

What's New with the ACA?

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Today's Webinar

During the webinar, feel free to email or text Richard if you have additional questions that you would like to have addressed.

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Agenda

- ▶ Executive Order
 - ▶ Association plans & selling insurance across state lines
 - ▶ Short-Term Limited-Duration Plans
 - ▶ Expansion of HRAs
- ▶ Elimination of cost sharing subsidies
- ▶ 2015 Employer Mandate penalty letters coming in late 2017
- ▶ Regulations and rulings to consider

From the Office of the President

Executive Order Promoting Healthcare Choice and Competition

- Order directs the federal agencies in charge of implementing the ACA to expand access to association health plans (AHPs), short-term insurance plans, and health reimbursement arrangements (HRAs)
 - DOL should expand the “commonality of interest” requirement for purposes of determining whether an association is an “employer” under ERISA
 - DOL should also consider ways to promote AHP formation on the basis of common geography or industry
 - Note: AHPs of employers are MEWAs and regulated at state and federal level
- Short-Term Limited Duration Insurance
 - Current rules limit STLDI coverage 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
- HRAs should be expanded to allow reimbursement of individual market plans

IRS Responds to Executive Order

IRS Notice 2017- 67 – Expansion of QSEHRAs

Responds to President's Executive Order to Expand HRAs

- Confirms QSEHRAs are subject to PCORI fee
- Includes guidance on the following topics:
 - Eligible employer and eligible employee
 - Same terms requirement
 - Statutory dollar limits
 - Written notice requirement
 - MEC requirement
 - Substantiation requirement
 - Reimbursement of medical expenses
 - Reporting requirement
 - Coordination with PTC
 - Failure to satisfy the requirements to be a QSEHRA
 - Interaction with HSA requirements
- Confirms QSEHRAs are subject to PCORI fee

IRS Responds to Executive Order

Qualified Small Employer HRAs

- **Allows small employers (non-Applicable Large Employers) to use an HRA to reimburse medical expenses and individual market health insurance premiums, up to a specified annual limit**
 - Limit for 2017 is \$4,950 (individual) / \$10,050 (family)
 - Limit for 2018 is \$5,050 (individual) / \$10,250 (family)
 - Employer contribution generally must be the same for all eligible employees; however, certain variations are permitted based on age and number of covered family members
 - Employers offering a QSEHRA cannot offer any Group Health Plan coverage to employees

Cost-Sharing Reductions

Future Looks Grim

- ▶ President Trump stops CSR payment to carriers due Oct. 18
 - ***What are CSR's?***
 - Cost-Sharing Reduction Payments designed to repay carriers for cost of providing low-cost health care (and subsidizing Congressional coverage)
 - ***Can the President Legally Stop CSR's?***
 - Live by the sword—die by the sword
 - What about Article II of the Constitution?
 - ***What Happens if CSRs Cease?***
 - The threat has already shown us the future
 - Less access and higher cost



ACA Penalty Notices Coming!

Reality for Employers


- ▶ IRS updated its FAQs: Penalties for 2015 to be assessed in late 2017

FAQs 55-58

- IRS Letter 226J will be used to propose and assess penalties. Will include:
 - a brief explanation of the pay-or-play provisions;
 - a table itemizing the proposed penalty by month and whether the liability is under the “no coverage” provision, the “unaffordability” provision or neither;
 - an employer shared responsibility response form;
 - a list of full-time employees who received subsidized Marketplace coverage each month and for whom the ALE did not qualify for an affordability safe harbor or other relief;
 - a description of the actions the ALE should take if it agrees or disagrees with the proposed payment amount in Letter 226J; and
 - a description of the 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

115TH Congress

Political Currents

Current Congress	
House:	 241 - 194
Senate:	52 - 48

A Party Divided



R. Portman (OH)



R. Paul (KY)



S. Collins (ME)



M. Lee (UT)



S. Moore Capito (WV)



L. Murkowski (AK)



J. Moran (KS)



T. Cruz (TX)



R. Johnson (WI)



D. Heller (NV)



J. McCain (AZ)

115th Congress

It's All Politics

2018 House and Senate Outlook

33 Senate seats (8/25)

All House seats

Tracking the President's Nominees

Need to Fill Regulatory Positions

- **At last count:**
 - **No nominee for 261 out of 610 key agency posts**
 - **169 Nominees**
 - **173 Confirmed**
- **Laws are interpreted by agencies**

ACA Repeal Status

- **Hard to find middle ground between conservatives and moderates**
- Conservatives generally don't want taxes and don't want subsidies
- Moderates concerned about the number of individuals who may lose coverage
- **"Skinny Repeal" Effort Failed**
 - Bill Cassidy (R, LA), Lindsey Graham (R, SC), Dean Heller (R, NV) and Ron Johnson (R, WI) introduced a bill allowing states to decide fate of ACA
 - Was not brought to a vote prior to Sept. 30th deadline for reconciliation bills
 - Meanwhile, CHIP funding expired
- Lamar Alexander (R, TN) Chair of Health, Education, Labor and Pensions & Patty Murray (D, WA) continue to work on bi-partisan bill
- Tax reform bills may have benefits-related provisions

Tax Reform

- **Tax Cuts and Jobs Act – Select Health and Welfare Benefits Provisions**
- Repeal medical expense deduction (eliminates deduction for medical expenses over 10% of AGI)
- Repeal employer-provided education assistance (eliminates exclusion for non-job-related employer-provided education assistance up to \$5,250)
- Repeal of dependent care FSAs (eliminates exclusion for dependent care expenses up to \$5,000)
- Repeal of adoption assistance programs (eliminates exclusion for qualified adoption expenses paid by an employer up to \$13,750)

