



# Second Annual Forum on Employer Sponsored Benefits

Thursday, June 8, 2017

## Panel Materials

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### Agenda and Speakers

#### Overview

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

8:15 - 8:55 am      **Registration and Breakfast**

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

9:00 to 10:00 am      **ACA Repeal and Replace: 2017 So Far and Looking Ahead**  
*Tim Goodman and Melinda Maher, Dorsey & Whitney LLP*

This session will provide an overview of the efforts to repeal and replace the ACA and where things stand. We will look at the status of the coverage mandates, taxes, employer reporting, and how this impacts employer plan design for 2018. The session will also look at how changes may impact employer health plans in a few years.

10:15 – 10:45 am      **Cybersecurity for Employee Benefit Plans**  
*Robert Cattanach and Holly Fistler, Dorsey & Whitney LLP*

Plan sponsors and service providers are under increasing pressure to safeguard employee benefit plan information. As plan administration requires data sharing within and between multiple entities, it is of vital concern to protect this information. This session will provide helpful insights into the cybersecurity environment and practical suggestions on how to implement risk management strategies for employee benefit plans.

10:50 - 11:20 am      **Participant Claims – Examples**  
*Andrew Holly and Bob Seng, Dorsey & Whitney LLP*

Andrew Holly and Bob Seng will take us on a whirlwind tour of hypothetical health plan claims, borrowing heavily on the collective experience of our seasoned ERISA attorneys and litigators. Be prepared to participate as we work through some tough facts and provide our thoughts (and collect yours) on how best to deal with difficult participant claims.

11:25 - 11:55 am      **To Plan or Not to Plan: Practical Tips on Structuring Severance Arrangements**  
*Liz Deckman and Rebecca Bernhard, Dorsey & Whitney LLP*

This session will focus on practical tips for offering severance benefits to your employees, including the pros and cons of whether to establish an ERISA plan for your severance benefits. There are a multitude of ways to structure severance arrangements to suit your company's needs, but also a multitude of ways to run afoul of discrimination, tax, and health care law and other requirements when doing so. Learn some of the practice tips we've collected over the years working with employee severance arrangements.

## Second Annual Forum on Employer Sponsored Benefits

### Speakers



**Rebecca J. Bernhard**

Partner

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Rebecca is a Partner in Dorsey's Labor & Employment Group. Rebecca's experience spans traditional labor and employment, immigration, and federal contract compliance and audits. She supports clients with their corporate transactions, advising on all aspects of labor and employment diligence, negotiating with new unions and conducting effects bargaining, and assisting her clients with post-acquisition or post-divestiture integration. Rebecca is a member of the Health Care, Food & Agribusiness, and Banking Industry Groups. Prior to joining the firm, she served as Senior VP of HR and Associate General Counsel at one of the nation's largest student loan guarantors. She is a frequent author and speaker on labor and employment topics confronting HR professionals, including legal issues related to talent management, succession planning, and compliance.



**Robert E. Cattanch**

Partner

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Bob is a Partner in Dorsey's Cybersecurity, Privacy & Social Media Group. Bob helps clients navigate the complexities of regulatory law, especially in the area of cybersecurity and compliance, and provides the perspective and skills of a seasoned trial lawyer to protect their interests in the courtroom. His technical background enables him to understand the complex business challenges associated with today's cyber world, and provide the strategic acumen to achieve success. Bob has represented numerous clients in breach responses, development of privacy policies and procedures, and provided counsel to corporate Boards of Directors and Audit Committees on matters of cybersecurity, privacy and internal governance. Bob's long history of interaction with key government agencies began with his service of the United States Department of Justice, Civil Division, which represents the interests of the United States and its agencies, including the CIA, FBI, Departments of State, Defense and Energy. His longstanding relationship with those agencies enables him to engage with key players on major cyber issues, and be the "go-to" attorney for all matters cyber. Bob has significant experience defending consumer class actions, including Telephone Consumer Protection Act suits.



**Liz Deckman**

Partner

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Liz is a Partner in Dorsey's Benefits & Compensation Group. She has extensive business law experience, with a focus in advising companies regarding employee benefits and ERISA. 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, 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.



**Holly Fistler**  
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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. She 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. Holly devotes a substantial portion of her practice to advising public and private companies on their employee benefits issues.



**Tim Goodman**  
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Tim is a Partner in Dorsey's Benefits & Compensation Group. He works with employers to assist them in understanding and navigating through complex tax, employment, and other laws that govern the benefits they provide to employees and executives. 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, banks and financial institutions, and Alaskan Native Corporations. 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).



**Andrew Holly**  
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Andrew is a Partner in Dorsey's Trial Department. He has extensive experience defending fiduciaries, sponsors, and insurers in ERISA fiduciary class actions, benefit claims, and both ERISA and non-ERISA executive compensation claims. Andrew also serves as antitrust counsel for various health care providers. He regularly represents financial institutions in various creditor cases, including foreclosure actions, fraudulent transfer claims, and other lender lawsuits. He also represents clients in complex environmental matters, as well as other securities, accounting malpractice, contract, and fraud matters. Andrew represents clients in a wide range of 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 (2008 and 2010) been named a "rising star" by Minnesota Law and Politics Magazine.





**Melinda Maher**  
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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.



