

# Employee Benefits Update – Summary 2017



Presented by:

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## Overview

- Affordable Care Act – possible changes
- Disability claims regulations
- Wellness program regulations
- Internal Revenue Service (“IRS”) Determination Letter program changes
- Excessive fee litigation
- Form 5500 – proposed changes
- Missing participants
- Emerging fiduciary duties
- Mergers and acquisitions issues



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## Affordable Care Act (“ACA”) Possible Changes

- U.S. House of Representatives passed H.R. 1628, the “American Health Care Act of 2017” (“AHCA”) on May 4, 2017
- AHCA repeals many of the ACA’s protections and provisions
- Senate reportedly working on its own version of “healthcare reform”

## AHCA Changes to the ACA

- Repeals the PPACA’s cost-sharing subsidies
- Permits health insurance issuers offering coverage in the individual or small group markets to charge higher rates for individuals who do not have continuous coverage
- Allows health insurance offered in the individual or small group market to vary rates by 5 to 1 for adults (instead of 3 to 1 under the ACA) or other such ratio as states may provide

## AHCA Changes to the ACA, cont'd

- Permits states to seek waivers that allow insurers to charge higher premiums for consumers with pre-existing conditions
- Allows states to seek waivers of the requirement to offer “essential health benefits”
- Repeals the ACA’s premium tax credit and replaces it with a refundable tax credit based on age and income
- Repeals the small employer health insurance tax credit
- Repeals the “individual mandate” penalty
- Repeals the “employer mandate” penalty

## AHCA Changes to the ACA, cont'd

- Delays the excise tax on high-cost employer-sponsored coverage (colloquially referred to as the “Cadillac tax”)
- Changes the definition of “qualified medical expenses” for health savings account (“HSA”) and health flexible spending arrangement (“FSA”) purposes so that over-the-counter drugs are considered qualified medical expenses
- Reduces the tax imposed on HSA distributions not used to pay for qualified medical expenses from 20% to 10%
- Eliminates the annual limitation for contributions to health FSAs
- Allows health insurance providers to deduct remuneration paid to officers, directors and employees that exceeds \$500,000

## Estimated Effects of AHCA

- The Congressional Budget Office Estimates:
  - In 2018, 14 million more people would be uninsured under the AHCA than under current law
  - 19 million more uninsured in 2020 and 23 million more in 2026
  - 1/6 of the population resides in areas in which the nongroup market would start to become unstable beginning in 2020

## Disability Claims Regulations

- New disability claims regulations issued December 19, 2016
  - Effective January 1, 2017; apply to claims for disability benefits filed on/after January 1, 2018
- Apply to any plan that offers disability benefits
  - A benefit is a “disability benefit” if the participant must make a showing of disability as a condition to receive the benefit
  - Health/welfare plans and retirement plans

## Disability Claims Regulations, cont'd

- New regulations establish certain procedural requirements for employers to act in compliance with their general fiduciary duties under ERISA § 503.
  - § 503 generally requires each employee benefit plan to provide adequate notice regarding claim denials and provide a reasonable opportunity to have denied claims fully and fairly reviewed by the appropriate named fiduciary.
- Examples of new requirements:
  - More detailed description of denial
  - Disclosure of specific internal rules, guidelines or protocols used in making a determination regarding benefits

## Disability Claims Regulations, cont'd

- Examples of new requirements:
  - Right to inspect claims file
  - Right to access new evidence on appeal
  - Avoidance of conflicts of interest
  - New procedures regarding rescissions of coverage
  - Notices must be written in a linguistically and culturally appropriate manner

## Disability Claims Regulations, cont'd

- Action Items:
  - Identify plans with “disability benefits”
  - Amend plans to incorporate new claims procedures
  - Prepare and issue summaries of material modifications
  - Determine whether denial of benefits notices comply with the new regulations and confirm with the insurer or third-party administrator that denial of benefits notices will comply
  - Determine whether the selection, compensation and retention of claims adjudicators comply with the new regulations and, if not, make appropriate changes
  - Ensure procedures are in place to accommodate non-English languages

## Wellness Program Regulations

- Genetic Information Nondiscrimination Act (“GINA”)
- Americans with Disabilities Act (“ADA”)
- Final wellness program regulations under GINA and ADA issued May 2016
  - <http://www.kutakrock.com/EEOC-Wellness-Program-Regulations-ADA-GINA/>
- New regulations apply on the first day of the first plan year that begins on or after January 1, 2017

