

Labor and Employment 2019 Symposium

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

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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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