**Bob Seng**  
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Bob is a Partner in Dorsey's Benefits & Compensation Group. He has experience in private practice and as an Assistant General Counsel for Pay & Benefits in a Fortune 50 Company. Bob understands that employee benefits law isn't for everyone. He takes pride in listening carefully and responding with clear answers and advice that can be followed by busy clients. Bob recently returned to Dorsey after 12 years as an in-house benefits lawyer to be part of a collaborative group with a long history of excellence in all aspects of the Benefits & Compensation area, including welfare and fringe benefit matters for plan sponsor and vendors as well as benefit committee and governance work. Bob remains active as a Policy Board Member and member of the Legal Affairs Committee for the American Benefits Council.



## Second Annual Forum on Employer Sponsored Benefits

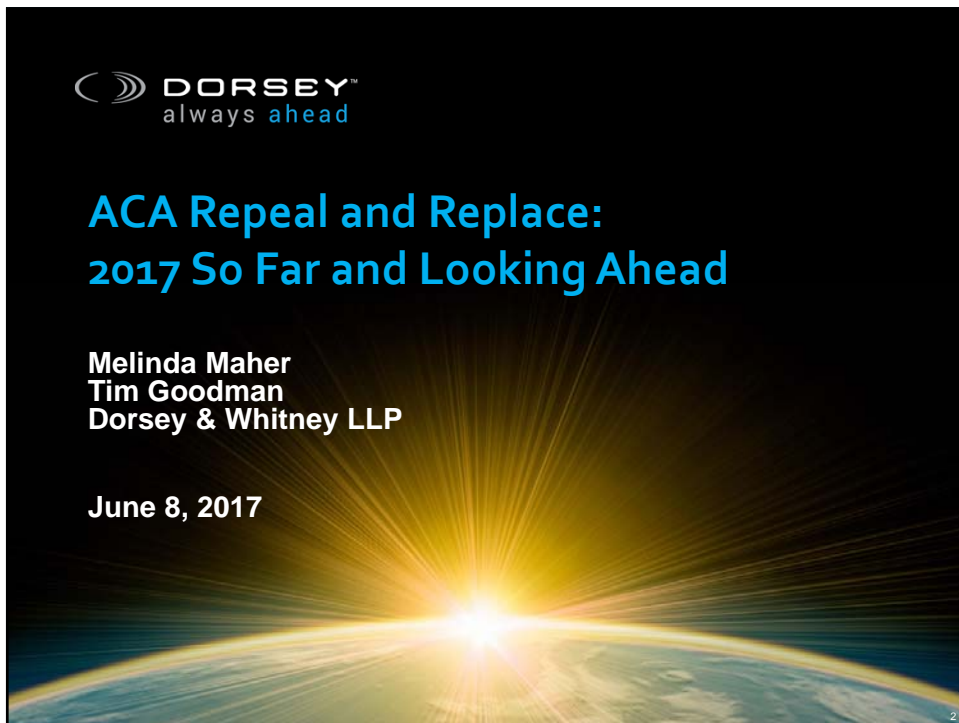
Dorsey & Whitney LLP  
June 8, 2017



## ACA Repeal and Replace: 2017 So Far and Looking Ahead

Melinda Maher  
Tim Goodman  
Dorsey & Whitney LLP

June 8, 2017



## ACA Why It Matters

- **ACA has increased coverage**
  - Exchanges – approximately 10 million individuals
  - Medicaid expansion – approximately 11 million individuals
- **ACA has expanded depth of coverage**
  - Coverage mandates
- **ACA has increased federal government taxes and costs**
  - Range of new taxes
  - Exchanges – subsidies and cost-sharing subsidies
  - Medicaid expansion – federal government pays 90% of cost
- **Insurance costs have risen**
  - Impact greatest on those not eligible for subsidies through exchanges
- **Insurance companies have had rocky time**
  - Complicated to compete on exchanges and price insurance

## ACA Current Law

- **Coverage requirements**
  - Coverage to age 26
  - Insurers must cover essential health benefits
  - No lifetime or annual limits on essential health benefits
  - No rescissions
  - No pre-existing condition limits
  - No waiting periods greater than 90 days
  - Preventative services
  - Revisions to claim procedures
  - Provision of summary of benefits and coverage
  - Other mandates

## ACA Current Law

- **Exchanges**
  - Each state has exchange (12 state-based; 5 state-based federal platforms; 6 state partnerships; and 28 federal platforms)
  - Subsidies available up to 400% of federal poverty line
  - Cover more than 10 million individuals
- **Subsidies**
  - Provide refundable, advance premium tax credits to eligible individuals with incomes between 100%-400% of federal poverty line for insurance purchased through exchanges
  - Credits computed on sliding scale so people pay no more than required percentage of income for second lowest cost silver plan for their age in their area
- **Cost sharing subsidies**
  - Provide cost-sharing subsidies to eligible individuals with income between 100%-250% of federal poverty line
  - Subsidies reduce deductibles, copays, and OOP limit that otherwise apply by increasing actuarial value of plan on sliding scale

## ACA Current Law

- **Medicaid expansion**
  - Medicaid is federal-state partnership providing health insurance for low income individuals
  - ACA allowed states to expand Medicaid (increasing coverage of parents from those at 91% to 138% of federal poverty line and others) with federal government paying 90% of cost
  - 32 states and D.C. opted into Medicaid expansion
  - Covers additional 11 million individuals



