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ACA Legislative and Regulatory Update

Legislative

There has been only one change in the ACA law in the past year- the reduction of the individual mandate penalty to \$0. The "Tax Cuts and Jobs Act," Public Law 115-97, signed into law on December 22, 2017, changes the provision defining the penalty for failing to have "minimum essential coverage" to zero, effective after December 31, 2018. Thus, for 2018, there is no change, and individuals that are not exempt must either have such coverage or pay a penalty. But beginning in 2019, there will be no penalty for failing to have health coverage. (Technically, the ACA will still require individuals to obtain minimum essential coverage, but there will be no penalty for those who fail to comply with this requirement.)

Regulatory

A number of regulations have been issued under the ACA, but they are not expected to have a significant impact on conference-sponsored health plans. For conferences that ended their sponsorship of a health plan, relying on the ability of clergy to obtain coverage on the public ACA Exchanges, premiums are generally higher, but the Exchanges remain functional, if expensive for those who do not receive subsidies.

One regulatory development for plan sponsors of wellness programs is the potential lack of EEOC¹ regulations as of January 1, 2019. Wellness programs must comply with a number of laws, including the ACA², the ADA³, GINA⁴, and the Internal Revenue Code. As the agency with jurisdiction over the ADA and GINA, the EEOC issued regulations in 2016 explaining how employers sponsoring wellness programs can avoid discrimination against the disabled, and can comply with the GINA restrictions on collection and use of genetic information. In response to a lawsuit claiming the regulations improperly allowed employers to induce employees to provide genetic and disability-related information by offering incentives that were too high, a court vacated these EEOC regulations, so they will expire December 31, 2018. Thus, employers that currently follow the EEOC regulations may

¹ Equal Employment Opportunity Commission

² Affordable Care Act

³ Americans with Disabilities Act

⁴ Genetic Information Nondiscrimination Act

need to consider how their exposure might change after December 31, 2018 to claims that their wellness program violates the ADA or GINA.

For example, the ADA generally prohibits employers from asking disability-related questions, and from requiring employees to submit to medical exams. But the ADA contains an exception, allowing employers to ask for these things on a voluntary basis as part of an employee health program (a wellness program). The 2016 EEOC regulations provided that a wellness program that asks for these things is “voluntary” as long as it doesn’t offer incentives higher than 30% of the cost of employee-only insurance. So if the cost of employee-only insurance is \$6,000 per year, a wellness program asking for disability-related information or medical examinations can offer up to \$2,000 per year as incentives for those things.

The 2016 regulations were viewed by some employers as helpful, since they aligned at least in part with the latest HIPAA⁵ regulations, which permitted health plans to offer up to 30% of the cost of employee-only insurance to induce an employee to comply with wellness programs that provided rewards in connection with certain health-related factors.

The litigation raised the question with respect to the ADA and GINA of whether incentives as high as this would make an employee feel they could not refuse the inducement, rendering their compliance not “voluntary.” There is a fair amount of disagreement on this question.

Wespath is monitoring developments, and believes its incentives for the HealthFlex wellness program are in the low to moderate range, and should comply with all of the pertinent laws. There are some plan sponsors of HealthFlex that provide additional incentives beyond those HealthFlex provides, however, and HealthFlex in many cases is not aware of what additional incentives the Plan Sponsor may provide. In addition, there are Annual Conferences that do not sponsor HealthFlex, but do sponsor the VirginPulse program on a stand-alone basis, and decide independently what incentives to provide for that wellness program. Conferences in either of these situations may wish to consult with their counsel to confirm that they are comfortable with the incentives they provide, going into 2019.

⁵ Health Insurance Portability and Accountability Act