Mid-Year Regulatory Update

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PRESENTER

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AGENDA

- ACA and Reporting
- EEOC and Wellness
- COBRA
- OSHA
- HIPAA and Phase 2 Audits
- FLSA

ACA AND REPORTING

To know where we are going in 2016 with the ACA, we must take a quick look back to 2015…

ACA AND REPORTING

2015 was the first year of Play or Pay and what you had to do was driven by how many people you employed…

- 0-49 FTEs — Not subject to ACA
- 50-99 FTEs — Not required to offer coverage in 2015, but required to do ACA reporting in 2016
- 100+ FTEs — Required to offer coverage in 2015 and required to do ACA reporting in 2016

ACA AND REPORTING

Who Do I Have to Cover?

FT Employees

- All salaried are presumed to be full time
- Works 30 hours per week or 130 hours per month
- FT Employee's dependent children until age 26
- Does not include spouse

Who Do I Not Have to Cover?

Part Time employees.

- Work fewer than 30 hours per week or 130 hours per month

Seasonal Team Members

- Work less than 6 months per year.
- Job classification must include "seasonal"

ACA AND REPORTING

How Do I Know Who to Cover?

Look-Back Period

- 3-12 month measurement period in the prior year where hours are measured
- Average 30 hours per week/130 hours per calendar month

Administrative Period

- You can take up to 90 days after the Look-Back to take care of administrative matters before Stability Period (and coverage) start
- Look-Back calculations
- Notify employees of eligibility or loss of eligibility
- Additions or deletions from insurance coverage
- Set up payroll deductions

ACA AND REPORTING

Stability Period

•Employees who are full-time during the Look-Back measurement period must be offered coverage during following “Stability” period as long as they are still employed (even if they are not Full Time)

•Full Time employees must be offered coverage, but they don’t have to take the coverage

•Stability period must be at least as long as but not shorter than the measurement period

•Be sure ACA requirements are reflected in your plan document!

ACA AND REPORTING

Who has to report?

Providers of Minimum Essential Coverage (MEC)

- Section 6055 MEC reporting on IRS Form 1094-B and1095-B (fully insured)
- Section 6055 MEC reporting on IRS Form 1095-C, Part III (self-funded)

Applicable Large Employers (ALEs)

- Section 6056 ALE reporting on IRS Form 1094-C and 1095-C

ACA AND REPORTING

ALEs must report even if they didn't have to offer coverage

- 50 or more Full Time Equivalents (FTEs) in 2014
  - Non-ALEs do not report
- 50-99 FTEs don't have to provide coverage in 2015, but do have to report!
- 100+ FTEs were required to provide coverage in 2015 AND must report
- Section 6056 ALE reporting on IRS Form 1094-C and 1095-C

ACA AND REPORTING

Individual Statement Deadline

- Employers were required to provide employees with 1095-C not later than March 31st for the 2015 tax year
- Next year it will be January 31st, 2017, same as W-2s.

IRS Filing Deadlines Pushed back to June 30, 2016.

ACA Penalty Letters

- The U.S. Department of Health and Human Services (HHS) has started to notify employers about employees receiving advance premium tax credits (APTC) or subsidies for 2016 on the ACA federally facilitated exchange
- Employers may want to appeal to HHS the finding that an employee was not offered employer health coverage that was affordable and of minimum value
- Employers have 90 days after receiving an HHS notice to appeal
- HHS posted an appeal form on HealthCare.gov for appealing to the federally-facilitated exchange as well state-based exchanges in California, Colorado, District of Columbia, Kentucky, Maryland, Massachusetts, New York and Vermont
- Employers should appeal the HHS letter if they believe they do not owe the penalty

ACA Penalty Letters

- *Remember* that it is the IRS which is responsible for assessing and collecting shared responsibility payments from employers, not HHS
- IRS will start notifying employers later in 2016 if they are potentially subject to shared responsibility penalties for 2015
- Likewise, the IRS will notify employers in 2017 of potential penalties for 2016, after their employees' individual tax returns have been processed
- Employers will have an opportunity to respond to the IRS before the IRS actually assesses any ACA shared responsibility penalties
- Keep in mind that appealing to HHS is not the same thing as appealing to the IRS
- Employers may want to appeal both the HHS letter and later the IRS letter when they come out
- IRS appeal forms are not year available

