Third Annual Forum on Employer Sponsored Benefits

June 7, 2018

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Thursday, June 7, 2018

Contents

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Agenda

Overview

Dorsey Benefits & Compensation Group will conduct its third annual forum on issues affecting employer sponsored health and welfare benefits. Sessions will focus on practical advice and guidance.

8:15 am – 8:55 am CT **Registration and Breakfast**

8:55 am – 9:00 am CT **Welcome** *(**Liz Deckman**, Dorsey & Whitney LLP)*

9:00 am – 10:00 am CT **Health Plan Claims and Litigation**

***Melinda Maher**, **Andrew Holly** and **Kirsten Schubert**, Dorsey & Whitney LLP*

Litigation involving health plans and benefits continues to grow at a fast pace. The litigation can range from class actions to 'mass actions' raised by medical providers seeking benefits on behalf of their patients, to breach of fiduciary duty claims. Melinda, Kirsten, and Andrew will review recent litigation, discuss trends in litigation, and steps employers can take to limit the risk of litigation and respond to a law suit.

10:05 am – 10:55 am CT **Disability Claims, Leaves and Accommodations**

***Tim Goodman** and **Marilyn Clark**, Dorsey & Whitney LLP*

The DOL's new disability regulations became effective April 1. In addition, there continues to be a stream of development of state and local leave requirements. This session will address these developments, the interplay between federal, state, and local laws (including the FMLA, the ADA, and workers' compensation), and look at the impact of leave on other benefit plans.

11:00 am – 12:00 pm CT **Hot Topics in Benefits**

***Liz Deckman**, **Holly Fistler** and **Hallie Goodman**, Dorsey & Whitney LLP*

Liz, Holly and Hallie will discuss new developments in the benefits world. Topics will include voluntary benefits, COBRA compliance and plan administration strategies in light of recent case law, and wellness plan and mental health parity updates. Additional topics to be added as developments break!

Third Annual Forum on Employer Sponsored Benefits
Speaker Biographies

Marilyn Clark
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Marilyn is a Partner in Dorsey's Labor & Employment Group. She regularly assists employers of all sizes with a wide array of issues arising under federal, state, and local employment laws. Marilyn understands the import of balancing legal constraints with practical business needs and goals. With former management and in-house experience, Marilyn is uniquely qualified to understand the multi-faceted challenges that arise in the modern workplace and to guide employers to appropriate solutions. She helps employers understand not only the potential legal consequences of employment decisions, but also the practical implications of such decisions. Through exercising both legal and practical expertise, Marilyn works with her clients to reach the best decisions for their businesses in a wide range of circumstances. When workplace disputes are unavoidable, Marilyn is an experienced litigator with a strong record of resolving threatened court actions, agency charges, and other disputes in favor of her clients. Marilyn's thoughtful approach to evaluating cases, coupled with strong negotiating skills, have contributed to a history of multiple zero-sum settlements reached at very early stages, saving her clients substantial time and money when faced with threatened litigation. Marilyn has particular expertise in wage and hour matters, and she has successfully defended employers against class-wide claims for alleged unpaid overtime and misclassification of workers. She also has conducted multiple wage and hour audits, particularly with regard to exemption status. Marilyn additionally has expertise in leave, accommodation, and workers' compensation matters, and she regularly offers practical guidance to help employers effectively manage complex issues and avoid liability in these areas. She has presented and offered numerous training sessions on the foregoing topics. Marilyn also is firmly committed to assisting non-profit organizations as well as individuals without resources who require legal assistance. She has worked on a variety of pro bono matters during her years at the firm, including serving on a team representing clients on death row in Texas. This commitment is an extension of her work during law school, where she received a CALI Award for her work representing death-row inmates in Cornell's capital punishment clinic.

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Liz is a Partner in Dorsey's Benefits & Compensation Group. She has designed and implemented all types of tax-qualified retirement plans and trusts, including Section 401(k), profit sharing, money purchase, employee stock ownership (ESOP), cash balance, and defined benefit plans. Liz also drafts and implements health and welfare plans and advises employers on related issues, such as COBRA, health care reform, and fiduciary issues. She also works with deferred compensation plans and IRC Section 409A. Liz's work covers issues such as: the effect of new laws on plans, nondiscriminatory coverage and contribution requirements, limitations on benefits, IRS determination-letter applications and plan defect-correction programs, plan terminations, and early-retirement window benefits. She also assists clients in the employee benefits aspects of mergers and acquisitions.

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Holly is a Senior Attorney in Dorsey's Benefits & Compensation Group. She helps clients achieve their business goals through designing and maintaining employee benefit plans. Holly advises clients on ERISA, tax and related issues affecting qualified retirement plans, non-qualified retirement plans, and health and welfare plans. Holly regularly assists clients with plan documents and administration, as well as with navigating compliance issues with the Affordable Care Act, HIPAA and other changing laws in this field. She devotes a substantial portion of her practice to advising public and private companies on their employee benefits issues.

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Hallie is an Associate in Dorsey's Benefits & Compensation Group. She counsels large companies, closely held businesses, nonprofits, and government entities on a wide range of employee benefits and executive compensation matters. Hallie regularly advises clients on qualified and nonqualified retirement plans and provides counsel on health and welfare plans, benefit plan governance, HIPAA privacy and security, and a variety of executive compensation arrangements. Hallie advises her clients on proactive strategies to navigate the regulatory complexities of employee benefits and executive compensation, ensuring compliance with the Internal Revenue Code, ERISA, and other applicable laws. By developing a close understanding of her clients' businesses, Hallie helps them to develop innovative benefit programs that satisfy their legal obligations, promote their business goals, attract and retain talented employees, and support the wellbeing of employees.

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Tim is a Partner in Dorsey's Benefits & Compensation Group. Tim works with employers on medical plans, retirement plans, executive compensation, and a wide range of benefits. Tim works with a broad array of employers, with a special focus on assisting cooperatives, agribusiness companies, hospitals and health care entities, and financial institutions. Employers have Tim provide advice on health care reform (the ACA), wellness plans, and other welfare plan matters (ranging from cafeteria and health FSAs to severance and tuition plans). With respect to health care reform, Tim advises employers on the new fees (from the employer shared responsibility fee to the Cadillac tax), assists them in preparing for reporting on Form 1095-C, and explains the new requirements ranging from notice requirements to plan mandates. Tim recognizes the complex nature of the rules governing retirement plans and works with employers to review operations, address errors, and help employers maintain the tax-qualified status of their plans. Tim advises employers on qualified and nonqualified retirement plans (including defined benefit, 401(k), 403(b), 457(b), and 457(f) plans, and section 409A).

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Andrew is a Partner in the Trial Group. He has extensive experience as lead counsel defending fiduciaries, sponsors, and insurers in ERISA fiduciary class actions, including cases involving company stock, 401(k) plan fees, defined benefit plans, pension age discrimination claims, Taft-Hartley pension plans, prohibited transaction claims, claims for plan benefits, executive compensation claims, and other fiduciary and plan investment matters. Andrew also handles various other complex civil matters, including tax disputes, and various complex civil matters. Andrew has handled dozens of jury and court trials, arbitrations, regulatory matters, and other evidentiary hearings. In addition to his primary work as defense counsel, he has also litigated various multi-million dollar plaintiffs' actions to successful trial judgment or settlement. A prolific speaker and writer, he has twice been named a "rising star" by *Minnesota Law and Politics* Magazine.