Senate Response

- **Hard to find middle ground between conservatives and moderates**
- Conservatives generally don't want taxes and don't want subsidies
- Moderates concerned about the number of individuals who may lose coverage
- “Skinny Repeal” Effort Placed Obamacare on the Back Burner—or Did It?
- Lamar Alexander (R, TN) Chair of Health, Education, Labor and Pensions & Patty Murray (D, WA) said to be working on bi-partisan bill
- Hard to find middle ground between conservatives and moderates

REGULATIONS, RULINGS & CASES

New Regulations

Administration Scales Back Contraceptive Coverage Requirement

- ▶ On Oct. 6, HHS, DOL and Treasury released regulations allowing employers to decline to cover contraceptives under their health plans based on a religious or moral objection
- ▶ Rules are effective immediately, although notice requirements apply
 - Rules were released in two parts, one covering employers with moral objections, the other for those with religious objections
 - Other states, including VA and OR, are exploring their options as well
- ▶ Within hours, the Attorney Generals of CA and MA, and the ACLU sued, seeking to stop implementation of the regulations
 - Other states, including VA and OR, are exploring their options as well

New Regulations

Administration Scales Back Contraceptive Coverage Requirement (cont.)

- ▶ The Religious Exemption automatically exempts all employers with a religious objection
- ▶ The Moral Exemption exempts all employers— except publicly traded companies — with a moral objection
- ▶ Employers may decide whether their employees receive independent contraceptive care coverage through the accommodation process
 - By making the accommodation process voluntary for employers, employees are no longer guaranteed the seamless coverage for contraceptives that exists under the accommodation process

Some Modest Proposals

- ▶ Fix the Affordable Care Act—It's Broken—But Aim Small, Miss Small
 - Republicans Should Try To Avoid The Key Mistake the Democrats Made With Process
 - Fill Regulatory Positions
 - Consider Actually Addressing *The Problem*

Rulings & Cases to Consider

- Thomas v. CIGNA Group Ins., 2015 WL 893534 (E.D.N.Y. 2015)
 - Life insurance case
 - Disabled employee ceased making life insurance payments *but did not file the available waiver*
 - Carrier denied claim
 - Employee's beneficiaries claimed notice of need to file waiver was not sufficiently provided
 - Court found plan sponsor with faulty **electronic delivery** system did not meet ERISA's standards

Learning from Thomas

- ERISA's electronic delivery rules are complex
- Merely placing SPDs on Company's website, without notice to participants of their availability and significance (and the right to a paper copy), will not satisfy ERISA's requirement
- Distribution method must be reasonably calculated to ensure actual receipt and result in full distribution

Rulings & Cases to Consider

- *Acosta v. Macy's Inc.* (S.D. Ohio, complaint filed Aug. 16, 2017)
 - DOL alleges that since 2011, Macy's tobacco cessation program hasn't met the regulatory requirements to be nondiscriminatory under ERISA
 - DOL alleges that the program did not provide a reasonable alternative standard to avoid a \$35 - \$45 surcharge
 - Wellness rewards not provided retroactively to those completing the alternative standard
 - Macy's also changed out-of-network reimbursement from Usual, Customary and Reasonable (UCR) charges to % of Medicare, but did not update SPD

Learning from Macy's

- Case hasn't been decided yet, but best practices include:
- Having wellness programs reviewed by benefits counsel prior to implementation
- Updating plan documentation and notifying participants accordingly when making changes

Rulings & Cases to Consider

- AARP v. EEOC, D.D.C., No. 16-2113 (August 2017)
 - Federal court in DC has ordered Equal Employment Opportunity Commission to reconsider limits it placed on wellness incentives
 - Court found that EEOC did not properly consider whether the 30% limit would ensure the program remained “voluntary” as required by the ADA and GINA
 - “To avoid disruption” court has allowed the limits to remain in place while the EEOC determines how it will proceed

Learning from AARP

- Status report: EEOC plans to issue proposed rules by Aug. 2018 and final rules by Oct. 2019 (eff. start of 2021)
- In the meantime, employers may use the 30% limits; however, it is possible the court’s decision may open the door for employee challenges

Compliance Attention

- ▶ Affordable offers of employer-sponsored health coverage in 2018

Rev. Proc. 2017-36 – used to determine affordability threshold

- Under the ACA, Applicable Large Employers who wish to offer “affordable” coverage cannot charge more than **9.5% (as indexed)** of an employee’s household income or other metric as determined under the “safe harbor” provisions (e.g., W-2 income, Rate of Pay, Federal Poverty Level) for employee-only coverage
 - 2015: 9.56%
 - 2016: 9.66%
 - 2017: 9.69%
 - 2018: 9.56%
- Final 2017 ACA Reporting Forms & Instructions available
 - Few changes, mostly relating to removal of Transition Relief
 - New safe harbor for *de minimis* errors where no single amount differs by more than \$100 (certain conditions apply)

Upcoming Events - Webinars

NOVEMBER 14TH, 12PM – 1PM EST

The Future of Wellness



Upcoming Events – HR Roundtable

NOVEMBER 16TH, 8AM – 10AM EST: FMLA: Part II: Go in Depth with Nuanced Provisions Under the FMLA

Speaker: Laura Rubenstein, Esq, Partner, Wright, Constable & Skeen

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Questions?

