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Compliance Recap

June was a busy month, with multiple updates from regulatory agencies as well as two important Supreme Court opinions that impacted the world of employer benefits. As the Supreme Court wrapped up the October 2014 term, it has granted petitions for the October 2015 term, which will ultimately impact ERISA plans. The IRS updated its PCORI fee instructions on Form 720, provided guidance on expatriate health plan compliance under the Patient Protection and Affordable Care Act (ACA), and released draft reporting forms for reporting relating to the ACA for 2015. The government is also accepting public comments relating to health plan identifier numbers (HPID) requirements, which are currently delayed.

UBA Guides and Compliance Documents

UBA published a guide to cafeteria plan change in status events and changing employee elections.

Read more about cafeteria plan election changes.

UBA released an updated Summary of Benefits and Coverage (SBC) FAQ to incorporate the recent Final Rule on SBC requirements.

Read more about SBC requirements.

UBA also updated a large number of older compliance documents, and issued two new documents. The new documents are titled **"What Plan Sponsors of Group Plans Need to Know about ERISA"** and **"HRAs, HSAs, and HFSAs under PPACA,"** both of which can be obtained through your Partner Firm.

PCORI Fee Instruction Update

The IRS quietly updated the instruction form for Form 720, which is used to pay the Patient Centered Outcomes Research Institute (PCORI) fee, paid by all plans that provide medical coverage to employees. The fee is due by July 31 of the year following the calendar year in which the plan or policy ends. The fee is adjusted every year for medical inflation and paid per covered life. The updated instructions provide for the most recent applicable rate of $2.08 per covered life for policy and plan years ending on or after October 1, 2014, and before October 1, 2015.

HPID Update

The ACA originally set requirements for large and small health plans to obtain a health plan identifier number (HPID), but this requirement was delayed indefinitely in October 2014. The Department of Health and Human Services (HHS) has published a request for information seeking public comments on the requirements of HPIDs, including the requirement to use the HPID in electronic health care transactions. Comments should be submitted by July 28, 2015. A request for comments often indicates the government's desire to move forward with proposed or final regulations on a subject.

IRS Reporting Under ACA Sections 6055 and 6056

The IRS has given instructions (in webinars) that when filling out Line 16 on Form 1095-C you may only use one code and you should follow the "code hierarchy" provided in the instructions. The instructions do not have a specific table or listed hierarchy, but when going through the instructions line by line, the following hierarchy emerges:

- 2C trumps all if the employee enrolls in minimum essential coverage
- 2E trumps 2D, 2F, 2G, and 2H

The IRS has also issued draft 2015 reporting forms, which include a few changes from the 2014 forms. The biggest difference between the 2014 and 2015 versions are on Form 1095-C, which in 2015 will likely include (assuming the draft forms are finalized as they currently appear) a "plan start month" field, allowing a filer to indicate the first month of the applicable large employer's (ALE's) plan year. The draft instructions indicate this would be optional for 2015. ALEs could use the 2014 format instead of filling out the information, or in the alternative may either fill out the first month of the plan year or fill in "00" rather than the actual first month. Beginning in 2016 this field will be required. Currently it is unclear if employers can use the 2014 forms if they choose to use the 2014 format, or if they should use the 2015 format and leave the field blank.

Read more about the IRS draft forms.

IRS Provides Expatriate Plan Guidance

The IRS released a notice providing further guidance on expatriate health coverage. The guidance generally provided for:

- Temporary relief allowing taxpayers to apply the requirements of the Expatriate Health Coverage Clarification Act (EHCCA) using a reasonable and good faith interpretation of the EHCCA while issuers, employers, and plan sponsors modify their current arrangements to comply with the EHCCA.

- Clarification that the EHCCA exemption from ACA provisions does **not apply** to requirements of sections 6055 and 6056 (play or pay reporting). However, statements to individuals reporting an offer of minimum essential coverage may be furnished electronically (unless the recipient refuses consent).