ACA AND REPORTING

Penalty relief available in 2016 for 2015 tax year

- Must be able to show “good faith effort to comply”
- Only applies to incorrect or incomplete information
- Totally at the discretion of the IRS
- Not available for late filing or no showing of good faith effort to comply

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PCORI Fee

The applicable fee for plans reporting 07/31/2016 are:

- $2.08 per person for plan years ending on or after Oct. 1, 2014 and before Oct. 1, 2015
- $2.17 per person for plan years ending on or after Oct. 1, 2015 and before Oct. 1, 2016
- Filed using updated IRS Form 720
- Self-funded plans, including HRAs must file
- Fully-insured plans filed by insurance carrier

Transitional Reinsurance Fee

Amount of Fee:

- The fee is $27 per covered life for 2016.

Fee Due Date:

- Submit an annual enrollment count to HHS no later than Nov. 15th. Within 15 days of submission (or by Dec. 15th), HHS notifies plan sponsor of required reinsurance amount due. Payment must be remitted to HHS within 30 days of the date of HHS' notification.

Fee Calculation:

- Average number of lives can be calculated based on the Actual Count, Snapshot, Snapshot Factor or Form 5500 Methods.

Transitional Reinsurance Fee

Calculation of Fee:

- Actual Count Method – add the number of lives covered each day of the plan year and divide by number of days in the plan year.
- Snapshot Method – add total lives covered on a date in each quarter of the plan year, or an equal number of dates for each quarter, and divide the total by the number of dates used.
- Snapshot Factor Method – Same as Snapshot method, but tally single coverages and set aside. Multiply all non-single coverages by 2.35 and add to total of single coverages. *Nearly always results in lower count.*
- Form 5500 Method – use the number of participants reported on the Form 5500 for that plan year

Cadillac Tax

- Imposes a 40% excise tax on any “excess benefit” provided to an employee, and provides that an excess benefit is the excess, if any, of the aggregate cost of the applicable coverage of the employee for the month over the applicable dollar limit for the employee for the month.
- The term “employee” includes “a former employee, surviving spouse, or other primary insured individual”
- Fully-insured carriers will pay tax, but will pass through to employers
- Self-insured plan sponsors will pay directly

Cadillac Tax

- "Cost of coverage" determined using COBRA methodology
- Coverage includes group medical coverage, FSA contributions, pre-tax employer and employee HSA contributions.
- Dental and vision are excluded if provided via separate plan or separate premium.
- Trigger amounts are $10,200 single and $27,500 other than single.
- Various adjustments will apply to increase these amounts. Treasury and IRS intend to include rules regarding these adjustments in proposed regulations and invite comments on the application and adjustment of the dollar limits.
- For taxable years after 2018, a cost-of-living adjustment will be applied to determine the applicable dollar limits.
- Adjustments for Qualified Retirees and High Risk Professions

EEOC and Wellness

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BACKGROUND

EEOC and its tortured approach to wellness

- EEOC has long had a very narrow view of ADA compliance
- EEOC refused to issue official guidance regarding wellness programs and the ADA for years
- DOL, IRS, HHS issued proposed HIPAA wellness rules in 2006 and final wellness rules in 2013

Congress expanded wellness programs in 2010 as part of the Affordable Care Act (ACA)

- General wellness incentives increased to 30% of cost of coverage
- New incentive created for tobacco cessation of up to 20% of cost of coverage

One court case of note- Seff vs. Broward County

- Federal trial court and federal appeals court side with employer
- EEOC “doesn’t agree with court’s position”

ADA WELLNESS RULES

Proposed and Final ADA Wellness Rules

- April 20, 2015 EEOC released its own proposed version of wellness rules based on its interpretation of ADA
- On May 16, 2016, EEOC issued final regulations governing the treatment of wellness programs under ADA and GINA
- Doesn't match up with the 2013 Final HIPAA Wellness Rules released by IRS, DOL, and HHS.
- Doesn't match up with Congressional ACA wellness amendments
- Apparently ignores bona fide benefit plan safe harbor in §501c of the ADA
- What could possibly go wrong?

NEW ADA WELLNESS RULES

Five Essential Elements

1.

