HEALTH & WELFARE PLAN LUNCH GROUP

September 3, 2015

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September 2015 H&W Plan Update

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Agenda

- **Top 10 H&W Benefit Developments for Summer 2015**
- **Deep Dive on Cadillac Tax**

Part One: Top 10 Benefit Developments for 2015

- Supreme Court: *King v. Burwell, et al*
- Supreme Court: *Obergefell*
- IRS Cadillac Tax Guidance
- DOL Conflict of Interest Guidance
- EEOC ADA Guidance for Wellness Programs
- Pay or Play and Its Impact on Employer Coverage
- IRS Notice 2015-17
- Big Data Breaches and Wake Up Call for HIPAA Compliance
- IRS Announcement 2015-22 Tax Free Identity Protection
- Final ACA Regulations and Cost Sharing Guidance

#1 King v Burwell

- Crisis? What Crisis?
- A case of interpretation:
  - Is it plausible for IRS to construe "exchange established by the states" to include federally run exchanges?
- Direct impact is on subsidies IRC 36B
  - Indirect impact on employer 4980H requirement
- Potential Fallout
  - Death spiral for federal exchanges ?
- Pure Applesauce and SCOTUSCARE

#2 Obergefell

- States must allow same-sex couples to marry and recognize marriages lawfully performed in other jurisdictions
  - Impact on Cafeteria plans
    - State tax issues
    - Change in status issues
  - Impact on FSAs
    - Dependent care
  - Impact on HSAs
  - Impact on health coverage eligibility
    - Domestic partner benefits
    - Suits for retroactive coverage

#3 Cadillac Tax: High Level Background

- The Affordable Care Act added Internal Revenue Code Section 4980I which creates a new nondeductible 40% excise tax starting in 2018 on the value of "applicable employer-sponsored coverage" in excess of statutory thresholds
  - Initial thresholds:
    - $10,200 for self-only;
    - $27,500 for family
- Expected to Impact 48% (or more) of Employers in 2018

#3 Cadillac Tax: High Level Background

- What is its purpose ?
  - Ostensibly to prevent over consumption due to tax subsidies
    - Too many colonoscopies?
  - Legislative history
    - Stop tax "leakage" from employee exclusion for employer provided health care
  - Revenue raiser to pay for ACA (such as individual premium subsidies)

#3 Cadillac Tax: Nitty Gritty

- The coverage subject to the excise tax rule includes:
    - The applicable premium (determined in accordance with COBRA rules) for all accident and health coverage provided by the employer, even if paid for with after-tax dollars by the employee (except vision only insurance, dental insurance, accident and disability insurance, long-term care insurance, and after-tax funded hospital indemnity and/or specified disease coverage)
    - Both non-elective and salary reduction contributions to a health FSA
    - Employer contributions (including salary reductions) to an HSA (IRS Notice 2015-16)

#3 Cadillac Tax: The Impact

- Excerpt from August 2015 Kaiser study

Table 1: Share of Employers with At Least One Plan Hitting Threshold

Year	HCPT Self-Only Threshold	Premium, HSA, HRA	Premium, HSA, HRA & FSA
2018	$10,200	16%	26%
2023	$11,800	22%	30%
2028	$13,500	36%	42%

Source: Kaiser Family Foundation analysis

#4: DOL Conflict of Interest Proposal

- Restrictions on compensation related to HSA Investment Options
  - Reliance on Disclosure/Approval by Accountholder Insufficient
  - Treatment of HSAs like IRAs
  - Potentially impacts any entity in investment option income stream
  - Options
    - Exception for HSAs
    - Platform carveout
    - BICE exception
  - Comment period closed in July

#5: Wellness Programs ADA and GINA Update

- *Voluntariness Decisions*
  - *EEOC v. Honeywell:* EEOC contends the financial "penalties" for those who do not complete biometric tests include: (1) a $500 surcharge for the employee; (2) a $1,000 tobacco surcharge for the employee; (3) a $1,000 tobacco surcharge if the employee's spouse refused to complete the tests; and (4) non-receipt of a Health Savings Account (HSA) contribution up to $1,500
  - *EEOC v. Orion Energy Systems, Inc.,* (E.D. Wis., 8/20/14) – loss of employer subsidy plus $50 "surcharge" if no biometrics (incl. blood work)
  - *EEOC v. Flambeau, Inc.*,(W.D. Wis., 9/30/14) – loss of coverage if no biometrics (incl. blood work)
- *Seff v. Broward County*, 691 F. 3d 1221 (11th Cir. 2012)
  - ADA's bona-fide group health plan safe harbor provision allowed wellness incentives (no review of "voluntariness" issue).

