Year in Review & 2017 Forecast

Presented by | Adam Jensen, Vice President

Cottingham & Butler

PRESENTER

ADAM JENSEN

Vice President
Compliance and Human Resource Consulting

ajensen@cottinghambutler.com
608-467-5030

AGENDA

- ACA and Reporting
- EEOC and Wellness
- COBRA
- OSHA
- HIPAA and Phase 2 Audits
- FLSA
- I-9s
- 5500s

What a year!

2016- Go home, you're drunk!

ACA AND REPORTING

2016 was the first year of 1094, 1095 Reporting

- Not exactly “smooth sailing”

ACA AND REPORTING

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

- 50 or more Full Time Equivalents (FTEs) in 2014
  - Non-ALEs did not report
- 50-99 FTEs didn't have to provide coverage in 2015, but did have to report in 2016!
- 100+ FTEs were required to provide coverage in 2015 AND must report
- Section 6056 ALE reporting on IRS Form 1094-C and 1095-C
- 2016 all ALEs required to provide coverage

ACA AND REPORTING

Individual Statement Deadline Pushed Back

- Employers were required to provide employees with 1095-C not later than March 31, 2016 for the 2015 tax year
- 2016 plan year statements already pushed back to March 2, 2017

ACA AND REPORTING

IRS Filing Deadline Was Pushed back to June 30, 2016

- IRS eventually relented and asked employers to get them in as soon as they could
- 2017 IRS electronic deadline STILL set for March 31, 2017

ACA Penalty Letters

- The U.S. Department of Health and Human Services (HHS) started to notify employers about employees receiving advance premium tax credits (APTC) or subsidies for 2016 on the ACA federally facilitated exchange
- HHS would only review three grounds for appeal:
  1. Was coverage offered?
  2. Was it affordable?
  3. Did it meet the 60% value test?
- All other reasons shoved off to a later IRS review, including person claiming subsidy wasn't an employee or wasn't full time
- Only winner apparently was HHS who had employers help them clean up their subsidy lists

ACA Penalty Letters

- *Remember* that it is the IRS which is responsible for assessing and collecting shared responsibility payments from employers, not HHS
- Not known when IRS will start notifying employers if they are potentially subject to shared responsibility penalties for 2015 (maybe never?)
- Likewise, the IRS will supposedly 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
- IRS appeal forms are not 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
- IRS is repeating this penalty relief in 2017 for 2016 tax year

ACA AND REPORTING

Future of ACA with the new administration

- Candidate Trump campaigned on the promise of repealing the ACA immediately after taking office.
- President-elect Trump has already walked back on that, suggesting instead that he was willing to keep portions of the law.
- Repeal via “Reconciliation” possible, fairly straight forward.
- Avoids filibuster
- GOP could also theoretically remove filibuster, but unlikely
- Rep. Price of GA nominated for HHS Secretary.
- ACA opponent, has authored 6 ACA repeal bills
- If repealed, strong possibility of 18-24 month phase out of ACA features that are popular with voters in hopes of winning additional seats in 2018 needed to establish super majority.

ACA AND REPORTING

Paul Ryan's "A Better Way" proposal is expected to be a guide for the administration

- For people without access to employer coverage, Medicare, or Medicaid, offers a refundable tax credit to help buy health insurance in the individual market.
- Expand the use of health savings accounts.
- Preserve employer-based insurance, but caps the open-ended tax break on employer-based premiums.
- Allow sales across state lines.
- Allow small businesses and individuals to band together through new pooling mechanisms.
- Back wellness programs.
- Medical liability reform.

ACA AND REPORTING

Much of the Republican strategy is expected to focus on supporting the 2018 midterm elections and the goal of capturing a super majority in Congress

- Republicans need 8 additional seats; 21 in play in 2018. This includes traditionally “Blue” states that went “Red” in 2016: Michigan, Wisconsin, Pennsylvania, etc.

What stays, what goes?

ACA feature likely to remain:

- Elimination of Pre-Existing Conditions
- Potential for 2-tiered system:

1. Continuous coverage, no Pre-Ex
2. Break in coverage, subject to Pre-Ex

- Supported by insurance industry to combat adverse selection/death spiral

What stays, what goes?

