



## **May 2016 Compliance Update**

### **EEOC Issues Final Wellness Rules**

The Equal Employment Opportunity Commission (EEOC) issued two final sets of rules governing wellness programs. The rules, which become effective for plan years beginning on or after January 1, 2017, provide guidelines under both the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA).

#### [EEOC Issues Final Wellness Rules](#)

The rules are long and complex and we will provide more information in a flash update shortly. However, we wanted to alert you to this breaking development.

### **Government Releases New Out of Pocket Limits for 2017**

One of the protections under health care reform was to limit the maximum out-of-pocket people would have to pay under the health plan. Those numbers are indexed each year for inflation.

#### [2017 Out-of-Pocket Limits](#)

Remember, these are limits on the maximum out-of-pocket applicable to essential health benefits under a nongrandfathered health plan. There are separate lower limits applicable to high deductible health plans. In other words, if you are sponsoring a high deductible health plan in conjunction with HSAs, the limits applicable to the high deductible health plan are lower than the maximum out-of-pocket limits permitted under health care reform.

### **Employer Mandate – Big Deal Over Small Potatoes**

A recent survey showed that most employers are unhappy with the employer mandate but the main concern is the time it takes to comply rather than the amount of the penalty.

### [Survey: Employers Find Mandate Burdensome](#)

Most employers believe they are offering quality/affordable health coverage so they will not be subject to the penalty. However, jumping through the hoops to prove that is burdensome, time consuming and costly. I guess this does not come as a surprise to most people reading this newsletter.

### **Health Care Reform Still Controversial**

We are heading into a presidential election, and health care reform remains a hot topic. However, the public perspective is shifting a little.

### [Public Opinion Remains Divided Over ACA](#)

Clearly, the statute has expanded access to health coverage, and more than 20 million non-elderly Americans have gained coverage due to the law. This could translate into 20 million votes, which the candidates cannot ignore.

### **Out-of-Pocket Costs Continue to Rise**

The previous article talks about how health care reform has expanded access for millions of Americans. However, the out-of-pocket costs for employer sponsored health plans have grown over the years.

### [Employees Take Greater Cost-Sharing Hit](#)

The Kaiser Foundation says the average deductible in 2006 was \$303 and in 2015 that number rose to \$1,077. This article provides some interesting data on health plan trends.

### **The Sky Is Not Falling**

Many people predicted the end of employer sponsored health plans once health care reform became the law of the land. However, that simply has not happened.

### [Employer-Sponsored Coverage Going Strong](#)

This article cites three reasons why employer-sponsored health plans continue. First, the tax laws favor employer-sponsored health plans. Second, competition for quality workers force employers to offer health coverage. Third, the health care exchanges or marketplaces have proved to be inadequate. Whether this changes, time will tell.

## **Are Health Care Exchanges or Marketplaces in Trouble**

UnitedHealthcare garnered a lot of media attention by saying that it is losing money and pulling out of a number of health care exchanges or marketplaces. Many people said this is big trouble for health care reform. UnitedHealthcare is one of the largest, best-run carriers in the country, and if they cannot make money participating in the exchanges how can anyone?

### [Likely Impact of UHC Withdrawal](#)

#### [UHC Expands Plan to Exit State Exchanges](#)

These articles examine what happens if United HealthCare pulls out of all the exchanges and concludes that the impact may be small in some areas and larger in other parts of the country.

Anthem and CIGNA, however, say they are in it for the long haul. That is, they do not plan on getting out of the exchanges or marketplaces.

### [Cigna, Anthem Won't Follow UHC's Lead](#)

It is hard or even impossible to predict the future of health care reform. The next president will have an impact on the law. However, with 20 million taking advantage of the expanded access, it is difficult to see a total repeal of the statute.

## **Reminder of Small Business Tax Credit for Health Coverage**

Small employers (i.e. those with fewer than 50 full-time and full-time equivalent employees) are not subject to the employer mandate. So to encourage smaller employers to continue offering health coverage, health care reform provides a tax credit to employers with fewer than 25 employees.

### [Few Small Employers Utilize Tax Credit](#)

However, few employers are taking advantage of this credit. So the government continues to issue reminders and tips on how to take advantage of this tax break.

## **Subrogation – Move Quickly or Else**

If you sponsor a self-funded health plan you probably are familiar with subrogation. This is when the health plan pays someone's medical bills and that

person then sues the individual that caused the injury. A typical scenario is an employee or family member is involved in a car accident. The employee or family member incurs medical claims that are paid by the health plan. The employee or family member sues the person that caused the accident and collects money from that person or his or her insurance company. The health plan now wants to get repaid the amount it spent on the medical claims.

