EMPLOYEE BENEFITS: 2017 UPDATE & WHAT EMPLOYERS NEED TO KNOW TO STAY COMPLIANT

2017 Labor and Employment Law Conference

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AGENDA

- Affordable Care Act ("ACA") update
- Health and welfare plans – other developments
- Retirement plans update

AFFORDABLE CARE ACT ("ACA") UPDATE

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KEY PROVISIONS OF THE AFFORDABLE CARE ACT (ACA)

- The individual mandate requires individuals to have qualifying health insurance (or face a penalty)
- Financial assistance available (premium tax credits and cost sharing subsidies)
- The employer mandate requires that employers with 50 or more full-time and/or full-time equivalent employees must offer "affordable" and "minimum value" health coverage to full-time employees and their dependent children, or face penalties
- Variety of market reforms (elimination of preexisting condition exclusions, coverage for children to age 26, elimination of coverage limits)
- Medicaid expansion
- Variety of taxes to fund
- Reporting to determine compliance and penalties

FITS AND STARTS – NO ACA REPEAL

- In January 2017, President Trump issued an Executive Order to "minimize the economic burden" of the ACA:
  - Administration's policy is to seek the prompt repeal of the ACA
  - In the meantime:
    - Agencies will exercise authority and discretion to waive, defer, grant exemptions from, or delay implementation of ACA that impose a cost, fee, tax, penalty or burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance or makers of medical devices
    - Employers not mentioned!

EXECUTIVE ORDER REVISING ACA

- After multiple failures by Congress to repeal or revise the ACA, on October 12, the President signed an Executive Order envisioning major changes in the structure and operation of health care and insurance coverage, including employer group health plans

- The Order authorizes the Departments of Treasury, Labor and Health and Human Services to evaluate and, if consistent with current law, issue regulations facilitating the purchase of health insurance across state lines and the development of a high-quality, affordable health system

EXECUTIVE ORDER REVISING ACA

- The Executive Order outlines three primary goals:

1. Authorize and expand access to the following health care arrangements:

   – **Association Health Plans (AHPs)** would allow small businesses, including businesses operating in different states, to group together to self-insure or to purchase large group health insurance coverage

   – **Short-Term, Limited-Duration Insurance (STLDI)** would provide a temporary alternative to government exchanges for individuals between jobs or who otherwise don't have employer-provided coverage

   – **Health Reimbursement Arrangements (HRAs)** would be expanded to allow employers to provide tax-advantaged, account-based coverage of health expenses or purchase of individual coverage by employees

EXECUTIVE ORDER REVISING ACA

2. Expansion of competition in the health insurance marketplace
   - Lower barriers to entry
   - Limit excessive consolidation
   - Prevent abuses of market power
3. Improving access to and quality of information about health care prices and outcomes to help consumers make informed health care decisions
   - This is paired with a possibly conflicting goal of reducing or minimizing the reporting burden on plans, providers and payors

EXECUTIVE ORDER REVISING ACA

- Timeline for possible action – the Order requires proposed regulations on the following subjects
  - 60 days: Establish scope and requirements for access to AHPs and the availability of STLDI
  - 120 days: Expand the ability of employers to offer HRAs on standalone basis or in connection with non-group health coverage
  - 180 days: Provide a report on existing sate and federal laws and regulations conflicting with or which limit the goals and policies expressed in the Order

EXECUTIVE ORDER REVISING ACA

- Unclear at this point exactly how each of these components will operate or whether they will be prohibited or at least restricted by existing law or regulations

- Unlikely to have much impact on large employers (those with more than 50 full-time/full-time equivalent employees)

- Many politicians, as well as health care and consumer advocates, have expressed concern or condemnation of the Order, saying it will drive up prices for those who need insurance the most

OTHER ACA DEVELOPMENTS AND UPDATES

- HHS issued separate rules on October 12 discontinuing certain cost-sharing subsidies to insurers under the ACA
- IRS has announced that it will reject 2017 tax returns (filed in 2018) that are silent on whether the taxpayer complied with the individual mandate
  - This reverses the IRS policy for 2016 returns (filed in 2017)
- Cadillac tax imposing a 40% excise tax on the cost of certain employer-provided health care plans exceeding a standard cap is still on the books and would become effective in 2020
  - Employers negotiating collective bargaining agreements that will be in effect in 2020 should consider adding flexibility to address potential Cadillac tax issues in the CBA

OTHER ACA DEVELOPMENTS AND UPDATES

- Summary of Benefits & Coverage (SBC): A new version of the SBC form (used to provide employees with information about what the plan covers and its cost-sharing provisions) became effective April 1, 2017 and should be used for new enrollments

- Interim final rules issued October 6, 2017 expand the scope of existing religious and moral-based exemptions from the ACA mandate that group health plans provide free contraceptive care

INCREASED PENALTIES AND OUT-OF-POCKET MAXIMUMS

- The penalties for employers who fail to offer compliant ACA coverage are:
  - For 2017, $2,260 for failure to offer coverage and $3,390 for failure to offer affordable, minimum value coverage
  - For 2018, $2,320 for failure to offer coverage and $3,480 for failure to offer affordable, minimum value coverage
- 2018 Cost-of-living increases
  - $7,350 annual cost sharing for self-only ($7,150 for 2017)
  - $14,700 annual cost-sharing for other than self-only ($14,300 for 2017)
  - $1,350 minimum HDHP deductible for self-only ($1,300 for 2017)
  - $2,700 minimum HDHP deductible for family coverage ($2,600 for 2017)
  - $3,450 maximum HSA contribution for self-only ($3,400 for 2017)
  - $6,900 maximum HSA contribution for family coverage ($6,750 for 2017)

