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INSURANCE BRIEF

INSIDE THIS ISSUE:

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King v. Burwell

The U.S. Supreme Court announced its 6-3 decision this morning in favor of Burwell. This upholds the federal government's authority to deliver health insurance subsidies through a federal exchange. Chief Justice Roberts wrote the majority opinion and was joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor and Kagan.

The majority stated "Congress passed the Affordable Care Act to improve health insurance markets, not destroy them [and] we must interpret the Act in a way that is consistent with the former and avoids the latter." To remove the subsidies would create insurance market "death spirals" in states with federal exchanges.

The favorite quote of the opinion appears to be: "the Act does not reflect the type of care and deliberation that one might expect of such significant legislation." We can certainly expect more proposals to repeal and replace during the campaign season.

Applicable large employers who had hoped for the end of subsidies and possibly the employer mandate must move forward with preparing for employer reporting. Please work with your SML Account Team to finalize your reporting solution.

New FMLA Forms

The Department of Labor (DOL) has released updated Family and Medical Leave Act (FMLA) forms which will be valid until 5/31/18. The new forms include "safe harbor" language that tells persons providing medical information not to disclose any genetic information, as defined under the Genetic Information Nondiscrimination Act (GINA).

The new FMLA forms are available at: http://www.dol.gov/whd/fmla/2013rule/militaryForms.htm

The DOL has eliminated its model FMLA leave request form. FMLA does not require employees to use a written form to request FMLA leave. For foreseeable leave, an employee need only provide a verbal notice. After an employee requests leave, the employer's responsibilities under FMLA may be triggered if it has knowledge that such leave may be for an FMLA-qualifying reason. Therefore, if an employee mentions illness or injury when making a leave request, the employer should err on the side of caution and provide the Notice of Eligibility and Rights & Responsibilities to the employee.

Limitations on Cost Sharing

The DOL, IRS, and HHS have jointly issued FAQ guidance affirming a somewhat controversial position taken by HHS regarding application of the self-only maximum annual limitation on cost-sharing under health care reform. In prior guidance, including the final 2016 parameters regulations and an FAQ posted earlier this month, HHS took the position that the self-only cost-sharing limit applies to each covered individual, whether the individual has self-only, family, or other coverage. The new FAQs affirm that the self-only annual limit will apply to each covered individual, regardless of whether the coverage is self-only coverage, under all non-grandfathered group health plans, including self-insured plans, large group health plans, and plans that are high-deductible health plans. The rule does not apply to plan or policy years beginning in 2015, but it will apply to years beginning in 2016 or later. The FAQs include an example illustrating the agencies' interpretation of the limit.

The agencies' interpretation of health care reform's annual cost-sharing limitation effectively embeds an individual out-of-pocket limit in all family group health plans with a higher family deductible—whether or not the high-deductible coverage is meant to make employees HSA-eligible. While it is now clear that this aspect of the rule will not apply until next year, that does not leave a lot of time for plan sponsors and insurers to prepare.

Meanwhile, the ERISA Industry Committee (ERIC) has asked the Departments to immediately withdraw the new rule. In their request ERIC asserts that the embedded limit is not supported by existing statute and is unenforceable. We will keep you posted on the Departments' response!

EEOC Proposed Rule on Application of ADA to Wellness Programs

The U.S. Equal Employment Opportunity Commission (EEOC) has issued a proposed rule that describes how the Americans with Disabilities Act (ADA) applies to employee wellness programs that are part of group health plans and that include questions about employees' health or medical examinations.

Background: The ADA, which prohibits disability discrimination by covered employers, generally restricts such employers from obtaining medical information from employees but allows medical examinations of employees and inquiries about their health if they are part of a "voluntary employee health program."

The proposed rule provides that a wellness program is considered an "employee health program" within the meaning of the ADA when it is reasonably designed to promote health or prevent disease (similar to the standard currently applicable to "health-contingent wellness programs," which require individuals to satisfy a standard relating to a health factor to obtain a reward).