#5: Wellness Programs Proposed EEO Regulations

- Similar to HIPAA wellness rules, but some significant differences
- Disability related inquiries/medical exams that are part of group health plan
  - 30% applies to participatory and outcome based programs (defined under HIPAA)
    - HIPAA did not subject participatory programs to 30% cap
  - 30% seems to be limited to individual, NOT family, coverage
    - HIPAA allows 30% of family coverage

#5: Wellness Programs Proposed EEO Regulations

- Inquiries/exam that are part of group health plan (cont.):
  - o New Smoking Cessation Rule

    - ➢ 50% cap only applies for questions about tobacco use
    - ➢ ANY MEDICAL TESTS (blood, saliva, etc.) trigger <u>30% threshold</u>

#6: 4980H In a Nutshell

- Only applicable to “Applicable Large Employers”
- *Generally effective January 2015 (but see transition relief)*
- *Small Applicable Large Employers* are not subject to excise taxes until 2016 (but must still report for 2015)
  - o Small applicable large employer is controlled group of corporations that satisfy the following conditions:
    - ➢ 50-99 FTEs in 2014
    - ➢ Employer does not reduce size of workforce or reduce overall hours of service of employees for other than bona fide business reasons
    - ➢ Employer does not eliminate or materially reduce health coverage maintained on 2/9/14
      - Contribution for employee only coverage must be at least 95% of dollar amount on 2/9/14 or same or higher percentage
      - Changes in employee only coverage permitted so long as coverage retains minimum value status
      - No reduction in classes of employees/dependents who were eligible on 2/9/14

#6: 4980H In a Nutshell

- Sledgehammer Bucket
  - You fail to offer coverage through an eligible employer sponsored plan to 95% of your employees who qualify as a full-time employee to whom coverage must be offered (and their dependent children) and ONE employee who qualified as a full-time employee to whom coverage must be offered receives a subsidy in the Exchange
    - 70% in 2015 ONLY
  - 1/12 of 2080 ($173.33) x all employees of the controlled group member who qualified as a full-time employee to whom coverage must be offered reduced by the employer's allocable share of 30
    - 80 in 2015
  - The reason that employee receives subsidy is not relevant

#6: 4980H In a Nutshell

- Tackhammer Bucket
  - Employer satisfies substantially all test but does not offer affordable, minimum value coverage through an eligible employer sponsored plan to 100% of its employees who qualify as full-time employee to whom qualifying coverage must be offered (and their dependent children) and a full-time employee to whom coverage must be offered receives a subsidy in the exchange
  - 1/12 of 3126 ($260.50) x the total number of full-time employees who receive a subsidy in the Exchange that month

#6: Employer Reporting Obligations

- 2 new filing requirements that potentially may apply
  - Code Section 6055
    - Designed to help the IRS administer the individual mandate
    - Helps individuals report to IRS regarding individual mandate
  - Code Section 6056
    - Designed to help IRS administer both Code Section 4980H (employer shared responsibility) and Code Section 36B (premium tax subsidy/credit)
    - Helps full-time employees substantiate premium subsidy/tax credit

#6: Large Employer Response

- Not a "Race to the Bottom" (at least not yet)
  - Shift Happens:
    - Greater interest in HDHP and account based plans (HRA/HSA)
    - Steerage away from traditional PPO plans
  - Greater interest in long term wellness initiatives
  - Pay or play "planning"
    - Increases in premium cost-share for spouse/family coverage (to offset extension of coverage/increase in subsidy to employee only) to avoid pay/play tax w/r/t employee coverage
    - Extension of eligibility to all employees and increase cost
      - Easier than tracking for those with limited PT workforce
    - Reduction in hours 29ers (with buffer) for PT employees
      - The *Dave & Buster's* case

#7: 2015-17 - Employer Payment Plans

- We really, really, really mean it this time
- What arrangements are affected?
  - Confluence of:
    - Active employees
    - Individual policy
    - Major medical coverage
- All pre-tax and ERISA covered arrangements utilizing individual major medical for active employees affected
  - Direct pay, 61-146 reimbursement, HRA funded, etc.
  - Voluntary payroll deduction by employee where employer is not involved may be exempt

