

JANUARY 2019 COMPLIANCE UPDATE

We hope everyone had a safe and happy holiday season. Time to get back to work unless you are impacted by the government shutdown. No telling when that will end. This newsletter will be longer than most since it includes articles from the date of the last newsletter (i.e. November 15, 2018) till today.

PLAN LIMITS FOR 2019

Many of the rules of government benefit plans have an inflationary factor. That is, the dollar amount can change each year to reflect inflation. These are charts listing those amounts.

[Annual benefit plan limits for 2019](#)

[IRS updates health and fringe benefit plan limits](#)

The first chart includes amount for retirement plans as well as welfare benefit plans. Note that the deadline for providing IRS Form 1095 to the employees has been extended. See later article.

ACA ADJUSTMENT FOR 2019

The previous article lists changes to the dollar amounts for various limitations in the Internal Revenue Code.

[ACA limits, fees and penalties through 2019](#)

This chart shows the current and historical amounts under the Affordable Care Act; namely the penalties, fees and limits for this year.

THEY'RE BACK – IRS FORM 1094 AND 1095

One of the more time-consuming compliance aspects of the Affordable Care Act has to do with annual reporting requirements applicable to the employer mandate.

[Employer's guide to ACA reporting requirements](#)

Employers have to prepare and distribute, to both the employees and the federal government, IRS Form 1095. The IRS has extended the deadline for pass out the Form 1095 to employees.

[Extended time to provide ACA statements](#)

[Deadline extension for individual distribution only](#)

Note that the deadline for sending the forms to the IRS **HAS NOT** been extended. The IRS has announced that electronic filing of Affordable Care Act (ACA) information returns (Forms 1094/1095) for the 2018 tax year will become available on January 15, 2019, at approximately 9 a.m. Eastern time. Failure to comply can result in substantial penalties.

PROPOSED HRA RULES

The Trump administration continues to chip away at Obamacare and offer new options to employers. One of those options is to allow employers to reimburse employees' premiums for individual health policies.

[Proposal would allow HRA be used for pay for coverage](#)

[HRA proposal leaves unanswered questions](#)

[An in-depth look at proposed changes](#)

[Guidance on safe harbors for HRAs](#)

Note the proposed rules do not become effective until January 1, **2020**. So you should be aware of the proposal but you can not yet establish these kinds of HRAs.

ACA EMPLOYER MANDATE

The Affordable Care Act (aka Obamacare) requires large employers to offer quality/affordable health coverage to full-time employees or pay a penalty (i.e. the employer mandate). The IRS is starting to access that penalty. Unfortunately, with the political climate in Washington, it is unlikely the employer mandate is going away any time soon.

[ACA penalty notices are in the mail](#)

[Letters signal stringent enforcement of mandate](#)

Our experience has been the IRS will send out a notice (i.e. Letter 226-J) listing the proposed penalty but, more often than not, the amount is not correct. That is, we have contested a number of assessments and each time the penalty has either been reduced or eliminated entirely. If you get this notice review it carefully to ensure that the proposed penalty is, in fact, accurate.

FINAL RULES ON CONTRACEPTIVES REQUIREMENTS

One of the most controversial requirements under the Affordable Care Act is the requirement that group health plans cover contraceptives free of charge.

[Rules finalized for opting out of contraceptive coverage](#)

[How new regulations will impact women](#)

Many employers objected on religious grounds and both the Obama and Trump administration have been struggling with a way to accommodate those employers. The Trump administration has issued final rules but litigation is likely to follow.

TPA “YES, IT’S COVERED, BUT NOT A GUARANTEE OF PAYMENT”

This is a pretty common occurrence. A person calls the TPA for precertification and the TPA says its covered but that is not a guarantee the bill will be paid.

[Require clear communication from TPA](#)

This article talks about how employers can help protect the plan participants from surprises after hearing the particular procedure is covered under the plan.

RECAP OF ACA CURRENT LITIGATION

Ever since the Affordable Care Act was enacted in 2010 there have been a number of lawsuits on many aspects of the law.

[ACA litigation roundup](#)

The latest big thing is a Texas District Court ruling that says the entire statute is invalid because the individual mandate is no longer in force. Most legal scholars believe this ruling will be overturned on appeal. However, when it comes to the ACA, nothing is certain.

HIPAA PRIVACY BREACH NOTICES

Hopefully you never have to refer to this article but it explains the steps you have to take if there is ever a HIPAA privacy breach.

[When and how to self-report a HIPAA breach](#)

If you are sponsoring fully insured plans, your HIPAA privacy obligations are reduced. However, the most important advice when it comes to protected health information or PHI is that you always encrypt any transmissions. That will go a long ways in minimizing the risk of a breach.

