MARATHAS BARROW WEATHERHEAD LENT LLP

ACA: Washington Update
Benefit Advisors Network

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Stacy Barrow

sbarrow@marbarlaw.com
(617) 830-5457

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Agenda

- Washington Update & Future of the ACA (*Texas v. US*)
- Compliance in 2019
- Proposed Rule Expanding HRAs

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Tax Cuts and Jobs Act (TCJA)

- **Individual Mandate Repealed as Part of TCJA (effective 2019)**
  - Does Not Mean Obamacare is Repealed
- ACA turned 9 on March 23, 2019
  - ~24M more people covered since the ACA's inception
  - 12M via Marketplace (9M receiving subsidies), 12M via Medicaid expansion
  - Recent study: Expansion resulted in lower mortality rates for heart disease
- CBO Predicts 13 Million Fewer Will Be Insured by 2027
  - Marketplace premiums predicted to increase by 10%
- Do Penalties Have That Much Impact?
  - 1M fewer insured in 2018 due to confusion re: timing of mandate's repeal
  - States may also start mandating coverage: MA, NJ & DC (2019), VT (2020)
  - California budget proposal includes individual mandate provision for 2020

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Cost Sharing Reduction (CSR) Lawsuits

- CSRs are cost-sharing reduction payments designed to repay insurers for cost of providing low-cost health care
  - They are part of the ACA's premium tax credit program
- President had ordered Health and Human Services (HHS) to cease making CSR payments in October 2017
  - Carriers began filing lawsuit shortly thereafter and have been largely successful
- February 2019 – four decisions in favor of insurers for unpaid CSRs
  - One was a class action that includes 91 insurance carriers

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Cost Sharing Reduction (CSR) Lawsuits

- Judgments have a common theme: Insurers are entitled to CSRs even if Congress has failed to explicitly appropriate the funds
  - The plain language of the ACA reflects Congress' intent to require HHS to make timely CSR payments to insurers
  - Insurers continue to "silver load" to mitigate damages
- Will the administration reconsider its position on CSR funding to avoid continued silver loading?
  - Final 2020 Notice of Benefit and Payment Parameters did not contain any regulatory changes addressing silver loading

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Texas v. United States (aka Texas v. Azar)

- 20 states and 2 individuals claim individual mandate is unconstitutional
- When the Supreme Court declared the mandate constitutional in 2012, it did so on the basis that the mandate qualifies as a tax because it provides at least *some* revenue to the government
  - After the Tax Cuts and Jobs Act set the penalty at $0, the plaintiffs' argument is that the mandate can no longer be described as a tax, thus rendering it unconstitutional, and because the individual mandate is integral to the law, the entire ACA is illegal
- Department of Justice declined to defend constitutionality of the individual mandate, later declined to defend the law at all
  - DOJ argued (initially) that only the ACA's provisions on guaranteed issue, community rating, preexisting condition exclusion protections, and discrimination based on health status must fall along with the individual mandate

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Texas v. United States (aka Texas v. Azar)

- Court has allowed "intervenor states" led by CA to appeal to the 5th Circuit
  - Intervenor states: CA, CO, CT, DC, DE, HA, IA, IL, KY, MA, MI, MN, NJ, NY, NC, NV, OR, RI, VT, VA, WA
  - Plaintiff states: TX, AL, AR, AZ, FL, GA, IN, KS, LA, MO, NE, ND, SD, SC, TN, UT, WV
- Dec. 2018: Judge O'Connor (TX) issues partial ruling declaring entire ACA to be unconstitutional
- Jan. 2019: Intervenor states appeal to the 5th Circuit
  - Government's brief on March 25 asked the court to strike down entire ACA
  - Plaintiffs responded April 24; defendants' reply briefs filed end of May
    - Defendants reply argues: (1) plaintiffs do not have standing; (2) the individual mandate remains constitutional; and (3) if not, it's severable from the rest of the ACA

