



## **COMPLIANCE UPDATE, APRIL 2017**

### **Trump Administration Tries to Stabilize Exchanges**

With all the talk and activity regarding the Obamacare repeal and replace, the carriers are nervous about the health care exchanges or marketplaces. The carriers have to decide relatively soon if they want to participate in the exchanges or marketplaces next year and with all the uncertainty, many of the carriers are indicating they may pull out of the program.

<http://khn.org/news/repeal-replace-revise-your-guide-to-market-stabilization/>

### **Repeal, Replace and Watch**

The Trump administration has indicated it will release final rules that impose a shorter enrollment window, tighter vetting of people who sign up outside of those open periods and efforts to require some consumers to show proof of prior insurance coverage. These steps are designed to better protect the carriers so that they will continue to participate in the exchanges and marketplaces but it remains to be seen if this is enough to keep them in the program.

### **Where Does the Trump Administration Stand on CSR Payments**

The previous article outlines steps the Trump administration is taking to strengthen the health care exchanges or marketplaces so that the carriers will continue to participate. However, the administration continues to send mixed signals by refusing to take a firm stance on the cost sharing reduction, or CSR, payments.

<https://morningconsult.com/2017/04/11/insurers-want-greater-certainty-obamacare-subsidies/>

<http://kff.org/health-costs/press-release/estimates-average-aca-marketplace-premiums-for-silver-plans-would-need-to-increase-by-19-to-compensate-for-lack-of-funding-for-cost-sharing-subsidies/>

The Affordable Care Act aka Obamacare provides that health plans offered through the health care exchanges or marketplaces have substantial maximum out of pocket limits. However, the statute also provides subsidies to the carriers for low-income individuals that reduces the maximum out of pocket limits. The Trump administration is sending mixed signals as to whether the government will pay those subsidies to the carriers and this has caused a lot of concern for the carriers. So, on one hand the administration is trying to encourage the carriers (see previous article) and, on the other hand, the administration is causing the carriers to rethink their position as outlined in the first article. The second article says premiums would have to be increased by 19 percent if the government pulls up lame when it comes to making the CSR Payments.

### **Practical Tips for GINA Compliance**

More employers are realizing that the main way to truly control health care costs is to get a handle on the individual's actual health. Healthier people just spend fewer health care dollars.

[https://www.dechert.com/files/Uploads/Documents/Employee%20Benefits/Welfare%20Plan%20Compliance%20under%20the%20Genetic%20Information%20Nondiscrimination%20Act%20\(GINA\).pdf](https://www.dechert.com/files/Uploads/Documents/Employee%20Benefits/Welfare%20Plan%20Compliance%20under%20the%20Genetic%20Information%20Nondiscrimination%20Act%20(GINA).pdf)

The first step in that process is identifying unhealthy people, and wellness programs are designed to do just that. However, there are all kinds of rules and limitations as to what questions employers can ask and what information they can gather. This article provides practical tips for setting up a program under Genetic Information Nondiscrimination Act or GINA.

### **Proposed Wellness Legislation**

The article above talks about the current complex rules governing wellness programs. With all the focus on repealing and replacing Obamacare, there was little fanfare about the House passing legislation clarifying the rules applicable to wellness programs.

<http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=401456>

Currently there is a hodgepodge of rules governing wellness programs and some rules contradict other rules. The proposed law would provide employers with a uniform set of rules when it comes to wellness programs.

## **Proposed Legislation for Self-Funded Health Plans**

The previous article talks about proposed legislation to help clarify the rules governing wellness programs. The government also is proposing legislation to help take out some of the uncertainty surrounding self-funded health plans.

<http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=401560>

ERISA provides that self-funded health plans are exempt from state regulations. However, that begs the question as to what is a self-funded health plan. The carriers are getting creative when it comes to developing products and some of the states are trying to regulate those products even though the carrier and employers are saying those products are self funded. Some of the plans claiming to be self funded (and exempt from state regulation) have pretty low stop loss limits and look a lot like high deductible health plans. The proposed legislation would preclude the states from regulating self-funded plans with stop loss policies.

## **ERISA Preemption Prevails Again**

An employee tried to buy life insurance for his spouse under an employer sponsored group term life insurance. The employer said the spouse had the coverage but the spouse never submitted evidence of insurability. The insurer and the employer refused to pay so the employee filed suit under state claims (i.e. constructive fraud, negligent misrepresentation and intentional infliction of emotional distress).

