THE AFFORDABLE CARE ACT … IT’S STILL HERE!

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OVERVIEW

- The continued viability of the ACA
  - *Texas v. United States*
  - The status of the contraceptive mandate
  - Wellness program litigation
- MEWAs
  - Cease and desist orders that DOL can issue pursuant to ACA regulations
- Association health plans and skinny plans
  - Regulations & lawsuits
- Surprise Billing
CONTINUED VIABILITY OF THE ACA

- **Texas v. United States**
  - Northern District of Texas holds ACA individual mandate is unconstitutional, and non-severable.
  - Order stayed as of 1/21/2019
  - Appeal pending

- **Columbus v. Trump & Maryland v. United States**
  - Lawsuits seek declaratory judgment that ACA is unconstitutional and
  - Alleges that Trump’s executive actions attempting to nullify the ACA violates the Constitution’s “take care” clause
ACA Contraceptive Mandate

- Obama administration: ACA preventive care and wellness provisions require most employers to cover contraceptives with no cost sharing by the individual
  - Exception for houses of worship based on religious objection
  - Religiously-affiliated nonprofits opt out by electing an accommodation under which the insurer, not the employer, pays for the contraceptive coverage

  - Led to expansion of opt out to closely held for-profit corporations
ACA Contraceptive Mandate - continued

- May 4, 2017: Executive Order: Promoting Free Speech and Religious Liberty
- October 6, 2017: two Interim Final Rules (IFR) - expiration date 1/14/2019
- Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act
  - expanded the full exemption to all entities “with sincerely held religious beliefs objecting to contraceptive or sterilization coverage”
  - makes it optional for the entity to offer the accommodation
- Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act
  - expanded the exemption to “include additional entities and persons that object based on sincerely held moral convictions” on the same terms as for religious organizations
- November 15, 2018: final rules issued
ACA Contraceptive Mandate - continued

- November 15, 2018: final rules provide
  - Employers other than religious entities that have a religious or moral objection to providing contraceptive coverage are exempt from the requirement to provide such coverage under the ACA.
  - They do not need to provide an accommodation.
  - Entities that have been providing coverage with an accommodation may terminate such accommodation with 60 days’ notice or on the first day of a plan year with 30 days’ notice.
  - The rule specifically applies to student health insurance provided by an educational institution.
  - State governmental entities are not covered by this exception.
ACA Contraceptive Mandate - continued

  - 5 states challenge interim final rules on several grounds including as invalid under the Administrative Procedure Act
  - Affirm injunction as to the five plaintiff states, vacating as overbroad as to the rest of the country, and remand
  - After the opinion was issued, eight additional states and the District of Columbia moved to be added as plaintiffs and all the plaintiffs filed a motion for a nationwide preliminary injunction as to the final rule

  - IFR enjoined on December 15, 2017
  - Stay of case lifted on December 14, 2018
  - Preliminary injunction hearing was held on January 10, 2019
  - On December 27, 2018 the defendants were granted an extension to February 28, 2019 to file an answer or otherwise respond to the complaint.
Wellness Programs

- **Stand-Alone Wellness Programs**
  - Incentives not tied to the group health plan
  - Example, health or wellness-loss club dues

- **Wellness Programs that Relate to Group Health Plans**
  - Lower premiums for non-smokers
  - Participatory Programs
    - *No reward or reward not related to a health factor (a diagnostic test, results don’t matter)*
  - Health Contingent Programs
    - *Must satisfy 5 requirements*
    - *Two subcategories: activity-only wellness programs and outcome-based wellness programs*
Wellness Programs

- Regulated: EEOC and DOL
- HIPAA Nondiscrimination Rules
- EEOC Final Regulations (May 2016)
  - Effective January 1, 2017
  - Notice and incentive limits
- EEOC Discussion Letters Prior to 2016 Final Regulations
  - Discussion letter are informal
  - Left guidance in a state of flux
Wellness Programs

– EEOC Litigation Prior to 2016 Final Regulations
  – EEOC files several lawsuits claiming that employers wellness programs violated ADA because their reward schemes made the programs involuntary. See EEOC vs. Orion Energy Sys. Inc. 2016 WL 5107019 and EEOC vs. Flambeau, Inc., 2015 WL 9593632