In addition, the proposed rule:

- Enumerates several requirements that must be met in order for participation to be considered "voluntary": (1) employees may not be required to participate; (2) employees may not be denied health insurance or given reduced health benefits if they do not participate; and (3) employees may not be disciplined for not participating. Employers must also provide employees with a notice clearly explaining what medical information will be obtained, who will receive it, how it will be used, and how it will be kept confidential.
- Allows employers to offer limited incentives for employees to participate in wellness programs or to achieve certain health outcomes. The total allowable incentive available under all wellness programs (i.e., both health-contingent programs and "participatory programs"-which generally are available without regard to an individual's health status) may not exceed 30% of the total cost of employee-only coverage.

Cont'd on Page 4

SB 125: California Employer Size

On June 17th Governor Brown signed SB 125 into law effective immediately.

Under the Patient Protection and Affordable Care Act (PPACA) a small employer is defined to mean an employer who employed an average of at least one but no more than 100 employees on business days during the preceding calendar year for plan years beginning on or after January 1, 2016. For purposes of determining the size of the employer, the counting method must treat full-time equivalents as full-time employees.

SB 125 revises the California definition of small employer, for plan years beginning January 1, 2016, to require the use of the full-time equivalent employee counting method for determining the size of the employer, as specified under PPACA. There is one exception to this and that involves counting employees of related entities. Employers must include employees employed by "affiliated companies" that are eligible to file a combined tax return for purposes of state taxation. The California tax code test for filing a combined tax return is not the same as the "controlled group" status under federal law.

California employers with related entities should consult their state and federal tax law advisors to make sure they are counting employees properly for California small group eligibility.

How do I determine if my full-time and full-time equivalent employees average 100 or more on business days in 2015?

Formula: Total all full-time employees (FT) (those working 30 hours or more per week or 130 hours per month) for each month. Secondly, calculate your FTE's for each month by counting the total number of hours of service by part-time (PT) employees in a month. Do not include more than 120 hours for any employee. Divide the total PT hours by 120. Note that hours of service includes hours for which employees are entitled to compensation even if no work was performed such as paid leave, sick days, etc. Lastly, add the number of FT's and FTE's for each month, then total all months and divide the sum by 12.

Example: Using six consecutive month determination period of March – August 2015.

	Mar	Apr	May	Jun	Jul	Aug
FT	34	34	35	35	35	35
PT	2700 ÷ 120 = 22.5 FTEs	2700 ÷ 120 = 22.5	2880 ÷ 120 = 24	2880 ÷ 120 = 24	2880 ÷ 120 = 24	2880 ÷ 120 = 24
Total	56.5	56.5	59	59	59	59

Totaling the number of FT's and FTE's for each month: 56.5 + 56.5 + 59 + 59 + 59 + 59 = 349. 349 divided by 6 (number of months) = 58. Therefore, Employer is subject to pay or play.

If your results, adding full-time and FTE's together less than 100 you are considered a Small Group employer. If you have 100+ FT's and FTE's then you are a Large Group employer.

EEOC Proposed Rules *cont'd*

- Addresses the confidentiality requirements that apply to the medical information employees provide when they participate in wellness programs.
- Requires employers to provide reasonable accommodations that enable employees with disabilities to participate and to earn whatever incentives the employer offers.

There are several differences between the proposed ADA rules and the current PPACA rules. Although the ADA rules do not change the current PPACA rules, a wellness program will need to satisfy the new ADA rules once finalized.

- The 30% maximum would apply to the total wellness program, regardless of whether it is participatory, health-contingent, or both. Currently, the 30% maximum applies only to health-contingent programs. Rewards for participatory programs would be included in the 30% maximum if the participatory program asks a participant to provide medical information, such as completing a Health Risk Assessment.
- The 50% maximum incentive that currently applies to tobacco cessation programs would only apply to programs that ask employees if they use tobacco. A biometric screening that tests for the presence of nicotine or tobacco would be considered a medical examination and the 30% maximum would apply.
- The proposed regulations do not address family member participation in wellness incentives. Currently the 30% maximum can be applied to the family premium when an employee's family members also participate in the wellness program and are enrolled in the group health plan. This will need to be clarified in the final regulations.

A fact sheet and Q&As are also available.

What's Next: The proposed rules are open for comments. The National Association of Health Underwriters has submitted comments as has the ERISA Industry Committee (ERIC). Both are recommending that the smoking cessation incentive should be raised to 50% to conform with rulemaking under PPACA .