ACA feature likely to remain:

- Ban on Rescissions
- Guaranteed Issue
- Guaranteed Renewal

What stays, what goes?

ACA feature likely to remain:

- Elimination of Lifetime Dollar Limits (Annual Dollar Limits might return)
- Coverage to Age 26
- Coverage of Clinical Trials
- Elimination of Prior Auth for OB/GYN, Pediatric Svcs, Out-of-Network ER Care
- Increased Wellness Incentives

What stays, what goes?

ACA features likely to go/change:

•Employer Mandate ("Play or Pay")

•Reporting (possibly not right away), since reporting is needed for Individual Mandate, Play or Pay, and Subsidies. If any one of the three remain, some form of reporting will be needed

•Individual Mandate

•Cadillac Tax

What stays, what goes?

ACA features likely to go/change:

- Federal Operation of Exchanges/MarketPlaces(reinstate state high risk pools?)
- Medicaid Expansion (replace with block grants?)
- Advanced Premium Tax Credits
- Other ACA Taxes (Medicare Surtax, Medical Device Tax, Health Insurer Tax)
- OTC Ban, Dollar Cap for FSAs
- Effect on IRS Guidance (Cash in lieu of benefits, etc.)

ACA AND REPORTING

ACA Items on the fence:

- Medical Loss Ratio/Limits on Carrier Profits (trade off for MarketPlace?)
- Annual Dollar Limits
- Preventive Care without Cost Sharing (Staying but changing?)
- Section 1557 non-discrimination rules

ACA AND REPORTING

How quickly might this happen?

- Expect to see the suspension/modification of ACA reporting
- Conservative position is to carry through with 2016 1095-C filings
- Likely waiver of Play or Pay penalties for 2016 (IRS is already months behind)
- The ACA “is the law until is isn’t”; it’s in effect until repealed/replaced

PCORI Fee

The applicable fee for plans reporting 07/31/2017 going up:

- $2.26 for plan years ending on or after Oct. 1, 2016 and before Oct. 1, 2017
- Filed using updated IRS Form 720
- Self-funded plans, including HRAs must file
- Fully-insured plans filed by insurance carrier

Transitional Reinsurance Fee

Fee Supposed to Phase out with 2016 payment

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.

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

ACA AND REPORTING

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

ACA AND REPORTING

Cadillac Tax

- Tax is disliked by both parties, may well be repealed

EEOC and Wellness

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”
- Federal trial court in Orion case recently went the opposite way

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
- Flambeau and Orion both won

RECENT EEOC LEGAL ACTION

ADA Safe Harbor

- 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

- September of 2016, Orion won case, but federal trial court ruled against bona fide benefit plan safe harbor argument used by self funded medical plan
- Making employee who wouldn't participate in HRA pay 100% of premium didn't make plan involuntary
- Future is uncertain for safe harbor
- 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"
- Uncertain if EEOC will retreat under new administration

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
- New administration may take steps to reign in EEOC, but need to wait and see
- 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 and Orion decisions.
- 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.
- Ongoing desk audits should be expected.
- Increased risk to self funded employers since HHS keeps the fines it assesses and it now has a cost effective tool for auditing plans.

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.

- Recordkeeping and reporting rules go into effect 1/1/2017.

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.
- 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).
- The anti-retaliation provisions were scheduled to take effect on Aug. 10th, but OSHA initially delayed enforcement until Nov. 1st and were delayed a second time until Dec. 1, 2016,
- Rules have been delayed partially due to a lawsuit filed by a number of business groups.

OSHA

- On October 19, OSHA released a guidance Memorandum to its own Area Offices to use in evaluating and citing programs, and also revised its FAQs on the www.osha.gov site.
- While OSHA did not reverse its stated positions in this Memorandum, it did concede that it would have to prove that the employer's policy or procedure discouraged employees from reporting workplace injuries or illnesses in order to make out an employer violation.
- The Memorandum then described the following analysis that would need to be carried out:

1. The employee reports a work-related injury or illness;
2. The employer takes adverse action against the employee (that is, an action that would deter a reasonable employee from accurately reporting a work-related injury or illness); and
3. The employer's adverse action was taken because the employee reported a work-related injury or illness.