#8: Big Data Breaches Cause Wake Up Call for HIPAA Compliance

- Aftermath of Anthem, Premera and Other Big Data Breaches
  - TPA responsibilities as a business associate
- Round Two OCR Investigations
- HIPAA Gut Check
  - HIPAA/HITECH Requires
    - Business associate agreement
    - HIPAA security procedure and written risk assessment
    - Gap analysis
    - Training
- Overview of OCR settlement agreements

#9: Tax Free Identity Theft Protection

- IRS Announcement 2015-22
  - *Post-breach* identity theft protection services are not gross income or wages
  - If organization that experienced a breach provides identity theft protection services *to individuals whose information might have been breached*, then value of services *does not* need to be included in individual's gross income
    - Example: If the electric company provides identity theft protection to customers after their information might have been breached, those customers do not need to include value of identity theft protection services in gross income and electric company does not need to issue 1099-MISC.

#9: Tax Free Identity Theft Protection

- IRS Announcement 2015-22 (continued)
  - Employers need not include the value of identity theft protection services in employees' gross income and wages *for employees whose personal information may have been compromised* in a data breach of the employer's recordkeeping system (or their agent's or service provider's)
    - Example: Employee whose information was breached by TPA of medical plan will not need to include value of identity theft protection they receive in gross income. Employer will not need to include value in gross income and wages *or* report on W-2.
    - Example: Former U.S. Immigration and Naturalization Service officer has background investigation stolen from OPM database. OPM does not need to report value of identity theft services to IRS or former employee, as it is not included in gross income (or wages).

#9: Tax Free Identity Theft Protection

- IRS Announcement 2015-22 (continued)
  - Identity theft protection must be included in income (and, for employees, wages) for:
    - Identity protection received other than due to a breach (for example, as part of an employee's benefit package)
    - Employees/individuals whose information was not subject to the breach
    - Cash received in lieu of identity protection services
  - Proceeds of an identity theft insurance policy are governed by existing law
  - IRS requests comments on whether organization commonly provide identity protection in other circumstances and whether additional guidance would be helpful
    - Comments due by October 13, 2015

#10: Final ACA Regulations and Guidance

- Excepted Benefit regulations
  - A win for limited scope vision/dental
  - No relief for stand alone general purpose FSAs
  - Still no word on wellness programs
    - Are they possibly EAP programs?
- IRS Expatriate health plans Notice
- SBC regulations
- Final Preventive Services Regulations

#10: Final ACA Regulations and Guidance

- FAQs XXVII: Embedded OOP Limit
  - All coverage must include embedded OOP limit
  - Implications for HDHPs
- FAQs XXI: RBP Guidance
  - RBP generally allowed if "adequate access" is ensured
  - Adequate access factors include: type of service, reasonable access, quality standards, exceptions process, and disclosure
  - Applicability to "Medicare plus" arrangements?
    - RBP or "no network"

Part Two:
Deep Dive on Cadillac Tax

Background

- The Affordable Care Act added new Internal Revenue Code Section 4980I
  - New nondeductible 40% excise tax starting in 2018
  - Tax on value of *applicable employer-sponsored coverage* in excess of statutory thresholds
    - Initial Statutory thresholds:
      - $10,200 for self-only
      - $27,500 for family

Background

- Purpose of Tax
  - Prevent over-consumption
  - Stop tax "leakage" from employee exclusion for employer provided health care
  - Revenue raiser to pay for ACA (such as individual premium subsidies)

Applicable Employer Sponsored Coverage

- Applies to "applicable employer sponsored coverage":
  - All "group health plan" (as defined by Code Section 5000) coverage that is excluded from income or would be excluded if it were provided by the employer, except:
    - Fully insured Dental
    - Fully insured Vision,
    - Long-term care insurance, and
    - After-tax funded hospital indemnity and/or specified disease coverage)

Applicable Employer Sponsored Coverage

- Types of coverage included by virtue of statute:
  - Major medical coverage for actives AND retirees
  - Health FSAs
  - HRAs
  - HSA contributions (both employer and employee pre-tax)
  - Onsite medical clinics
  - Wellness programs
  - EAP
  - Self insured dental/vision
  - Pre-tax indemnity/specified disease coverage
  - Supplemental coverage ("gap" coverage)

