



## Compliance Update, January 2017

### The Repeal and Replace Battle Cry

The Republican Party and President-Elect Trump have made it crystal clear that repealing and replacing Obamacare is Job No. 1. There have been a number of proposals and hundreds, if not thousands, of articles on how this might happen and what we may end up with. It simply is not possible to predict how this will unfold.

[Future of ACA: The Tom Price Plans](#)

[Quick ACA Repeal Likely](#)

The first article is one of a series of articles by a really good law firm talking about what health care in America may look like in the coming months. Health care reform is one of the most politically charged topics in America and it will be changed in the coming weeks, months and years but no one can predict what the final product will look like at this time. However, one theme that seems to be emerging is that the Republicans are saying the government's role is to help provide universal **access** to health care as opposed to universal **coverage**.

### COBRA Still Around and New Model Notices – But No Changes

It is easy to forget about COBRA with all the noise about health care reform and the incoming Trump administration. However, COBRA has been around since 1986 and it does not look like it is going away anytime soon. The government provides COBRA templates employees should use to comply with the notice requirements.

[Non-Compliant COBRA Notices May be Costly](#)

[COBRA: Back to Basics](#)

[New Expiration Date for CHIP, COBRA](#)

The first article talks about an employer that got clipped for using a deficient COBRA notice. The second article talks about COBRA in general, and the last article says the model notices

have been modified but there were no substantive changes to the model notices. Again, employers should use the government's template but you should modify the template to require any notices to the employer be in writing. That is, you should modify the template to say whenever the individual is required to notify the employer, that notification must be in writing.

### **CMS Notice Requirement Due March 1**

One of the requirements under the Medicare prescription drug program is that the employer notify the government regarding the status of the employer's group health plan (i.e. creditable or noncreditable coverage).

#### [Medicare Drug Notice Due March 1](#)

This notice is due within 60 days of the start of the plan year. Therefore, employers maintaining calendar year plans need to notify the government no later than March 1, 2017. This notice has to be done electronically.

### **Small Employers Get a Break**

One of the last pieces of legislation signed by President Obama reverses the government's prior position that precluded small employers from paying for the employees' individual health policies. The new rules allow small employers that do not offer **any** type of health plan (including dental or vision plans) to pay for the employees' individual health policies on a tax-favored basis.

#### [HRA for Qualified Small Employers](#)

#### [Cures Act Revives HRA for Small Employers](#)

#### [New Law Expands Stand-Alone HRAs](#)

#### [Mental Health Parity and other Cures Act Provisions](#)

#### [A Closer Look at Cures Act](#)

The law made other changes. The first couple of articles talk about the new rules allowing small employers to pay for individual health policies and the last article talks about several other new changes. The changes are welcome news but it is frustrating when the government issues rules, employers comply and then the government reverses itself.

### **Small Employer ACA Items on Chopping Block**

It remains to be seen how the repeal and replacement of Obamacare shakes out. All kinds of proposals are floating around so it is too early to predict the final outcome. This article focuses on what may play out with respect to small employers.

### [Repeal, Replace and Small Employers](#)

Unfortunately it appears the political agenda is driving this movement more than simply taking a practical approach to improving on the current system.

### **Don't Forget Your IRS Form 1094 and IRS Form 1095**

Obamacare is certainly in the Trump administration's crosshairs and there are all kinds of speculation that many provisions will be repealed or modified. However, the current state of affairs is that employers still need to comply with the various reporting requirements including IRS Form 1094 and IRS Form 1095.

### [1094, 1094 Deadline Relief](#)

### [IRS Issues Updated ACA Guidance](#)

Employers have until March 2, 2017, to distribute IRS Form 1095 to the employees but the deadline for submitting the IRS Form 1094 and IRS Form 1095 to the IRS has not changed. If the employer is submitting the forms to the IRS in paper format the deadline is February 28, 2017, and if the forms are being submitted to the IRS in electronic format, the deadline is March 31, 2017.

