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July 15, 2016, Compliance Update

Filing Deadlines Fast Approaching

I am going to make this one of the shorter compliance updates because I want to focus on two approaching deadlines and I do not want them to get lost in a long update.

Form 5500

The ERISA filing rules applicable to “welfare benefit plans” like health, dental and group term life insurance are crystal clear and have been around for many years. You have to file an annual report (i.e. Form 5500) if there were at least 100 participants (i.e. employees) in the plan as of the first day of the plan year. The reports, which have to be filed electronically, are due seven months after the close of the plan year. This means, the 2015 forms are due July 31, 2016, for plans maintained on a calendar year basis.

Assuming all the lines of coverage (e.g. medical, dental, vision, disability and life) are incorporated into one plan as opposed to each line of coverage being considered a separate plan, you look at all the lines of coverage when determining the number of employees. For example, there could be 85 employees in the medical and 115 employees in the company-paid life insurance. Since there are over 100 participants (i.e. employees) in one line of coverage and the plan incorporates all the lines of coverage, the company would have to file the forms for the plan. If you are not going to be able to meet the July 31st deadline you can file for an automatic 2½-month extension until October 15, 2016, for calendar year plans by submitting IRS Form 5558 prior to the July 31, 2016, filing deadline. That is, you have to file for the extension before the original due date for the Form 5500.

The penalty for filing the forms late has just been dramatically increased. The old potential penalty under the statute could have been up to \$1,100 per day but the government had indicated the maximum amount it would assess was up to \$300 per day, up to \$30,000 per year. However, the new maximum potential penalty for not filing the Form 5500 on time has been increased to over \$2,000 per day!!!!

<http://us.practicallaw.com/w-002-7339?source=rss>

Therefore, it is imperative all the filings be done on time. If, however, you missed a filing, the government has instituted the DFVCP, Delinquent Filer Voluntary Compliance Program (the "Program"), where the employer can come forward and file all the late forms and pay a reduced maximum penalty of \$4,000 regardless of the number of years. For example, the employer could file five years of late forms and only pay \$4,000 for all the late forms.

To take advantage of the Program, the employer has to come forward and file all the late forms and pay the reduced penalty before the employer has been contacted by the government. In other words, if the government contacts the employer about the late forms before the late forms are filed under the Program, the employer cannot take advantage of the Program and will be subject to much higher penalties.

Note that different rules apply to retirement plans (e.g. a 401k plan). Also, the general rule about having to have at least 100 participants (i.e. employees) in the plan on the first day of the plan year does not apply if the welfare benefit plan is considered "funded" under ERISA. The most common scenario for a funded welfare benefit plan is if the plan is maintained in conjunction with a trust, and the most common trust is a VEBA or voluntary employees' beneficiary association. This article provides a nice overview of the filing requirements. Remember the potential penalties have just increased and those numbers are not reflected in this article.

[Form 5500 Questions and Answers](#)

The filing rules have been around for some time although the increase in potential penalties is new. So you should be familiar with the rules and you should be complying. However, now is a good time to ensure "your house is in order" when it comes to the annual ERISA filing requirements applicable to welfare benefit plans.

PCORI Fee

The Patient-Centered Outcomes Research Institute or PCORI fee is a temporary fee under health care reform that is to be used to fund research. The fee expires after the 2018 calendar year. It is assessed on health plans. In the case of an insured health plan, the carrier will pay the fee but most carriers are passing the cost onto the employer. If the employer is sponsoring a self-funded health plan, then the employer is responsible for reporting and paying the fee.

The fee is reported on IRS Form 720 and is paid with IRS Form 720V. The filing and payment date is July 31, 2016. So if you are sponsoring a self-funded health plan (including an HRA) then you need to meet the July 31, 2016, deadline. The fee is relatively small (i.e. \$2.08 or \$2.17 per person depending on date of the last day of the plan year). Note the fee is assessed on a per-person basis participating in the plan.

There are several ways to determine the number of people in the plan. This article does a great job explaining the PCORI fee.

[PCORI Fee Reminder](#)

Again, if you are sponsoring a fully insured health plan, then the carrier will take care of the PCORI fee. However, if you are sponsoring a self-funded health plan (including an HRA) then you need to report and file the fee by July 31, 2016. The rules become complicated if you sponsored a fully insured health plan for part of the year and then switched over to a self-funded health plan.