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DeOtte, et. al. v. Azar

- On June 5, Judge O'Connor (TX) issued a nationwide injunction barring further enforcement of the ACA's contraceptive coverage mandate by the federal government against employers or providers that object to contraceptive coverage
- Plaintiffs allege that the requirement violates the Religious Freedom Restoration Act (RFRA); federal government declined to defend the contraceptive mandate
  - Exemptions may be claimed without using "accommodation" process
- Decision conflicts with federal district courts in CA and PA that have issued injunctions blocking rules that would have exempted employers, carriers and other entities with religious or moral objections to contraceptives
  - Also contrary to other 5th Circuit decisions re: RFRA

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Protecting Pre-Existing Conditions & Making Health Care More Affordable Act of 2019 (PPECMHCMAA)

- Bill introduced to fix the "family glitch" that can occur when a family attempts to obtain subsidized Marketplace coverage
  - Under the ACA, a family can be rendered ineligible for a premium subsidy if either spouse is eligible for family coverage that is affordable based on the "employee only" rate
- The bill also contains provisions that would:
  - Expand subsidies to all individuals purchasing plans through the Marketplace
  - Rescind the regulations designed to expand Association Health Plans (AHPs) and short-term limited duration insurance (STLDI)
  - Protect the Marketplace, ACA Navigators
- Is this ACA 2.0? Maybe a 2.0% chance of passing…

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Single Payer is Not the Answer

- State attempts:
  - Vermont: Quietly Abandoned
  - Colorado: Single Payer Amendment (Failed)
  - California: Abandoned When Determined It Would Cost 2X Current State Budget
- Mercatus report showed Medicare-for-all could save $2 trillion over 10 years?
  - The $2 trillion figure assumes provider payments reduced to Medicare levels, negotiation with prescription drug manufacturers will generate significant savings, and administrative costs will be cut from 13% to 6%
  - Alternative scenario where cost control not as effective? $3.25 trillion **increase** over 10 years

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Association Health Plan (AHP) Regulations Struck Down

- Judge in Washington, DC blocked Trump administration's rule expanding Association Health Plans ("Pathway 2 AHPs")
  - Court found the rules were an end-run around the ACA, citing the President's Executive Order and Secretary of DOL's Op-Ed
  - "Pathway 1 AHPs" (bona fide associations) are unaffected
- Court found that the DOL rule unreasonably expands the definition of "employer" to include groups without any real commonality of interest despite Congress's clear intent that ERISA cover benefits arising out of employment relationships
  - Rule extends ERISA to cover what are essentially commercial insurance transactions between unrelated parties and thus exceeds the statutory authority delegated by Congress in ERISA

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What’s Next for Association Health Plans?

- Trump administration will appeal decision rather than amend rule
- Rule will be considered *de novo* by a panel of judges in DC
  - Administration did not request a stay of the order in the meantime
- States may limit approval of new AHPs and may direct AHPs to stop marketing and new enrollment
  - States’ position may depend on DOL & HHS’s enforcement stance
- “Look-through” doctrine will generally apply going forward
  - Carriers can comply with guaranteed renewability requirements by issuing a policy to the association or employer members
    - If to the association, policy must comply with applicable market requirements by employer size (e.g., essential health benefit package for small group plans)

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HHS Proposes Changes to ACA Section 1557 Rules

Section 1557 – Nondiscrimination in Health Programs or Activities

- Proposed revisions would:
  - Remove gender identity, stereotyping, and pregnancy termination as protected categories under Section 1557—though they will remain protected under other civil rights laws and regulations
  - Narrow the scope of who Section 1557 regulates
    - A "health program or activity" specifically would not include employee benefit programs, including short-term plans and self-funded ERISA plans
    - Insurance carriers only regulated with respect to products for which the carrier receives federal financial assistance
  - Eliminate the "tagline" requirement that requires distributing certain statements in 15 different languages in every "significant" publication associated with a health plan