### **Marketplace Appeal Notices**

Federally run marketplaces sent out notices to employers telling them that some of their employees had applied for premium subsidies. The notice gave the employer the opportunity to contest the employee's eligibility for the subsidy. Many employers took advantage of this and appealed the employee's right to a subsidy. Now some of the employers are getting a letter saying the employer's appeal has been denied.

### [HHS Appeals - Are There Any Losers?](#)

The most important thing to note is that the marketplace notice is not determinative as to whether the employer is subject to the employer mandate penalty. In other words, that determination is made by the Internal Revenue Service and not the marketplace. So the fact the marketplace ruled against the employer does not mean the employer is subject to the employer mandate penalty. The IRS will send out a separate notice of the proposed assessment of a penalty and the employer will then have the opportunity to contest the actual

assessment. This, of course, presumes that the Trump administration does not repeal the employer mandate.

### **Court Imposes Nationwide Injunction on Certain ACA Discrimination Rules**

The Affordable Care Act, aka Obamacare, has provisions that prohibit discrimination in health programs and activities on the basis of race, color, national origin, sex, age, or disability. The government issued rules explaining and enforcing those provisions that were scheduled to take effect January 1, 2017. However, a Federal District Court issued a preliminary nationwide injunction suspending the regulations prohibiting discrimination on the basis of gender identity and termination of pregnancy, in the context of both insurance coverage and the provision of health care services.

#### [Court Enjoins Part of Nondiscrimination Rule](#)

#### [Wellness Program Incentives Survive](#)

The government said that it will continue to enforce other provisions of the law and specifically highlighted that the regulations enhancing language assistance for people with limited English proficiency and other sex discrimination provisions are still in effect. However, it remains to be seen how the Trump administration will respond to the court's ruling. That is, the new administration may decide to scrap this part of the law entirely.

### **First Checklist for 2017**

It is amazing how much information is out there and a lot of vendors are looking for catchy phrases to garner your attention. This one has labelled its article as the first checklist for 2017.

#### [Your First To-Do List](#)

It worked on me because I am enclosing it in the newsletter. I am sure there will be more lists as the year progresses but this can hold the title as the "First for 2017."

### **Employer Sponsored Health Plans May be Impacted**

Most of the focus on repealing Obamacare has been on the potential impact on the coverage provided to individuals. However, repealing Obamacare also will impact group health plans sponsored by the employers.

#### [Repeal Will Affect Employer-Sponsored Plans, Too](#)

This article talks about the potential impact on group health plans if and when Obamacare is repealed.

## **Top 10 Employee Benefits Resolutions for 2017**

This article provides some practical pointers to consider for every employer sponsoring any type of employee benefit plan.

### [10 Benefits Resolutions for 2017](#)

Surprisingly, the 10 tips are not legal in nature but are more based on common sense. Sometimes it makes sense to just take a step back and consider the practicality of sponsoring a group plan.

## **Contraceptive Coverage Remains in the Spotlight**

Health care reform requires health plans to provide free contraceptive coverage and some have found this provision offensive. This issue had found its way to the U.S. Supreme Court and instead of ruling on the case, the court sent the matter back to the lower courts to decide. The Obama administration issued its own set of procedures this month on how it intends to handle the issue.

### [Obama Lets Contraceptive Coverage Rule Stand](#)

As with health care, in general, it remains to be seen how the new administration will handle this issue. It is very possible the requirement to provide contraceptive coverage may be completely eliminated.

## **EEOC Reminder for Employers Sponsoring Wellness Programs**

One of the more confusing sets of rules has to do with wellness programs. The problem is there are a couple of government agencies involved and they have issued different guidelines. This article reminds employers that the EEOC has issued rules and a sample notice if the wellness program involves the ADA (Americans with Disabilities Act) or Genetic Information Nondiscrimination Act (GINA).

### [EEOC Issues Sample Notice for Wellness Programs](#)

Hopefully the new administration will eliminate (or at least reduce) some of the complexity and provide clear, practical rules that everyone can understand and follow.