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Melinda is a Partner in Dorsey's Benefits & Compensation Group. Her experience includes working with entities involved with health care on compliance with ERISA, COBRA, HIPAA, Medicare Secondary Payer rules, Federal and State health care mandates, and the Patient Protection and Affordable Care Act (Health Care Reform). Melinda's practice focuses on employee health and welfare plans.

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Kirsten is a Partner in Dorsey's Commercial Litigation Group. She helps clients large and small navigate all aspects of complex commercial litigation. Kirsten has a broad range of experience defending commercial clients in nationwide class actions, ERISA litigation, shareholder disputes, SEC and DOJ investigations, and other types of fiduciary and contract disputes. While Kirsten enjoys representing a diverse client base ranging from telecommunications companies to individual small business owners, Kirsten is particularly well-versed on the unique needs of clients in the health care and financial services industries. Kirsten has also devoted a significant portion of her practice to pursuing pro bono habeas claims on behalf of death row prisoners and immigrant detainees.

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Health Plan Claims and Litigation

Andrew Holly
Melinda Maher
Kirsten Schubert

Dorsey & Whitney LLP

What We Will Cover

- What the providers are doing and how to respond
- Types of health plan claims and litigation we are seeing:
  - Class Actions
  - Mass Actions by Medical Providers Against Group Health Plans & Providers
  - Breach of Fiduciary Duty claims
  - ERISA 510 Claims
  - Mental Health Parity claims
  - HIPAA Privacy claims
- What are Courts and Regulators doing?
  - Disability plan claims regulations
  - Retiree medical

Aggressive Providers

- "Fee forgiving" – waiving of cost sharing by providers to incent participants to use the out of network provider
- Aggressive letters requesting documents under ERISA and making threats
- For example, dialysis providers aggressively pursuing payors primary to Medicare

How to Combat Aggressive Providers

- How to respond to threatening provider letters
- Anti-assignment clauses
- Forum selection clauses
- Where is the discretionary authority to decide claims and appeals?
  - who is deciding and do they have the proper authority?
  - to increase the likelihood of deferential review by a court, delegation of discretionary authority should be done clearly and in accordance with the terms of the plan
  - final decisions should be made only by parties to whom discretionary authority has been appropriately delegated
- Ensure proper plan documentation
- Coordination of benefits language

The Health Plans Strike Back

- Recoupment Actions
- Fraud and Conversion Claims
- Antitrust Lawsuits

Class Actions

- Cigna hit with 2 class actions (in PA and CA) alleging collusion with American Specialty Health (ASH) to misappropriate millions of dollars each year and falsification of Explanation of Benefits (EOB) forms to disguise charges from ASH.
  - Primary legal claim is ERISA breach of fiduciary duty
  - CIGNA uses ASH to build a network of providers and administer claims
  - Allegation is the ASH and CIGNA administrative expense billed to members as medical claims costs
    - Resulting in overcharges to participants
    - Resulting in false Minimum Loss Ration (MLR) calculation
- PBM class actions: Alleges RICO and ERISA claims against various PBMs regarding various practices including collecting cost sharing from participants in excess of amounts paid for drugs

ERISA Breach of Fiduciary Duty Claims

- **Frye v. Metropolitan Life Ins. Co., 2018 WL 1569485 (E.D. Ark. 2018)**
  - **Employer and insurer failed to notify employee that her son had aged out of dependent life and AD&D coverage and continued to take premiums.**
  - **Court found that it was a breach of fiduciary duty to use flawed administrative procedures that failed to confirm eligibility at enrollment, thereby allowing employees to enroll dependents who either were ineligible or became ineligible.**
  - **The court held that the appropriate remedy was a surcharge against the employer and insurer equal to the amount the employee would have received if coverage had been in force when her son died.**

ERISA Interference Claims

- **Stein v. Atlas Indus., Inc., 2018 WL 1719097 (6th Cir. 2018)**
  - **The Sixth Circuit has ruled that a terminated employee may pursue retaliation and interference claims against his former employer under ERISA § 510, reversing the district court's summary dismissal of the case.**
  - **The employee was fired after he failed to report for work (or call in) during the three days after his doctor released him for light-duty work following knee surgery.**
  - **The employee argued that his firing was motivated, at least in part, by the employer's desire to avoid liability under its self-insured health plan for large medical bills incurred by the employee's son.**

Mental Health Parity

- There has been an uptick in litigation activity under the Mental Health Parity Act (MHPA)
- For example, in two different 2018 cases out of the Southern District of New York, the court found in favor of the plaintiff and against the group health plans in MHPA actions:
  - In one case, the group health plan's exclusion of residential mental health treatment services was improper even before final mental health parity regulations specifically required them to be covered to the same degree as skilled nursing facility services.
  - In another case, the court refused to dismiss a claim from an individual with anorexia nervosa who alleged an MHPA violation arising from a failure to cover nutritional counseling for the plaintiff, but covering it for non-mental-health conditions such as diabetes.

HIPAA Privacy Claims

- Fresenius Medical Care Holdings, Inc.: Resolution Agreement (Jan 24, 2018) and HHS Press Release (Feb. 1, 2018).
  - Fresenius Medical CareHoldings reported five "small" HIPAA Privacy breaches to the Office of Civil Rights (OCR) of HHS.
  - The breaches concerned stolen or missing hard drives, laptops, and USB drives.
  - The breaches triggered a "compliance review" by OCR, which found other HIPAA violations (e.g. insufficient policies).
  - This resulted in a $3.5 million penalty paid to OCR and a two year Corrective Action Plan for Fresenius

HIPAA Privacy Claims

- **U.S. v. Luthra, 2018 WL 1783799 (D. Mass. 2018)**
  - **A federal trial court refused to dismiss criminal charges against a physician accused of "knowingly" disclosing patients' protected health information (PHI) in violation of HIPAA's privacy rule.**
  - **The physician, frustrated by insurers' repeated coverage denials of a brand-name drug for which cheaper generic alternatives were readily available, enlisted the help of a sales representative of the brand-name drug manufacturer to complete prior authorization forms for submission to insurers.**
  - **The federal government brought criminal charges against the physician, alleging that she knowingly disclosed PHI to the sales represenative without proper authorization.**
  - **The court denied the physician's motion to dismiss the indictment, rejecting arguments that the disclosures were permitted for treatment, payment, or health care operations.**

Disability Plans

- **More stringent disability claims regulations**
- **Went into effect April 1, 2018**
- **May apply to any plan providing benefits or rights contingent on a finding of the claimant's disability (e.g., full vesting under a pension plan or waiver of life insurance premiums under a life insurance plan)**
- **Any plan that provides benefits based on its own disability determinations must adhere to procedures (but DOL advised that procedures do not apply to AD&D)**