If you “fumbled the ball” and failed to report and/or pay the PCORI fee on time, there are potential penalties. See this article.

[Paying PCORI Fees - Corrections and Amendments](#)

The maximum potential penalty is 25% of the fee and since the fee is relatively small, the penalty is nowhere near the potential penalty for missing the Form 5500 filing.

All Group Health Plans Will Have to Begin Filing Form 5500 in the Future

The Department of Labor released almost 1,000 pages of new rules governing the annual filing requirements (i.e. Form 5500) under ERISA. The biggest news is that all group health plans will be subject to the reporting requirements. Previously fully insured group health plans with fewer than 100 participants (i.e. employees) were exempt from the filing requirements. However, that will no longer be the case.

[DOL Proposes Modernized 5500](#)

The government is releasing the rules on July 21, 2016, and there will be a 75-day comment period. After that the government will finalize the rules and release drafts of the new forms and indicate when the new reporting requirements become effective. The new Form 5500 filing rules are projected to become effective beginning with the 2019 plan year. Stay tuned!!!!

Marketplace Notices Starting to Show Up

The federal facilitated marketplaces (Ohio is one of them) are starting to send notices to employers telling them that certain employees are going to get a premium subsidy. The employer will then have the option to appeal the employee's right to receive the premium subsidy. Health care reform imposes penalties on large employers whose full-time employees go to the marketplace and receive a premium subsidy. The new notices apprise the employer that it could be subject to a potential penalty

because one of its employees is getting a premium subsidy so that the employer can contest the employee's right to the premium subsidy. If it is determined the employee is not entitled to the subsidy, then this eliminates the possibility the employer will be penalized for that employee. This also will avoid the employee having to repay the premium subsidy back to the government. This article explains the process.

[Marketplace Insurance Exchange Notices are Coming](#)

It is important to realize the employer is not obligated to contest the employee's right to the premium subsidy. That is, the employer is not automatically penalized if the employer fails to respond to the notice. The employer will receive a notice from the IRS next year listing the potential penalty and the employer will then have the right to appeal that determination. In other words, the IRS is the one to assess and collect the employer penalty and the IRS will establish its own separate appeal procedures.

EEOC Releases Sample Wellness Program Notice

The EEOC issued regulations governing wellness programs and their application under the Americans with Disabilities Act ("ADA") and promised to issue a sample notice employers can use to comply with the regulations. The EEOC released that sample notice.

[Another EEOC Notice for Wellness Programs](#)

These notice requirements become effective next year but employers sponsoring wellness programs may want to review the document and gear up for the requirements now.

Fully Insured Health Plans Probably Required to Provide Health Services for Gender Transition

The government issued rules saying carriers that receive federal funds cannot discriminate on the basis of sex. This prohibits the denial of health care or coverage based on gender identity and sex stereotyping. So if the carrier receives any federal funds (e.g. the carrier offers Medicare Advantage products or participates in a health care exchange or marketplace and gets premium subsidies), then all of the carrier's products must comply with the new discrimination rules.

[HHS Rules on Exclusions for Gender Transition](#)

For example, say a national carrier offers a product through the Utah health care exchange. A private employer in Ohio that buys a fully insured product from that

carrier would be subject to new discrimination rules. The rules are different if the private employer in Ohio is sponsoring a self-funded health plan and is using the carrier for only administrative services.

Certain Wellness Program Benefits Always Are Taxable

The tax rules are pretty clear. Anything the employer provides to employees is taxable income unless specifically excluded under the Internal Revenue Code. Some people think that if the amount is below a certain limit it is tax free, but that is not the case.

[Cash Wellness Rewards are Always Taxable](#)

This article explains the tax rules when it comes to wellness programs. If the wellness program rewards are in the form of a premium reduction, HSA contribution or reduced copayments and deductibles, the rewards are tax free. However, if the wellness program rewards are paid in cash or a gift card, the rewards are taxable regardless of the amount.

Correcting IRS Form 1095-Cs

I am guessing most large employers are breathing a sigh of relief now that the submission deadline for IRS Form 1095-C has passed. However, you may want to correct any erroneous information on the forms. This article talks about that process.

[Filing Corrections for Form 1095-C](#)

The government has indicated it will not assess penalties against those employers that made a good faith effort to comply with the reporting rules. The author of this article says that good faith standard includes correcting any forms that were "accepted with errors."