HEALTH PLAN COMPLIANCE CHART

Here is a pretty simple and straightforward compliance chart for 2019 for health plans maintained on a calendar year basis.

[2019 health plan compliance calendar](#)

The chart is pretty basic and is really just a starting part. The reason I included it was because it highlights the most important dates in an easy to understand format, and a lot of plans are on a calendar year basis.

HOSPITALS NOW POSTING FEES

The Trump administration now requires hospitals to post their prices online. It remains to be seen how helpful this information will be.

[Hospital sticker prices likely to confuse](#)

Health care is extremely complicated and the billing process adds to this complexity. Additionally, the listed price is not always what the carrier ends up paying. That is, most major carriers have negotiated steep discounts. So listing the “retail” price may not be very helpful at the end of the day.

HEALTH CARE TRENDS FOR 2019

No one can predict the future but this article lists six trends to expect this year. The biggest wild card is on the legislative front.

[Six employee benefits trend to watch in 2019](#)

With a divided Congress and a Presidential election next year, it is difficult to see how any major federal legislation involving health care gets passed. So people will have to look to states and courts to monitor any changes.

MEDICARE PART D NOTICES

Medicare Part D is the prescription drug benefits under Medicare. There are two notice requirements under the Medicare Part D.

[Medicare Part D disclosure to CMS](#)

One notice goes to the plan participants. The second notice goes to the government. The notice to the government must be electronic and is due sixty (60) days after the start of the plan year. This means the 2019 notice to the government must be by March 1, 2019, if the health plan is maintained on a calendar year basis.

This article talks about the Medicare Part D notice requirements applicable to a Health Reimbursement Account (HRA) and Flexible Spending Account (FSA).

[Part D disclosure and HRAs, FSAs](#)

Spoiler alert - The answer is probably yes for the HRA, and no for the health FSA. However, the good news is if all of the HRA participants are also participants in the employer's major medical plan, the employer could avoid separate notices for the HRA entirely.

WAYS SMALLER EMPLOYERS CAN OFFER BETTER HEALTH BENEFITS

There is no silver bullet when it comes to offering health benefits to employees. Smaller employers are at a somewhat disadvantage because they lack the bargaining power of larger employers.

[Five ways to better benefits for small organizations](#)

This article offers some suggestions smaller employers may want to consider when offering health coverage to employees. In addition, the marketplace is starting to evolve and innovate products for smaller employers like MEWAs and Association Health Plans.

TECH'S ROLE IN HEALTH CARE

Technology has become such an important part of everyday life it is not surprising that it is starting to creep into the health care sector.

[Five health-tech predictions for 2019](#)

As the younger generation becomes more important, tech's role in the health care arena becomes more important. Over time, technology's role will become a major factor in health care.

PARTIAL GOVERNMENT SHUT DOWN

The line has been drawn in the sand. President Trump wants money for a border wall and the Democrats are refusing to fund the wall.

[Impact of shutdown employers](#)

This article from a major law firm talks about how the partial shutdown will impact employers. Hopefully the shutdown will end soon but, unfortunately, that is hard to see since both sides have dug in.

ANOTHER ONE HITS THE GROUND

One of the requirements buried deep in the Affordable Care Act was that self-funded health plans use a Health Plan Identifier, or HPID, which was a unique 10-digit number mandated under HIPAA electronic standard transaction rules whenever transmitting data.

[HHS proposes to kill HPID](#)

The requirement to use a HPID had been pushed back and the government is proposing the requirement simply be eliminated.

PREMIUM PAYMENT DOES NOT GUARANTEE COVERAGE

I have been saying this for a long time. Just because the insurance company cashes the check does not mean the person has coverage.

[Eligibility requirements must be met for coverage](#)

If the person does not meet the plan's eligibility requirements, the person is not entitled to the coverage. This comes up most often when an owner retires but he or she still is on the group health plan. Almost every group health plan requires the employee to work a certain number of hours (e.g. 30 hours per week) to be eligible for coverage. The owner retires and quits working but they keep him or her on the health plan. That person is not meeting the eligible requirements and must be offered COBRA (or state continuation if less than 20 employees). The fact the insurance company cashes the premium check does not change the fact the person is not entitled to the coverage!!

CUTTING HOURS TO AVOID ACA CAN BE EXPENSIVE

The Affordable Care Act requires larger employers to offer quality/affordable health coverage to full-time employees or face a potential penalty. When the first pass there was a lot of talk of employers cutting back the employees' hours so that they would be considered part-time and, therefore, eliminating the employer's obligation under the law to offer them health coverage.