Retiree Medical

- **CNH Industrial N.V., v. Reese, 583 U.S. ___ (2018).**
  - **US Supreme Court again reversed the 6th Circuit and rejects and use of " Yard Man" inferences**
  - **While the lawsuit was pending, the Supreme Court decided M&G Polymers USA, LLC v. Tackett, holding that courts must interpret collective bargaining agreements according to "ordinary principles of contract law."**
  - **The Supreme Court has now addressed the vesting of retiree health benefits twice in three years, and the law is clear—lifetime vesting cannot be inferred from a collective bargaining agreement; rather, it must be expressly written into the agreement.**
  - **Making it easier to terminate retiree medical benefits even if they were agreed upon in a Collective Bargaining Agreement**

Questions

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Disability Claims, Leaves and Accommodations Update

June 7, 2018

Marilyn Clark
Tim Goodman
Dorsey & Whitney LLP

Overview

- Disability claims
- Leave law overview
  - Family and Medical Leave Act ("FMLA")
  - Americans with Disabilities Act ("ADA")
  - Workers' Compensation laws
  - State & local leave laws
  - Other laws to bear in mind
- Tricky intersections and other trouble areas
- Potentially problematic policies
- Practical tips

Disability Claims

- **Plans, programs and ERISA**
  - ERISA generally applies to employer retirement, health, and welfare benefit plans
    - Examples
      - Retirement plans (401(k) plans, defined benefit plans, etc.)
        - » May provide for vesting, distribution, or continued accrual of benefits upon disability
      - Disability plans (long term disability and insured short term disability plans)
      - Nonqualified plans (top-hat disability plans and retirement plans)
  - ERISA provides exclusion for salary continuation plans
    - If employer's short term disability coverage is salary continuation plan, then ERISA does not apply
    - See 29 C.F.R. § 2510.3-1(b)
- **Status matters because if ERISA applies, then need to comply with ERISA's claim procedures**

Disability Claims

- **ERISA claim procedures**
  - Plans covered by ERISA are required to have claim procedure
    - See 29 U.S.C. § 1133 (ERISA § 503)
    - See 29 C.F.R. § 1260.503-1
  - Claim procedures are to be described in applicable summary plan description
  - In general, if employer follows reasonable claim procedures, courts grant deference to decision made
    - Failure to follow claim procedures may result in
      - No deference
      - Expedited appeals to court
- **New disability claim procedures**
  - Meant to address potential conflicts of interest in determining whether individual had disability

Disability Claims

- **ERISA's new disability claim procedures**
  - **Proposed November 18, 2015; finalized December 19, 2016**
    - **See *Claims Procedure for Plans Providing Disability Benefits*, 81 Fed. Reg. 92136 (Dec. 19, 2016)**
    - **See 29 C.F.R. § 2560.503-1**
  - **Original effective date: January 1, 2018**
  - **Delayed effective date: April 1, 2018**
    - **See DOL News Release, Jan. 5, 2018 (https://www.dol.gov/newsroom/releases/ebsa/ebsa20180105)**
- **Apply where plan administrator is making determination on whether individual is disabled**
  - **If plan bases disability determination on decision by third party (such as insurance company for long term disability plan or Social Security Administration determination), then regular claim procedures for type of plan apply instead of special disability claim determination rules**

Disability Claims

- **Disability claims rule changes – overview**
  - **Notice and disclosure enhancements**
    - **Additional information in denial letters**
    - **Discussion of decision**
    - **Access to claim file and internal protocols**
    - **Notice of new evidence and opportunity to respond before adverse decision**
    - **Culturally and linguistically appropriate notices**
  - **Process enhancements**
    - **Independence and impartiality of claim adjudicators**
    - **Strict adherence to claims rules / deemed exhaustion**
    - **Rescissions treated as adverse benefit determinations**

Disability Claims

- **Disability claims rule changes – overview (continued)**
- **Claim denial letters**
  - **All claim and appeal denial letters must:**
    - **Include statement that claimant is entitled to receive, upon request and free of charge, reasonable access to, and copies of, all documents records, and other information relevant to claim**
    - **Previously, only required for appeal denial letters**
  - **All appeal denial letters must describe any contractual limitation period applicable to claimant's right to bring action, including calendar date on which contractual limitation period expires**
  - **Explain basis for disagreeing with or not following:**
    - **Views of medical and vocational professionals treating claimant**
    - **Views of medical or vocational experts whose advice was obtained by plan, regardless of whether plan relied upon views**
    - **Social Security Administration determination**

Disability Claims

- **Disability claims rule changes – overview (continued)**
- **Culturally and linguistically appropriate notices**
  - **Plans must furnish adverse benefit determinations (both initial and on appeal) in "culturally and linguistically appropriate manner"**
    - **Similar to requirements for medical benefit claims**
    - **Where claimant resides in U.S. county with 10% or more of population literate only same non-English language, claim and appeal denial notices must include statement "prominently displayed" in that language identifying how to access language services provided by plan**

FMLA Refresher

- **FMLA provides unpaid leave for employee's own or family member's serious medical condition**
  - **Up to 12 weeks in 12-month period**
    - **Rolling vs. calendar year**
    - **Employer may select OR most beneficial to employee**
  - **Block or intermittent (where medically necessary)**
  - **Medical certifications**
    - **Second opinions**
    - **Recertification**

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FMLA Refresher

- **FMLA protects employees from "interference" with exercising FMLA rights**
  - **Employer <u>cannot</u> deny employees their right to leave**
    - **Provide notice of rights**
    - **Designate leave as FMLA**
  - **Employer <u>cannot</u> use FMLA leave against employee**
    - **Negative attendance treatment**
    - **Other adverse treatment**

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ADA Refresher

- **ADA prohibits employment discrimination "against a qualified individual on the basis of disability"**
  - **42 U.S.C. 12112(a)**
- **Individual has "disability" when s/he:**
  - **Has physical or mental impairment that substantially limits one or more major life activities;**
  - **Has record of such impairment; or**
  - **Is regarded as having such impairment**

ADA Refresher

- **Employees must be "qualified" to be protected by ADA**
  - **"can, with or without reasonable accommodation, perform the essential functions of such position"**
- **Failure to provide reasonable accommodation is discrimination, unless accommodation would impose undue hardship**
  - **Interactive process to determine accommodation**
- **ADA may require employer to suspend or modify its policies (<u>including attendance</u>) to accommodate disabled worker**

Workers' Comp Refresher

- **Workers' compensation statute provides exclusive remedy for on-the-job injuries**
- **Employers are prohibited from obstructing employee rights to benefits (Minn. Stat. § 176.82)**
  - **Cannot discharge or threaten to discharge in retaliation for seeking benefits**
  - **Cannot intentionally obstruct employee benefits**
  - **Must offer continued employment where available within employee's physical limitations**