## ACA Current Law

- **Taxes**
  - **Mandates (taxes)**
    - Individual mandate
    - Employer shared responsibility fee
  - **Corporation taxes**
    - Cadillac tax
    - Patient centered outcomes research institute fee (PCORI fee)
    - Medical device tax; pharmaceutical manufacturer tax; Health insurer tax
  - **Individual taxes**
    - Medicare tax (additional .90% on amounts above \$200,000)
    - Medicare tax (additional 3.80% on modified adjusted gross income (MAGI) and net investment income)
    - Tanning device tax (10% on indoor tanning services)
- **Reporting**
  - Coverage reporting (Forms 1094 and 1095)
  - Benefit reporting (Form W-2, Box 12, Code DD)

## ACA – Repeal & Replace Proposed Legislation

- **Republicans have brought forth several proposals**
  - House of Representatives
    - American Health Care Act (AHCA) (2017)
    - World's Greatest Health Care Plan Act (2017)
  - Senate
    - Senator Cassidy – Patient Freedom Act (2017)
    - Senator Paul – Obamacare Replacement Act (2017)
- **President Trump statement (one of many)**
  - “Everybody’s got to be covered...I am going to take care of everybody. I don’t care if it costs me votes or not. Everybody is going to be taken care of, much better than they’re taken care of now.”  
9/27/2016 (60 Minutes interview)
- **Secretary Price statement (one of many)**
  - “[W]e want a system that’s affordable for everybody. Accessibility, we need a system that’s accessible for everybody. A system that’s of the highest quality...” 3/7/2017 (White House press conference)

## ACA – Repeal & Replace Proposed Legislation

- **House – American Health Care Act (AHCA)**
  - Taxes
    - Repeal individual mandate (effective 2016)
    - Repeal employer mandate (effective 2016)
    - Many other taxes repealed, but Cadillac tax postponed and retained
    - **Note: Medicare .90% tax repeal as of 2023**
  - Exchanges and subsidies
    - **2018 & 2019: Increase for younger adults; reduce for older adults**
    - **2020 forward: Tax credits based on age (\$14,000 max per family)**
      - Credit amounts per family member
        - » Up to age 29 \$2,000
        - » 30-39 \$2,500
        - » 40-49 \$3,000
        - » 50-59 \$3,500
        - » 60 and older \$4,000
      - Phase out based on income
        - » Single starts at \$75,000 and phased out at \$115,000
        - » Joint starts at \$150,000 and phased out at \$230,000

## ACA – Repeal & Replace Proposed Legislation

- **House – American Health Care Act (AHCA)**
  - Cost sharing subsidies (payment of copays and other costs)
    - Repealed as of end of 2019
  - Reporting
    - No change; employers still have reporting requirements
  - Coverage requirements
    - Retains age 26 coverage
    - Originally retained 10 essential health benefits
    - Subsequently amended to allow state waiver
  - Women's health requirements
    - Retains requirement for preventative services
    - Retains prohibition on gender rating
  - Other benefit design aspects
    - Enhance HSAs; does not address association health plans

## ACA – Repeal & Replace Proposed Legislation

- **House – American Health Care Act (AHCA)**
  - Health flexible spending accounts (health FSAs)
    - Repeal annual limit on health FSAs (\$2,500 as adjusted)
    - Repeal prohibition on use for over-the-counter medications (allow for both prescription drugs and over-the-counter drugs)
  - Medicaid expansion
    - Retain Medicaid expansion through 2019
    - Originally changed Medicaid expansion in 2020 to per capita allotment and reduce amount (subsequently modified for block grants)
    - Reduce eligibility as of 2020
  - Additional provisions
    - Changes market rating limits based on age
      - Under ACA, oldest may be charged only 3 times youngest (3:1)
      - Originally AHCA, oldest may be charged 5 times youngest (5:1)
      - Subsequently, state may seek waiver
    - 30% surcharge if individual has break of 63 days or more in last 12 months
    - Repeal of elimination of deduction for Part D subsidy retiree medical drug subsidy (starting 2018)

## ACA – Repeal & Replace Proposed Legislation

- **House – American Health Care Act (AHCA)**
  - A series of amendments were made to AHCA in March and April
    - **Manager amendment – March 20 and March 23**
      - Allows states to choose block grant for Medicaid expansion rather than per-capita cap
      - Delays repeal of Medicare surcharge for one year
      - Adds \$15 billion to patient stability fund for 2020 for certain care
    - **Invisible risk sharing amendment – April 6**
      - Adds \$15 billion to patient stability fund over 9 years
    - **MacArthur amendments – April 23**
      - Allows states to apply for waiver of essential health benefits
      - Allows state to apply for waiver of AHCA 5:1 age rating requirement
      - Allows state to apply for waiver of community rating standard
    - **Upton amendment – May 1**
      - Creates \$8 billion dollar fund for 2018 to 2023
        - » For states that allow insurers to charge higher premiums for individuals with gap in coverage
        - » Used to assist individuals with premiums

## ACA – Repeal & Replace Proposed Legislation

- **House – American Health Care Act (AHCA)**
  - CBO scores
    - **March 9 version (released March 13)**
      - Federal deficit reduction - \$336 billion
        - » Spending down \$1,219 billion; revenue down \$883 billion
      - Coverage as of 2020, 21 million fewer covered
      - Coverage as of 2026, 24 million fewer covered
    - **March 20 version (released March 23)**
      - Federal deficit reduction - \$151 billion
        - » Spending down \$1,150 billion; revenue down \$999 billion
      - Coverage as of 2020, 21 million fewer covered
      - Coverage as of 2026, 24 million fewer covered
    - **May 4 version (released May 24)**
      - Federal deficit reduction - \$119 billion
        - » Spending down \$1,111 billion; revenue down \$992 billion
      - Coverage as of 2020, 19 million fewer covered
      - Coverage as of 2026, 23 million fewer covered

