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Top Things You Need to Know Now About:
Affordable Care Act
Employee Benefit Plans
ERISA and Fiduciary Liability

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1. **Final employer mandate Pay or Play rules have been issued, and contain some surprises.**

   - Employers of 50-99 can delay coverage until January 1, 2016 IF they do not reduce workforce or aggregate work hours to be a small employer, or materially reduce or eliminate coverage which was existing on 2/9/2014.
   - Employers of 100+ will still be subject to mandated coverage or penalties beginning 1/1/2015.
   - Full-time employee determinations have changed - update your procedures. You can determine eligibility monthly, but there will be administrative issues – coordinate with your carriers! Common law employee definition applies (e.g. excludes sole proprietors, 2% S-Corporation shareholders, partners, may include temporary or leased employees or contractors). Controlled group rules apply. Must count actual hours worked for hourly, variable, seasonal, and part-time employees, but may not need to for student employees. Waiting for on-call work rules.
   - In 2015, only 70% of full-time employees must be covered to avoid penalties, rather than the 95% level applicable in later years. Penalties will be calculated by subtracting the first 80 employees, rather than the first 30 employees, from total full-time employees.
   - Large employers – if you have “common law” employees provided by a PEO or staffing firm, health coverage provided by the staffing firm counts to avoid penalty if you pay a higher fee for employees who enroll in health coverage than you pay if they don’t.
   - Dependents exclude spouses, stepchildren, foster children, and non-US citizens except for residents of Canada, US, or Mexico; dependents must be covered through end of month in which they turn 26. Employers can rely on employee representations about children and their ages.
   - Affordability safe harbor – to use W-2 safe harbor, employee contribution must be consistent throughout year as percentage of pay or dollar amount; special adjustments for part-year coverage.
   - **KEEP GOOD RECORDS! If even one employee gets a subsidy, you likely will hear from the IRS the following year.** Doesn’t matter if they end up having to give it back later because they weren’t entitled to it, you will need to defend your coverage.

2. **The maximum 90 day waiting period for health coverage may not work the way you think.**

   - 90 day waiting period is not equal to 3 months.
   - Waiting period does not start to run until the employee has satisfied the other requirements for coverage. Employers can impose eligibility conditions, such as: 1) full-time employee status, 2) salaried or hourly employee status, 3) eligible job classification, 4) cumulative hours of work (up to 1,200), 5) lapse of time (no more than 90 days), 6) achieving job-related licensure requirements, or 7) bona fide employment orientation periods, proposed at up to one month. These must be in the plan and SPD to apply.
   - ADDED: An anti-abuse rule, saying you can’t impose conditions if the primary reason is to avoid coverage requirements of the 90-waiting period rule.
   - This requirement is integrated with the employer mandated coverage rules (pay or play).

3. **You might be penalized for your stand-alone cafeteria plan/FSA or HRA plan.**

   - Generally, “excepted” benefits are not subject to the ACA “market reforms” regarding essential health benefits, affordability, no caps on annual or lifetime benefits, etc.
   - These traditionally included single-purpose, stand-alone dental and vision plans, retiree-only plans, and cafeteria plan flexible spending accounts which meet certain requirements.
   - The cafeteria plan rules permit an FSA account to reimburse participants for the cost of individual insurance policies. This was a way for small companies who couldn’t afford to provide group health insurance to help reduce the cost of individual insurance for their employees. Another option was to
TOP 5 THINGS YOU NEED TO KNOW NOW ABOUT HEALTH PLANS AND THE AFFORDABLE CARE ACT

provide company-paid stand-alone HRAs, or reimbursement accounts, for certain amounts of non-covered medical expenses.

- **Stand-alone HRAs are no longer permitted, and FSA-only cafeteria plans reimbursing individual policy premiums are questionable.** IRS guidance issued last fall ended a number of these popular programs. Those who read the guidance closely say there’s a technical argument that this loophole still exists for small employers. However, it is not clear, and the risk to employers who adopt this route is substantial, including possible penalties up to the greater of $2,500 or $100/day/affected employee plus possibly losing cafeteria plan tax benefits for some or all of your employees.

