Wichita Association of Health Underwriters

Healthcare and ACA: Legislative and Regulatory Update

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April 2017

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ACA Repeal and Replace

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ACA Repeal and Replace

- Where do things stand right now?
  - Lots of questions
  - No actual legislative changes (yet)
  - Uncertainty about potential administrative action
    - "Ease the Burden" Executive Order
    - "Two for One" Executive Order
    - Non-enforcement policies?
  - Should employers continue trying to comply?

ACA Repeal and Replace

- American Health Care Act (AHCA)
  - Proposed in House but not voted on
  - Seems likely to return in some form
- What would the AHCA change?
  - Employer shared responsibility mandate
    - Does NOT repeal the mandate, but all penalties (sledgehammer and tackhammer) are reduced to $0, effective for 2016
  - Individual mandate
    - Does NOT repeal the mandate, but penalties are reduced to $0, effective for 2016

ACA Repeal and Replace

- What would the AHCA change? (cont.)
  - Cadillac tax
    - Delayed (further) to 2025
  - OTC medications
    - Eliminate the Rx requirement for reimbursement from HSA and FSA
  - HSAs
    - Increase contribution limits to match HDHP MOOP limits
    - Reduce penalty tax on non-qualifying distributions to 10% (v. 20%)
    - Spousal catch-up contributions to same HSA
    - 60-day lookback period for expenses incurred before HSA established

ACA Repeal and Replace

- What would the AHCA change? (cont.)
  - Health FSA
    - Eliminate the dollar limit on employee contributions
  - Other taxes
    - Repeal HIT, additional Medicare tax, and medical device tax
  - Exchanges and tax credits
    - Eliminate 36B credit after 2019 and replace with 36C credit in 2020
      - New 36C credit ($2,000 to $4,000) is adjusted for age but not income; phased out above $75,000 in MAGI
    - Eliminate cost-sharing subsidies after 2019

ACA Repeal and Replace

- What would the AHCA change? (cont.)
  - Exchanges and tax credits (cont.)
    - 5:1 ratio (v. 3:1) for age rating of premiums after 2017
    - Eliminate cap on repayment of APTC after 2017
  - New continuous coverage requirement
    - Premiums would increase by 30% for a plan year, if an individual had a 63-day gap in coverage during the 12-month period before the enrollment date
    - Individual and small group market (Further price pressure on small group insurance premiums?)
  - Significant changes to Medicaid funding approach, ultimately resulting in block grants to states

ACA Repeal and Replace

- What would NOT change under the AHCA?
  - No change in PHSA mandates (e.g., guaranteed issue; age 26; no pre-ex; preventive care; no annual and lifetime limits)
    - A proposed change would have modified the EHB rule to eliminate EHB requirement and AV metal levels but retain MOOP – although this appears to violate the "Byrd Rule" limitations and likely would not have survived in the Senate
  - Tax exclusion for employer sponsored insurance remains 100%
    - A leaked draft of the bill would have capped the exclusion
  - Information reporting under 6055 and 6056 would remain
    - Still need 6055-like reporting to track tax credit eligibility and the continuous coverage requirement

ACA Repeal and Replace

- Where will this all end up?
  - NO WAY TO PREDICT!
  - Apparent bipartisan support for:
    - Repeal of Cadillac tax (although expensive)
    - Retaining full tax exclusion for ESI
    - Retaining many PHSA mandates (e.g., age 26; no pre-ex)
  - If Congress cannot make further progress, the administration may shift its focus to relief through administrative action and non-enforcement

Church Plans

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Advocate Health Care v. Stapleton

- Background
  - Currently pending at the Supreme Court
  - One of several pension plan cases dealing with the scope of ERISA's definition of a "church plan"
- Key Issue
  - Can a plan maintained by a church-affiliated organization be a "church plan" if it was not first established by the church itself?
    - Big issue for church-affiliated schools and health care entities
- Why do we care?
  - May affect ERISA/non-ERISA status of all plans maintained by church-affiliated organizations, including health plans

Taxation of Indemnity Coverage

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Taxation of Indemnity Coverage