<https://www.erisaclaimdefense.com/erisa-preempts-common-law-fraud-claims-employer-enrollment-dispute/>

The Court dismissed the lawsuit saying ERISA preempted the state law claims. Note that under ERISA the plaintiff can only sue for the lost benefits. That is, ERISA does not, as a general rule, allow for extra damages like emotional distress. So, at least from a potential damages standpoint, it is better for the employer to have the plan subject to ERISA.

## **Pets in the Workplace**

More employers are looking at innovative ways to attract and retain quality employees. Some employers are adopting pet-friendly workplaces. This article examines the issue in detail.

[https://www.banfield.com/Banfield/media/PDF/Banfield-PAWrometer-Summary\\_FINAL-41117.pdf](https://www.banfield.com/Banfield/media/PDF/Banfield-PAWrometer-Summary_FINAL-41117.pdf)

I have two dogs and if I brought them to work everyone's productivity would drop to zero because they would chew all the computer wires!!!!!!!

### **Claim Audits can Save Money**

Providing medical benefits is expensive enough so it is critical the plan only pays legitimate claims. In other words, it is purely a waste of money to pay a claim the plan was not legally obligated to pay for whatever reason.

<https://www.mossadams.com/articles/2017/april/help-contain-costs-with-a-benefit-claims-audit>

To make sure that does not happen employers should conduct claims audits periodically to ensure that only legitimate plan claims are being paid.

### **Encrypt, encrypt, encrypt that ePHI**

When is the last time you put a stamp on an envelope and mailed something to someone? Electronic communication is the norm today. It is instantaneous and free. So it is not surprising that protected health information or PHI is transferred electronically.

<http://www.passwordprotectedlaw.com/2017/04/hipaa-guidance-issued-on-man-in-the-middle-attacks/>

The Office of Civil Rights (the government agency charged with enforcing HIPAA) reminds everyone that "best practices" dictate all PHI be encrypted if sent electronically.

### **Quick Response to a HIPAA Breach Required**

If you didn't follow the sage advice in the previous article regarding encryption or there is some other breach, it is imperative that you respond to the breach quickly.

<http://www.icemiller.com/ice-on-fire-insights/publications/are-you-timely-reporting-hipaa-breaches-ocr-settle/>

<https://www.perkinscoie.com/en/news-insights/recent-hipaa-privacy-and-security-settlements-and-lessons.html>

The first article talks about how the government recently imposed a penalty on a covered entity for failing to comply with HIPAA's Breach Notification Rule's timeline requirements for reporting breaches. That is, the penalty was imposed just because the organization failed to follow the time frame for reporting the breach. The second article provides some general guidance on how to stay out of trouble when it comes to the HIPAA rules.

### **Employer Mandate Penalty Calculation**

The employer mandate under Obamacare is one of the most controversial provisions of the statute. However, until the legislation is modified, it is the law of the land. The IRS released information on how the penalty is to be calculated.

<https://www.irs.gov/affordable-care-act/employers/types-of-employer-payments-and-how-they-are-calculated>

Health care is in such a state of flux it is nearly impossible to develop a compliance strategy. Nevertheless, the IRS has issued this helpful guidance on the employer mandate penalty. It remains to be seen if the penalty is ever assessed and collected but employers should comply with the current rules until those rules are changed.

### **Selling Across State Lines**

One of the ideas floating around is allowing carriers to sell health policies across state lines. Although this sounds good in concept, this article says allowing this approach will not really reduce costs or expand options.

<http://www.commonwealthfund.org/publications/blog/2017/apr/selling-health-insurance-across-state-lines?omnicid=rsspubs>

It is easy to create political sound bites like increasing competition, expanding choices and lowering costs. However, actually accomplishing those goals is a lot more difficult simply throwing out general concepts.

### **Small Employers Paying for Individual Health Policies**

The government was adamant employers could not pay for the employees' individual health policies under any circumstances. However, President Obama reversed that stance late last year before leaving office.

<https://www.cheiron.us/cheironHome/viewArtAction.do?artID=189>

<https://www.employmentmattersblog.com/2017/03/qsehra-the-21st-century-cures-act-creates-a-new-health-care-plan-option-for-small-employers/>

Small employers (i.e. those with fewer than 50 employees) can now pay for the employees' individual health policies if certain conditions are satisfied. We have included articles on this in previous newsletters but these are pretty good pieces on the rules so I am including them in this newsletter.