## ACA – Repeal & Replace Proposed Legislation

- **Senate**
  - Senator McConnell has assembled a group of 13 Republican Senators to draft legislation
    - Senator Collins of Maine believes group will propose health care plan too partisan to succeed and is working with Republicans and Democrats on alternative
    - <http://www.pressherald.com/2017/05/19/as-senate-drafts-health-care-bill-collins-predicts-it-will-fail/>
  - Republican Senator concerns
    - Does not repeal ACA
      - Senators Paul (KY) and Lee (UT)
    - Does not lower premiums
      - Senator Cruz (TX)
    - Impact on Medicaid expansion
      - Senators Cassidy (LA), Portman (OH), Gardner (CO), Moore Capito, (WV) and Murkowski (AK)
      - 20 Republican Senators from Medicaid expansion states

## ACA – Repeal & Replace Proposed Legislation

Note: This table is vast simplification of proposed legislation	House AHCA	House WGHCP	Senate Cassidy	Senate Paul
Coverage mandate – age 26	Retain	Retain	Retain	Retain
Coverage mandate – other	Retain some; State waiver option	Retain some; repeal some	Retain	Repeal
Exchanges	Retain but change	States have choice to allow exchanges	States have choice - ACA states (retain) - Grant states	Repeal
Subsidies	Retain but change – amount based on age	Retain but change (basic insurance)	ACA states – retain (smaller) Grant states – funding	Repeal
Medicaid expansion	Retain but reduce – reduce eligibility and allow block grants	Retain but change (block grants)	ACA states – retain Grant states – retain (may contribute to Roth HSAs)	Retain – more flexibility
Taxes – individual and employer mandates	Repeal	Repeal	ACA states – retain Grant states – repeal	Repeal
Taxes – Medicare and other taxes	Repeal	Retain	Retain	Retain

## ACA – Repeal & Replace Legislative Process

- **Congress**
- **House of Representatives**
  - **Composition**
    - 237 Republicans (about 35 Freedom caucus members)
    - 193 Democrats
    - 5 open seats
    - Need 216 to pass legislation (with 5 open seats)
- **Senate**
  - **Composition**
    - 52 Republicans
    - 48 Democrats
  - **Reconciliation**
    - Need at least 50 votes (assuming Vice President then breaks tie in favor)
  - **Regular legislation**
    - Need 60 votes to avoid filibuster

## ACA – Repeal & Replace Legislative Process

- **Reconciliation and Byrd rule**
  - Taxes
    - Under Byrd rule, Senate prohibited from considering extraneous matter as part of reconciliation bill
    - If raised and sustained, offending title, provision, or amendment is deemed stricken unless its proponent can muster 60 votes in Senate to waive Byrd rule
    - Byrd rule tests (Section 313(b)(1) of Congressional Budget Act):
      - Do not produce change in outlays or revenues
      - Produce changes in outlays or revenues which are merely incidental
      - Outside jurisdiction of committee that submitted provision
      - Increase outlays or decrease revenue if fails committee's instructions
      - Increase outlays or decrease revenue during fiscal year after years covered by reconciliation bill unless provision's title, on whole, remains budget neutral
      - Contain recommendations regarding OASDI (social security) trust funds

## ACA – Repeal & Replace Legislative Process

- **Calendar**
  - May 29-June 2 House and Senate home districts work weeks
  - July 3-7 Same
  - July 31-Sept 4 Same
  - Sept 18-22 House
  - Sept 21-22 Senate
  - Oct 9-13 Senate
  - Oct 16-20 House
  - Nov 20-27 House and Senate home districts work weeks
  - Dec 15-31 House and Senate home districts work weeks



## ACA – Repeal & Replace Regulations & Guidance

- **Executive orders**
  - **Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal**
  - **Executive Order 13765 (1/20/17)**
    - To maximum extent permitted by law, Secretary of HHS and all department heads with authority and responsibility under ACA shall exercise all authority and discretion available to waive, defer, grant exemptions from, or delay implementation of, any provision or requirement that would impose fiscal burden on any State or cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications
    - If action under this order means revision of regulations issued through notice-and-comment rulemaking, agencies shall comply with Administrative Procedure Act and statutes in promulgating revisions

## ACA – Repeal & Replace Regulations & Guidance

- **Executive orders**
  - **Reducing Regulation and Controlling Regulatory Costs**
  - **Executive Order 13771 (1/30/17)**
    - For every one new regulation issued, at least two prior regulations must be identified for elimination, and that cost of planned regulations be prudently managed and controlled through budgeting process
    - For 2017 fiscal year, total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by Director of Office of Management and Budget (OMB)

## ACA – Repeal & Replace Regulations & Guidance

- **New regulations**
  - CMS – Market stabilization proposed regulations (2/17/17)
    - Shorten enrollment periods and make other changes
    - <https://www.gpo.gov/fdsys/pkg/FR-2017-02-17/pdf/2017-03027.pdf>