State & Local Sick Leave

- **Minneapolis and Saint Paul**
  - **Effective July 1, 2017, Sick and Safe Time Ordinances create access to time off work for employees across these cities**
  - **Applies to full-time, part-time, and temporary employees, as well as paid interns, who work at least 80 hours per year within city**
  - **Employees accrue 1 hour of leave for every 30 hours worked**
  - **Employers may cap annual accrual at 48 hours and total "bank time" accrual at 80 hours**
  - **Leave may be used for mental or physical health condition of employee or family member (broadly defined); absences due various issues relating to domestic abuse, sexual assault or stalking; and for various public health and weather-related issues**
- **PTO plan can satisfy ordinance requirements if plan**
  - **Provides employees at least as much leave as ordinance, and**
  - **Allows employees to use leave for all of reasons and under same conditions required by ordinance**

State & Local Sick Leave

- **Local paid sick-leave requirements continue to expand**
  - **States**
    - Arizona
    - California
    - Connecticut
    - Maryland
    - Massachusetts
    - Oregon
    - Vermont
    - Washington
  - **Counties and Cities**
    - Austin, TX
    - Berkeley, CA
    - Cook County, IL
    - Washington, D.C.
    - St. Paul, MN
    - Minneapolis, MN

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State & Local Sick Leave

- **Pushback**
  - Sixteen states have enacted laws that preempt city and county ordinances on wage and/or leave issues
    - (*Source: National Partnership for Women & Families*)
  - State laws effectively bar local governments from adopting their own workplace rules
- **Takeaway for employers with multi-state operations**
  - Two broad options
    - Set policies state-by-state or locality-by-locality
    - Find common accrual rate that satisfies most generous state or locality where you do business, then apply everywhere

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Other Laws to Bear in Mind …

- Military leave laws
- Voting and jury duty leave laws
- Pregnancy Discrimination Act

Benefits and Leaves

- Medical leaves raise benefits issues
  - Health plans
    - Continued coverage
    - COBRA notices
    - Hours counting for ACA
  - Retirement plans
    - Loans
    - Hours counting for eligibility and vesting service
    - Potential full vesting upon disability
    - Potential distribution upon disability
  - Short term disability
    - Possibility to supplement with PTO
  - Coordination of disability, paid leave, and unpaid leave

Benefits and Leaves

- **Military leaves raise similar but also additional issues**
  - **Health plans**
    - **Continued coverage**
    - **COBRA notices**
    - **USERRA notice**
    - **Hours counting for ACA**
  - **Retirement plans**
    - **Loans**
    - **Hours counting for eligibility and vesting service**
    - **Potential crediting of service upon return**
    - **Potential crediting of employer contributions upon return**
    - **Potential make up elective contributions upon return**
  - **Supplement pay**
    - **If employer pays supplemental pay, then additional issues**

Tricky Intersections & Trouble Areas

Notice

FMLA Notice

- **Eligible employees seeking FMLA leave may be required to give:**
  - **Thirty-day advance notice of need to take FMLA leave when need is "foreseeable";**
  - **Notice "as soon as practicable" when need to take FMLA leave is not foreseeable;**
  - **Sufficient information for employer to understand that employee needs leave for FMLA-qualifying reasons; and**
  - **Timely notice that past absence was for FMLA reasons, if employer was not made aware of reason in first instance**

FMLA Notice

- **SCENARIO 1: "Absence excuse" for termination**
  - **Eli Eisenmann is difficult employee. Performance is generally good, but he has trouble getting along with his peers, and most of his co-workers have complained about his rude behavior. Indeed, Eli's personality is so abrasive that his supervisor, Sam, is uncomfortable confronting him. Sam has not provided any feedback regarding his workplace conduct.**
  - **One afternoon, Eli tells Sam he has severe pain in his side and he needs to leave work. Next two days, Eli does not report for work. Company policy states that two consecutive "no call, no shows" will be treated as job abandonment.**
  - **Following day, Eli calls to say that he has appendicitis and will be out for one week. Sam, looking for excuse to get rid of Eli, tells him that because he didn't give written notice of his need for leave, his employment was terminated under Company's "no call, no show" policy.**

FMLA Notice

- ***Sarnowski v. Air Brooke Limousine Inc.*, No. 06-2144 (3d Cir. Dec. 12, 2007)**
  - **Formal, written request is not required to provide sufficient notice of employee's intent to take protected leave**
  - **DOL regulations only require that employee "provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave"**
    - **May provide FMLA-qualifying notice before knowing exact dates or duration of leave they will take**
  - **Thirty day statutory notice requirement is designed to be flexible, and employee is not required to give greater notice than is "practicable"**

Practice Tips

- **Avoid relying upon absences that potentially arise from medical conditions as grounds for dismissal**
- **Address performance or workplace issues promptly and directly – treat these issues separately from requests for leave**
- **Avoid treating leave requests from "problem employees" differently than you would similar requests from others**
- **Ensure attendance policies include carve-outs for protected leaves!**

Notice

- **SCENARIO 2: Preemptive strike**
  - Company Z's Engineering group has big project due in six months. Sayid, engineering supervisor, is getting worried about meeting deadline because 2 of team's 8 employees are out on medical leave.
  - Just when he thought things couldn't get worse, another employee, Evelyn Eastwood, tells Sayid that she's pregnant and is submitting 30-day FMLA notice.
  - Sayid reviews Evelyn's personnel file and discovers that she's only been with company for 11 months. Since she hasn't passed 12-month threshold for FMLA eligibility, Sayid decides to terminate her and hire another employee to ensure adequate coverage through big deadline.

Notice

- **Reynolds v. Inter-Industry Conference on Auto Collision Repair, No. 08-CV-2115 (N.D. Ill. Jan. 22, 2009)**
  - FMLA requires employees to give 30-day notice of leave, so "it would be illogical to interpret the notice requirement in a way … that exposes them to retaliation, or interference, for which they have no remedy"
  - DOL regulations provide that determination of whether employee has worked requisite 1,250 hours to be eligible for leave is made as of date leave is to begin, not as of date of leave request
    - See 29 C.F.R. § 825.110(d)
  - "An employer has no legitimate interest in being able to terminate an eleventh month employee simply for requesting foreseeable leave for which he is eligible . . . ."

Practice Tips

- **While granting FMLA leave can be difficult, especially where multiple requests are submitted simultaneously, working around FMLA absences is less cumbersome than defending against lawsuit!**
- **Preemptively terminating employment to avoid accrual of leave entitlement may send wrong message to your workforce**

Notice

- **SCENARIO 3: Atypical behavior**
  - **Ernesto Endres has worked for Company Z for ten years, and he has always been exemplary employee who is well-liked by all. Following 3-day blackout in Center City, Ernesto suddenly begins showing up late for work. While at work, he is uncharacteristically quiet and withdrawn, and he is observed engaging in odd behavior, such as moving lamps from his co-workers' offices into his own.**
  - **Few days after blackout, Ernesto's supervisor Sam accidentally turns off his office light while Ernesto is in room, and Ernesto begins yelling at Sam incoherently and runs out of office.**
  - **Ernesto misses work following two days. After he fails to return any of Sam's calls, Sam decides to terminate Ernesto's employment.**

Notice

- *Stephenson v. Hyre Electric Co.*, No. 06-3410 (7th Cir. Oct. 16, 2007)
  - Actual notice may not be necessary where employer has "constructive notice" of employee's need for FMLA leave
  - Courts may find constructive notice where "clear abnormalities" in employee's behavior alert employer to potential serious health condition, especially where employee is not capable of communicating need for leave himself
- Under ADA: Employers must reasonably accommodate known disabilities
  - Can be constructive notice here as well!