- PCORI fee calculations may exclude lives covered under a specified health insurance policy that is issued or renewed on or after July 1, 2015, or under an applicable self-insured health plan for plan years starting on or after July 1, 2015, if the facts and circumstances demonstrate that the policy or plan:

    1. was designed and issued specifically to cover primarily employees
    (a) who are working and residing outside the United States, or
    (b) who are not citizens or residents of the United States but who are assigned to work in the United States for a specific and temporary purpose or who work in the United States for no more than six months of the policy year or plan year; or

2. was designed to cover individuals who are members of a group of similarly situated individuals for purposes of § 3(d)(3)(C) of the EHCCA under the explained special rule for groups of similarly situated individuals

The IRS will consider an individual to be a member of a group of similarly situated individuals if:

- the group of individuals satisfies the standards under §§ 3(d)(3)(C)(i) and (ii) of the EHCCA;
- in the case of a group organized to travel outside the United States, each member of the group is expected to travel or reside outside the United States for at least six months of the policy year (or, in the case of a policy year that is less than 12 months, for at least half of the policy year), and in the case of a group organized to travel within the United States, each member of the group is expected to travel or reside in the United States for not more than 12 months; and
- the group of individuals meets the test for having associational ties under § 2791(d)(3)(B) through (F) of the PHS Act (42 U.S.C. 300gg-91(d)(3)(B) through (F)).

U.S. Supreme Court Upholds ACA Subsidy Eligibility on Federal Exchanges

The Supreme Court issued its opinion in *King v. Burwell*, holding that the Internal Revenue Service (IRS) may issue regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the federal government under the Patient Protection and Affordable Care Act (ACA). The six-to-three opinion was authored by Chief Justice John Roberts, who was joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan.

Read more about *King v. Burwell.*

U.S. Supreme Court Finds Same Sex Marriage is Protected by the 14th Amendment

The Supreme Court ruled in *Obergefell v Hodges*, that the 14th Amendment requires a state to license a marriage between two people of the same sex, and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state. The decision was reached five to four. Justice Kennedy delivered the majority opinion and was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

As a result, group health plans that offer spousal benefits must extend these benefits to any individual who is validly married in any state, regardless of the sex of his or her spouse. Although the ruling does not explicitly extend to same-sex marriages performed out of the country, other federal regulations on the issue would indicate that employers should also recognize same-sex marriages performed validly wherever the marriage took place. It is likely that the Department of Labor and other agencies will issue guidance on this issue, but employers should be prepared to change spousal policies excluding same-sex marriages as soon as practicably possible.

Read more about *Obergefell v. Hodges.*

Upcoming ERISA-related Supreme Court Cases to Watch

The Supreme Court has granted the petition in *Gobeille v. Liberty Mutual Insurance Company*, a case centered on the issue of whether the Employee Retirement Income Security Act of 1974 (ERISA) preempts Vermont's health care database law as it was applied to a third-party administrator for a self-funded ERISA plan. Vermont requires health care providers and payers to provide claims data and information to a state health care database, which informs the state on health care policy. The Second Circuit held that ERISA concerns were intruded on by the state's recordkeeping requirements. The Second Circuit held that under ERISA only a "slight reporting burden" is permissible, and the Vermont requirements were burdensome and time-consuming.

The Court will likely hear oral arguments on the case (or in the alternative, rely on briefings only), and render a decision in the October 2015 term, which will end in early summer 2016.

The Supreme Court will also rule in *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan* on whether or not a lawsuit by an ERISA fiduciary against a participant to recover an alleged overpayment seeks "equitable relief" within the meaning of ERISA if the fiduciary has not identified a fund that is in the participant's possession and control at the time the fiduciary asserts its claims.

The Supreme Court has asked the Solicitor General to file a brief expressing the views of the United States in a third case involving ERISA: *Smith v. Aegon Companies Pension Plan*, which is a case involving ERISA's venue provisions, as it relates to litigation.

Another case relating to reporting, payment, recordkeeping, and audit requirements on ERISA plan administrators is on a "petition watch list" and was distributed for conference on June 25, 2015. The case Self-Insurance Institute of America, Inc. v. Snyder rose out of the 6th Circuit and asks questions regarding ERISA preemption and whether it encompasses preemption against new state laws that "seek to exploit the core functions of ERISA plan administrators." Whether or not the Supreme Court will decide to hear grant the petition remains to be seen.

QuestionoftheMonth

Q: When an employer is calculating HSA contribution comparability (contributions must be the same dollar amount or the same percentage of the high deductible health plan (HDHP) deductible among comparable participating employees) are there any individuals that are not included in the comparability calculation?

A: Yes. Regulations allow employers to exclude collectively bargained employees (covered by a bona fide collective bargaining agreement where health benefits were bargained in good faith). You may also exclude non-collectively bargained former employees who elected COBRA coverage under the HDHP, independent contractors, self-employed individuals (such as a partner or more than 2% shareholder in an S corporation) and employees or former employees of unrelated employers outside the employer's controlled group. You may also exclude highly compensated employees with respect to non-highly compensated employees, which allows employers to contribute more to non-highly compensated employees than highly compensated employees