## ACA – Repeal & Replace Regulations & Guidance

- **New regulations**
  - DOL, HHS, IRS – Contraceptive coverage regulations (??/17)
    - Draft regulation provides expanded exemptions for entities and individuals with both moral or religious objections to contraceptives
    - Exemption would allow employers to exclude contraceptive coverage
    - Impact
      - Contraceptives are 30% - 44% of women's out-of-pocket health-care spending (Kaiser Family Foundation)
      - Savings on oral contraceptive pill accounted for more than 50% of drop in all out-of-pocket prescription drug spending under ACA
      - [https://www.washingtonpost.com/national/health-science/trump-moves-to-allow-broad-exemption-from-aca-birth-control-coverage/2017/05/31/a0e7235c-462d-11e7-a196-a1bb629f64cb\\_story.html?utm\\_term=.db2e34e78745](https://www.washingtonpost.com/national/health-science/trump-moves-to-allow-broad-exemption-from-aca-birth-control-coverage/2017/05/31/a0e7235c-462d-11e7-a196-a1bb629f64cb_story.html?utm_term=.db2e34e78745)
      - <http://www.kff.org/womens-health-policy/issue-brief/the-future-of-contraceptive-coverage/>

## Why This Will Not Go Away: Health Care Exclusion Impact on Budget

- **Amount of expenditure (5 year periods)**
  - 1975-79      21.2 billion
  - 1980-84      91.5 billion
  - 1985-89      133.4 billion
  - 1990-94      205.5 billion
  - 1995-99      269.7 billion
  - 2000-04      324.1 billion
  - 2005-09      493.7 billion
  - 2010-14      659.4 billion
- **Amount of expenditure (1 year amount)**
  - 1984      ~25 billion
  - 1994      ~50 billion
  - 2004      ~100 billion
  - 2014      ~190 billion
  - Table above source: Health Related Tax Expenditures: Overview and Analysis, CRS R44333 (1/8/2016) <https://fas.org/sgp/crs/misc/R44333.pdf>
  - Tables in other column source: Background Information on Tax Expenditure Analysis and Historical Survey of Tax Expenditure Estimates, JCX-18-15 (2/7/2015) <https://www.jct.gov/publications.html?func=startdown&id=4705>
- **Compared to other expenditures 2010-2014**
  - Health      659.4 billion
  - Mortgage      484.1 billion
  - Capital gain      402.9 billion
  - DB plans      303.2 billion
  - DC plans      212.2 billion

## Why This Will Not Go Away: Medicare Impact on Budget

- **Medicare Hospital Insurance (Medicare Part A)**
- **Medicare funding**
  - “Trustees project that the Medicare Hospital Insurance (HI) Trust Fund will be depleted in 2028... At that time dedicated revenues will be sufficient to pay 87 percent of HI costs.”
    - Summary of 2016 Annual Reports (<https://www.ssa.gov/oact/trsum/>)
  - Expected insolvency date has changed over time
    - 2002      2030
    - 2004-2008      2018 to 2020
    - 2009      2017
    - 2010-2016      2024 to 2030
    - <https://fas.org/sgp/crs/misc/RS20946.pdf>
  - Reasons
    - Individuals are living longer
    - Ratio of workers to those receiving benefits
    - Medical costs
    - Taxes imposed

## Why This Will Not Go Away: Medicaid Expansion Impact on Budget

- Medicaid program is for low income individuals
  - Medicaid expansion
    - Costs for expansion adults
      - 2014 fiscal (10/2013-9/2014) ~24 billion (4.3 million individuals)
      - 2015 fiscal (10/2014-9/2015) ~58 billion (9.1 million individuals)
      - 2016 fiscal (10/2015-9/2016) ~70 billion (11 million individuals)  
(2016 is an estimate)
    - <https://www.medicaid.gov/medicaid/financing-and-reimbursement/downloads/medicaid-actuarial-report-2015.pdf>
    - <https://www.medicaid.gov/medicaid/financing-and-reimbursement/downloads/medicaid-actuarial-report-2016.pdf>
    - States adopting expansion where expansion covers more than 500,000: California, Illinois, Michigan, New Jersey, New York, Ohio, Oregon, Pennsylvania, Washington
    - <http://kff.org/interactive/interactive-maps-estimates-of-enrollment-in-aca-marketplaces-and-medicaid-expansion/>

## Why This Will Not Go Away: Workforce Trends

- Life expectancies are increasing
- Employees are working longer
  - Average age of employees
    - 1994 37.7 years old
    - 2004 40.3 years old
    - 2014 41.9 years old
    - 2024 42.4 years old (expected)
    - Bureau of Labor Statistics  
([https://www.bls.gov/emp/ep\\_table\\_306.htm](https://www.bls.gov/emp/ep_table_306.htm))
  - Percentage employed
    - 2014 About 23% of men and 15% of women age 65 and older
    - 2022 About 27% of men and 20% of women age 65 and older (expected)
    - Population Reference Bureau  
(<http://www.prb.org/Publications/Media-Guides/2016/aging-unitedstates-fact-sheet.aspx>)

## ACA – Repeal and Replace Employer Impact

- **Health plan design**
  - AHCA would likely accelerate move to high deductible health plans
    - Increase in contribution limits for HSAs
    - Both spouses can make catch-up contributions to HSAs
  - AHCA may cause employers to look to drop essential health benefits
    - Insured plans – ability to change would depend on state obtaining waiver
    - Self-insured plans – may forum shop in order to impose annual or lifetime maximums on benefits that were formerly essential benefits
  - AHCA does not directly change prohibition on preexisting condition exclusion, but individuals with preexisting conditions will likely face higher costs
    - Insurers permitted to vary premiums based on health status for people who “cannot demonstrate” coverage for all but 63 days of prior 12 months
  - AHCA elimination of employer shared responsibility fee may cause employers to review coverage (raise hours requirement)
  - 2018 health plan design – almost too late