Q 10: What should employers do until a final rule is published to make sure their wellness programs comply with the ADA?

While employers do not have to comply with the proposed rule, they may certainly do so. It is unlikely that a court or the EEOC would find that an employer violated the ADA if the employer complied with the NPRM until a final rule is issued. Moreover, many of the requirements explicitly set forth in the proposed rule are already requirements under the law. For example, employers should make sure they:

- do not require employees to participate in a wellness program;
- do not deny health insurance to employees who do not participate; and
- do not take any adverse employment action or retaliate against, interfere with, coerce, or intimidate employees who do not participate in wellness programs or who do not achieve certain health outcomes.

Additionally, employers must provide reasonable accommodations that allow employees with disabilities to participate in wellness programs and obtain any incentives offered. For example, if attending a nutrition class is part of a wellness program, an employer must provide a sign language interpreter, absent undue hardship, to enable an employee who is deaf to participate in the class. Employers also must ensure that they maintain any medical information they obtain from employees in a confidential manner.

Draft Forms for Employer Reporting and Q&A

The IRS has released the draft 2015 forms for the Section 6055 & 6056 employer reporting.

Forms 1094-B and 1095-B; Forms 1094-C and 1095-C

The draft 2015 B forms and Form 1094-C are essentially unchanged from the 2014 versions. The IRS identifies the following anticipated changes to Form 1095-C:

- *Plan Year Field.* A new field titled "Plan Start Month," which would indicate the first month of the applicable large employer's (ALE's) plan year, would be added. The field would be optional for 2015 forms- ALEs can use the 2014 format instead of adding this field. ALEs choosing to add the field could enter either the first month of the plan year (in numerical format) or "00" (rather than the actual month). The field would be required starting with the 2016 forms.
- *Continuation Sheet.* Part III of the 2015 form includes a continuation sheet for filers reporting enrollment information for more than six individuals. (A similar continuation sheet has also been added to Part IV of the 2015 Form 1095-B for filers providing information on covered individuals.)
- *Indicator Codes.* The line 14 indicator codes that report offers of coverage are unchanged for 2015. However, new codes for 2016 would indicate whether an offer of coverage to an employee's spouse is a conditional offer. For example, an offer conditioned on not having access to coverage through the spouse's employer.

In May the IRS released Q&A for Forms 1094-C and 1095-C. While some of the Q&As contained in this guidance were previously addressed in the instructions to Forms 1094 and 1095, others provide helpful clarifications and new information. Employers subject to the reporting requirements should give careful attention to this and future guidance as the reporting deadline draws nearer.

Delivery to Employees. The guidance confirms that a Form 1095-C may be delivered to employees in any manner permitted for delivery of Form W-2, including hand-delivery. However, unlike Form W-2, employers need not furnish a mid-year Form 1095-C upon an employee's request following termination of employment.

Reporting Offers of COBRA Coverage. New Q&As illustrate reporting under various COBRA scenarios. The guidance explains how sponsors of self-insured plans should report enrollment information for non-employee COBRA beneficiaries, such as former spouses. Qualified beneficiaries electing COBRA independently from the employee must receive separate forms, while those who have COBRA due to an employee's election should be included on the same form that is provided to the employee. (As previously noted in the instructions to the final forms, reporting may be made on either Form 1095-B or 1095-C for individuals who were not employees at any time during the year.) Several examples illustrate how an ALE should complete Form 1095-C for full-time employees who receive a COBRA offer due to termination of employment or a reduction of hours. In general, a COBRA offer made due to termination of employment is reported as an offer of coverage only if the former employee enrolls in COBRA coverage and the employee's cost of coverage reflects the COBRA premium for the lowest-cost, self-only coverage providing minimum value. In contrast, a COBRA offer made to an active employee due to a reduction of hours would be reported as an offer of coverage on Form 1095-C even if the employee declines COBRA coverage. Unfortunately, the example used to illustrate this final point does not extend more than 60 days after the loss of eligibility, so it is unclear whether the ALE would still report that coverage is offered after the employee's COBRA election period has ended.

What's Next: The final forms and instructions are expected before the end of the year. Comments on the forms and instructions can be submitted to the IRS at their Comment on Tax Forms and Publications page.