- An employee health program, including any disability-related inquiries or medical examinations that are part of such programs, must be reasonably designed to promote health or prevent disease
- Similar to existing HIPAA Rule

NEW ADA WELLNESS RULES

Five Essential Elements

2.

- All wellness programs must be voluntary
- Cannot be mandatory
- Cannot deny coverage under any group health plan or particular benefit packages within a group health plan for non-participation, nor can benefits be limited for employees who do not participate
- Cannot take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees for not participating

NEW ADA WELLNESS RULES

Five Essential Elements, cont'd

2.

- New notice required
- Written so that the employee from whom medical information is being obtained is reasonably likely to understand it
- Describes the type of medical information that will be obtained and the specific purposes for which the medical information will be used; and
- Describes the restrictions on the disclosure of the employee's medical information, the employer representatives or other parties with whom the information will be shared, and the methods that the covered entity will use to ensure that medical information is not improperly disclosed (including whether it complies with the HIPAA Privacy Rule)

NEW ADA WELLNESS RULES

Five Essential Elements, cont'd

3.

- Incentives (financial or in-kind) connected with the wellness program must not exceed a 30% limit of the total cost of employee-only coverage
- More restrictive than HIPAA rule
- 30% limit applies to both participatory and health-contingent programs, or any combination of the two
- More restrictive than HIPAA rule

NEW ADA WELLNESS RULES

Five Essential Elements, cont'd

4.

- Reasonable accommodations must be provided, absent undue hardship, to enable employees with disabilities to earn whatever financial incentive an employer offers (regardless of whether a wellness program includes disability-related inquiries or a medical examination)
- Similar to HIPAA rule

5.

- Confidentiality be observed with regard to the medical information collected in connection with the wellness program

RECENT EEOC LEGAL ACTION

Chicago office of EEOC has recently sued 3 employers alleging that their wellness plans violate the ADA

- EEOC cited ADA prohibition against employers requiring employees to undergo medical tests (mandatory tests)
- Two WI employers sued
- Honeywell Corp of Mpls, MN operated a HIPAA compliant wellness plan, but was sued anyway

RECENT EEOC LEGAL ACTION

- Honeywell Corp of Mpls, MN operated a HIPAA compliant wellness plan, but was sued anyway
- Federal judge recently denied EEOC's request for a restraining order and temporary injunction against Honeywell's wellness plan
- One of the requirements to obtain an injunction is that your case must be likely to prevail. The Court's denial of the motion for injunctive relief was a clear signal that the EEOC was going to lose
- Case voluntarily dismissed
- Case against Flambeau Corp in WI decided against EEOC, based on Bona Fide Benefit Plan Safe Harbor of ADA

RECENT EEOC LEGAL ACTION

Mandatory or voluntary HRA really isn't the point

- ACA play or pay requirement to offer coverage or face $2,000 fine per FT employee makes mandatory HRAs impractical
- ADA safe harbor for "bona fide benefit plans" at Section 501(c)
- *A wellness program that falls within the ADA's safe harbor for bona fide benefits plans need not comply with the ADA requirements regarding medical examinations and inquiries for employees*

RECENT EEOC LEGAL ACTION

The ADA Section 501(c) safe harbor was used by Broward County, Florida in 2012 to defeat an employee's lawsuit that alleged that the County's wellness plan violated ADA

- Based on the bona fide plan defense, the suit was thrown out of federal court in summary judgment
- The federal court judge in the Seff vs. Broward County case didn't spend time on whether the Broward County program was voluntary or mandatory, but rather went straight to focusing on the ADA's bona fide benefit plan exemption under ADA Section 501(c)
- Broward County's wellness plan was upheld by two separate courts; both the federal trial court and the 11th Circuit Court of Appeals found the wellness plan to fall within the ADA bona fide benefit plan safe harbor
- EEOC was not a party to the Seff case

RECENT EEOC LEGAL ACTION

- Even though EEOC lost the Honeywell case, it may cause employers to think twice about pursuing a wellness strategy (which may be the EEOC's ultimate aim)

- Employers need to make sure that their wellness plans comply with HIPAA and Section 501(c) of the ADA!

