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WHAT YOU NEED TO KNOW



COMPLIANCE RECAP

July was a relatively quiet month in the employee benefits world, despite the U.S. Senate's release of two bills in its attempt to repeal the Patient Protection and Affordable Care Act (ACA).

First, the U.S. Senate revised its Better Care Reconciliation Act and declined to vote on its revision. Then the U.S. Senate released its Health Care Freedom Act and voted on it. The Health Care Freedom Act failed to pass the U.S. Senate.

The Occupational Health and Safety Administration (OSHA) launched an electronic form 300A that employers use to report work-related injuries and accidents. Two courts issued decisions regarding ACA accommodation and website accessibility. The U.S. Citizenship and Immigration Services (USCIS) released a revised version of Form I-9, Employment Eligibility Verification, opened the H-2B Temporary Nonagricultural Worker program to an additional 15,000 workers for 2017, and began issuing redesigned Green Cards and EADs as part of the Next Generation Secure Identification Document Project.

The U.S. District Court, which issued a nationwide preliminary injunction against the U.S. Department of Health and Human Services (HHS) to prohibit HHS from enforcing portions of the ACA's Section 1557, remanded the case in part to HHS for reconsideration of the regulation.



UBA Updates

UBA released three new advisors in July:

- [COBRA Notices](#)

- [Determining COBRA Premiums for Fully Insured and Self-Funded Health Plans](#)
- [ERISA's "Church Plan" Exception](#)

UBA updated existing guidance:

- [OSHA's Final Rule on Electronic Tracking of Workplace Injuries and Illnesses](#)

U.S. Senate Releases Revision of Better Care Reconciliation Act

On July 13, 2017, the U.S. Senate released a revised draft of its [Better Care Reconciliation Act](#) (BCRA) bill. The U.S. Senate released the original draft of the BCRA on June 22, 2017, which would substitute the House's [House Resolution 1628](#), a reconciliation bill aimed at "repealing and replacing" the Patient Protection and Affordable Care Act (ACA). The House bill was titled the "American Health Care Act of 2017" (AHCA).

The revised draft BCRA proposes to affect employer-sponsored plans in a few ways:

- Allow health savings account (HSA) funds to be used to pay for the medical expenses of children under age 27 and to pay for high-deductible health plans' (HDHPs) premiums that are not otherwise covered by tax credits, deductibles, or exclusions.
- Make HDHPs ineligible for HSAs if the HDHPs cover abortions except where necessary to save the mother's life or in cases of rape or incest.
- Allow professional employer organizations to sponsor association plans.

On July 18, 2017, the U.S. Senate declined to vote on the revised BCRA after it determined that it didn't have enough votes to pass the bill.

On July 28, 2017, the U.S. Senate voted on the [Health Care Freedom Act](#) to repeal the ACA's individual and employer mandates and temporarily repeal the medical device tax. The bill failed to pass.

Employers with group health plans should continue to monitor progress in Washington, D.C., and should not stop adhering to any provisions of the ACA in the interim, or begin planning to comply with provisions in either the AHCA or revised BCRA.

OSHA Launches Electronic Form 300A

In 2016, the Occupational Safety and Health Administration (OSHA) published a rule entitled "Tracking of Workplace Injuries and Illnesses" which issued sweeping changes to the way certain employers were required to report work-related injuries and accidents. Employers with at least 10 employees at a single site have always been required to maintain and annually post a Form 300A log. Among the changes were that "high risk" employers with at least 20 employees (see the complete list at www.osha.gov/recordkeeping/NAICScodesforelectronicsubmission.pdf) and all employers with 250 or more employees in a single physical location were required to file their report electronically. The original due date for filing 2016 data was July 1, 2017.

On June 28, 2017, OSHA proposed delaying the compliance date until December 1, 2017, "to provide the new administration an opportunity to review the new electronic reporting requirements prior to their implementation and allow affected entities sufficient time to familiarize themselves with the electronic reporting system, which will not be available until August 1."

OSHA will release the electronic [Injury Tracking Application](#) (ITA). Three options have been made available for submission:

1. Users may manually enter data into a web form.
2. Users may upload a CSV file to process single or multiple establishments at the same time.
3. Users of automated recordkeeping systems will have the ability to transmit data electronically via an API (application programming interface).

OSHA estimates that it will take employers 10 minutes to create an account. Establishments may no longer submit paper reports. Future plans include an interface for entering data from a mobile device.

Technology is the New Frontier with ADA Accommodation

Website accessibility has become a hot topic in the world of ADA accommodation. Recently, a Florida federal judge handed down a trial verdict finding that grocery chain Winn-Dixie had violated Title III of the Americans with Disabilities Act (ADA) by having a website that was inaccessible to a blind plaintiff. Shortly thereafter, a federal judge in the Central District of California allowed another blind plaintiff to continue a case against Hobby Lobby for failing to "provide full and equal enjoyment of goods and services offered by its physical stores by not maintaining a fully accessible website."

