

## Labor and Employment 2019 Symposium

### What's New and Cutting-Edge in the Employee Benefits World?

#### Speakers

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#### Materials

1. PowerPoint Presentation

# ahead of the curve

Workplace law trends for today and beyond.  
Come up to speed to stay ahead.



## What's New and Cutting Edge in the Employee Benefits World

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## Topics Covered



- **Assorted health and welfare topics**
  - **Benefits for millennials**
  - **Health coverage trends**
  - **Targeting prescription drug spending**
  - **Mental health and substance abuse treatment**
  - **Future of the ACA ...?**
  - **Association health plans**

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## Topics Covered

- **Assorted retirement plan topics**
  - **MEPs**
  - **Electronic participant communication**
  - **DOL and IRS audits**
  - **Pension plan de-risking**
  - **Cryptocurrency**
  - **Fiduciary developments**

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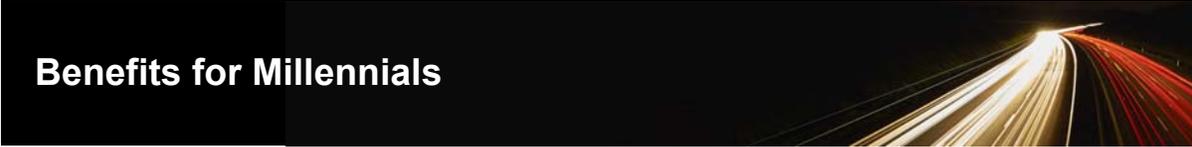
## Benefits for Millennials

- **MILLENNIALS: Born 1981-2000 (18-37 years old)**
- **Student loan repayment help**
  - **Student loan debt is second only to mortgage debt**
  - **Average student loan debt for the class of 2017 is \$39,400**
  - **Abbott instituted program to provide a “student loan non-elective contribution” to employees who pay at least 2% of income towards student loan repayment**
  - **Other employers make direct payments to an employee’s student loan servicer, although this results in taxable income to employees**

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## Benefits for Millennials

- **Socially Responsible Investing (or incorporating environmental, social and governance – ESG - factors into investing)**
  - A 2017 Morgan Stanley survey found that 86% of Millennials are somewhat interested in ESG funds
  - But see DOL Field Assistance Bulletin 2018-01 (issued April 23, 2018):
    - “fiduciaries must not too readily treat ESG factors as economically relevant to the particular investment choices at issue when making a decision.”
    - For participant directed investments in 401(k) Plans, the DOL noted that a “prudently selected, well managed, and properly diversified ESG-themed investment alternative could be added to the available investment options on a 401(k) plan platform without requiring the plan to remove or forgo adding other non-ESG-themed investment options to the platform.”

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## Benefits for Millennials

- **Benefits for pet owners (leave to care for pets, pet insurance)**
- **Expanded parental leave**
- **PTO “buy up” (“buy” more than the granted PTO)**
- **Robust “wellness” programs: mindfulness, meditation, gym memberships**
- **Do millennials want to be employees at all?**
  - Rather be independent contractors participating in the “gig economy”?
  - Difficult to provide benefits to non-employees

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## Health Coverage Trends

- “On demand” health insurance: employer provides a certain basic level of benefits, and employees can “buy up” if they need more (e.g. for knee surgery)
- Incentives or requirements for employees or dependents to only go to certain “top performing” doctors/clinics/hospitals
- “Voluntary” benefits – e.g. disease specific coverage, or indemnity policies
- Telehealth
- HRAs for individual policies (only works for smaller employers)
- Private exchanges

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## Targeting Prescription Drug Spending

- The Trump Administration, as well as Democrats and Republicans, have decided that RX spending is an easy target
- Rebates are a big issue
- HHS OIG proposed rule on prescription drug rebate safe harbors
  - Removes rebates from the current discount safe harbor from liability under the Anti-Kickback Statute; and
  - Creates two new, more narrow safe harbors to address:
    - Point-of-sale drug rebates; and
    - Service fees paid by pharmaceutical manufacturers to pharmacy benefit managers (“PBMs”)

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## Targeting Prescription Drug Spending

- **Proposed** legislation requiring rebates to be provided at POS for private health coverage (Introduced by Congressman Braun – Indiana Republican)
- **Applies to all markets:**
  - Individual
  - small and large group insured; and
  - self funded plans
- **Effective January 1, 2020 (!)**

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## Targeting Prescription Drug Spending

- **Proposed legislation: Prohibits group health plans and issuers offering group or individual coverage (including PBM that provides service to plan or issuer) from receiving a reduction in price or other remuneration with respect to any prescription drug received by an enrollee UNLESS**
  - Reduction in price is reflected at the point-of-sale to the enrollee; and
  - Any other remuneration is a flat fee-based service fee that a drug manufacturer pays to a PBM for services provided to the manufacturer, if certain conditions established by the Secretary are met, including disclosure of fees to plans and issuers