– EEOC Litigation After 2016 Final Regulations
  – AARP vs. EEOC, 2016 WL 7646358 – Court determined that the EEOC had failed to provide a reasonable explanation for its decision to adopt incentive levels and sent the regulations back to the EEOC for reconsideration.
  – EEOC filed a status report advising the court that any amended rule would not be applicable until 2021.
  – Court concluded proper remedy was to vacate the rule as of January 1, 2019
Wellness Programs

Plan Administration Considerations
- Where do we go from here?
- Continue to follow the 2016 Final Regulations?

Incentive Structure
- No incentive
- Modest incentive
- Up to 30%
Wellness Program

- Administering the Wellness Program properly
  - *Acosta v. Macy’s*, S.D. Ohio, No. 1:17-cv-00541 – complaint filed regarding alleged mismanagement of the retailer’s tobacco cessation program in its employee wellness plan.
  - *Acosta v. Dorel*, S.D. Indiana, No. 1:18-cv02993 – consent judgment entered restoring losses attributed to mismanagement of the company’s tobacco cessation program in its employee wellness plan.
Ex Parte Cease & Desist and Summary Seizure Orders for Multiple Employer Welfare Arrangements
Overview

- Background on the Regulations
- Cease and Desist Orders
- Summary Seizure Orders
Background

A Brief Description of Regulation
Background

- The Affordable Care Act, Public Law No. 111-148, 124 Stat. 119 added §521 to ERISA.
- The statute authorizes the Department to issue cease and desist orders ("C&D Order"), and provides for issuance of summary seizure orders ("Seizure Order").
- 29 CFR §2560.521-1 - §2560.521-4
- 29 CFR §2571.1 - §2571.13
- The regulations establish the procedures for the Secretary to issue C&D Orders and Seizure Orders with respect to fraudulent or financially hazardous MEWAs and establish procedures for use by administrative law judges and the Secretary when a MEWA or other person challenges a C&D Order.
Cease and Desist Orders
A C&D Order may be issued when it appears that the alleged conduct of a MEWA or any person acting as an agent or employee of the MEWA is:

- Fraudulent;
- Creates an immediate danger to the public safety or welfare; or
- Is causing or can be reasonably expected to cause significant, imminent, and irreparable public injury.
• The conduct of a MEWA is fraudulent when the MEWA or any person acting as an agent or employee of the MEWA commits an act or omission knowingly and with an intent to deceive or defraud plan participants, plan beneficiaries, employers or employee organizations, or other members of the public, the Secretary, or a State regarding:
  • (A) the financial condition of the MEWA (including the MEWA’s solvency and the management of plan assets);
  • (B) the benefits provided by or in connection with the MEWA;
  • (C) the management, control, or administration of the MEWA;
  • (D) the existing or lawful regulatory status of the MEWA under Federal or State law; or
  • (E) any other material fact, as determined by the Secretary, relating to the MEWA or its operation.
Fraudulent conduct includes:

- False statements regarding any of (A) through (E) that is made with knowledge of its falsity or that is made with reckless indifference to the statement’s truth or falsity.
- The knowing concealment of material information regarding any of paragraphs (A) through (E).
Fraudulent Conduct

• Examples:
  • Misrepresenting the terms of the benefits offered or the financial condition of the MEWA.
  • Engaging in deceptive acts or omissions in connection with marketing or sales or fees charged to employers or employee organizations.
Danger to Public Safety or Welfare Conduct

- The conduct of a MEWA (or any person acting as an agent or employee of the MEWA) creates an immediate danger to the public safety or welfare if the conduct impairs, or threatens to impair, a MEWA’s ability to pay claims or otherwise unreasonably increases the risk of nonpayment of benefits.