Practice Tips

- FMLA regulations permit retroactive designation of leave provided that employer and employee mutually agree to do so and doing so "does not cause harm or injury to the employee"
- Absent extenuating circumstances, employers must notify employees in writing whether leave will be counted as FMLA leave within five business days after employer becomes aware of such need
  - What if employee doesn't want leave to be designated as FMLA?

Tricky Intersections & Trouble Areas

FMLA and ADA

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FMLA and ADA

- **SCENARIO 4: Where FMLA ends and ADA begins**
  - **Estelle Embers started working for Company Z one year after developing back pain. She was promoted steadily, but after five years, she was diagnosed with degenerative back and spinal condition and underwent surgery.**
  - **Estelle took FMLA leave – but on last day underwent second surgery that would keep her from returning for two to three months. Estelle asked for extended leave; Company Z said no, terminated her employment, and invited her to re-apply for work after she was medically cleared to work.**
  - **Estelle does not reapply: She sues under the ADA.**

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FMLA and ADA

- *Severson v. Heartland Woodcraft Inc.*, 872 F.3d 476 (7th Cir. 2017)
  - Long-term leave of absence is NOT reasonable accommodation
  - "[A]n extended leave of absence does not give a disabled individual the means to work; it excuses his not working."
- However…

FMLA and ADA

- *Leanne Ferrante v. Costco Wholesale Corp.*, 2010 WL 724032 (W.D. Wash. Feb. 25, 2010)
  - Even though FMLA leave is exhausted, employee may still be entitled to reasonable accommodation under ADA
  - Where supervisor arguably has knowledge of employee's alleged disability, triable issue may exist over whether employer regarded employee as disabled
  - Where employer has long history of tolerating absences, but decides to impose discipline only after it may have learned of alleged disability, employee may have viable retaliation claim under ADA

Practice Tips

- Enforce attendance policies consistently and equitably – and document enforcement
- If employee makes it clear that they are only seeking FMLA leave, avoid additional inquiries related to ADA coverage
- However, if employee volunteers information that suggests he may need accommodation – or where you know potential disability is at play – it is usually best to engage in interactive process and determine if extended leave is reasonable
  - Duration of leave request?
  - Open-ended leave?

FMLA and ADA

- SCENARIO 5: Where leave turns Into "work from home" accommodation request
  - While out on 2-month medical leave, Emiko Eguchi, salesperson, asked her supervisor Sandy to send her client files so she could work from home. Sandy refused, stating that it was "company policy" that no one is allowed to work from home.
  - After Emiko returned at end of her leave, she had trouble reconnecting with her clients. She failed to meet her sales goals for several months and was fired.
  - Emiko sued, claiming that her employer failed to accommodate her by refusing to allow her to work from home.

FMLA and ADA

- *Fuller v. Interview, Inc.*, 2014 WL 2601376 (S.D.N.Y. May 14, 2014)
  - Court denied employer's motion for summary judgment, holding that reasonable fact finder could conclude plaintiff made accommodation request when she asked her employer to send work home

Practice Tips

- As with leave requests, accommodation requests may be made informally
- Employer's general policies – including attendance expectations – may need to be set aside to provide reasonable accommodation unless doing so would cause undue hardship
- Undue hardship must be based on "individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense"

Practice Tips

- **Concerns that non-disabled employees may expect similar treatment does not qualify as undue hardship**
  - ***Miles v. Northcott Hosp. Int'l, LLC*, 963 F. Supp. 2d 878 (D. Minn. 2013)**
    - **Employer asserted allowing employee to work from home would cause undue hardship**
      - **Stated it was "company culture" to work from office**
      - **If Plaintiff's request was granted, others would have to be allowed to work from home as well**
    - **Court held that reasonable jury could conclude no undue hardship existed despite employer's concerns**

Tricky Intersections & Trouble Areas:

Medical Certification

Medical Certification

- **Requests for medical documentation under the ADA**
  - **Disability-related inquiries and medical examinations are permitted when "job-related and consistent with business necessity"**
  - **Question is whether employer "has a reasonable belief, based on objective evidence, that:**
    - **Employee's ability to perform essential job functions will be impaired by medical condition; or**
    - **Employee will pose a direct threat due to a medical condition"**

Medical Certification

- **Requests for Medical Documentation under the FMLA:**
  - **Employers may require employee to provide medical certification to support need for leave due to serious health condition**
  - **FMLA regulations set what content of certification form may include**
    - **Best practice is to use the DOL's form as template**
  - **If certification information is incomplete, request that the employee provide additional information in writing**
    - **Employee gets seven days to cure**
  - **Inform employee of consequence for failure to provide certification or to cure**

Medical Certification

- Generally, may require recertification no more frequently than duration of prior certification or every 30 days, whichever period is longer
- Regardless of duration of original certification, employer may require recertification every six months in connection with absence

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Medical Certification

- More frequent recertification may be required if:
  - Employee requests extension of leave
  - Circumstances described by previous certification have changed significantly
    - For example, changes in duration or frequency of absences or nature or severity of illness
  - Employer receives information that casts doubt upon employee's stated reason for absence or continuing validity of certification
    - For example, catching employee in activity contrary to stated medical issue

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Medical Certification

- **SCENARIO 6: The doctor's note**
  - Mary returned to work after FMLA leave for surgery. She found her medication caused her to feel fatigued at end of day. She began leaving at 4:30 instead of 5:00. Mary's supervisor, Abdul, did not ask for medical certification for reduced schedule.
  - Six months later, Abdul is fed up. He informs Mary she needs to work full eight-hour day. Mary brings in note from her doctor stating she occasionally may need reduced hours due to her medical condition. Abdul tells Mary she must complete new FMLA paperwork within 15 days, including medical certification from her doctor specifying 1) precisely how much time off she will need on monthly basis, and 2) how long her need for intermittent leave will last.
  - Mary fails to complete paperwork, and when Abdul asks, she says she has been busy and forgot. Abdul gives her warning stating that if she doesn't submit it within one week, she could be fired. Mary still fails to turn in paperwork and her employment is terminated.
  - Mary sues alleging unlawful interference with her FMLA rights and retaliation.

