MARATHAS BARROW WEATHERHEAD LENT LLP

2018 Compliance Year in Review

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Agenda

- Washington in 2018
- Mid-Term Election Update and the Future of the ACA (*Texas v. US*)
- Final Rule Expanding Association Plans
- Final Rule Expanding Short-Term Limited Duration Plans
- What to Expect in 2019
- Proposed Rule Expanding HRAs

Tax Cuts and Jobs Act

- **Individual Mandate Repealed as Part of Tax Cuts and Jobs Act (effective 2019)**
- Despite Trump Tweet—this Does Not Mean Obamacare is Repealed
- Political Win for Trump: Most Conservatives View Mandate as Unconstitutional
- CBO Predicts 13 Million Fewer Will Be Insured by 2027
- Do Penalties Have That Much Impact?

Tax Cuts and Jobs Act – Benefits Provisions

- Medical expense deduction remains in place at 10%
  - Reduced to 7.5% for 2017 and 2018
- Employers can no longer deduct amounts paid under qualified transportation programs
  - Employees can still contribute pre-tax
  - Employers just lose the deduction
- House version eliminated employer-provided education assistance programs, dependent care FSAs, and adoption assistance programs
  - **No changes** to these types of arrangements under the final bill

Tax Cuts and Jobs Act – Tax Credit for Paid Leave

- Business tax credit for employers that offer paid FMLA-type leave
- To qualify, employer must allow all "qualifying" full-time employees at least 2 weeks of annual paid family and medical leave (pro-rata for part-time employees)
  - Employer does not have to be subject to FMLA
  - Policy must include non-interference language
  - Must provide at least 50% of employee's regular wages
  - Vacation leave, personal leave, or other medical or sick leave would not be considered family and medical leave, nor would state-mandated leave
  - Payments under STD/salary continuation may qualify for the credit if leave is FMLA-qualified

Tax Cuts and Jobs Act – Tax Credit for Paid Leave

- Employee is "qualifying" if he/she has been employed for at least 1 year, and who, for the preceding year, had compensation not in excess of 60% of the compensation threshold for highly-compensated employees ($120,000 for 2018)
  - Credit equals to 12.5% of the amount of wages paid, increased by 0.25% for each point over 50% (but not to exceed 25% of the wages paid)
  - Up to 12 weeks of leave taken into account per year
- Effective for wages paid in 2018 and 2019
  - Provision sunsets after 2019

Short-Term Spending Bill

- **Extension of Continuing Appropriations Act, 2018**
- Cadillac Tax delayed until 2022
  - Previously delayed from 2018 to 2020 under the PATH Act
  - 40% tax on value of health coverage in excess of $10,200 (single) / $27,500 (fam)
- 2.3% Medical Device Tax Suspended for 2018 and 2019
  - Was also suspended for 2016 and 2017
- HIT Tax (Health Insurance Industry Tax) Suspended for 2019
  - Was suspended for 2017, in effect for 2018
  - Applies to fully insured medical, dental and vision plans

Proposed HSA Expansion Bills

- H.R. 6199: Restoring Access to Medication and Modernizing HSAs Act
  - Carryforward of FSA balances – up to 3x annual FSA limit may be carried over
  - Entitlement to Medicare Part A due to age will not disrupt HSA eligibility
  - Increase HSA contribution limit to out-of-pocket limit ($6,650 / $13,300 for 2018)
  - Allow both spouses to make catch-up contributions to the same HSA
  - 60-day grace period rule – HSAs opened within 60 days after gaining HDHP coverage treated as having been opened with the HDHP
  - "Bronze" and catastrophic ("Copper") plans to be treated as HSA-qualified HDHPs
  - Allow Copper plans to be sold to all Marketplace enrollees, not just those under 30
  - Extends moratorium on HIT tax for 2020 and 2021 (already deferred in 2019)

Proposed HSA Expansion Bills

- H.R. 6311: Increasing Access to Lower Premium Plans and Expanding HSA Act
  - Up to $250 per year ($500 family) in coverage may be provided before the deducible is met
  - Direct Primary Care (DPC) up to $150 per month ($300 fam.) would not disrupt HSA eligibility
  - Services at on-site or retail medical clinics would not disrupt HSA eligibility (so long as significant medical care benefits are not provided)
  - Spousal FSA enrollment will not disrupt an employee's HSA eligibility as long as the spouse doesn't submit the employee's expenses for reimbursement
  - Employers may allow employees to convert FSA or HRA balances into an HSA contribution upon enrolling in an HDHP (amount is capped at $2,650, 2X for family coverage)
    - Conversion occurring in same year as the FSA or HRA contribution counts against annual HSA limit
  - OTC medical products once again treated as qualified medical expenses
  - Amounts paid for qualified sports and fitness expenses excludable up to $500 (1,000 for joint filers) per year