### **COBRA and Severance Packages**

COBRA had been around for a long time and it does not appear that it is going away any time soon. Nevertheless, the number of people electing and paying for COBRA has declined because coverage under the health care exchanges or marketplaces oftentimes is cheaper. However, some employers may want to include COBRA coverage under a severance plan.

<http://frenkelbenefits.com/blog/2017/04/03/severance-too-much-of-a-good-thing/>

This article talks about some points employers ought to consider if they are contemplating paying for COBRA coverage under a severance agreement.

### **Potential Changes Under ACA**

Every day new articles, TV and radio come out with an update on health care reform. It is impossible to keep track of all the proposals and, on top of that, they keep changing hour by hour.

[http://www.truckerhuss.com/wp-content/uploads/2017/03/20170303\\_special\\_alert.pdf](http://www.truckerhuss.com/wp-content/uploads/2017/03/20170303_special_alert.pdf)

This article does a nice job of talking about the process of change. It talks about the limitations on "reconciliation" and how the law can be changed under this approach.

## **FMLA Traps**

The Family and Medical Leave Act – FMLA – was signed into law by President Clinton and so it has been around for some time. However, employers continue to get tripped up and get sued under the statute.

<http://hrdailyadvisor.blr.com/2017/03/29/risks-unpaid-leave-fmla/>

This article talks about how an employer can fall short if the employee goes out on a non-FMLA leave but becomes eligible for FMLA while out.

## **Grandmothering for Another Year**

Health care reform imposes all kinds of rules on group health plans. Those rules were scheduled to kick in but the government keeps delaying the effective date for certain plans. This has been referred to as “grandmothering” and the government has just delayed the rules for another year.

<http://news.wolterskluwerlb.com/news/ccio-gives-small-group-non-grandfathered-policies-more-time-to-ease-into-aca-compliance/>

The new effective date is January 1, 2019. So certain plans can continue to be exempt from various ACA rules until January 1, 2019. It is possible that (1) new health care reform is enacted before that date or (2) the rules get extended beyond January 1, 2019.

## **COBRA Making a Comeback?**

A previous article talks about traps involving COBRA and severance packages but that article just assumes the former employee is going to elect COBRA. This article discusses why COBRA may be making a comeback.

<https://www.benefitfocus.com/blogs/benefitfocus/why-cobra-might-be-making-a-comeback>

When COBRA was enacted over 30 years ago individuals had few options when it came to individual health coverage. With Obamacare they now have the health care exchanges or marketplaces and many individuals can receive subsidies to help pay for that coverage. So many people thought COBRA would just go away but the COBRA law remains in force and

people still do elect COBRA coverage rather than going to the exchanges or marketplaces for coverage.

### **Are Association Health Plans in Your Future?**

All the media attention has been on the House's attempt to repeal and replace Obamacare. What has slipped under the radar is the fact the House has passed legislation allowing the creation of Association Health Plans or AHPs. This law would allow small businesses to band together to buy health coverage.

<https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/association-health-plans-bill.aspx>

[http://www.naic.org/documents/health\\_archive\\_naic\\_opposes\\_small\\_business\\_fairness\\_act.pdf](http://www.naic.org/documents/health_archive_naic_opposes_small_business_fairness_act.pdf)

The theory is small employers can band together to buy quality/affordable health coverage the way large employers secure coverage. However, the legislation has its distractors. The first article talks about the proposed law and the second article is from the National Association of Insurance Commissioners opposing the law.

### **Gig Employee Benefits**

A growing trend is to hire employees on a full time but temporary basis to help with a single specific project. The question becomes what if any benefits can the employer offer (or be required to offer) those employees.

<https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/what-benefits-can-companies-offer-gig-workers.aspx>

This article provides some innovative ways to attract and retain these types of workers. However, a word of caution: The employer mandate under health care reform does not recognize "gig" employees. If the employees are hired with the expectation they will work at least 30 hours per week and they are not considered "seasonal employees," they have to be offered health coverage within 90 days of hire. In other words, just because they may be terminated after a short time does not make them ineligible for health coverage under the Affordable Care Act.