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Compliance in 2019

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PCORI Fees Due By July 31

- PCORI fee applies to self-insured and fully insured plans
  - Paid by insurers if insured plan, plan sponsor if self-insured (Form 720)
  - Fee is $2.39 fee per member per year for plan years ending on or after October 1, 2017, and before October 1, 2018
  - Fee is $2.45 fee per member per year for plan years ending on or after October 1, 2018, and before October 1, 2019
- Applies on a per-member basis for major medical
- Applies on a per-covered employee basis for HRAs
- Examples of due dates:
  - 07/01/17 – 06/30/18 – $2.39 PMPY due by 7/31/19
  - 01/01/18 – 12/31/18 – $2.45 PMPY due by 7/31/19
- This is the last PCORI fee calendar year plans will pay!

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2020 HSA and ACA OOP Limits

	2020 (single/family)	2019 (single/family)
Annual HSA Contribution Limit	$3,550 / $7,100	$3,500 / $7,000
Minimum Annual HDHP Deductible	$1,400 / $2,800	$1,350 / $2,700
Maximum Out-of-Pocket for HDHP (applies to all in-network benefits)	$6,900 / $13,800	$6,750 / $13,500
ACA Maximum Out-of-Pocket Limits	$8,150 / $16,300	$7,900 / $15,800

- ACA requires family plans to have an embedded individual OOP limit
- Embedded OOP limit rule applies to all non-grandfathered group health plans, including HDHPs

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Interaction between HSA Rules and ACA OOP Limits

- Recap (2020 figures shown):
  - **HSA Rule**: Family HDHPs cannot have embedded deductible less than $2,800
  - **HSA Rule**: OOP limit for family HDHP coverage cannot exceed $13,800 in 2020
  - **ACA Rule**: Family coverage (whether HDHP or non-HDHP) must have an embedded individual OOP limit that does not exceed $8,150
- This means that for the 2020 plan year, an HDHP subject to the ACA out-of-pocket limit rules may have a $6,900/$13,800 out-of-pocket limit (and be HSA-compliant) so long as there is an embedded individual out-of-pocket limit no greater than $8,150 (so that it is also ACA-compliant)

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Employer Mandate and Reporting

- Projected employer mandate penalties for 2019: $2,500 / $3,750
- Projected employer mandate penalties for 2020: $2,570 / $3,860
- FPL Safe Harbor for Calendar Year 2019 Plans
  - $12,140 FPL × 9.86% ÷ 12 months = $99.75 / month
- Good faith compliance for accuracy-related errors extended for 2018
- Safe harbor for *de minimis* errors: 1095-C's filed with incorrect dollar amounts may fall under the safe harbor for *de minimis* errors if no single amount off by more than $100
  - Corrected form not required unless requested by employee

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Employer Mandate Penalty Letters

- Employers are receiving penalty letters (226J) for CY2016
- Letter 226J includes:
  - Proposed penalty by month and whether it's under the "A" or "B" penalty
  - List of employees who received a subsidy each month and who were not reported as being within a "safe harbor"
  - 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

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Letter 5699

- **IRS contacting employers it believes should have filed ACA forms**
  - Letters going out for 2015 and 2016
  - Recipients have 30 days to respond and indicate:
    - They were an ALE and already filed under a different EIN;
    - They were an ALE and have included the forms with the response (paper filers only); or
    - They were an ALE and will file by “X” date (if longer than 90 days, explanation is required)
- Employers should talk to ERISA counsel before responding

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Wellness Programs in 2019

AARP v. EEOC

- August 2017 – Federal court in Washington, DC orders EEOC to reconsider limits placed on wellness incentives under ADA and GINA
- September 2017 – EEOC advised the court that anticipated effective date of further rulemaking would be 2021
- December 2017 – Court vacates 30% incentive limits effective 1/1/19
- March 2018 – EEOC status update: No plans to issue revised regulations by a particular date certain
- October 2018 – EEOC anticipates June 2019 for proposed regs

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What to do in the Meantime?