### [Plan Sponsors Must Act Quickly to Recover Funds](#)

#### [Court Limits ERISA Reimbursement Rights](#)

The health plan may be able to recoup the money but (1) the plan documents, etc. must clearly spell out the plan's right to recover the money and (2) the plan must move quickly. If you sponsor a self-funded health plan you will want to become involved in the process to ensure the plan recoups the money. If you sponsor a fully insured health plan, the carrier will enforce its subrogation rights.

### **On-Site Health Clinic – Emerging Trend**

Employers continue to look for ways to help control costs, and some larger employers are establishing on-site health clinics as a way to reduce expenses. Obviously, the workforce has to be large enough to support such an endeavor.

#### [Is On-Site Health Care Right for You?](#)

This article talks about things to consider when deciding whether to establish an on-site health clinic.

### **Employer Mandate and Reducing Employees' Hours**

There has been a lot of press about the employer mandate and how some employers are trying to avoid the penalty by reducing the employees' hours. However, there are risks involved with that approach.

#### [Reducing Employee Hours a Risky Approach](#)

A long-standing ERISA provision precludes employers from taking adverse employment actions against employees if that action is benefits-driven. That is, it violates ERISA if the employer interferes with the employee's attainment of any right to which such participant may become entitled under the plan. There has

been a lawsuit filed against an employer alleging the employer reduced the employees' hours to avoid the employer mandate, and this violates ERISA.

## **ADA Update**

The Americans with Disabilities Act or ADA requires employers to offer employees with a disability a reasonable accommodation under certain circumstances.

### [ADA and Reasonable Accommodation](#)

#### [Reasonable Accommodation and Impact on Employers](#)

The EEOC issued a "resource document" explaining an employer's obligation to provide reasonable accommodations. Although the document is helpful, employers should keep in mind the government often takes the most conservative approach when it comes to these types of compliance issues.

## **Lawsuit Shifts the Burden of Proof**

A recent Court decision could change the landscape of lawsuits involving benefit claims. As a general proposition, the plaintiff (i.e. the plan participant or beneficiary) has the burden of proof that they are entitled to the benefits. However, a recent Court decision held otherwise.

### [Burden of Proof Ruling Creates Uncertainty](#)

In this particular case the plan administrator had sole possession of the data needed to determine if the person was entitled to the benefits. Therefore, it would be unfair to require the plaintiff to meet the burden of proof since the defendant (i.e. the plan administrator) had all the information. The ruling makes sense but could have a dramatic impact on future lawsuits.

## **Midyear HDHPs and HSAs Implementation**

High Deductible Health Plans (HDHPs) and Health Savings Accounts (HSAs) have been around for a while and they continue to grow in popularity. Most employers install these arrangements at the beginning of the plan year. That is, they make the change during open enrollment.

### [Introducing Midyear HDHPs with HSAs](#)

However, a host of compliance issues can pop up if the employer wants to introduce an HDHP with HSAs midyear if the employer is currently sponsoring a health FSA. This article talks about those issues.

### **Again, No Standalone HRAs!!!!**

The government for some time has indicated employers cannot maintain standalone HRAs. The government's objective is that employers provide their employees and families comprehensive health benefits. HRAs, by definition, provide limited benefits. Therefore, employers have to "bolt on" the HRA to a group health plan.

#### [HRAs Alone Aren't Enough](#)

In other words, the employer cannot sponsor just an HRA. The penalty is \$100 per day per participant. This is nothing new and has been the government's position for some time.

### **CMS Revisits Special Enrollment Periods**

One of the main components of health care reform is the health care exchanges or marketplaces where people and small businesses can go to get health coverage. There is an annual open enrollment period when people can elect health coverage. However, there also are special enrollment periods where people can first select health coverage mid-year.

#### [CMS Acts on Special Enrollment Periods](#)

#### [Special Enrollment Periods and Co-Ops](#)

To preclude adverse selection by precluding people from enrolling just before they know they are going to incur medical expenses, the special enrollment period rules list the events that allow midyear entry into a health plan offered through the exchanges. The government has just tweaked those rules.

### **ERISA or Not ERISA**

ERISA covers both retirement plans and welfare benefit plans. In most cases it is pretty easy to determine whether the program is, in fact, subject to ERISA.

#### [Have You Identified All Your ERISA Benefits?](#)

This article does a nice job going through the basics and there should be very little surprises, but it is a good refresher course.

### **Telemedicine Continues to Grow**

Telemedicine can complement the employer's traditional group health plan. Telemedicine can save money and is a convenient way to talk to a physician about a simple medical condition.