Midterm Election Update

- House of Representatives
  - Democrats take control – needed 218
    - Democrats: 234 (gain 39 seats)
    - Republicans: 200 (lost 30 seats)
    - 1 undecided
- Senate
  - Republicans maintain control
    - Democrats: 47 (lost 1 seat; 23 Democrats not up for election)
    - Republicans: 53 (gain 2 seats; 42 Republicans not up for election)
- Governors
  - 23 Democrats (gain 7 seats; 7 not up for election)
  - 27 Republicans (lost 6 seats; 7 not up for election)
- Medicaid expansion proves popular – 37 states have now expanded

Unravelling the ACA

- **Texas v. United States, No. 4: l 8-cv-00167-O (N.D. Tex.)**
- 20 states and 2 individuals claim individual mandate unconstitutional
- U.S. Department of Justice (DOJ) declined to defend the constitutionality of the individual mandate, although rather than agreeing the ACA should be struck down entirely, they argued that only the ACA's guaranteed issue and community rating rules are inseverable from the individual mandate
- 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)
  - Since the Tax Cuts and Jobs Act set the penalty at $0 effective 1/1/19, the argument is that the individual mandate can no longer be described as a tax, thus rendering it unconstitutional

Texas v. United States

- Plaintiffs argue that the individual mandate is *inseverable* from the rest of the ACA, and therefore the entire statute should be invalidated
- Under Obama, the DOJ argued that if the individual mandate is unconstitutional, it is severable from the ACA's other provisions, except for the guaranteed issue and community rating rules
  - Current DOJ agreed with the prior DOJ regarding severability – i.e., the court should declare the pre-existing conditions protections and other consumer protections to be unconstitutional
  - Partial ruling Dec. 14th declared entire ACA to be unconstitutional!
    - Law remains in effect for now, pending appeal
    - If the ACA is rendered unconstitutional by the TCJA, the TCJA's provision reducing the individual mandate penalty to $0 should be repealed

Fixing the ACA

- **Undo Sabotage and Expand Affordability of Health Insurance Act**
- Introduced by the three Ranking Members of Energy and Commerce, Ways and Means, and Education and the Workforce Committees
  - Goal is to expand affordability and restore stability to the ACA Marketplaces
- Undoing Sabotage
  - The Act would rescind the regulations designed to expand Association Health Plans (AHPs)
  - Protect consumers with preexisting conditions by requiring short-term limited duration insurance (STLDI) to comply with guaranteed issue, community rating, essential benefits, and other ACA rules
  - Various provisions to protect the Marketplace, ACA Navigators

Fixing the ACA

- **Undo Sabotage and Expand Affordability of Health Insurance Act**
- Expanding Affordability
  - Expand eligibility for premium tax credits (PTC) beyond 400% of the federal poverty level (FPL) and increase PTC for all income brackets
  - Expand eligibility for cost sharing reductions (CSRs) from 250% to 400% FPL and make CSRs more generous for those below 250% FPL
  - Fix the "family glitch" – i.e., base "affordability" on family coverage
- Is this ACA 2.0? Maybe a 2.0% chance of passing…

Fixing the ACA

Single Payer is not the Answer

- **Colorado: Single Payer (Failed)**
- **California: Abandoned When Determined It Would Cost 2X Current State Budget**
- **Vermont: Quietly Abandoned**
- No Model For Single Payer for 350M That Works
- No Model for Federal Government Success as **Market Participant**

- Mercatus report showed Medicare-for-all could save $2 trillion over 10 years?
  - The $2T 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? $3.25T **increase** over 10 years

Final Regulations on Association Health Plans

Final Regulations on AHPs

- **DOL's New Definition of Employer**
- *Historically*: Association had to be formed for something other than obtaining health insurance coverage – no longer a requirement
- Under final "Commonality of Interest" rules, AHP may be formed
  - Along same Geographic Area (In-State or In-Metropolitan Area)
  - Along same Trade, Industry, Line of Business, or Profession
- Must be formally established and run by employers
- Effective dates:
  - 9/1/18 - All associations may establish a fully insured AHP
  - 1/1/19 - Existing associations that sponsor an AHP may self-insure
  - 4/1/19 - All other associations (new or existing) may self-insure an AHP
- MBWL can help with incorporating documents & related documents