## ACA – Repeal and Replace Employer Impact

- **Health plan costs**
  - AHCA impact on taxes on employers
    - Employer taxes would be eliminated
    - Employers less concerned about covering workers
  - AHCA and health plan premiums
    - In short term, impact would vary based on number of factors
      - Does employer have insured or self-insured health plan
      - If insured, has state obtained waiver of essential health benefits
      - If insured, has state obtained waiver with respect to rating ratio an / or community rating
    - In long term, impact would also vary and be hard to predict
      - Providers may raise prices faster due to more uncompensated care
      - Workers uncertain about future options may be more reluctant to retire and stay in work force longer, increasing aging workforce
  - AHCA and employees seeking coverage
    - Changing price ratio to 5:1 means insurance becomes much more expensive for older individuals
    - Older employees less likely to get coverage elsewhere and work longer

## ACA – Repeal and Replace Employer Impact

- **Health plan administration**
  - **Disclosure to participants**
    - No changes – disclosure continues, including:
      - Summary of benefits and coverage
      - Exchange notice
      - Section 1557 nondiscrimination notice
      - Form 1095
  - **Reporting to federal government**
    - No changes – reporting continues, including:
      - Forms 1094 and 1095
      - Form W-2 (reporting in Box 12)
  - **Claim administration**
    - No changes – enhancements to claims procedures (independent review) continues
  - **COBRA**
    - Likely more requests because AHCA tax credit can be used for COBRA and exchanges become more uncertain

## ACA – Repeal and Replace Employer Impact

- **Exchanges**
  - A number of issues are undecided
    - Will cost sharing reductions for low-income individuals continue?
      - House litigation on cost sharing reductions to be discussed on 5/22/17
      - 2017 estimated cost sharing is \$7 billion
      - 2018 estimated cost sharing is \$9 billion
    - Will Trump administration seek to encourage participation on exchanges?
  - If exchanges fail, employees more likely to use employer-provided health coverage, including extending health coverage through COBRA



## ACA – Repeal and Replace Health Care Provider Impact

- **Coverage**
  - ACA increased coverage
    - Exchanges cover more than 10 million individuals
    - Medicaid's expansion covers more than 11 million individuals in Medicaid expansion states
  - AHCA focused on cost and choice rather than coverage
    - CBO projection – loss of coverage for 24 million
  - Fewer covered individuals means that providers will see lower payment and will provide more charity care
- **Type of coverage**
  - Number covered under high deductible health plans continues to grow
  - Amount of high deductible health plans continues to grow
  - Individuals become more responsible for payment (and more likely not to be able to pay)

## ACA – Repeal and Replace Health Care Provider Impact

- **Provider reimbursement**
  - If provider reimbursement from broader base declines, likely that providers will need to raise fees on those who have coverage
  - Among first organizations to express concerns about AHCA
    - American Medical Association
    - American Hospital Association

## ACA – Repeal and Replace Looking Forward

- **Possible legislation**
  - **Small approach**
    - **Taxes**
      - Repeal individual mandate and employer mandate
    - **Other changes**
      - Perhaps allow association health plans
      - Perhaps enhance HSAs
  - **Large approach**
    - **Taxes**
      - Repeal individual mandate and employer mandate
      - Repeal other ACA taxes
    - **Coverage mandates**
      - Allow state waiver of essential health mandates
    - **Exchanges and subsidies**
      - Exchanges continue but restructured and smaller subsidies
    - **Medicaid expansion scaled back**
    - **Other changes**
      - Perhaps allow association health plans
      - Perhaps enhance HSAs

## ACA – Repeal and Replace Looking Forward

- **Republicans will need to be able to obtain sufficient agreement**
  - **House of Representatives**
    - **Republican Freedom caucus has approximately 35 members**
      - Of these 1 voted against AHCA on 5/4/17
    - **Republican Tuesday group has approximately 35 members**
      - Of these 14 voted against AHCA on 5/4/17
  - **Senate**
    - **Senator Collins (R – Maine) was no vote on AHCA (3/16/17)**
    - **Senator Paul (R – Kentucky) was no vote on AHCA (3/13/17)**
    - **Senators Cruz (R – Texas), Cotton (R – Arkansas), and Lee (R – Utah) have taken issue with AHCA, but not said they would vote against it**
      - **New York Magazine**  
(<http://nymag.com/daily/intelligencer/2017/03/susan-collins-no-gop-health-bill.html>)

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## Legal Notice

**This presentation is intended for general information purposes only and should not be construed as legal advice or legal opinions on any specific facts or circumstances. An attorney-client relationship is not created through this presentation.**