- IRS CCA 201703013 (Dec. 12, 2016)
  - Describes three different plans
    - Plan #1: Fixed indemnity plan that pays employees $100 for each medical office visit and $200 for each day in the hospital
    - Plan #2: “Wellness plan” that pays a fixed indemnity cash payment of $100 for a health risk assessment, $100 for participating in a health screening, and $100 for participating in other preventive care activities
    - Plan #3: “Wellness plan” that pays a fixed indemnity cash payment every pay period that the employee is participating in the wellness plan

Taxation of Indemnity Coverage

- CCA 201703013 (cont.)
  - Guidance provided
    - If the premiums for fixed indemnity health coverage are paid **after tax** (i.e., the premium cost is taxable to the employee), all benefits paid under the coverage are **tax-free**
    - If the premiums for fixed indemnity health coverage are paid **pre-tax** (by the employer or through a cafeteria plan), all benefits paid under the coverage are **taxable** "regardless of the amount of any medical expenses incurred by the employee"
    - If the premiums for the wellness plan are paid **pre-tax** (by the employer or through a cafeteria plan), all benefits paid under the coverage are **taxable** "regardless of the amount of any medical expenses incurred by the employee"

Taxation of Indemnity Coverage

- But wait . . . what about Rev. Rul. 69-154?
  - Even when premiums for indemnity coverage are paid pre-tax, reimbursements are only taxable to the extent they exceed actual out-of-pocket medical expenses
  - Example (Rev. Rul. 69-154, Situation 2):
    - Individual covered under indemnity insurance on a pre-tax basis incurs $900 in medical expenses and receives $1,200 in indemnity payments from the insurance coverage
    - Result: The individual is only taxable on the $300 of excess indemnity payments ($1,200 - $900 = $300)
  - CCA 201703013 does not reference or discuss Rev. Rul. 69-154

Taxation of Indemnity Coverage

- So what now?
  - Can we reconcile CCA 201703013 with Rev. Rul. 69-154?
    - Short answer: No
  - But it appears the IRS intends to "clarify" its position
    - Rev. Rul. 69-154 remains good law
    - CCA 201703013 was intended to deal with a particularly abusive arrangement ("wellness plans" run amok)
  - BOTTOM LINE: Appears to be business as usual for taxation of traditional indemnity products, but there is still some risk to employers pre-taxing indemnity coverage (technically need to track any excess indemnity payments)

ACA Section 1557

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ACA Section 1557

- Franciscan Alliance v. Burwell (N.D. Tex. 2016)
  - Decision
    - Nationwide injunction on enforcement of Section 1557 regulations that prohibit gender identity and abortion discrimination
  - Scope of Injunction
    - Applies nationwide (HHS seems to agree)
    - Applies to all types of plans and employers (not just religious)
    - BUT: Only applies to part of the Section 1557 regulations
      - Compliance with remainder of Section 1557 regulations still required (e.g., LEP "taglines" and notices)
    - Does NOT directly affect EEOC's position under Title VII

ACA Section 1557

- Will the EEOC take enforcement action?
  - Some evidence of the EEOC investigating and issuing "right to sue" letters relating to Title VII sex discrimination based on sexual orientation
    - Recent cases have involved exclusions of same-sex spouses from health insurance coverage (e.g., Walmart was sued in a class action)
    - Not aware of any cases yet involving exclusion of sex change procedures and other benefits related to gender transition
    - Cases tend to arise first in the federal context (e.g., discrimination by a federal agency) or in more progressive jurisdictions – but they remain a threat in any jurisdiction
    - Still unclear how the Trump administration will approach the issue

QSEHRAs: Tough Issues

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QSEHRAs: Tough Issues

- Brief Background
  - Special type of HRA available to small employers (non-ALEs)
  - Can reimburse individual insurance premiums and other 213(d) medical expenses
  - Annual benefit amount is capped ($4,950/$10,000, adjusted for inflation)
- Issue #1: No Other GHP
  - Employer offering a QSEHRA may not also offer any other GHP
  - Does this include benefits such as dental and vision coverage?
    - Not clear, but it is hoped that future guidance will say no (anything "excepted" does not count)

QSEHRAs: Tough Issues

- Issue #2: Nondiscrimination Requirement
  - Same benefits must be available to all employees
  - Limited exceptions
    - Employed less than 90 days
    - Part time (under what hours standard?)
    - Seasonal (under what definition?)
  - Inability to exclude otherwise eligible employees may make QSEHRAs unpalatable to certain small employers