Medical Certification

- ***Ridings v. Riverside Medical Center*, No. 06-4328, 7th Cir. Aug. 11, 2008)**
  - Employers must give notice of requirement for medical certification each time certification is required
  - Regulations permit employer to request certification at later date if employer "has reason to question the appropriateness of the leave or its duration"
  - Employer "cannot be deemed to retaliate against an employee by asking her to fulfill her obligations" under FMLA

Practice Tips

- Give employee written notice of need to provide medical certification or recertification
  - Provide proper forms
- State in notice AND in your FMLA/ADA policies consequences of failing to provide certification – follow through on those consequences
- Employee has 15 days to provide medical certification, absent unusual circumstances
  - Follow up with employee
- Require that certification contain adequate information
  - Follow up on any vague language

Practice Tips

- Communication is key
- Employer may:
  - Ask questions to confirm whether leave needed or being taken qualifies for FMLA purposes
  - Contact health care provider for purposes of "clarification" and "authentication" of medical certification after employer has given employee opportunity to cure any deficiencies
    - BUT such contact must be made through health care provider, human resources professional, leave administrator, or management official
    - Employee's direct supervisor may NOT contact employee's health care provider
    - Employers may not ask health care providers for additional information beyond that required by certification form

Practice Tips

- Under FMLA regulations, “authentication” means providing health care provider with copy of certification and requesting verification that information contained on certification form was completed and/or authorized by health care provider who signed document
- No additional medical information may be requested
- “Clarification” means contacting health care provider to understand handwriting on medical certification or to understand meaning of response

Practice Tips

- Implement “call-in” policies
- FMLA and ADA allow employers to ask employees to give periodic reports on status and intent to return to work after leave
- Make sure your BOTH your FMLA and ADA policies outline clear expectations, and provide copies of these policies to employees who may have leave/accommodation needs
- As with any policy, apply consistently and in non-discriminatory manner

Tricky Intersections & Trouble Areas:

Intermittent Leave

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Intermittent Leave

- **Scenario 7: Migraine headaches**
  - **Acme Company uses rotating shifts for its manufacturing employees, one of which starts at 11:00 p.m. and continues through 7:00 a.m. Every employee is asked to work "night owl" shift one day every other week.**
  - **Employee Eva Engels has submitted FMLA paperwork stating that she needs intermittent leave of up to 3 days per month for migraine headaches. Every time Eva is asked to work night-owl shift, she takes day of FMLA leave, claiming that she has migraine. Her supervisor, Sasha, has heard that she jokes with her co-workers that she plans to get migraine each time she has to work that shift.**
  - **Sasha investigates and discovers Eva has been out hiking, horseback riding, and mountain biking on last three days she took intermittent leave. Sasha terminates Eva's employment, and Eva sues.**

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Intermittent Leave

- *Vail v. Raybestos Prods. Co.*, No. 07-3621 (7th Cir. July 21, 2008)
  - Persuaded that employer had "honest suspicion" that employee was abusing leave court found that employer had not violated its employee's FMLA rights by terminating employee
  - Employee must demonstrate that she took leave "for the intended purpose of the leave"
    - 29 U.S.C. § 2614(a)(1)
  - Employer can defeat FMLA claim by showing that employee did not take leave for "intended purpose"
  - Employer is under no obligation to reinstate employee returning from FMLA leave if refusal is based on "honest suspicion" that employee was abusing leave

Intermittent Leave: Combating Abuse

- Draft good job descriptions that contemplate regular attendance, especially for jobs where attendance is crucial requirement
- Require employee needing FMLA/ADA leave to follow employer's usual and customary call-in procedures for reporting absences
- Utilize medical recertification opportunities (once every 30 days)
- Contact employee's health care provider for purposes of clarification and/or authentication of medical certification if needed, <u>but only after</u> employer has given employee opportunity to cure any deficiencies

Practice Tips

- Insist that employee provide certification from health care provider that she has serious medical condition
- Employer may insist that employee visit another medical provider (at employer's expense) for second opinion
- If two medical assessments are in conflict, employer may insist upon third opinion (again at its expense) by third medical provider
- Investigate!

Top 10 Take-Aways

1) Adopt clear policies with notice, certification, and call-in requirements PLUS consequences for violations
2) Be aware of circumstances that may provide constructive notice of employee's leave or accommodation needs
3) Obtain clear medical certification stating scope and duration of all medical leaves
4) Carefully track intermittent leave use
5) Follow up where amount or timing of leave is inconsistent with certification or is suspicious

Top 10 Take-Aways

6) When one type of protected leave is exhausted or unavailable, be sure to consider what other options may apply
7) Explain in your policies how various types of leave will work together
8) When considering undue hardship related to leave as accommodation, evaluate all aspects of role and options for covering it
9) Engage in thorough interactive process prior to discharging employee on protected medical leave
10) Do not use leave or attendance issues as way to avoid addressing performance problems

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Hot Topics in Benefits

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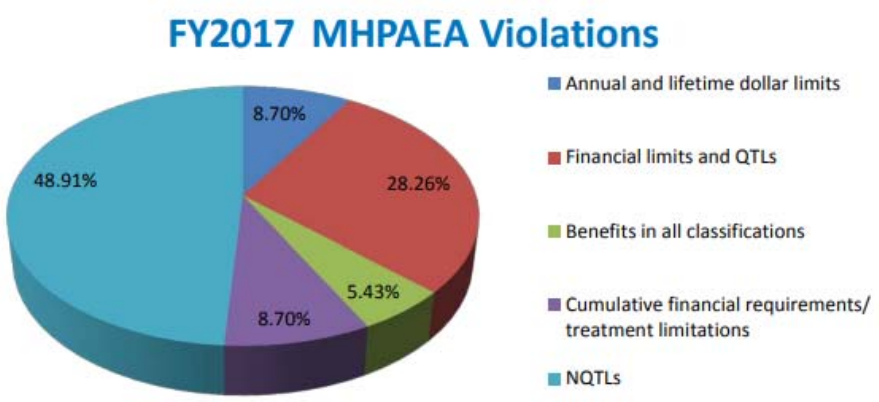
Mental Health Parity

- If a group health plan that provides medical/surgical benefits also provides either mental health or substance use disorder benefits, plan may be subject to "mental health parity" requirements as set forth by Mental Health Parity Act ("MHPA") and Mental Health Parity and Addiction Equity Act ("MHPAEA")
- Does not mean that a group health plan is required to cover mental health or substance use disorder benefits BUT state insurance laws may require mental health benefits be offered
- Parity applies to:
  - Annual or lifetime limits
  - Financial requirements and quantitative treatment limitations
  - Nonquantitative treatment limitations

2017 Enforcement Update

- According to EBSA, EBSA closed 347 investigations in 2017 (and 3,286 health investigations since 2011)



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New Proposed FAQs

- Newly released proposed guidance regarding:
  - Nonquantitative treatment limitation
  - Disclosure requirements
- Released on April 23, 2018
- Prepared by DOL, HHS and Treasury
- Public comments must be submitted by June 22, 2018

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Nonquantiative Treatment Limitation ("NQTL")

- **Rule: "A group health plan or health insurance issuer may not impose an NQTL with respect to Mental Health/Substance Use Disorder ("MH/SUD") in any classification unless, under the terms of the plan (or insurance coverage) as written and in operation, any processes, strategies, evidentiary standards or other factors used in applying NQTL to MH/SUD benefit in the classification are comparable to, and are applied no more stringently than the process strategies, evidentiary standards, or other factors used in applying the limitation to medical surgical benefits in the same classification."**

What?

