McGohan Brabender

July 1, 2015, Compliance Update

US Supreme Court Issues Two Major Rulings

The US Supreme Court issued two major rulings the week of June 22, 2015, that impact employer sponsored benefit plans.

King v Burwell

The US Supreme Court (the "Court") announced the King decision on June 25, 2015. This case involved the premium subsidies under health care reform. By way of background, health care reform provides government subsidies to low- and moderate-income individuals who get their coverage through a health care exchange or marketplace. Congress envisioned that the states would establish and run their own exchanges or marketplaces. However, as a backstop, the law provides that the Federal government would step in and run the exchange or marketplace if the state failed to establish its own exchange or marketplace.

As it turned out, 36 states opted not to set up their own exchanges or marketplaces. As a result, the Federal government started running the exchanges or marketplaces in those states. However, the statute clearly stated the government subsidies were only available to those that got health coverage through an exchange or marketplace established by a state. The Internal Revenue Service issued regulations saying the premium subsidies were available to individuals who got coverage through the exchange or marketplace even if that exchange or marketplace was run by the Federal government.

Several lawsuits were filed saying the Internal Revenue Service did not have the authority to issue regulations saying the premium subsidies were available under all the exchanges or marketplaces (i.e. those run by the states and Federal government). The Plaintiffs said the subsidies were only available if the exchange or marketplace was run by a state as opposed to being run by the Federal government. The Defendant (i.e. the government) said it really didn't matter if the exchange or marketplace was run by the state or Federal government. The Federal government said the Internal Revenue Service has the right to issue regulations saying who is entitled to the premium subsidies.

The Court ruled that the premiums subsidies are available under both the state and Federally run exchanges or marketplaces. The ruling, however, was not based on the Internal

Revenue Service's regulations. Instead, the Court ruling is based on the Court's interpretation of the statute, that is, the Court looked at the intent of the law and decided that Congress wanted the premiums subsidies to be based on the person's income and not whether or not the person got coverage through a state run or Federally run exchange or marketplace.

Although the end result is the same, it is important to note the basis for the Court's decision. If the Court had simply ruled it was within the Internal Revenue Service's authority to issue regulations saying the premiums subsidies were available to everyone, the law's future would have remained uncertain. Based on this logic, the Internal Revenue Service, under a different administration, could change its position. However, since the Court's decision was based on what it perceived was Congress' intent, only Congress can change the rules. In other words, it will literally take an act of Congress to modify the rules governing the premiums subsidies.

healthaffairs.org

www.alston.com

These articles discuss the case and explain how the Court's decision cements health care reform's near-term future. Employers need to realize health care reform is the law of the land and need to comply with the rules as they are currently written.

Obergefell v Hodges

The second major Court decision was released the following day on June 26, 2015. In a 5-4 decision the Court held the US Constitution requires all states to license and recognize same-sex marriages. Note that the ruling applies to the various states and their instrumentalities but not to private employers. Nevertheless, the ruling will impact employers, especially in those states like Ohio that did not recognize same-sex marriages.

Employer sponsored health and welfare plans will be the most impacted by the Court's ruling. The Court's 2013 Windsor decision required Federal laws (e.g. ERISA and the Internal Revenue Code) to treat same-sex and opposite-sex spouses the same. Since qualified retirement plans are governed by both ERISA and the Internal Revenue Code, the Obergefell ruling will have little impact on qualified retirement plans.

There is no Federal law and the Obergefell ruling does not require employers to offer health coverage. In fact, health care reform specifically provides that employers need not offer health coverage to spouses. As a result, it is up to the employer whether or not to offer health coverage. However, all insured group health plans have to comply with state insurance laws and, as previously mentioned, all states have to recognize same sex-marriages. Therefore, employers sponsoring fully insured group health plans will have to check with their insurance company to determine if applicable state law requires the carrier to offer spousal coverage. If

that is the case, then an employer with a fully insured health plan will have to treat same-sex and opposite-sex spouses the same under the fully insured group health plan.

If the employer is sponsoring a self-funded group health plan, ERISA preempts state law so the employer has more flexibility when setting the plan's eligibility requirements. Many self funded health plans simply define "spouse" based on state law. So if the employer wants to exclude same-sex spouses, the employer will have to review the self-funded health plan's definition of spouse to ensure the plan does not define "spouse" by simply referencing state law.

However, even employers with self-funded health plans may be on shaky ground if they continue to exclude same-sex spouses. Federal law does not currently prohibit private employers from discriminating against a gay or lesbian employee. There may, however, be various state and local laws that bar employers from discriminating against employees based on sexual orientation. Also, it is likely the Obergefell ruling may spur the Equal Employment Opportunity Commission (EEOC) to challenge employers who deny coverage to same-sex spouses on the basis of gender bias.

The Court's ruling will, however, make plan administration easier. Each state and municipality has its own tax laws. However, all state and city tax laws must now treat same-sex and opposite-sex married couples the same as the Federal tax laws. As a result, the tax treatment of employee benefits will now be uniform across all levels of government. The following are articles about the Court's Obergefell decision.

www.jacksonlewis.com

www.seyfarth.com

benefitsattorney.com

Note that the Court's ruling has no impact on the treatment of domestic partners. That is, the ruling only applies to same sex individuals who are legally married and does not address same-sex or opposite-sex domestic partners.

www.millerjohnson.com

Although the Court's recent decision does not address domestic partners this article talks about the practical implications on domestic partners after the Obergefell decision.

Government's June 30th Deadline For Individual Health Policies

We have reported before that employers may no longer pay for employees' individual health policies on a pre-tax or post tax basis. The government gave small employers (i.e. those

with fewer than 50 employees) until June 30, 2015, to stop that practice. See this article on the rules.

news.leavitt.com

The penalty for noncompliance is $100 per day (or $36,500 per year) for each employee.

Definition of Small Employer Scheduled to Change

Health care reform says that the community rating rules will apply to small employers for plan years beginning on or after January 1, 2016. The definition of a small employer is one that has fewer than 100 employees during the previous calendar year. However, the states had the right to impose its own definition of small employer prior to January 1, 2016. Ohio, for example, defined small employer as one with fewer than 50 employees.

smarthr.blogs.thompson.com

Many are asking to have the law changed and to lock in the definition of small employers to group with fewer than 50 (as opposed to 100) employees.

PCORI Fees & Form 5500s

Employers with self-funded health plans should not forget about the PCORI Fee that is due next month. The PCORI fee is reported on IRS Form 720 and paid on IRS Form 720V.

www.kapnick.com

The Form 5500 is due seven months after the close of the plan year. This means the forms are due July 31, 2015, for calendar year plans that are required to file the forms.

A Year in Review

Law firms try to market themselves in a variety of ways and producing timely and in-depth newsletters is one way.

www.employmentmattersblog.com

This is a link to a major law firm that releases a newsletter for everyone on different topics. They do a great job and if they happen to hit on a topic that applies to you there is a wealth of information available in the article. For example, this firm just did a four-week series on health care reform and student/employees.

SBCs Revisited

One of the requirements under health care reform is that all plans provide a uniform four-page summary of benefits and coverage, or SBC. The government has recently revised the rules governing the SBCs.

healthaffairs.org

mcgrawwentworth.com

us.practicallaw.com

The government provides a template employers and carriers can use to comply with the notice requirements. The new template will be effective January 1, 2017, but some of the other rules become effective prior to that date.