ACA NONDISCRIMINATION RULE

- ACA Section 1557: an individual shall not be excluded from participation in, or denied the benefits of, or be subjected to discrimination, under any health program or activity, any part of which receives federal financial assistance from the HHS

- Required some employer sponsored group health plans to cover benefits to treat gender dysphoria

- In December, a US District Court issued a nationwide preliminary injunction enjoining the federal agencies from enforcing certain provisions of the rule

- Implications for employers:

  - Most plan designs already changed for 2017

  - EEOC continues to interpret Title VII's sex discrimination prohibition to include gender identity

QUALIFIED SMALL EMPLOYER HRA'S (QSEHRA)

- Prohibition on reimbursing employees for premium expenses for individual health insurance policy or directly pay such premiums

- Position was reversed in the 21st Century Cures Act
  - Employers with fewer than 50 full-time and full-time equivalent employees that do not offer group health insurance to any employees
  - May reimburse on a pre-tax basis premiums paid for individual health coverage and eligible unreimbursed medical expenses
  - Generally, must provide on the same terms to all employees
  - Subject to limits on maximum amount of reimbursement
  - Required to verify other covered
  - Notice required
  - Starting in 2018 for the 2017 tax year, benefits must be reported on Form W-2

MARKETPLACE CHANGES

- Final rule issued on April 13, 2017
  - Intended to reform and stabilize the marketplace
  - In response to the recent exit of several issuers from the healthcare marketplace and the increasing rates
  - The proposed changes include the following:
    - Shortening of Open Enrollment Period
    - Changes to Special Enrollment Pre-Enrollment Verification Process
    - Changes to Guaranteed Availability Requirements

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

HEALTH AND WELFARE PLANS – OTHER DEVELOPMENTS

TO-DO'S

- Review plan documents (cafeteria plans, insurance policies, summary plan descriptions) to confirm that they reflect appropriate eligibility rules and definitions (especially if using ACA full-time employee definition)

- Evaluate HIPAA Compliance

  – HHS began conducting HIPAA Phase II audits in 2016, involving review of HIPAA policies and procedures, including business associate agreements, complying with HIPAA's privacy, security and breach notification regulations

  – Guidance released on use of business associate agreements with "cloud service providers" housing electronic private health information

MORE TO-DO'S

- Wellness Program Compliance Issues
  - Certain wellness programs (e.g., those that involve biometric screenings or health risk assessments) must provide an ADA Notice to participating employees
  - Evaluate tax treatment of certain wellness incentives (e.g., gym club reimbursements)
- Disability Claim Procedure Regulations require disability claims procedures similar to ACA health claims and apply to all plans where disability is evaluated, including retirement plans and certain nonqualified deferred compensation plans
  - Currently schedule to be effective January 1, 2018, but DOL is considering extending the deadline until April 1, 2018

RETIREMENT PLANS UPDATE

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FIDUCIARY RISKS AND LIABILITIES

- 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 multimillion dollar ERISA fiduciary claims and class actions against employers and Boards claiming a breach of fiduciary duty for failure to monitor investment options or fees paid to outside administrators
- Important to ensure plan fiduciaries are well educated about their responsibilities
  - Identify fiduciaries
  - Conduct fiduciary training
- Violating ERISA's fiduciary rules can result in personal liability for fiduciaries, as well as significant civil penalties and excise taxes

TAX REFORM – IMPACT ON RETIREMENT PLANS

- The President's tax reform plan does not mention any changes to the tax treatment of 401(k) and other retirement plans
- Some tax reform proposals have included a reduction in the amount employees can defer pre-tax into 401(k), 403(b) and similar employer-sponsored plans
- Also, for defined benefit pension plans, assuming corporate income tax rate is reduced, employers with underfunded plans may consider making larger contributions for current tax year to maximize deductions against higher corporate income tax rate prior to the implementation of the reduced rates

RETIREMENT PLAN TO-DO'S LIST

- Notices, notices and more notices (for calendar year plans)
  - Safe Harbor 401(k) Plan Notice by December 1, 2017
  - Annual Automatic Enrollment 401(k) Plan Notice by December 1, 2017
  - Annual Qualified Default Investment Alternative (QDIA) Notice by December 1, 2017
  - Distribute Summary Annual Report following filing of 5500 annual report
  - Distribute participant fee disclosures

MORE RETIREMENT PLAN TO-DO'S

- Determine if any regulatory or other amendments are required before the end of the year
  - The five year cycle determination letter program has been terminated, but plans still have to be amended to stay current with regulatory or similar amendments
  - Review the IRS's "Required Amendments List" to determine if any amendments are necessary
  - Make sure any amendments or material changes are accurately reflected in the plan's summary plan description (note that SPDs must be restated and distributed to participants at least every five years, even if there are no material changes in the plan's terms)

RETIREMENT PLAN LIMITS FOR 2018

- $18,500 elective deferral limit ($18,000 for 2017)
- $6,000 additional catch-up contribution limit for employees 50 or older (unchanged)
- $120,000 threshold for highly-compensated employee status (unchanged)
- $275,000 annual compensation limit ($270,000 for 2017)

QUESTIONS?

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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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