FALL OUT

Substantial fallout from EEOC's actions

- IRS, DOL, and HHS regard EEOC ADA rules as infringing on established HIPAA final wellness regulations
- EEOC viewed as not working and playing well with others
- Congress displeased with EEOC effectively ignoring/overriding ACA wellness amendments
- Routine Congressional reappointment hearing for EEOC counsel turned into a dressing down by members of Congress
- Chicago EEOC office confirmed as having "gone rogue"

NEW GINA WELLNESS RULES

EEOC recently released proposed wellness rules for compliance with the Genetic Information Non-Discrimination Act (GINA)

- Generally follow the prior proposed ADA rules
- Requesting any health information for a spouse is viewed in the regulation as requesting genetic information from the employee; proposed regulation permits this with written permission
- Total incentive for an employee and spouse to participate in a wellness program that is part of a group health plan and collects information about current or past health status may not exceed 30%of the total cost of the plan in which the employee and any dependents are enrolled
- Maximum portion of an incentive that may be offered to an employee alone may not exceed 30% of the total cost of self-only coverage
- Still ignores ACA Tobacco cessation incentive of 20%

NEW GINA WELLNESS RULES

EEOC appears to be continuing to pursue its own standard of how a "reasonable wellness plan" is defined

- May not match up with HIPAA or ACA definitions

NEXT STEPS

- Effective date will be after the close of current plan year, i.e. 2016.
- EEOC rule not popular with either political party, especially since it conflicts with ACA.
- Employers will not have to comply with either set of regulations until 2017
- Legal action likely against EEOC to prevent final regulations from taking effect
- Congressional action not likely
- 88% of employers with 500 workers or more offer some sort of wellness plan, according to a 2014 national survey by the benefits consultant Mercer
- Of those, 42% offer employees incentives to undergo screening, and 23 percent tie incentives to actual results, such as reaching or making progress toward blood pressure or BMI targets
- Most programs' incentive structures do not extend pass the 30% threshold, so there doesn't seem to be a huge concern from an incentive design point of view

FINAL WELLNESS THOUGHTS

- Employers should be aware that the EEOC is not likely to reverse its position on wellness programs because of the Flambeau decision.
- The agency has staked out its position and can be expected to continue to pursue wellness programs that do not fit the EEOC's concept of an ADA-compliant program.
- Employers that currently maintain or are contemplating starting a wellness program as part of their group health plan should monitor this situation closely and stay tuned for further legal developments.
- Wellness programs and benefit design must be compliant with all rules following plan renewal date following 1/1/17.

COBRA

COBRA

- On June 21, 2016, the Departments of Labor (DOL), Health and Human Services (HHS), and Treasury released another Frequently Asked Question (FAQ) related to Affordable Care Act (ACA) issues.
- https://www.dol.gov/ebsa/faqs/faq-aca-32.html
- The FAQ provides group health plan administrators the option to include *additional information* in COBRA election notices about ACA Marketplace coverage that might be available to participants who are eligible for COBRA due to a qualifying event.

COBRA

Additional information about ACA Marketplace coverage could include:

- How to obtain assistance with enrollment, including special enrollment.
- Information about Marketplace websites and contact information.
- General information regarding particular products offered in the Marketplace.

COBRA

No new COBRA model notice was released

- Use of the DOL model COBRA election notice will continue to be considered good faith compliance with COBRA election notice requirements.
- No action required, but employers may choose to update their notices.

HIPAA Phase 2 Audits

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HIPAA PHASE 2 AUDITS

- The U.S. Department of Health and Human Services' Office for Civil Rights recently announced that it has begun Phase 2 of its HIPAA Audit Program.
- These audits will assess compliance by health plans and their business associates with the HIPAA privacy and security rules, and the HITECH Act breach notification rules.
- During Phase 2, the OCR will conduct audits of about 200 covered entities and business associates. Most of the audits will be desk audits of covered entities, such as health plans and health care providers, followed by a second round of desk audits of business associates.
- Desk audits are scheduled to be completed by the end of December 2016.

HIPAA PHASE 2 AUDITS

Audit selection criteria for an audit will include:

- The entity's size;
- It's affiliation, if any, with other health care organizations;
- The type of entity and its relationship to individuals;
- Whether an organization is public or private;
- Geographic factors; and
- Any ongoing enforcement activity with OCR.
- OCR will not audit entities that have an open complaint investigation or are currently undergoing a compliance review.

HIPAA PHASE 2 AUDITS

Employers must review their HIPAA Privacy and Security compliance and verify that they are in compliance.

