions
- Important to ensure plan fiduciaries are well educated on their responsibilities
- Violating ERISA's fiduciary rules can result in personal liability for fiduciaries, as well as significant civil penalties and excise taxes
- Fiduciary training should be part of your company's legal compliance initiatives

QUESTIONS?



Kristi R. Gauthier

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kgauthier@clarkhill.com

THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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