## Wellness Program Regulations, cont'd

- Action Items
  - Review wellness program documents and employee communications and ensure they were updated
  - Ensure wellness program rewards/penalties are within limits
  - Ensure policies/procedures exist to protect privacy and confidentiality

## IRS Determination Letters

- Five-year remedial amendment cycle eliminated for individually designed plans effective January 1, 2017
- Retirement plans generally can get determination letters only on initial qualification and termination
- IRS will publish lists annually to help with compliance
- Plan sponsors still need qualification opinions (e.g., for auditors, bankers, or mergers/acquisitions)
- Kutak Rock offers qualification opinions through Retirement Plan Opinion Letter program
  - <http://www.kutakrock.com/retirement-plan-opinion-letter-program/>

## Excessive Fee Litigation

- Retirement plan participants suing plan sponsors commonly allege that plan fiduciaries:
  - Did not use cheapest share class available
  - Held funds that were significantly more expensive than Vanguard alternatives in same investment style
  - Did not use separate accounts or collective investment trusts
  - Failed to monitor and control revenue sharing
  - Imprudently retained a money market fund instead of a stable value fund
- Courts consistently look to whether plan fiduciaries had prudent, consistent processes that they followed
- Plan sponsors should validate processes, not just make changes listed above

## Form 5500 – Proposed Changes

- Joint effort by IRS, U.S. Department of Labor, and Pension Benefit Guaranty Corporation
- Majority of changes targeted for implementation for 2019 plan year
- Goal of changes generally to collect more information for compliance purposes and facilitate data mining
- IRS, DOL, PBGC and plaintiffs' attorneys will have more access to data than ever before
- Plan sponsors should conduct self-audit now to ensure that data they will send with new Form 5500 does not create compliance issues or increase audit risk



## Locating Missing Participants

- DOL auditing plans to determine whether they make good-faith efforts to locate and pay participants
- IRS also has identified missing participant issues as a priority
- Retirement plan sponsors need to review and update processes and procedures
- Retirement plan sponsors should conduct self-audits to ensure that they are following DOL's most recent guidance on lost participants

## Emerging Fiduciary Duties

- ERISA § 404(a)(1)(B): Generally provides that fiduciaries must discharge duties with respect to a plan solely in the interest of the participants and beneficiaries with the care, skill, prudence, and diligence under the circumstances that a prudent person acting in a like capacity and familiar with such matters would use
- Data privacy/security emerging as possible ERISA fiduciary duty
- No formal DOL guidance (yet?)

## Emerging Fiduciary Duties, cont'd

- Advisory Council on Employee Welfare and Pension Benefit Plans – “Cybersecurity Considerations for Benefit Plans” (Nov. 2016)
  - Plans often maintain and share sensitive employee data and asset information (“Data”) across multiple unrelated entities
  - This Data should be specifically considered when implementing cybersecurity risk management measures

## Emerging Fiduciary Duties, cont'd

- “Cybersecurity Considerations for Benefit Plans” (Nov. 2016)
  - Plan sponsors and fiduciaries should consider cybersecurity in safeguarding Data, as well as when selecting or retaining a service provider
  - Does not opine on whether Data privacy/security is a fiduciary duty
- Action Items

## Employee Benefits in M&A

- Recent observations in addressing employee benefits in M&A transactions
  - Engage benefits team early
  - Due diligence
  - Transaction documentation
  - Planning for post-closing benefits
    - Terminate target's plan(s)?
    - Plan amendments?
    - Which employees participate in which plans?
    - Employee communications

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Mr. Bartels works with public (governmental), tax-exempt, and private sector clients on employee benefit plan issues. He advises clients on health and welfare plans, cafeteria plans, fringe benefits, and qualified and nonqualified plans. Mr. Bartels counsels clients on benefit plan design and administration issues and drafts plan documents, amendments, and summary plan descriptions. He assists clients with issues relating to the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). Since 2010 Mr. Bartels has worked closely with clients on questions regarding the Patient Protection and Affordable Care Act, as amended, and its implementing regulations. Mr. Bartels also counsels clients on employee benefit issues in the context of mergers, acquisitions, and divestitures.