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## Mental Health and Substance Abuse Treatment

- The Opioid crisis, among other reasons, is causing employers to beef up MH/SA treatment
- Some are using EAPs
- Must avoid, however, providing “significant benefits in the nature of medical care” under the EAP

## Mirror, Mirror, On the Wall...

- **Future of the ACA?**
  - Texas v. Azar - individual mandate un-constitutional following tax reform
    - Critical component of the ACA
    - Inseverable
  - ACA declared unconstitutional but remains enforceable
  - Appealed to Fifth Circuit
  - Trump has weighed in for complete repeal (and a replace after 2020?)
- **Save American Workers Act**

## Association Health Plans

- **On June 21, 2018, Department of Labor (DOL) published final rules expanding availability of AHPs**
  - Purpose of AHP is to allow small employers to band together and obtain coverage in large group insurance market, which generally imposes fewer coverage requirements
  - According to DOL, AHPs will “expand employer and employee access to more affordable, high-quality coverage”
- **However, AHPs are MEWAs and therefore are subject to regulation under state laws, and they are still subject to certain other federal mandates**

## Association Health Plans

- **New final regulations expand existing test to determine whether association is employer plan sponsor of group coverage by allowing any size employer, including working owner, to join AHP if:**
  - Employers are in same trade, industry, line of business, or profession; OR
  - Each employer has principal place of business in same region that does not exceed boundaries of single state or metropolitan area (even if metropolitan area includes more than one state)
- **This permits even those employers from disparate industries to form an AHP, so long as geographic region requirement is met**
- **Still difficult to be a self insured MEWA (and still prohibited in most states)**

## MEPs

- Multiple employer plans on the retirement plan side
- President Trump wants to promote the use of MEPs for small employers (August 31, 2018 Executive Order)
- Proposed regulations provide clarity regarding the types of “bona fide” groups or associations of employers and professional employer organizations (“PEOs”) that can sponsor MEPs
- Also, MEP-related bills, like the Retirement Enhancement and Savings Act and the Family Savings Act, contain more generous provisions permitting open MEPs and eliminating the one-bad apple rule

## Electronic Participant Communication

- Trump’s 8/18 Executive Order - Make plan disclosures more understandable and useful and reduce costs and burdens of production and distribution
- Proposed Receiving Electronic Statements to Improve Retiree Earnings (RETIRE) Act allows automatic enrollment in electronic delivery for plan communications, while providing an opt-out option for employees who prefer to continue receiving paper documents
  - **Must result in “effective access” via:**
    - direct delivery of the material to an electronic address;
    - posting of material to a website to which access has been granted and proper notice of the posting has been provided; or
    - any other electronic means reasonably calculated to ensure actual receipt.
- **Must be able to modify delivery preference any time, can elect to receive paper documents at no additional cost and annual paper notices describing delivery options**



## DOL and IRS Audits

- **Our experience shows that there is an increase in audits**
- **IRS looking at tax qualification issues**
- **DOL looking at participant-related issues**
  - **Fiduciary issues, such as monitoring investment options and associated fees, training**
  - **Missing participants – use the new IRS guidance**
  - **Late contributions**
- **Two simple tips for responding to audits**
  - **Be organized and timely**
  - **Ask for extensions if needed**

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## Pension Plan De-Risking

- **Over the last several years, employers have been taking advantage of interest rates to “de-risk” their pension plans to avoid volatility, interest rate and longevity risks**
  - **Increase automatic cash out limit and implement lump sum window programs**
  - **Buy annuity contracts**
- **Previously could only pay out vested terminated employees, not retirees in pay status**
- **IRS changed its mind in March, but beware!**
  - **Nondiscrimination, funding based benefit limits, spouse consent, adverse selection**
  - **Participant disclosures of consequences of electing a lump sum**

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## Cryptocurrency

- **New investment option for retirement plans in the digital assets universe**
  - Fund is structured like a traditional venture capital fund that invests in the equity of companies in the blockchain and digital assets industry and a small percentage in liquid cryptocurrencies, such as bitcoin
- **Use of blockchain technology for authenticating securities transactions and tracking securities ownership**

## Fiduciary Developments

- **New lawsuit charging that the infrastructure fee mutual funds pay to be in Fidelity's stable of investments for retirement plans was not properly disclosed and prohibited under ERISA**
- **Health plan fiduciaries have same duties as retirement plan fiduciaries**
  - **Monitor health plan fees and employ a good fiduciary process**
- **Can there be too many investment options in a retirement plan?**
- **Pay attention to the plan's terms**



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