Applicable Employer Sponsored Coverage

- Notice 2015-16 requested comments on:
  - Self insured dental/vision
  - EAP
  - HSA contributions
  - Onsite medical clinics

- Notice 2015-52 also requested comments on Cadillac Tax
  - Who pays when plan is self –insured?
  - Challenges posed by controlled group rules
  - Cost allocation and Notice of tax process
  - Exclusion of tax from cost
  - Allocation of HSA contributions/FSA contributions to each month
  - Age and gender adjustments
  - Notice

Value of Coverage

- Value determined in accordance with rules similar to the rules that apply to COBRA premiums
  - Focus is on "similarly situated"

- Special rules for:
  - Health FSA (includes employer flex credits)
  - Retiree Coverage (can treat pre and post 65 folks as similarly situated)

Value of Coverage

- Notice 2015-16 requested comments on potential approaches for determining value:
  - Aggregation by benefit package option
  - Mandatory disaggregation between self-only and other than self only
  - Permissive aggregation for other than self-only
    - Treat everyone with other than self only as similarly situated
    - Treat all with same number of family members as similarly situated
  - Permissible disaggregation based on other "traditional distinctions"
- Notice 2015-16 also requested comments on determining value of HRAs

HRAs and Cadillac Tax

- Recap: HRAs generally are applicable coverage
  - Three proposals for determining cost
    - Amounts newly available for year
    - Claims and administrative expenses divided by number of covered employees during period
    - Actuarial basis
  - Non-ratable contribution issue (monthly calculation)
- Other issues for HRAs
  - Discount value of vision/dental?
  - Effect of carryover on valuation?

Thresholds

- Threshold adjustments
  - The higher family threshold applies to both single and family coverage offered under a multiemployer plan
  - An employer may make an adjustment if employer's age and gender demographics are not representative of national average
  - No adjustments for high-cost areas (e.g., Northeast, metro areas, etc.)

Thresholds

- Threshold adjustments
  - The annual limit for retirees between ages 55 and 64, individuals engaged in certain high-risk professions (e.g., law enforcement professionals, EMTs, longshoremen, construction workers, and miners), and those employed to install electrical or telecommunication lines is increased to $11,850 for individual coverage and $30,950 for family coverage

Thresholds

- Future adjustments
  - Threshold amounts are to be adjusted automatically if health costs increase by more than anticipated before 2018
    - Health Cost Adjustment Percentage (HCAP) Formula based on percentage increase in FEHBP standard option minus 55% from 2010-2018
  - The thresholds are increased by CPI-U + 1 in 2019, and by CPI-U thereafter

Who Pays Tax?

- Determined by the employer and assessed against "coverage providers"
  - "Coverage providers" are defined to include:
    - In the case of fully insured plans, the health insurer
    - In the case of HSA contributions, the employer making the contributions
    - In the case of a self-insured plan or flexible spending account (FSA), the person that administers the plan (e.g., the TPA)
  - In many cases, employer-sponsored coverage will include both fully insured and self-insured contributions (it may also include HSA contributions)
    - The coverage provider's applicable share of the tax will bear the same ratio to the total excess benefit as the cost of the coverage provider's coverage to the total value of employer-sponsored coverage

Who Pays Tax?

- Because provision is an excise tax, all employers may be subject to tax:
  - Private, for-profit employers regardless of size
  - Non-profit and tax-exempt entities
  - Governmental entities

The Impact

- Excerpt from CBO Budget Outlook 2015-2025
  - CBO and JCT expect that premiums for health insurance will tend to increase more rapidly than the threshold for determining liability for the high-premium excise tax, so the tax will affect an increasing share of coverage offered through employers and thus generate rising revenues. In response, many employers are expected to avoid the tax by holding premiums below the threshold, but the resulting shift in compensation from nontaxable insurance benefits to taxable wages and salaries would subject an increasing share of employees' compensation to taxes. Those trends in exchange subsidies and in revenues related to the high premium excise tax will continue beyond 2025

Employer Responses

- Wellness
- Increase employee OOP
- Implement CDHP (HSA)
- Eliminate high cost options
- Unbundle Dental and Vision
- Reductions in spousal coverage
- Convert/Eliminate ancillary benefits
  - **MOST SIGNIFICANT THREAT TO ACCOUNT BASED PLANS (FSA, HRA, HSA) EVER.**

Question & Answer