## Second Annual Forum on Employer Sponsored Benefits

Break 10:00 – 10:15 am

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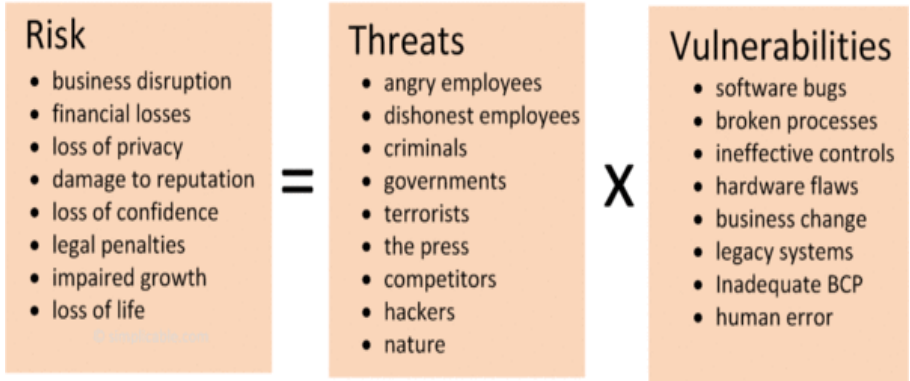
## Cyber Security for Employee Benefit Plans

Robert Cattanach  
Holly Fistler  
Dorsey & Whitney LLP

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# Risk = Threats x Vulnerabilities

Ref: <http://simplicable.com/new/the-big-list-of-information-security-vulnerabilities>



Information Security Risks, Threats and Vulnerabilities  
© simplicable.com

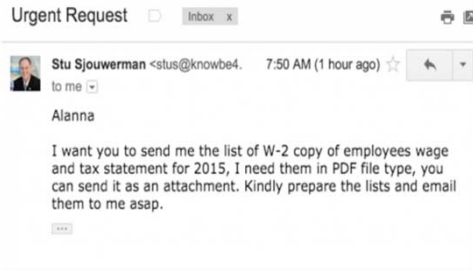
# Threat Overview

	HACKTIVISM	CRIME	INSIDER	ESPIONAGE	TERRORISM	WARFARE
THREATS						
MOTIVATION	Hacktivist use computer network exploitation to advance their political or social causes.	Individuals and sophisticated criminal enterprises steal personal information and extort victims for financial gain.	Trusted insiders steal proprietary information for personal, financial, and ideological reasons.	Nation-state actors conduct computer intrusions to steal sensitive state secrets and propriety information from private companies.	Terrorist groups sabotage the computer systems that operate our critical infrastructure, such as the electric grid.	Nation-state actors sabotage military and critical infrastructure systems to gain an advantage in the event of conflict.

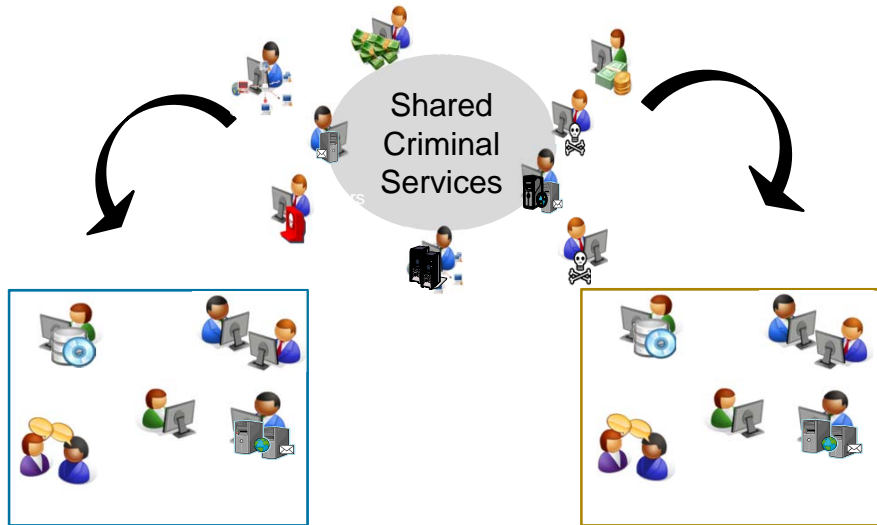
## Create financial gain or cause financial loss

- Theft
- Extortion
- Nuisance / Harassment
- Destruction

# Money, Money, Money



# Cyber Underground Economy





## What "IS" at Risk?

- **Money**
  - Replacing credit cards
  - Insurance premium increases
  - Direct financial losses caused by a breach (theft, fraud)
  - Business downtime
  - Breach mitigation/investigation (outside companies)
- **Reputation**
  - Damage to brand equity/reputation
  - Replacing executive staff
- **Competitive advantage**
  - Stolen IP
  - Business development plans
  - Marketing strategy
  - Loss of competitive advantage
- **Civil Liability**
  - Settlements
- **Regulatory / Criminal Liability**
  - Regulatory fines (if applicable)

## Threat Landscape: Data Breach Costs

**\$6.5 M**

U.S. average cost of a data breach (\$4 M globally)

**29%**

Increase since 2013, in global cost of a breach

**\$221**

U.S. average cost for each exposed record (\$158 globally)

Source: 2016 Cost of Data Breach Study: Global Analysis, Sponsored by IBM, Conducted by Ponemon Institute LLC (June 2016)

## Threat Landscape: Data Breach Costs

**66%**

Indirect Costs:  
Staff hours  
Lost Goodwill  
Customer  
“Churn”

**34%**

Direct Costs:  
Outside Counsel  
Outside Experts  
ID Theft Insurance  
Notification Costs

Source: 2016 Cost of Data Breach Study: Global Analysis, Sponsored by IBM, Conducted by Ponemon Institute LLC (June 2016)



