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ACA Update
Legislative Update

• Repeal and replace efforts not successful
• Some bipartisan efforts being pursued
  – Problem Solvers
  – Hearings set for this fall
  – Continued bipartisan opposition to Cadillac tax (to take effect in 2020)
CSR (Cost-Sharing Reduction) Payments

- Certain low-income individuals who enroll in the exchange may be entitled to CSR payments, in addition to premium tax credits.

- CSR payments are made directly from federal government to insurers for the purpose of reducing deductibles and copayments for these low-income individuals.
CSR (Cost-Sharing Reduction) Payments

• The U.S. House brought a lawsuit (Price v. HHS) claiming that CSR payments are unconstitutional because the funds used for the payments were not “appropriated” by Congress

• A federal court agreed with the House and issued a decision prohibiting HHS from making CSR payments
• However, the district court suspended its decision during appeal by HHS (under the Obama administration)
• Under the Trump administration, it is unclear whether HHS intends to pursue this appeal
• But some states have been allowed to join the case and appeal
• Unclear whether HHS intends to continue making CSR payments in the future
• The Trump administration allowed CSR payments to be made for August 2017, but remained silent on whether these payments will be made in the future
• If HHS stops making CSR payments, it is likely that some insurers will stop offering health insurance policies on the exchange
• For those insurers that continue, it is expected that exchange premiums will increase by 20% in 2018 (compared to 2017)

• These premium increases will increase the corresponding premium tax credits, adding an estimated $194 billion to the federal deficit over the next 10 years
Enforcement Update

- Enforcement of individual mandate penalty?
  - IRS didn’t reject 2016 1040s where individuals didn’t complete question regarding health coverage
  - But IRS issued recent information letters:
    - Explaining no exemptions to the individual mandate penalty beyond those included in the ACA, and
    - That Trump executive order doesn’t provide penalty relief
Enforcement Update

• Enforcement of employer pay or play penalty?
  – IRS issued recent information letters:
    • Explaining no exemptions to the pay or play for tax-exempt (or any) large employer, and
    • That any Trump executive order doesn’t provide penalty relief
Enforcement Update

• New draft reporting Forms 1094-B, 1095-B, 1094-C and 1095-C for 2017 just released

• New draft instructions also just released
  – No substantive changes
  – Will there be a delayed deadline?
Section 1557 Update
Section 1557 Update

• 2016 regulations apply to insurers and employer group health plans sponsored by health care providers

• One requirement of regulations is a prohibition on blanket exclusions for transgender health benefits in health plans
• In December 2016, a federal court in Texas issued a nationwide injunction on enforcement of this rule
• Last month HHS filed a status report in the case indicating that it has drafted proposed regulations in response to the court’s injunction
• Once released, the regulations are expected to roll back this rule under Section 1557
• But even if rolled back, are there other legal reasons to not impose a blanket exclusion health plan exclusion on transgender health benefits?
  – Federal employment discrimination claim based on sex
Contraceptive Coverage Update
• ACA requires non-grandfathered health plans to provide 100% coverage of contraceptives
• Certain employers including churches, faith-based non-profits and certain private companies pushed back for religious reasons, including filing lawsuits
Contraceptive Coverage Update

• Some objected to the entire mandate, others took issue with the emergency contraceptives portion
• In response to the complaints and litigation, the Obama administration created an accommodation process for employers to escape the requirement
Some employers don’t believe the accommodation process is sufficient and have continued to object.

Leaked copy of new HHS regulations suggests that process will be broadened to permit any non-public employer objecting on religions or moral grounds to opt out.
Wellness Benefits
Wellness Benefits

• HIPAA and the ACA have imposed requirements on employer wellness programs for many years
• These rules only apply to wellness programs where the incentive is connected to the employer’s health plan (usually in the form of a premium, deductible or copay differential)
• Further, the HIPAA/ACA rules only apply if the wellness program incentive is based on the employee’s participation in an activity or the employee’s health status

• The HIPAA/ACA rules do not apply to participation-based only wellness programs
Wellness Benefits

• In 2016 the EEOC issued additional wellness program regulations under the ADA and GINA which are similar to but different than, the HIPAA/ACA rules

• The EEOC regulations apply to all wellness programs offering an incentive regardless of whether connected to the employer’s health plan
Wellness Benefits

• Further, they apply to any program asking for health information so it could apply to a participation-based wellness program with components such as an HRA and/or biometric screens

• There is a significant participant notice requirement
Wellness Benefits

- There is also a spousal authorization requirement where the spouse is involved in the program.
- The caps on the incentives are not identical to and are potentially more limiting than under the HIPAA/ACA wellness program rules.
- Since the EEOC regulations have been issued, there has been a lot of criticism.
- The AARP filed a lawsuit challenging the regulations.
Wellness Benefits

- Last month, the court agreed with the AARP that the regulations were not reasonable nor supported by the administrative record.
- The court remanded the regulations back to the EEOC for further consideration.
- However, the current regulations remain in force while the EEOC is undergoing this process.
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