- **Example:**
  - **Plan denies treatment as experiential when no professionally recognized treatment guidelines define clinically appropriate standards of care for condition, and fewer than two randomized controlled trials are available to support treatment's use with respect to the condition**
  - **Same plan defines Autism Spectrum Disorder as a mental health condition**
  - **Plan denied Applied Behavioral Analysis therapy on grounds that it is experimental or investigative**
  - **However, more than one professionally recognized treatment guideline and more than two controlled randomized trials support use of that therapy**

WHAT?

- **Was the denial of treatment permissible?**
  - **No!**
  - **Medical management standard limiting or excluding benefits based on whether treatment is experimental or investigative is an NQTL**
  - **This means that NQTL must be applied no more stringently than for medical/surgical benefits**
  - **Even though plan document is compliant, application was not!**

Application to Medications

- **Plan excludes treatments that have a rating below B in Hayes Medical Technology Directory**
- **However, plan reviews and covers certain treatments with a C rating for medical/surgical conditions on a treatment-to-treatment basis (while not allowing any C ratings for MH/SUD treatments)**
- **Is this okay?**
  - **No!**
  - **Evidentiary standards must be the same!**
- **This also applies to dosage limitations (e.g., if standard is professionally-recognized treatment guidelines, must apply to all medications)**
- **Can your plan use pharmacy and Therapeutics committees to determine how to cover prescriptions?**
  - **Yes, but it is important that standards set continue to treat medical/surgical and MH/SUD the same**

Another Example: Exclusion of Certain Conditions

- Health plan or large group insurance coverage provides benefits for prescription drugs for medical/surgical and MH/SUD.
- However, they do not cover items and services for bipolar treatments, including prescriptions
- Is this permissible?
  - Yes
  - An exclusion of all benefits for a particular condition or disorder is not a treatment limitation for purposes of regulations
- However, it could be prohibited under state law and might be required as an essential health benefit

Additional Examples

- Step Therapy – Can a plan require a participant to have two unsuccessful attempts at outpatient treatment in the past 12 months to be eligible for certain inpatient in-network SUD benefits?
  - Plan requires one unsuccessful attempt at an outpatient treatment in the past 12 months to be eligible for inpatient, in-network medical/surgical benefits.
  - Okay?
    - Probably not because it appears to be more stringent
    - Only okay if plan can demonstrate that evidentiary standards or other factors were utilized comparably to develop and apply differing step therapy for thee benefits
    - Facility types are an NQTL and must be same (in-patient/out-patient)

Additional Requirements Addressed by the FAQs

- Can plan pay reduced reimbursement rates for non-physician practitioners for MH/SUD but the same rates for physician or non-physician practitioners for medical/surgical benefits?
  - No
  - Provider reimbursement rates do not need to be same, but standards for admitting a provider is an NQTL and must be comparable
- Note: Plans must consider how long participants and beneficiaries wait for appointment for services under state and federal network adequacy standards. Then must consider these adequacy factors for MH/SUD to comply with MHPAEA

Disclosure Requirements

- Medical necessity determinations with respect to MH/SUD benefits must be made available by plan administrator or health insurance issuer to any current or potential participant, beneficiary or provider when requested
- Reason for denial must be available as well
- ERISA requires that instruments under which plan is established or operated must generally be furnished to plan participants within 30 days of request
  - This includes information on medical necessity criteria for both medical/surgical benefits and MH/SUD benefits as well as factors used to apply an NQTL
- If SPD includes a list of providers, must be up to date for both medical/surgical and MH/SUD

A Brief Wellness Update

- EEOC Wellness Regulations vacated effective Jan. 1, 2019
- EEOC did not sufficiently explain how 30% cost threshold was voluntary
- Wellness programs back on EEOC regulatory agenda; ordered to issue new proposed rules by August 31
- Status update from March 2018 indicated that EEOC has not made a final choice of course of action and has no plan to issue a Notice of Proposed Rulemaking addressing incentive for participation in wellness programs (has not ruled out possibility in future)
- Chair of EEOC still awaiting confirmation

Voluntary Plans – A Refresher

- Voluntary plans are known by different names…
  - Voluntary benefits
  - Worksite benefits
  - Employee-pay-all plans
- … and cover a wide variety of different group and individual coverages, including
  - Dental
  - Vision
  - Employee assistance programs
  - Critical illness, hospital indemnity and disease specific coverage
  - Life insurance, accidental death & dismemberment
  - Pre-paid legal services
  - Identification theft protection

Voluntary Plans – A Refresher

- Generally, voluntary plans are "employee welfare benefit plans" and "welfare plans" under ERISA § 3(1)
- By virtue of being ERISA plans, voluntary plans that are also "group health plans" are required to comply with other legal mandates:
  - COBRA continuation coverage
  - HIPAA portability (notably, special enrollment rights, nondiscrimination)
  - FMLA
  - Affordable Care Act requirements
  - Mandated notices

Voluntary Plans – ERISA Safe Harbor

- ERISA provides a safe harbor, exempting certain voluntary plans from being considered "employee welfare benefit plans"
  - Labor Reg. § 2510.3-1(j)
- For a voluntary plan to satisfy safe harbor, it must:
  - Be a group or group-type insurance program offered by an insurer
  - Not receive any employer contributions
  - Ensure employee participation is 100% voluntary
  - Employer cannot endorse program but is allowed to perform certain administrative functions, such as allow insurer to publicize program, collect and remit premiums to insurer
  - Not receive any consideration other than reasonable compensation

Voluntary Plans – Staying Within the Safe Harbor

- **If an employer decides to rely on safe harbor, certain factors are easier to satisfy than others:**
  - **Voluntary participation**
    - **Generally, cannot require employees to enroll and cannot auto-enroll them**
  - **No employer contributions**
    - **Employer cannot contribute towards the cost of premiums and cannot reimburse employees for premiums already paid**
    - **ERISA does not provide a *de minimus* exception**
    - **Caution: some courts will consider use of cafeteria plans to allow employees to make pre-tax premium payments an employer contribution.**
      - **Recent guidance under ACA indicates that use of after-tax premium payments would not cause a plan to fail to satisfy safe harbor**
      - **See IRS Notice 2013-54, 2013-40 IRB 287 (09/13/2013)**

Voluntary Plans – Staying Within the Safe Harbor

- **Employer involvement and compensation must be limited:**
  - **General administrative and ancillary activities are permitted, including**
    - **Allowing insurers access to employees to publicize program**
    - **Collecting and remitting premium payments**
    - **Setting up plan, establishing plan year, sharing employee eligibility and enrollment information with insurer**
  - **No receipt of compensation from insurer except for "reasonable compensation"**
    - **Safe harbor regulations do not define "reasonable compensation"**
    - **Some analogous guidance for employer payments to IRAs**
      - **Limited reimbursement for costs of premium collection and remittance acceptable**
      - **Caution: using same insurer or broker for ERISA plans and voluntary plans may create questions about impermissible compensation**

Voluntary Plans – Staying Within the Safe Harbor

- **Not engaging in impermissible "endorsement" is most problematic factor for employers**
- **Employers should avoid:**
  - **Recommending (or even general enthusiasm about) program to employees (ERISA Op. Ltr. 94-23A)**
  - **Using employer's name or logo on plan materials**
  - **Actively selecting insurance companies**
  - **Requesting plan design changes**
  - **Stating or implying that plan is subject to ERISA**
  - **Assisting employees with claims and appeals issues with insurer**
  - **Collecting premiums through any method other than straight-forward payroll deductions**