## **CEO Personally Liable for Health Plan Premiums**

The court in this lawsuit had no trouble holding the company's CEO personally liable for paying almost \$70,000 in health plan premiums. The company withheld the money from the employees' paychecks and never sent the money to the carrier.

### [CEO Owes Carrier for Premiums](#)

It is almost impossible to believe the court would reach any other conclusion. The CEO filed for bankruptcy but the court said the bankruptcy would not discharge the CEO's obligation to pay the premiums.

### **New Claims Procedure for Disability Plans**

With all the attention on health plans it is easy to forget about other benefit programs. However, the Department of Labor finalized the claims procedure for disability plans. The new rules are intended to provide more protection to the plan participants with many of the protection afforded those that participate in a group health plan.

### [DOL Finalizes Disability Claims Regulations](#)

### [Regulations Address Notice Requirements](#)

Note that the new rules only apply to disability claims filed on or after January 1, 2018. So (1) there is time to get ready and (2) the rules may change under the Trump administration. However, you should, at this time, at least be aware of the changes.

### **Federal Contractors Subject to New Rules**

If you do work for the Federal government you should be aware of new rules that apply to new contracts or renewed contracts entered into on or after January 1<sup>st</sup> of this year.

### [New Requirements for Federal Contractors](#)

The new rules require paycheck transparency and that some federal contractors provide paid sick leave to covered employees.

### **HIPAA Audits on the Uptick**

The HIPAA privacy rules have been around for some time. If you are a smaller employer with a fully insured health plan, you pretty much avoid most of the HIPAA privacy rules. On the other hand, if you sponsor a self-funded health plan or are a larger employer that receives PHI from the carrier, you should be familiar with the rules. The government is starting to conduct HIPAA audits to ensure compliance.

### [Second Phase of HIPAA Audits Under Way](#)

To that end, you should ensure that your "HIPAA House" is in order. The government is taking the rules seriously so it is prudent to be proactive and ensure that your policies and procedures

are up to date and that you have business associate agreements with all the vendors. So this begs the question: Who is a business associate?

### [Identifying HIPAA Associates](#)

This article helps answer that questions. Finally, it cannot be overemphasized how important it is to encrypt emails containing PHI.

### **2018 Limits Released**

Health care reform imposed a number of limits on a variety of programs. For example, there is a limit on the maximum annual amount participants can contribute to a health FSA and the maximum amount of out-of-pocket expenses participants have to pay under a group health plan.

### [2018 Out-of-Pocket Maximums](#)

These limits are indexed and can increase each year to account for inflation. The government has released the numbers for 2018. This article lists the historical amounts.

### **Excepted Benefits**

Health care reform imposed a number of rules on group health plans. The rules are complex and many people argue that they dramatically increase the cost of health coverage in America. However, excepted benefits are exempt from health care reform.

### [Excepted Benefits, Part I](#)

### [Excepted Benefits, Part II](#)

Some employers are offering excepted benefits that are exempt from Obamacare as a way to supplement their group health plans. Excepted benefits, as a general proposition are much cheaper than medical plans so many employers feel they get a “bigger bang for the buck” by offering them. Additionally, excepted benefits are often on a completely voluntary basis where the employees pay the entire premium.

### **Tips for Controlling Drug Costs**

Health care is expensive and drugs are one of the fastest growing drivers of the increasing costs. Some of the specialty pharmaceuticals can cost hundreds of thousands of dollars. So employers are looking for ways to help control those spiraling costs.

### [Tips for Adding Prescription Coverage Limits](#)

This article offers some practical considerations when it comes to trying to reduce the cost of prescription drugs.

### **Chalk One Up for the EEOC Wellness Rules**

The EEOC issued rules governing wellness programs and what they have to do to comply with the ADA (the Americans with Disability Act) and GINA (the Genetic Information Nondiscrimination Act). AARP filed a lawsuit saying the rules would increase the cost of coverage to individuals and the rules should be invalidated.

#### [Wellness Regulations Survive Challenge](#)

The court ruled in favor of the government. Unfortunately the rules are complicated (see article above) but the Trump administration may take steps to reduce some of the complexity associated with offering wellness programs.