Title III relates to public accommodation (private and non-profit business) and could impact any business offering goods and services through a website, which, in this era of e-commerce is far-reaching. Further, Title I of the ADA relates to employment, so would impact online application processes and career web pages.

In the Winn-Dixie case, the court recognized [Web Content Accessibility Guidelines](#) (WCAG) 2.0 as the website standard. WCAG are guidelines developed by a private group of accessibility experts that have been used to support accommodation initiatives. Until this case, WCAG had not been referenced by the court as the de facto legal standard.

Regarding Title I employment accommodation, the U.S. Department of Labor recently identified the Partnership on Employment & Accessible Technology (PEAT) as the source for employers who want to ensure that their workplace technology is accessible to all employees and job applicants. In particular, the "[Accessible Technology Action Steps: A Guide for Employers](#)" was recommended as a resource.

Definitive guidelines have traditionally been elusive in the amorphous arena of public accommodations within the requirements of the ADA. Businesses would be well advised to review their accessibility through these validated resources.

Immigration Updates: I-9, H-2B Visas, Green Cards

I-9 Updates

U.S. Citizenship and Immigration Services (USCIS) released a revised version of [Form I-9, Employment Eligibility Verification](#), on July 17, 2017. Employers can use this revised version or continue using Form I-9 with a revision date of 11/14/16 through September 17, 2017. On September 18, 2017, employers must use the revised form with a revision date of 07/17/17. Revisions include changes to the instructions and revisions to the List of Acceptable Documents, including:

- All the certifications of report of birth issued by the Department of State (Form FS-545, Form DS-1350, and Form FS-240) were combined into List C, number 2.
- All List C documents were renumbered, except the Social Security card. For example, the employment authorization document issued by the Department of Homeland Security on List C changed from number 8 to number 7.
- Consular Report of Birth Abroad (Form FS-240) was added to List C. Employers completing Form I-9 on a computer will be able to select Form FS-240 from the drop-down menus available in List C of Sections 2 and 3. E-Verify users will also be able to select Form FS-240 when creating a case for an employee who has presented this document for Form I-9.

Increase in H-2B Visas

USCIS has opened the H-2B Temporary Nonagricultural Worker program to an [additional 15,000 workers for 2017](#). The H-2B Temporary Nonagricultural Worker program was designed to serve U.S. businesses unable to find a sufficient number of qualified U.S. workers to perform nonagricultural work of a temporary nature. To qualify for the additional visas, petitioners must attest, under penalty of perjury, that their business is likely to suffer irreparable harm if it cannot employ H-2B nonimmigrant workers during fiscal year (FY) 2017.

New Green Cards Issued

USCIS has begun issuing redesigned Green Cards and Employment Authorization Documents (EADs) as part of the Next Generation Secure Identification Document Project. The new cards feature enhanced graphics and fraud-resistant features. Enhancements include:

- The card holder's photo on both sides of the card
- Unique graphic images and color palette
- Holographic images

Cards will no longer display the individual's signature, nor will they have an optical stripe on the back.

Court Remands ACA Section 1557 Case to HHS

ACA Section 1557 provides that individuals shall not be excluded from participation, denied the benefits of, or be subjected to discrimination under any health program or activity which receives federal financial assistance from the U.S. Department of Health and Human Services (HHS), on the basis of race, color, national origin, sex, age, or disability.

In May 2016, HHS issued a [final rule](#) implementing Section 1557, which took effect on July 18, 2016.

Eight states and three faith-based private health care providers filed a lawsuit to challenge HHS' authority under the ACA to issue regulations that interpret sex discrimination as forbidding discrimination based on gender identity and termination of pregnancy. The lawsuit also asserted that the regulations violate the Religious Freedom Restoration Act as applied to them.

On December 31, 2016, the U.S. District Court for the Northern District of Texas issued a nationwide [preliminary injunction](#) prohibiting enforcement of the rule as it prohibits discrimination on the basis of gender identity or pregnancy termination.

On July 10, 2017, the District Court stayed the case and remanded it in part to HHS for reconsideration of the rule. The injunction remains in place.

Question of the Month

Q. Who must be counted under Form 5500's 100-participant rule?

A. Generally, small unfunded, insured, and combination unfunded/insured welfare plans are exempt from the Form 5500 filing requirement. To qualify for the exemption, a plan must cover "fewer than 100 participants at the beginning of the plan year."

Employees who are covered participants are counted. All former employees who are COBRA qualified beneficiaries are counted. Non-employees (covered spouses and dependent children) are not counted.

Only covered participants are counted. To determine when a participant is covered, the plan sponsor would look to the earlier of:

- The date that the plan document states that participation begins.
- The date when the individual becomes eligible to receive a benefit.
- The date when the individual makes a voluntary or mandatory plan contribution.

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