- Intent to create an immediate danger is not required for this criterion.
Danger to Public Safety or Welfare Conduct

• Examples:
  • A systematic failure to process or pay benefit claims, including failure to establish and maintain a claims procedure that complies with ERISA Section 503 and the regulations thereunder.
  • Failure to establish or maintain a recordkeeping system that tracks the MEWA’s financial condition or the claims made, paid, or processed.
  • A substantial failure to meet applicable disclosure, reporting, and other filing requirements, including the annual reporting and registration requirements.
Danger to Public Safety or Welfare Conduct

- Examples Continued:
  - Failure to comply with a cease and desist order issued by a government agency or court.
Irreparable Public Injury Conduct

- The conduct of a MEWA (or any person acting as an agent or employee of the MEWA) is causing or can be reasonably expected to cause significant, imminent, AND irreparable public injury:
  - If the conduct is having, or is reasonably expected to have, a significant and imminent negative effect on any of the following:
    - (1) an employee welfare benefit plan that is, or offers benefits in connection with, a MEWA;
    - (2) the sponsor of such plan or the employer or employee organization that makes payments for benefits provided by or in connection with a MEWA; or
    - (3) plan participants and plan beneficiaries.
  - Intent to cause injury is not required for this criterion.
• EXAMPLES:
  • Employment by the MEWA of a prohibited person.
  • Conversion or concealment of property of the MEWA.
  • Embezzlement from the MEWA.
  • Improper disposal, transfer, or removal of funds or other property of the MEWA, including unreasonable compensation or payments to MEWA operators and service providers.
A C&D Order may be obtained to:

(i) prohibit specific conduct or prohibit the transaction of any business of the MEWA;

(ii) prohibit any person from taking specified actions, or exercising authority or control, concerning funds or property of a MEWA or of any employee benefit plan, *regardless of whether such funds or property have been commingled with other funds or property*; and,

(iii) bar any person either directly or indirectly, from providing management, administrative, or other services to any MEWA or to an employee benefit plan or trust, as the Secretary determines is necessary and appropriate to stop the conduct on which the order is based, and to protect the interests of plan participants, plan beneficiaries, employers or employee organizations, or other members of the public.
Summary Seizure Orders
Conduct that Warrants a Seizure Order

- A Seizure Order may be issued when it appears that a MEWA is in a financially hazardous condition.
Financially Hazardous Condition

- The MEWA is, or is in imminent danger of becoming, unable to pay benefit claims as they come due; or
- The MEWA has sustained, or is in imminent danger of sustaining, a significant loss of assets; or
- A person responsible for management, control, or administration of the MEWA’s assets is the subject of a cease and desist order.
Financially Hazardous Condition

· Examples:
  · $0 plan assets in self funded plan
  · Large amount of unpaid claims
  · Significant drop in plan assets
  · Imprudent or prohibited investment of substantial portion of plan assets in risky or illiquid assets
  · Pattern of factors i.e. a lowering of plan assets, rising unpaid claims, no change in premiums, and no actuarial assessment of MEWA
  · DOL C&D order removes all individuals responsible for plan assets
More on Seizure Orders

- Seizure order is pursuant to judicial authorization
- Seizure order may prohibit or restrict the transfer or disposition of assets.
ASSOCIATION HEALTH PLANS
LEGAL UPDATE & ANALYSIS

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Expands definition of *bona fide* association by expanding commonality of interest standard to employers that:

1. are in the same trade, industry, line of business, or profession; or
2. have a principal place of business within a region that does not exceed the boundaries of the same State or the same metropolitan area (even if the metropolitan area includes more than one State).

Commonality of interest and control requirements are retained in the final rule as elements that distinguish employment-based benefit arrangements from commercial insurance marketing programs.

The second factor lacks definition and problems related to state insurance laws complicate its implementation.
Allows an association to form for the purpose of providing insurance provided the association has at least one substantial other business purpose.

- A purpose that would allow AHP to continue to operate if the health plan ceased.

- Requires the AHP to have a “formal organization structure with a governing body” as well as by-laws or other indications of formality.

- Allows “working owners” to participate.

- The group or association must not condition employer membership in the group or association on any health factor, as defined by HIPAA.
Final regulations redefine the term “employer” principally by expanding who can sponsor a large plan.