QSEHRAs: Tough Issues

- Issue #3: Paying the Employee's Share of the Premium
  - Problem: Even if the QSEHRA covers individual insurance premiums, it likely will not cover 100% of the cost
  - Can the balance be paid through payroll withholding? Pre-tax?
    - Not clear – could create an impermissible "employer payment plan" because it does not meet the requirements for the DOL "voluntary plan" safe harbor
    - Pre-tax is a problem for the same reason (using cafeteria plan to pay employee premiums likely creates an EPP – see Notice 2015-87)
  - Any good solution?
    - Not unless future guidance provides more flexibility

QSEHRAs: Tough Issues

- Issue #4: Relationship to FSAs and HSAs
  - Can a small employer sponsor a QSEHRA and a health FSA?
    - Likely not – health FSA will not qualify as an "excepted benefit"
    - Potential exception for a health FSA that only covers limited scope dental and vision benefits (but remember the "no other GHP" rule)
  - Can an employee covered under a QSEHRA also contribute to an HSA?
    - May be ok if QSEHRA only covers dental, vision, and preventive care benefits (limited purpose) and premiums on HDHPs
    - What if it offers the option to cover premiums on non-HDHPs too? Ok for those employees who elect and HDHP?
      - Not clear (hopefully future guidance will clarify)

QSEHRAs: Tough Issues

- Issue #5: Relationship to State Insurance Law
  - Some states (not KS) say that any employer contribution to the cost of coverage for individual insurance makes that individual coverage subject to the state's small group insurance market rules
    - Would seem to preclude a QSEHRA design that allows for payment of individual insurance premiums
  - States may be reviewing these laws (see, e.g., Minnesota), but it's still a state-by-state analysis
- Issue #6: ERISA Compliance
  - QSEHRAs are not "group health plans" for purposes of Part 7
  - But they are still "employee welfare benefit plans" for purposes of general ERISA rules (e.g., PD, SPD, claims procedure)

Odds and Ends

Autism Cases

- Big Picture
  - There have been numerous cases filed in the last 12-18 months related to limits or exclusions on benefits for individuals with Autism Spectrum Disorders (ASD), such as limits on benefits for Applied Behavior Analysis (ABA)
  - Argument is that limitations or exclusions violate Mental Health Parity requirements
- Lots of Questions
  - Is ASD always a mental health condition?
  - Is ABA a mental health benefit?
  - What about other claimed benefits (e.g., speech, physical, and occupational therapy)?

Autism Cases

- Not Many Answers (Yet)
  - A recent court decision concludes there are enough common legal issues to certify a class action, even if each covered individual's diagnosis and treatment plan must be evaluated
    - Wilson v. Anthem Health Plans (W.D. Ky. Jan. 3, 2017)
  - Other cases have been settled, either by agreeing to modify plans or pay additional benefits
- Takeaways
  - Handle any claims related to autism benefits carefully
    - Use the ERISA claim and appeal process
  - Think carefully about impact of Mental Health Parity requirements

Surrogacy and IVF

- Uddoh v. United Healthcare (E.D.N.Y. Feb. 10, 2017)
  - The facts are what's important here (no final decision yet):
    - Male employee and his same-sex partner applied to plan for IVF, intending to utilize a non-paid surrogate
    - IVF benefits included sperm harvesting, egg harvesting, and implantation
    - Plan conditionally pre-approved coverage
    - When the plan "discovered" both covered individuals were men (they were both listed as male in plan records), it rescinded coverage for female-related services, but agreed to cover male-related services
    - Participant sued claiming $150,000 in damages (apparently because the plan's delay required him to hire a paid surrogate)

Surrogacy and IVF

- Morrissey v. United States (M.D. Fla. 2016)
  - This is a tax case
    - Taxpayer deducted $36,000 in medical expenses for IVF process involving an unrelated surrogate and claimed a tax refund
    - IRS denied the deduction and refund because the expense was not a Code Section 213(d) expense
    - Court agreed with the IRS (no deduction or refund)
- Takeaways
  - Consider clear plan language excluding surrogacy and any related IVF expenses where the surrogate is not a covered person
  - Flag IVF claims for closer review to ensure they are covered expenses and benefits will be tax-free

Questions?

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