FLSA Overtime Rules

FLSA Overtime Rules

FLSA Overtime Rules

- New final overtime rules were set to go into effect 12/1/2016
- Legacy item for Obama administration
- 21 states challenging the final rule in Federal court were recently granted a temporary nationwide injunction that prevented the new rules from taking effect on 12/1/2016

FLSA Overtime Rules

Final rules included changes to:

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

FLSA Overtime Rules

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FLSA Overtime Rules

- In order to grant an emergency injunction, the judge must find that there the party requesting the injunction is more likely than not to win at trial
- This means that the judge already believes that the states opposing the new FLSA rules are more likely than not to win their case in the end, but not guaranteed

FLSA Overtime Rules

Now what?

- DOL has the right to request an emergency, expedited hearing prior to January 20, 2017
- Unlikely to be granted due to amount of time DOL took to issue final rule
- Having a new political party coming into power typically not viewed as an "emergency"
- Federal judge needs to set a hearing on permanent injunctive relief
- Even if the hearing takes place prior to January 20, 2017, there will be a delay after the hearing to permit the judge to consider the case and write up his decision

FLSA Overtime Rules

Now what?

- If the temporary nationwide injunction is still in place when the new administration comes into office, unlikely the current rule will ever be put into effect
- Trump administration could abandon any appeal in progress or withdraw the final rule
- New Secretary of DOL could issue a new interim final rule with a lower salary test amount

FLSA Overtime Rules

Even if rolled back, businesses that have already complied will find it difficult, if not impossible, to undo changes

- Totally legal to revert to prior compensation, but hard to take back raises
- “Horse is already out of the barn”, although could be recharacterized as bonuses
- Administrative changes could include phased-in increases to Salary Test and/or a lower Salary Test amount
- FLSA has built-in small business exception already- only applies to businesses with annual revenues of $500,000 or more

FLSA Overtime Rules

Potential FLSA strategies:

- Conservative approach is to comply fully
- Start by looking at how many employees are actually affected
- The higher the number of affected employees, the higher the risk
- Determine whether employees failed the new rules due to Duties Test, Salary Test, or both
- If they failed the duties test, employees actually should be non-exempt
- For employees who failed the Salary Test, consider minimum disruption strategies

FLSA Overtime Rules

- Because the FLSA rules center on who gets overtime and who does not, non-exempt employees can still be paid a salary, they just are eligible for overtime
- Non-exempt employees can be paid by the hour, day, week, or by the piece
- Employees who are currently salaried exempt who don't meet the new salary test amount of $47,476 can be designated as salaried, non-exempt
- If the Trump administration rolls back the rules, the employees could be redesignated without having to flip between hourly and salaried status
- Do nothing in hopes that new rules are repealed- puts employer at risk for regulatory action and employee suits
- If injunction is overturned, employers could face overtime liability back to 12/1/2016

I-9

I-9

New I-9 Form

- On Nov. 14, USCIS released a revised version of Form I-9, Employment Eligibility Verification.
- Employers may continue using Form I-9 with a revision date of 03/08/2013 through Jan. 21, 2017. By Jan. 22, 2017, employers must use the revised form.
- Employers should continue to follow existing storage and retentions rules for all of their previously completed Forms I-9.

I-9

Form I-9 Changes

- Among the changes in the new version, Section 1 asks for “other last names used” rather than “other names used,” and streamlines certification for certain foreign nationals.
- Individuals who have limited work authorization need provide only their A number or I-94 admission number or foreign passport number in Section 1.
- The addition of prompts to ensure information is entered correctly (when using Adobe PDF viewer or application).
- The ability to enter multiple preparers and translators.
- A dedicated area for including additional information rather than having to add it in the margins.
- A supplemental page for the preparer/translator.
- A separate page (Page 3) for Section 3 of the Form I-9

Form 5500

I-9

Major Changes

- H&W plans with fewer than 100 participants required to file as of 2019 plan year
- Changes to data fields to permit data mining

QUESTIONS?

ADAM JENSEN

Vice President
Compliance and Human Resource Consulting

ajensen@cottinghambutler.com
608-467-5030