4. **You might be responsible for reporting, filing, and paying fees and taxes that you were not even aware existed. Examples:**

- Final health coverage reporting rules were just issued. Provided 2 safe harbors to simplify - but if some employees aren’t eligible for SH, you might end up with multiple reporting methods.
- **Make sure your contracts with your payroll providers and/or TPA cover all reporting requirements, and that the providers take responsibility if they don’t do it correctly or fail to prepare or file a report or tax return.**
- Plan sponsors of self-insured plans must file Form 720 each year and pay the $1/covered life PCORI fee (tax deductible) thru 2019 by July 31 (insurers file for insured benefits).
- If you owe excise taxes, you must self-report and pay by filing Form 8928. **Limited time window (30 days after you know or should have known) to correct problems without paying the excise tax – time is of the essence. If you are required to file and don’t, there is no time limit for assessing the tax.**

5. **AUDITS – We’re from the government and we’re here to help. Just maybe not you.**

- The DOL, IRS, CMS, and other agencies are increasing the frequency/scope of benefit plan audits.
- HIPAA audits are also expected to start sometime in the next few months. Penalties for failures are high, and inadvertent failures are all too easy. New guidance is being issued all the time on specific points. You’ll be relying heavily on experts if you have any of this data in-house, including inadvertent disclosures for FMLA leaves, disability applications, & helping employees resolve claims with insurers.
- The DOL has stated that up to 1/3 of retirement plans’ financial audits are “substandard,” and the costs of fixing those could also be substantial. **New enforcement initiative is being launched.**
- If you have a retirement plan of less than 100 employees, you must be careful with “non-standard” investments such as loans or non-publicly traded securities. You may need to increase your ERISA bond to avoid a plan financial audit, and you may have non-discrimination rule violations.

**NOTE:** “Skinny” preventive-care reimbursement plans are promoted by some as a way to avoid the $2,000/employee penalty for large employer. These are much riskier and more complex than they may at first appear, may not avoid all ACA penalties, and may result in other taxes and penalties if not designed properly.

**FINAL THOUGHT** – If a professional, broker, vendor, provider, or other party is offering you a way “around” any of these rules, they may not be fully disclosing the associated costs and risks and are likely not accepting responsibility if IRS, DOL, or CMS/HHS later disagrees with the approach. Any resulting fines, fees, penalties, and litigation defense costs will be squarely in your lap. Business is all about taking risk when it’s beneficial to do so, but be sure you are making an informed decision. **If it sounds too good to be true, it probably is.**
1. **Executive Deferred Compensation Plans – “Unfunded” status no longer prevents taxation.**
   - Final Section 83 rules on transfer of property for services recently issued confirming this.
   - Getting more difficult to defer taxation on non-qualified deferred compensation.
   - Generally, you now must have a substantial requirement to render future services to defer taxation.
   - The interaction between the various applicable Code sections – 83 (property transfers), 457(f) (certain non-qualified deferred compensation plans), 409A (all deferred compensation plans), 280G/4999 (golden parachutes) is as complex, uncertain, and wrought with potential pitfalls as ever.

2. **Boomerang employees – rehires and benefit plans**
   - When must they come back into your benefit plans? Depends on the kind & terms of the plan.
   - For health plans:
     - Treat anyone who has been terminated for at least 13 weeks as a new employee, required to satisfy service/eligibility requirements and fulfill the waiting period again for coverage.
     - May be able to use an optional shorter “rule of parity” for employees terminated at least 4 weeks if the period of termination is at least as long as the preceding period of employment. This must be in the plan document to be enforced, just as with any optional benefit rule.
   - For retirement plans:
     - Depends on whether your plan’s eligibility requirements are based on hours of employment or periods of employment (elapsed time), and purpose – eligibility, vesting, or benefit accrual.
     - E.g. eligibility: if hours of employment, ignore gaps if employed on first and last day of period & have requisite hours; if elapsed time, ignore gaps of less than 12 months (treat as if fully employed during entire gap).
   - Special issues with regard to interns and co-op employees – you may be required to offer them 401(k) plan participation or put money in on their behalf if you fail to do so.

3. **The courts may be able to rewrite your benefit plans if they aren’t done properly.**
   - Cigna v Amara decision in U.S. Supreme Court held that the plan document controls over conflicting terms in the SPD.
   - If SPD leaves out terms that are in the plan document (e.g., the health insurance policy), this lack of disclosure may expose you to liability.
   - If there is no plan document – e.g., a self-funded medical plan with only an SPD and an administrative services agreement – what then controls? Can the court rewrite your plan? This is not settled.
   - Getting IRS approval of a retroactive “scrivener’s error” correction in a retirement plan does not protect you against participants who sue for promised benefits. The federal circuit you are in may determine the outcome of litigation.