Final Regulations on AHPs

- **Potential Limits Based on State Regulation**
- All AHPs are MEWAs and will need to ensure compliance with existing federal regulatory standards governing MEWAs (such as M-1 filings)
  - DOL intends to reexamine existing reporting requirements for AHPs/MEWAs, including the Form M-1 and possibly the Form 5500
- Final rule does not preempt state insurance law, nor does it create an exemption from existing state regulation for self-insured MEWAs
  - Many states regulate self-insured MEWAs as commercial insurance companies and others prohibit them altogether
  - States regulation of fully insured MEWAs is limited to setting contribution and reserve levels, licensing, registration, and financial reporting to ensure solvency; however, states may regulate the underlying insurance contacts or policies

Final Regulations on AHPs

- **In the past, states have opposed AHPs due to consumer protection concerns**
- *Adverse selection*: AHPs will be subject to large group rating rules (no EHB requirement) – they could be marketed toward healthier/younger individuals, which could undermine the individual and small group marketplaces
- Other concerns relate to fraud protection from unscrupulous promoters
- States may impose standards to protect consumers and guard against adverse selection, which may cause AHPs to be less attractive to employers
- Some states already prohibit small group members of an association from being rated as large group

What's Next?

- The new regulations may not significantly increase the number of self-insured AHPs because of existing state MEWA rules
  - Future of AHPs is in the hands of the states
  - Massachusetts and New York AG's have filed a lawsuit challenging the legality of the new regulations
    - 15 other state AGs had signed onto a comment letter opposing the rule; however, they haven't joined the lawsuit at this time
  - New Jersey recently enacted an individual mandate (eff. 2019), which provides that coverage under an AHP will not qualify as minimum essential coverage for purposes of the law unless it complies with state standards
  - States with individual mandates in 2019: MA, NJ, DC
    - Vermont's starts in 2020

Short Term Limited Duration Insurance (STLDI)

- Obama-era regulations limited STLDI to 3-month non-renewal gap insurance
- Final regulations effective October 2, 2018 allow for longer coverage periods and renewability
  - Carriers must include a notice advising consumers to review the policy carefully to make sure they're aware of any exclusions or limitations regarding coverage of preexisting conditions or health benefits
- States may limit these plans as well

Short Term Limited Duration Insurance (STLDI)

- **Final rule changes duration of STLDI from <3 months to <12**
  - **Up to 36 months in total with renewals and extensions**
- STLDI is designed to fill temporary gaps in coverage
- STLDI is not MEC and is not subject to ACA Market Reforms
  - STLDI plans may impose annual limits, have preexisting condition exclusions, and are not required to cover essential health benefits, so it's less expensive than ACA plans
- Allowing longer duration STLDI reduces the risk of a gap in coverage for people with short-term coverage who become seriously ill while covered
  - Under prior rules, an individual who became ill likely would not qualify for another STLDI plan due to medical underwriting and would need to wait until Marketplace open enrollment to gain coverage

What to Expect in 2019

2019 HSA and ACA OOP Limits

	2019 (single/family)	2018 (single/family)
Annual HSA Contribution Limit	$3,500 / $7,000	$3,450 / $6,900
Minimum Annual HDHP Deductible	$1,350 / $2,700	$1,350 / $2,700
Maximum Out-of-Pocket for HDHP (applies to all in-network benefits)	$6,750 / $13,500	$6,650 / $13,300
ACA Maximum Out-of-Pocket Limits	$7,900 / $15,800	$7,350 / $14,700

- 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

Interaction between HSA Rules and ACA OOP Limits

- Recap:
  - **HSA Rule**: Family HDHPs cannot have embedded deductible less than $2,700
  - **HSA Rule**: OOP limit for family HDHP coverage cannot exceed $13,500 in 2019
  - **ACA Rule**: Family coverage (whether HDHP or non-HDHP) must have an embedded individual OOP limit that does not exceed $7,900
- This means that for the 2019 plan year, an HDHP subject to the ACA out-of-pocket limit rules may have a $6,750/$13,500 out-of-pocket limit (and be HSA-compliant) so long as there is an embedded individual out-of-pocket limit in the family tier no greater than $7,900 (so that it is also ACA-compliant)

