

Preventive Medicine: Avoiding Liability in the Rapidly Changing Healthcare Industry

Debra J. Berns

UnitedHealth Group Incorporated
Chief Compliance, Ethics & Privacy Officer
Minnetonka, Minnesota

Jennie P. Carlson

U.S. Bancorp
Executive Vice President, Human Resources
Minneapolis, Minnesota

Andrew Holly

Dorsey & Whitney LLP
Partner
Minneapolis, Minnesota
(612) 340-8830
holly.andrew@dorsey.com

Robert A. Seng

Dorsey & Whitney LLP
Partner
Minneapolis, Minnesota
(612) 492-6071
seng.bob@dorsey.com

William R. Stoeri

Dorsey & Whitney LLP
Partner
Minneapolis, Minnesota
(612) 343-7942
stoeri.bill@dorsey.com

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1. PowerPoint

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Dorsey & Whitney LLP

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Macro trends in healthcare

- **Consumer issues are rising to the front**
- **The landscape is changing for insurers**
- **Employer health plan design is changing ... and not just in response to ACA**
- **Tax policy continues to loom large**
- **New models for payment and delivery**
- **Volume of regulation continues to grow**

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Affordable Care Act Regulatory Issues

- Employer mandate
- Cadillac tax
- Mandated benefits
- State waivers

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Affordable Care Act Litigation Issues

- Religious exemption litigation continues
- Retiree Medical Plans under ERISA
 - ERISA § 732(a)(1)
 - *King v. Blue Cross Blue Shield of Illinois*, 2015 WL 2385684 (S.D. Cal. May 13, 2015)
- Workforce Realignment
 - ERISA § 510; ACA § 1558
 - *Marin v. Dave & Busters*, Case No. 15-cv-3607 (S.D.N.Y. May 8, 2015)

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Affordable Care Act Litigation Issues

- **Mandated Benefits Litigation**
 - Benefits Litigation
 - Actuarial Value
 - Non-Discrimination and Utilization Review
- **Medical Loss Ratio Litigation**
 - *U.S. v. Farha et. al.*, (M.D. Fla. 2011)
 - *MRI Scan Center v. Cigna et. al.*, (S.D. Fla. 2013)
 - *Amer. Chiropractic Ass’n v. Cigna et. al.*, (E.D. Pa. 2012)
- **Provider exclusions from networks:**
 - Antitrust, “Any Willing Provider,” and other state law theories
 - ACA § 2706

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Discrimination: Wellness Plans

- **Overlapping and inconsistent regulation by the Department of Labor (HIPAA) and the Equal Employment Opportunity Commission (ADA)**
- **Recent court challenges include Orion Energy Systems, Flambeau, Inc., and Honeywell**
- **EEOC issued regulations in response to pressure from Congress**

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Discrimination: Mental Health Parity

- 2008 Mental Health Parity and Addiction Equity Act
- Quantitative Treatment Limits – Financial Restrictions and Treatment Limitations
- DOL Regulations – Non-Quantitative Treatment Limitations
- Significant Parity Litigation
 - *NYSPA v. UnitedHealth Group*, 798 F.3d 125 (2nd Cir. 2015)
 - *APA v. Anthem Health Plans*, No. 3:13-cv-00494 (D. Conn. Apr. 10, 2013)
 - *S.S. v. Microsoft Corp. Welfare Plan*, No. 14-cv- 351 (W.D. Wash.)
 - *Harlick v. Blue Shield of Cal*, 686 F.3d 699 (9th Cir. 2012)
- Future Challenges: Residential Treatment/Custodial Care

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Discrimination: Affordable Care Act

- ACA § 1557
- New HHS Regulations
- How far do these reach?

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Discrimination: Autism Spectrum Litigation

- **Autism Treatment Litigation**
 - *Z.D. v. Group Health Co-op*, W.D. Wash. No. 2-11-cv-01119
 - *McHenry v. Pacifisource Health Plans*, 679 F. Supp.2d 1226 (D. Or. 2010)

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ERISA Health Care Litigation

- **Out of Network Disputes**
 - Plan Reimbursement Rates
 - Benefits Coverage
 - Claims Processing
 - Recoupment Practices
- **Mass Actions by Providers**
- **Health Plans Respond**
 - Overpayment Claims
 - Waiver of Co-Pays
 - Fraud/Misrepresentation Claims
- *E.g. Aetna Life Insurance Co v. Bay Area Surgical Management, LLC*: the \$66,100 “correction of bunion” charge
- **Employers are drawn into the mix**

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ERISA Health Care Litigation

- **Disputes raise innumerable legal issues**
 - Standing of Third Party Administrators
 - Compliance with ERISA's claims process
 - Preemption of state law claims
 - ERISA estoppel claims
 - Effect of plan anti-assignment clauses
 - Scope of assignments to medical providers
 - Remedies under ERISA 502(a)(3)
 - ERISA breach of fiduciary duty claims
 - Plan documents: SPDs vs. Plan documents

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ERISA Health Care Litigation: What can be Done?

- Review Plan Documents/SPDs
- Review Agreements with TPAs
- Consider Anti-Assignment Clauses
- Review Claims Procedures
- Plan document requests
- Arbitration clause?
- Preclude Class Actions?

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Privacy & Big Data

- Big data plays an increasingly large role in plan design and cost containment
- The HHS Office of Civil Rights has been looking closely at technology used to store data—and entering into settlement agreements
- ERISA lawyers on both sides are starting to think about whether plan data is a “plan asset” subject to numerous rules under ERISA
- HIPAA and GINA issues common
- Employee commitments in communications easily rise to the level of enforceable contractual commitments around data handling

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Antitrust Litigation and Review

- Health care focus for federal antitrust regulators
- Rush to consolidate because of ACA, market forces
- DOJ/FTC challenges to hospital, provider mergers
 - Hospital Merger Cases
 - *Saint Alphonsus Medical Center et al. v. St. Luke's Health System*, -- F.3d --, 2015 WL 525540 (9th Cir. Feb. 10, 2015)
- Insurer Consolidation
- Narrow Networks
- Vertical Combinations

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Medical Provider Employment Issues

- Seeing opportunity, plaintiffs lawyers are starting to hold themselves out as expert counselors to employees in the healthcare field
- Healthcare workers filed 359 petitions for union representation in 2014, up from 314 in 2013
- Nearly 80% of elections in 2014 resulted in union recognition
- Pharmacy workers organized Target's first ever union in Brooklyn this year

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Steps to Avoid Liability

- Keep an eye on the policy and legislative landscape as you work to change plan design and control costs
- Know where your data resides and who is watching over it
- Review ERISA plan documents, consider relevant changes, review relationship with TPA or insurer, and process for evaluating requests from participants or providers
- Focus on employee classification
- Pay attention to the little things—SBCs, notices of creditable coverage, stability periods, etc.

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