[Employer settles for \\$7.4 million after employees sue](#)

However, one employer found out the hard way that ERISA precludes employers from retaliating or discriminating against a participant for exercising any right to which he or she is entitled under the provisions of an employee benefit plan. The Court in this lawsuit held the employer violated ERISA when it reduced the employees' hours so that the employer could avoid the employer mandate under the Affordable Care Act.

WELLNESS PROGRAMS IN LIMBO

Wellness programs are designed to encourage and reward individuals when it comes to the employer's group health plan. The rules are extremely complicated and were recently changed to add to the uncertainty.

[Wellness incentives rescinded for 2019](#)

[Sky isn't falling on wellness programs](#)

[The right way to structure a wellness program](#)

There are limits on the maximum amount of the reward (or penalty) that can be offered under a wellness program. Those limits are dictated by different statutes. That is, wellness programs have to comply with several different laws. The government (i.e. the EEOC) last month removed the limits under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). However, the limits under HIPAA still remain.

To prove the government is serious amount the wellness rules, the Department of Labor recently imposed over \$160,000 in fines and penalties on an employer that failed to comply with wellness program regulations.

[Wellness program noncompliance costs employer](#)

Even more concerning is the fact the government found the violation also was a fiduciary breach under ERISA. As a result, there could personal liability for certain employees!!

EDUCATION AND ADOPTION PROGRAMS DISCRIMINATION RULES

As a general proposition, everything an employer provides an employee is taxable income unless specifically excluded under the Internal Revenue Code.

[Nondiscrimination testing for educational, adoption assistance](#)

Benefits under an education and/or adoption program is excluded from income. However, in exchange for that favorable tax treatment, the program has to satisfy certain discrimination rules. This article talks about those rules.

TAX ISSUES RELATED TO DOMESTIC PARTNERS

The U.S. Supreme Court has ruled that states must recognize same sex marriages the same as opposite sex marriage. Therefore, the need to provide benefits to domestic partners has diminished. Nevertheless, some employers continue to offer benefits to domestic partners.

[Domestic partners and employee benefits taxation](#)

This article talks about the tax issues involved with offer benefits to domestic partner. Note, there is nothing new here, I just wanted to include the article as a reminder if you do offer coverage to domestic partners.

NO DUTY TO NOTIFY FORMER EMPLOYEE ABOUT CONVERSION OPTIONS

A recent Sixth Circuit Case (Ohio is in the Sixth Circuit) let the employer off the hook for not telling the widow of a former employee of the conversion option under the group term life insurance plan.

[Court sides with employer on conversion notification](#)

Although the employer dodged a bullet this time, you do not want to be in this position. First, the employer incurred legal fees that should have been avoided. In addition, the next time around a court could hold the employer liable. This is where an ounce of prevention equals a pound of cure. Just get the conversion notices out and not worry about how a court would decide the case if the notices were not distributed.

KEEP THOSE RECORDS

I get asked this question every now and then: How long do we have to keep the records? The short answer, at least under ERISA, is at least eight years.

[ERISA record retention requirements](#)

Technically speaking, someone might be able to fashion a lawsuit under state law (e.g. a breach of contract claim) and the statute of limitation could be longer. A couple of points on that theory. One, ERISA may preempt a state law claim. Second, as a practical matter, it is unlikely someone is going to wait more than a couple of years to file suit. So, although eight years is not an absolute guarantee, it is a pretty safe bet. Having said that, storing records electronically is much easier so there is no reason to delete them after the eight years have passed. Finally, if you do keep the records electronically, they have to be in a format that you can search and retrieve them.

I WANT OUT!

PEOs, or Professional Employer Organizations, have been around for some time. Basically, they are entities that take over the management of the employees. There are several ways the arrangement can be structured.

[So you're ready to exit your PEO, now what?](#)

This article talks about things to consider when you want to terminate the arrangement. Oftentimes this creates challenges from a benefit prospective.

GET OFF!

Health coverage is expensive and is a major commitment from the employer to the employees. As a result, only those entitled to coverage should enroll.

[Identifying ineligible dependents on your plan](#)

Oftentimes those not eligible are covered under the plan. This is not fair to the employer, the carrier and other employees. This article discusses how ineligible individuals are sometime covered under the plan when they should not be enrolled.

VOLUNTARY BENEFITS TRENDS

The carriers are developing more and more voluntary benefits to meet the growing demands, especially when it comes to part-time employees.

[Voluntary benefits: What's hot for 2019](#)

According to this article, voluntary benefits fall into two categories. First that are “must have” and the second those that are “nice to have.”

KEY CONSIDERATIONS WHEN HIRING SERVICE PROVIDERS

Plan administration and compliance are really complex issues and most employers hire outside consultants to help with the plans.

[Avoid these pitfalls when negotiation service provider agreements](#)

Here are four important things to consider and address when negotiating with prospective service providers.

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