- Design wellness plans that don't tie incentives to medical exams or disability-related inquiries?
  - Employers could avoid potential exposure by tying incentives to activities such as tobacco user surcharges with no medical testing, participatory programs such as health seminars or gym use, and activity-based programs such as walking challenges
- Wellness programs designed to comply with existing rules, specifically the 30% cap, are unlikely to be challenged by the EEOC
  - Previous EEOC enforcement action targeted very aggressive plans with incentives far outside of the 30% limit
- Continue to monitor developments

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Wellness Programs in Court

EEOC v. Flambeau Inc.*, and *Seff v. Broward County, FL

- Courts in *Flambeau* and *Seff* held that the ADA's "insurance safe harbor" provision applies to wellness programs in a way that allows employers to penalize employees who do not participate in wellness
- EEOC believes both cases were wrongly decided
- EEOC rejects the idea that the safe harbor could apply to employer wellness programs, since employers are not using information in a manner required by the safe harbor
  - EEOC rules explicitly state that the safe harbor provision does not apply to wellness programs even if they are part of an employer's health plan

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Wellness Programs in Court

EEOC v. Orion Energy Systems

- Employees who did not participate in wellness were required to pay 100% of the cost of medical coverage
  - Employer paid 100% for employees who participate in wellness
- In September 2016, the court in Orion agreed with the EEOC that the ADA's safe harbor did not apply to Orion's wellness program, but concluded that it was still voluntary
  - EEOC hadn't yet drafted regulations specifying 30% limits

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Proposed Regulations Expanding HRAs

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Proposed Rule for Individual Coverage HRAs

- Proposed rule effective January 1, 2020 would allow employers of all sizes to offer an HRA that is integrated with individual health insurance coverage (an "ICHRA")
  - Employee and dependents must be enrolled in individual market coverage
  - Employers cannot offer choice between group coverage and an ICHRA
  - Employers may offer an ICHRA on a class basis to: (1) full-time employees, (2) part-time employees, (3) seasonal employees, (4) collectively bargained employees, (5) employees subject to a waiting period, (6) employees under age 25, (7) non-resident aliens, (8) employees whose primary site of employment is in the same rating area and (9) certain combinations of the various classes
    - FT, PT and Seasonal can be defined under Section 105(h) or 4980H

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Proposed Rule for Individual Coverage HRAs

- Individual Coverage HRAs (ICHRAs) must be offered on the same terms and conditions to all participants within a certain class
  - May increase contributions for older participants and those covering dependents
- Employees must be able to opt-out of the HRA at least once per year
- Procedures must be in place to verify individual health insurance coverage
- HRA must provide written notices to each participant upon initial eligibility and at least 90 days before the beginning of each plan year

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Proposed Rule for Individual Coverage HRAs

- ICHRAs are eligible employer-sponsored plans for purposes of the ACA's employer mandate
  - ICHRAs are "minimum essential coverage"
  - ICHRAs can offer "affordable" minimum value coverage
    - IRS to issue additional guidance on affordability safe harbors
- Employees may pay for the remainder of their individual market coverage pre-tax through a cafeteria plan without the individual plan being considered a group health plan for ERISA and ACA purposes

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Proposed Rule for Excepted Benefits HRAs

- Proposed rule effective January 1, 2020 would treat certain types of HRAs as "excepted benefits" that are not subject to ACA requirements
- Employer must offer choice between group plan or the excepted HRA
- Employer may offer up to $1,800 per year to reimburse employees for out-of-pocket medical expenses, including premiums for:
  - Coverage under a group health plan that consists solely of excepted benefits;
  - Short-term, limited-duration insurance plans; and
  - COBRA coverage
- Excepted benefit HRA cannot reimburse premiums for individual health coverage, coverage under a group health plan (other than COBRA), or Medicare parts B or D

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Questions?

Stacy H. Barrow

sbarrow@marbarlaw.com

(617) 830-5457

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