#### [Telemedicine Breaks Down Barriers to Access](#)

Obviously telemedicine is not intended to replace traditional health plans and it is not for serious medical conditions. However, telemedicine can save both the employer and employee time and money.

### **DOL Issues New Fiduciary Rules Regarding Investments**

The government has been working on new fiduciary rules governing those that provide investment advice. Although the rules will have a major impact on employer sponsored retirement plans, the impact is minimal on welfare benefit plans. That is, few welfare plans accumulate assets. That is, most health plans are fully insured so the employer and employees simply pay premiums to the carrier. In the case of a self-funded health plan, the goal is not to accumulate assets but to simply pay claims.

#### [DOL Fiduciary Rules and HSAs](#)

The one exception to the rule is HSAs. HSAs are designed to allow employees to accumulate assets over the years to pay future medical expenses. However, the employee, not the employer, owns the HSA. So the new rules really impact the institutions holding the HSA assets and not the employer. Nevertheless, I wanted to include this article that talks about how the new rules could impact the institutions holding HSA money.

### **US Bureau of Labor Statistics**

There are tons of surveys out there and you always have to be skeptical of the findings. Oftentimes the findings are used to support someone's predetermined position, so it is important to see who conducted the survey and who is paying for it.

#### [Private Employer Costs for Pay, Benefits Up 1.8 Percent](#)

This is the Federal government's survey on a number of topics. One would hope that the government's numbers would not be driven by a hidden agenda.

### **Freelance Hiring on the Rise**

More employers are bringing freelance individuals onboard for projects rather than hiring traditional employees as a way to avoid health care reform mandates.

#### [Study: Freelance Hiring on Rise](#)

This is a growing trend and is similar to hiring independent contractors as opposed to full-time employees. However, a word of caution: Just because the employer slaps the label of "freelance individual" or "independent contractor" onto someone does not necessarily mean that person is not, in the eyes of the IRS, an employee.

### **Learning to Count All Over Again**

We all learned to count in grammar school. However, with health care reform we have to go back and learn to count again.

#### [Counting Employees Doesn't Always Add Up](#)

This is a really great article on how to count the number of employees for different purposes. For example, you fractionalize employees when determining if the employer is subject to COBRA, but you use full-time equivalents to see if the employer is subject to the employer mandate. This article explains the different methods for different laws.

### **Domestic Partner Benefits**

Some employers continue to offer domestic partner benefits but that number is dropping. Now that all states must recognize same sex spouses the need for domestic partner benefits is basically eliminated. That is, same-sex spouses can now marry and they have to be treated the same as opposite-sex married couples.

#### [Understanding Domestic Partner Benefits](#)

This article talks about the various issues involved with offering domestic partner benefits. Again, domestic partners are those (i.e. same-sex and opposite-sex individuals) that are not married.

## **Government Issues New FMLA Posters**

Employers are required to post the FMLA rules. The government recently updated its poster that employers can use to comply with this requirement. The government also released a comprehensive FMLA employer guide.

[Department of Labor's New FMLA Guide](#)

[Link to FMLA Poster](#)

The new poster is pretty similar to the old one. Nevertheless, employers should replace the old with the new.

## **Check Your Mailbox - ACA Notices Coming**

You filed (or will be filing) your IRS Forms 1094 and IRS Form 1095 so time to kick back and wait for next year – not so fast!!! The federally run health care exchanges (Ohio is one of them) will start sending out notices to certain employers asking about employees who receive a premium subsidy under the exchange.

[Expect a Notice if Employees Received Premium Subsidies](#)

[What To Do When Notices Arrive](#)

These articles provide a roadmap of what you should do if you do, in fact, receive an exchange notice about one or more of your employees.

## **PCORI Fee Coming Due**

We have some time, but I thought I would remind you that if you are sponsoring a self-funded health plan you will need to report and pay the PCORI fee by the end of July.

[PCORI Fees Due by the End of July](#)

The fee gets reported and filed on IRS Form 720. There are several ways to calculate the number of employees but, as a practical matter, the fee is not that large so most employers simply take the numbers on the latest Form 5500 assuming they were required to file a Form 5500.

## **Get Your HIPAA House in Order**

HIPAA has been around for some time. The goal is to protect and secure protected health information or PHI. If you sponsor a fully insured health plan there is a good chance you do not have access to PHI so HIPAA is not really a concern. On the other hand if you are receiving PHI then you need to comply with the rules.

### [HIPAA Audit Program Announced](#)

The government is stepping up its enforcement efforts when it comes to HIPAA compliance. Therefore, you need to review your policies and procedures to ensure you are up to snuff if you are, in fact, required to comply with the HIPAA rules.