Employer Mandate and Reporting

- 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
- FPL Safe Harbor for Calendar Year 2019 Plans
  - $12,140 FPL × 9.86% ÷ 12 months = $99.75 / month
- Projected employer mandate penalties for 2019: $2,500 / $3,750
- Official Health FSA contribution limit for 2019: $2,700
- Due date extended for 2018 *employee* forms to March 4, 2019
  - Good faith compliance for accuracy-related errors also extended

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

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

Wellness

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 advises 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 – anticipated timetable of June 2019 for proposed regs

ADA Insurance Safe Harbor

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 answer disability-related questions or undergo medical examinations (e.g., employees who refuse to complete an HRA and/or biometric screening)
- 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
  - Final 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

ADA Insurance Safe Harbor

EEOC v. Orion Energy Systems

- Employees had to complete HRA and use Range of Motion machine
- Employee refused to participate and was required to pay 100% cost of medical coverage
  - If employee had participated, employer would have paid 100% of premium of coverage
  - Employee was later terminated
- 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

What's Next for Wellness?

- Employers may continue to rely on the final regulations for 2018
- In 2019, employers wishing to avoid exposure could design wellness programs that do not contain incentives tied to medical exams or disability-related inquiries
  - They could tie all incentives to activities not subject to the ADA and GINA, such as, tobacco user surcharges with no medical testing, participatory programs such as health seminars or gym use that do not contain disability-related inquiries, and activity-based programs with no medical tests such as walking challenges

What's Next for Wellness?

- On the other hand, some believe that wellness programs designed to comply with existing rules, specifically the 30% cap, are unlikely to be challenged by the EEOC
  - Arguably, vacating the safe harbor should not require employers to reduce incentives for 2019 based on activities performed in 2018
  - Previous EEOC enforcement action targeted very aggressive plans with incentives far outside of the 30% limit
- Employers using wellness programs should continue to monitor developments and work with benefits counsel to ensure their wellness programs comply with all applicable laws

Proposed Regulations Expanding HRAs

Proposed Rule Expanding Premium Reimbursement HRAs

- Rule proposed to be effective 1/1/2020 would allow employers of all sizes to provide an HRA that is integrated with individual health insurance coverage
  - Employee and any dependents must be enrolled in individual health insurance coverage
  - Employers cannot offer choice between group health coverage and an integrated HRA
  - Only certain classes are permitted: (1) full-time, (2) part-time, (3) seasonal, (4) collectively bargained, (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

Proposed Rule Expanding Premium Reimbursement HRAs

- HRA must be offered on the same terms (i.e., amount 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

Proposed Rule Expanding Premium Reimbursement HRAs

- Premium reimbursement HRAs are minimum essential coverage (MEC) and may qualify as affordable, minimum value coverage for ACA purposes
- Employees may pay for the remainder of their individual market coverage pre-tax through a cafeteria plan
- Individual market coverage is not necessarily a group health plan for ACA and ERISA purposes
- An HRA integrated with individual insurance coverage may be an eligible employer-sponsored plan for purposes of the ACA's employer mandate
  - IRS intends to issue guidance that provides a safe harbor for purposes of determining whether an employer that has offered an HRA integrated with individual health insurance coverage would be treated as having made an offer of affordable coverage that provides MV for purposes of the employer mandate

Proposed Rule for Excepted Benefits HRAs

- Rule proposed to be effective 1/1/2020 would treat certain types of HRAs as "excepted benefits" that are not subject to some ACA requirements
  - Excepted benefits HRAs would not need to be "integrated" with a GHP
  - An excepted benefit HRA cannot reimburse premiums for individual health coverage, coverage under a group health plan (other than COBRA or other group continuation coverage), or Medicare parts B or D.

Proposed Rule for Excepted Benefits HRAs

- Under an excepted benefit HRA, employers could offer up to $1,800 per year (indexed annually for inflation) to reimburse employees for certain qualified medical expenses, including premiums for:
  - Individual health coverage that consists solely of excepted benefits (such as stand-alone vision and dental plans, accident-only coverage, workers' compensation coverage or disability coverage);
  - Coverage under a group health plan that consists solely of excepted benefits;
  - Short-term, limited-duration insurance plans; and
  - COBRA coverage

IRS Priority Guidance Plan for 2019

- Guidance on changes to qualified transportation programs under TCJA
- Guidance on issues arising under Section 4980H (employer mandate)
- Regulations under Section 4980I (Cadillac Tax)

Questions?

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