- Does not replace existing guidance; just provides “additional” mechanism to achieve *bona fide* association status for the purpose of being deemed a large ERISA-covered plan.
**RULE DOES NOT ELIMINATE PRE-RULE PATH**

<table>
<thead>
<tr>
<th>Pre-Rule Guidance</th>
<th>AHP Rule</th>
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<tr>
<td>Members must be employers (or partnerships)</td>
<td>Members can include sole proprietors or working owners (with no employees)</td>
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<td>Regional chambers of commerce are too broad a commonality of interest</td>
<td>Associations defined by region or state are permitted</td>
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<tr>
<td>For insured AHPs, insurers could set different rate for different employer-members</td>
<td>For insured AHPs, insurers cannot set different rates for different employer-members (though can still set different rates based on other factors, like geography or industry type)</td>
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ASSOCIATION HEALTH PLAN– EXPECTATIONS AND REALITY

- **Expectations:**
  - A greater number of small groups could band together and be deemed a large group.

- **Results small groups could:**
  - Avoid state mandates.
  - Avoid ACA 10 essential benefits.
  - Leverage pricing.
  - Transfer day-to-day plan obligations from small employer to AHP manager.
ERISA Preemption does not apply in the context.
State and Federal laws govern MEWAs.
Crossing state lines not possible—unless you use national carrier.
Applicable deadlines:

September 1, 2018, for employee welfare benefit plans that are fully insured and that meet the requirements for being an association health plan sponsored by a bona fide group or association of employers.

January 1, 2019, for any employee welfare benefit plan that is not fully insured, is in existence on June 21, 2018, meets the requirements that applied before June 21, 2018, and chooses to become an association health plan sponsored by a bona fide group or association of employers.

April 1, 2019, for any other employee welfare benefit plan established to be and operated as an association health plan sponsored by a bona fide group or association of employers.
AHP REGULATORY CHALLENGE

- On July 26, 2018, 16 states and D.C. initiated a lawsuit in the District of Columbia challenging the AHP regulation.
- Basis of lawsuit:
  - Rule conflicts with the statutory structure that Congress adopted in the ACA to apply fundamental protections to the individual and small group markets.
  - Rule conflicts with the ACA, ERISA, and established case law by enabling a purportedly self-employed individual (denominated a “working owner”) with no other employees—and with minimal income and verification—to be both an “employer” and “employee” under ERISA with the authority to establish a group health plan.
  - Rule unlawfully expands ERISA to allow all employers (including self-employed individuals described) in a State or “metropolitan area” to group together into a profit-making commercial insurance enterprise.
- Fully-insured plans not considered a problem and as long as the carrier is licensed in the state, MEWA can operate in the state.
- Self-funded MEWAs are scrutinized and some states don’t allow them to operate at all.
Surprise Billing

▸ services from an out-of-network provider at an in-network hospital or facility
  ▸ Surprise to the insurer or group health plan
  ▸ Surprise to the individual

▸ denial of emergency room charges as not being related to an emergency
  ▸ Surprise to the individual

▸ Types of providers
  ▸ emergency room physicians
  ▸ ancillary providers: radiologists, pathologists, and anesthesiologists
 Surprise for the individual

- https://erbills.vox.com
Relief for the Individual

- Some States have or are considering legislation to protect individuals in these situations
- State legislation pre-empted as to self-insured ERISA plans
The Perspective of the Group Health Plan

- The individual does not have control over these out-of-network providers when going to the ER or to a network hospital/provider
  - If balance billed the individual is financial hurt
- The Plan needs to control overall plan costs for all participants and beneficiaries
  - Paying full billed amount is a financial burden
  - Stop loss might not cover
Some Strategies for Group Health Plans

- Paying non-network providers at the same level of benefits as the facility where the services were performed on the allowed amount and considering the payment of additional amounts on appeal;
- Trying to negotiate with the non-network providers and paying on the negotiated amount;
- Paying non-network providers at the same level of benefits as the facility where the services were performed on the billed amount;
- Educating participants and steering them away from hospitals that use non-network ancillary providers that won’t negotiate; and
- When considering and comparing networks take into account the extent to which the network includes these ancillary providers.