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Voluntary Plans – To Be or Not to Be Subject to ERISA

- **Employers should determine at time plan is offered whether to treat plan as subject to ERISA or as satisfying safe harbor**

ERISA Compliance		Safe Harbor Compliance
• Plan document / SPD • Form 5500 annual reporting • Summary Annual Report • Fiduciary duties • DOL claims procedures for group health plans, disability benefits • COBRA continuation coverage* • FMLA leave coverage* • HIPAA portability* • ACA requirements*	Gray Area – most likely ERISA applies	• Voluntary participation • No employer contributions • No employer endorsement • No compensation for the employer (except for reasonable compensation) • Potentially COBRA under Code/PHSA* (see next page)

* For group health plans, only

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Voluntary Plans – To Be or Not to Be Subject to ERISA

- **Beyond legal determination, employers should also consider administrative impact:**
  - **Does employer already sponsor ERISA plans or an existing wrap plan that plan(s) can be integrated into?**
  - **Is it feasible to perform safe harbor analysis?**
  - **Is it feasible to maintain two different sets of plans, with different legal requirements?**

Voluntary Plans – To Be or Not to Be Subject to ERISA

- **But, COBRA could still apply to voluntary "group health plans"**
  - **COBRA provisions under ERISA will not apply (ERISA §§ 601 et seq.)**
  - **But COBRA provisions under Code § 4980B may apply to group health plans**
    - **"… 'group health plan' means a plan (including a self-insured plan) of, or contributed to by, an employer (including a self-employed person) or employee organization to provide health care (directly or otherwise) to the employees, former employees…" (Code § 5000)**
    - **"… a group health plan is maintained by an employer […] even if the employer […] does not contribute to it if coverage under the plan would not be available at the same cost to an individual but for the individual's employment-related connection to the employer…" (Treas. Reg. § 54.4980B-2, Q/A-1(a))**
  - **May affect individual medical insurance policies, disease specific policies, coverage to supplement other medical costs**
  - **Risk may be mitigated by ensuring policy is convertible to individual policy after termination of employment or that premiums are not discounted due to employment relationship**

Voluntary Plans – To Be or Not to Be Subject to ERISA

- **Above all, it is important to perform this analysis early – and ideally before voluntary plan is initially offered**
- **Otherwise, plan sponsor risks:**
  - **Statutory penalties for failure to file timely Form 5500s (up to $1,000/day, adjusted for inflation; DFVCP can significantly reduce penalties)**
  - **Statutory penalties for failure to provide plan document/SPD/SAR (up to $110/day)**
  - **Statutory penalties for failure to provide compliant COBRA notices (up to $110/day)**
  - **Issues related to loss of favorable standard of review, exhaustion of claims procedure if plan does not contain ERISA-compliant claims procedures**

COBRA Notices – Pay Attention to Content

- **Recent cases indicate more attention is being paid to COBRA enrollment notice content**
- ***Bryant v. Wal-Mart Stores, Inc.*, 1:16-cv-24818**
  - **Complaint states COBRA notice only "partially adhered" to DOL model notice**
  - **Lacks contact information for COBRA administrator, written in a manner that is confusing, ambiguous and "piecemeal"**
  - **Does not include instructions for electing spousal coverage or coverage on behalf of minor children**
- ***Gilbert v. SunTrust Banks, Inc.*, 9:15-80418 (S.D. Fla., Feb. 16, 2016)**
  - **SunTrust settled with plaintiffs for $290K and agreed to revise notice to:**
    - **Specifically identify COBRA administrator**
    - **Identify where on HR website COBRA election information can be found**
    - **Provide alternate means of obtaining an election form**

COBRA Notices – Pay Attention to Content

- When conducting periodic reviews of COBRA notices, employers will want to consider:
  - Incorporating language from DOL model notice
  - Reviewing notice to make sure it is written clearly, and provides instructions that help participants navigate through COBRA elections
    - Merely providing a general human resources website and phone number for questions may not be enough
    - May wish to take into account multilingual workforce needs
  - Including information about how a spouse / legal guardian can elect coverage for other qualified beneficiaries
  - Ensuring notice provides name, address and telephone number of the COBRA administrator
  - Reviewing both ERISA and Code requirements for notices – they are slightly different!

Effectiveness of Notices and Disclosures

- Advisory Council on Employee Welfare and Pension Benefits Report on the effectiveness on health and welfare plan notices and disclosures
- Conclusion:
  - "… mandated disclosures currently do not address the underlying statutory purpose of providing important information in a useable framework, and they are burdensome for plan administrators."

Recommendations - Fingers Crossed!

- **Safe harbor annual quick reference guide (instead of updated SPD, SAR or SMM)**
  - **Distribute with SBC**
  - **SPD required to be delivered on initial eligibility**
  - **Still have to update SPDs every 5 or 10 years**
  - **DOL to publish a model guide (example given in the Report)**
- **Alternative method for complying with SAR requirements**
- **Permit annual required notices to be consolidated into one notice furnished when first required or during open enrollment**
- **Make electronic notices default delivery mechanism**

When Administrative Procedures and an SPD "Go Bad"

- **Frye v. Metropolitan Life Insurance Company and American Greetings Corporation, US District Court in the Eastern District of Arkansas, 2018**
  - **Employee properly enrolled her child in optional life and AD&D insurance in 2013 but failed to disenroll child in 2015 when he reached limiting age**
  - **Plan document and SPD clearly disclosed age limitation and requirement for employee to notify plan**
  - **When child died in car accident, insurer denied claim and premiums were refunded**
  - **Employee claimed she did not know about age cutoff and that employer was aware of child's age due to information provided for medical coverage**

Frye v. MetLife - Court Findings

- Plan/SPD were clear, but employer and insurer breached their fiduciary duty to employee due to a "flawed administrative procedures"
  - Easy to add age screening
  - Windfall to insurer
- Employee also had some responsibility, but court awarded make-whole relief in form of a surcharge equal to amount of insurance proceeds, as well as attorneys' fees, costs and interest
  - Reasons for this?
    - Plan and SPD were long (75 pages and 25 pages, respectively)
    - "Life is busy and it's human nature to overlook details like this age ceiling"
    - During open enrollment, employee did not have to confirm that child remained eligible

Frye v. MetLife - Administrative Tips

- Review administrative process for ensuring enrolled dependents are eligible, regardless of disclosures in plan or SPD
- During annual enrollment, have employees certify dependent eligibility
- If you collect dependent birthdates for medical coverage, use this data to verify eligibility for other coverages, such as life and AD&D

And We Had To Have At Least One ACA Slide!

- **IRS Website has issued two notices to help employers understand correspondence that they might receive regarding an employer shared responsibility payment**
  - **https://www.irs.gov/individuals/understanding-your-letter-226-j**
  - **https://www.irs.gov/faqs/irs-procedures/notices-letters/understanding-your-letter-227**

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