- Documentation of PHI flow
- Policies, procedures, forms up to date
- Documented training
- Annual HIPAA Security IT audit
- Failure to conduct the required annual IT audit may be “willful neglect” by the Covered Entity

OSHA

OSHA

On May 11, 2016, the Occupational Safety and Health Administration (OSHA) issued a final recordkeeping and reporting rule that requires employers to electronically submit their injury and illness reports.

OSHA

- OSHA's final rule also creates a new remedy for OSHA to pursue where it believes an employer either retaliates against employees for reporting work-related injuries or illnesses or through a policy or procedure deters them from doing so. OSHA may penalize employers for violating the provisions of its new rule.

OSHA

- Previously, OSHA could only act if an employee files a complaint within 30 days of the retaliation.
- Under the new regulation, OSHA will be able to cite an employer for retaliation even if the employee did not file a complaint, or if the employer has a program that deters or discourages reporting through the threat of retaliation.
- Specifically, employers must inform employees of their right to report work-related injuries and illnesses free from retaliation. This obligation may be met by posting the *OSHA Job Safety and Health — It's The Law* worker rights poster (www.osha.gov/Publications/poster.html).

FLSA Overtime Rules

FLSA CHANGES

- Increased Salary Level Test
- Use of Bonus Compensation
- Automatic Increases
- Increased HCE Exemption
- Change to Duties Test

PROPOSED CHANGES

Increased Salary Level Test

- To restore the effectiveness of the salary level test, the Department set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers
- The new level is $47,476/year or $913/week, up from $23,660/year or $455/week
- Further, in order to prevent the salary level requirements from again becoming outdated and ineffective between rulemakings, the salary levels will automatically update on an annual basis

FLSA CHANGES

Use of Bonus Compensation

- New rules allow nondiscretionary bonuses, such as certain production or performance bonuses, to satisfy a portion of the standard salary test requirement
- Such bonuses include for example, nondiscretionary incentive bonuses tied to productivity and profitability
- Must be paid quarterly or more often to be counted
- Can only use 10% of bonus amount for satisfying Salary Test
- Effectively means employers must pay regular salary of $821.70 or more

FLSA CHANGES

Automatic Increases

- To ensure that they remain meaningful tests for distinguishing between bona fide executive, administrative, and professional workers who are not entitled to overtime and overtime-protected white collar workers.
- Tied to changes in lowest paid US Census region (Southern) to keep the salary level test at the 40th percentile
- Automatic increases start 1/1/2020

FLSA CHANGES

Increased HCE Exemption

- Final rules changed the highly compensated employee ("HCE") annual compensation level equal to the 90th percentile of earnings for full-time salaried workers to $122,148 annually from $100,000

FLSA CHANGES

No Change to Duties Test

- DOL proposed changing the duties test for the Executive Exemption to adopt the California executive exemption duties test
- Exempt employees must perform exempt job duties more than 50% of the time in California
- Final rules did NOT adopt the change!

NEXT STEPS

Conduct an Audit

- Determine which exempt positions that are currently paid between $23,660 and $50,440 annually.
- Determine hours worked per week.
- Change management for employees who may have to start tracking hours.
- Examine policies for employees using electronic devices outside of schedule work hours.
- Be aware of state OT and exemption laws.

POTENTIAL STRATEGIES

- Consider making employees salaried, non-exempt
- Move employees to non-exempt (hourly) and track hours
- Increase employees' salary to $47,476 or $122,148
- Consider hiring more employees to cover OT hours
- Decrease salary (same net salary)
- Manage hours worked in workweek to avoid OT

POTENTIAL STRATEGIES

Salaried Non-Exempt Strategy

- Employers may continue to pay employees a salary covering a fixed number of hours, which could include hours above 40.
- It is possible for an employer and employee to agree to a fixed salary for a work week of more than 40 hours, in which the salary includes overtime compensation under certain conditions.
- Signed compensation agreement required.

Example:

John Doe has an agreement with his company where he is paid a fixed salary of $40,000 per year for a 45-hour work week. The fixed salary includes both straight time for the first 40-hours ($16/hour x 40 hours) and overtime compensation for hours 41-45 ($24 overtime rate x 5 hours). If his schedule changes, his salary needs to be adjusted.

QUESTIONS?

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