4. **It costs a lot more to fix problems than it does to prevent them.**
   - For qualified retirement plans, the IRS says there is no time limit for disqualifying a broken plan; you cannot rely on an audit that didn’t find a problem to insulate you. Once a plan is disqualified, it is disqualified forever, unless and until you correct the problem in the manner required by the IRS.
   - It’s a lot harder getting money back from a service provider that you’ve already paid them than it is to negotiate it down before you sign the contract.
   - Consulting a qualified attorney can be especially important when changing providers, and the earlier in the process the better.
   - Ignorance of the law is no defense. Hiding your head in the sand and assuming the third parties you pay to help run the plan are taking care of everything is a sure recipe for disaster.
5. **Even if you have a retirement plan where participants choose their investments from a menu of available options, you may still be responsible for the selection of the investments made available.**

- This includes, for mutual funds, the share classes available to investors.
- If your plan has funds which pay revenue sharing or 12b-1 fees to TPAs or other providers, you are responsible for knowing how much money that is and ensuring that what the providers are paid is reasonable for the services performed.
- For example, the mutual funds available in annuity contracts are usually special share classes not available to any other investor with higher, sometimes substantially higher, fees. Retirement plans sold by brokerage houses often use proprietary funds and share classes which pay hefty back-end or front-end loads.
- The Dept. of Labor frowns on plans which try to dodge this responsibility by making them entirely "brokerage window," or "choose your own," with no core fund menu at all.
- Saying that the retirement plan provider chose the funds also does not let you off the hook, as you didn’t have to choose that provider and there are others with more open platforms.
- The "fiduciary warranty" offered by some providers can be a prohibited transaction – if it protects you as the employer, and doesn’t cost you anything, then it’s certainly being paid for by the plan.
TOP 5 THINGS YOU NEED TO KNOW NOW ABOUT ERISA AND FIDUCIARY EXPOSURE

1. **You, or one or more of your top officers, is very likely an ERISA fiduciary, even if you don’t know it.**
   
   - Hiring someone to handle the day-to-day recordkeeping chores does not relieve you of responsibility for plan oversight and your fiduciary responsibility as plan administrator.
   - **PERSONAL LIABILITY! Your house, your car, and your savings are at risk.**
   - The definition of fiduciary is expanding. Under ERISA, it is a “functional” definition – doesn’t matter if you admit to being a fiduciary, if you have any discretionary authority over anything in the plan or its administration, you may actually be one.
   - If you are sued and you lose – the court can may you pay for the winner’s legal fees too. This is part of ERISA, not the usual rule in American courts.
   - Courts are expanding the situations in which participants can get money damages – and the cost of defending yourself is often the greatest part of your losses.
   - You must act at all times in the best interests of the participants and beneficiaries – not the company, not your boss, and definitely not you.

2. **Can you outsource fiduciary responsibilities? Definitely maybe – but only some of them.**
   
   - Employer/plan sponsor retains the responsibility for hiring qualified service providers, ensuring the contracts reflect what they have undertaken to do, ensure compensation is reasonable, and monitoring and, if necessary, replacing the appointed fiduciaries.
   - Hiring qualified service providers means you have to understand and evaluate the credentials, experience, and skills of those you hire.
   - For example, using your brother-in-law, who happens to be a stockbroker, to make your sister happy is great, but do you want to be personally financially responsible if he messes up?

3. **Unless you have purchased special insurance policies specifically covering your administration of and fiduciary duties for ERISA plans, your regular liability and errors insurance very likely doesn’t protect you.**
   
   - Most general insurance policies either exclude coverage for these losses entirely, or strictly limit them to perhaps a few thousand dollars.
   - These policies can be called ERISA administrative services coverage, ERISA fiduciary coverage, or similar. Read them carefully to understand what’s covered.
   - The ERISA bond, which is required by the law for retirement plans, is not the same as commercial or criminal liability insurance coverage.

4. **Service providers will promise you the world in the sales process – then take it all away again in cleverly worded contracts.**
   
   - Assume that nothing you see in a contract, ever, is there by accident and the most innocuously worded sentence can be used as an excuse to put the liability back on you, the employer.
   - You (or your plan participants) are probably paying more for services than you think – and fiduciaries are responsible for knowing, and approving, all compensation, on pain of possible prohibited transaction excise taxes.
5. You can protect and insulate yourself from a lot of the risk associated with benefit plans.

- Process, procedure, documentation. If you can prove your decision-making process was prudent, you have gone a long way toward insulating yourself from liability for the end result.
- Have a fiduciary audit done of your plan(s).
- Hire an attorney who specializes in these issues to review contracts, help you make sure plan restatements are done correctly when you move to new providers, ensure your documentation is correct and complete and the necessary disclosures are made, and to help you understand where the money is hidden in the contracts.