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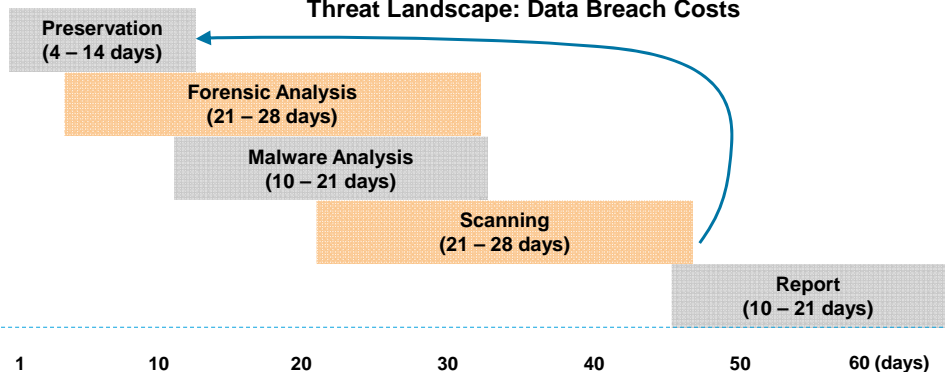
## Response Plan: Timing Expectations

Average Time to Contain = 59 to 82 days

### Forensic Investigation Timeline

Rebuild Drives

Threat Landscape: Data Breach Costs



Source: Ponemon Institute, “2016 Cost of Data Breach Study: Global Analysis,” Sponsored by IBM (June 2016)



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## Data Breach – Proactive Steps

1. Know Your Data and where it resides
2. Know (and manage) Your Vendors
3. Have an Incident Response Plan
4. Practice the Plan
5. Evaluate Your Cyber Insurance

## Know Your Data: Information Governance

- Know what data is being collected, who has access and how long it will be retained (and why); map the flows
- Institute Information Risk Management Program
- Determine adequate security measures:
  - Cannot protect everything
  - Assume hackers will obtain access
  - Build defenses and monitoring around those critical assets
- Document the process
- Have it tested

## Know and Manage Your Vendors (1)

- **Review and approve vendors who host sensitive company data**
  - Insurers / claims administrators
  - Record keepers
  - Third-party administrators (TPAs)
  - COBRA administrators
  - Consultants
  - Brokers
  - IT Vendors
  - Professional service providers
  - Onsite independent contractors and temps

## Know and Manage Your Vendors (2)

- **Assess vendor security measures before retention**
  - Screening of staff, including on-boarding/off-boarding
  - Location and retention of data
    - Will it be stored, or even routed, outside the US?
  - Encryption of data in transit and at rest
  - Intrusion testing
  - Security certifications
- **Site visits and audits**

## Know and Manage Your Vendors (3)

- **Contractual requirements and protections**
  - Legally binding security obligations
  - The big “I”: Indemnification
  - Ownership of data (including de-identified data)

## Template Checklist for Outside Vendors: General Cyber Security Approach

- **Has the vendor experienced any security breaches?**
- **Does the vendor conduct periodic risk assessments to identify threats, vulnerabilities and potential consequences?**
- **What are the vendor’s processes and systems for dealing with threats and protecting data?**
- **Are technology systems updated regularly?**
- **Does the vendor use advanced authentication? Can the vendor explain its process?**

Source: Pensions & Investments, “Important Questions to Ask Current Providers, in RFPs,” (August 24, 2015)

## Template Checklist for Outside Vendors: Internal Controls

- Does the vendor have a privacy and security policy, and does it apply to clients' plan data?
- Is the vendor's policy clear regarding data storage on laptops and portable storage devices?
- Are all personnel who come into contact with plan data trained on adequate protection of the data?
- Does the vendor have policies on storing plan data, including where it is stored, how long it is stored, and how it is eliminated?
- Does the vendor have a chief information security officer or equivalent position?

Source: Pensions & Investments, "Important Questions to Ask Current Providers, in RFPs," (August 24, 2015)



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## Template Checklist for Outside Vendors: External Support

- Does the vendor carry cyber insurance and what does it cover?
- Does the vendor have an annual independent assessment made of its cyber security processes?

Source: Pensions & Investments, "Important Questions to Ask Current Providers, in RFPs," (August 24, 2015)



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## Incident Response Plan

- **Identify the Team**
  - a) **Team leader (will depend on the nature and severity of the incident)**
  - b) **Human Resources**
  - c) **Information Technology**
  - d) **Information Security**
  - e) **Risk Management**
  - f) **Legal – inside and outside counsel**
  - g) **Customer Service**
  - h) **Public Relations**

## Practice the Plan

- **Engage the Team in planning and practice**
  - a) **Assign initial responsibilities; articulate escalation criteria**
  - b) **Identify and involve backup personnel**
  - c) **Primary and backup contact information**
  - d) **Practice the plan**
    - **Start with a table-top exercise**
    - **Escalate to more life-like scenarios**
    - **Involve objective third parties**
    - **Conduct a gap analysis with continuous improvement**

## Identifying Legal Risks – Federal and State Framework

- **No single federal law addresses benefit plan security**

### ERISA

- Electronic delivery rules
- Fiduciary duties
- *Example:* QDIA notices, benefit statements, SPDs, COBRA notices, SOX notices

### Internal Revenue Code

- Electronic delivery rules
- But no security rules

### FTC Act

- FTC-regulated plan sponsors
- Covers: PHI, employee data

### HIPAA

- Group health plans
- Covers: Protected health information (PHI)

### European Union laws

- FTC-regulated plan sponsors
- Covers: EU citizen employee's data

### State laws



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## Identifying Legal Risks – State Governments

### State

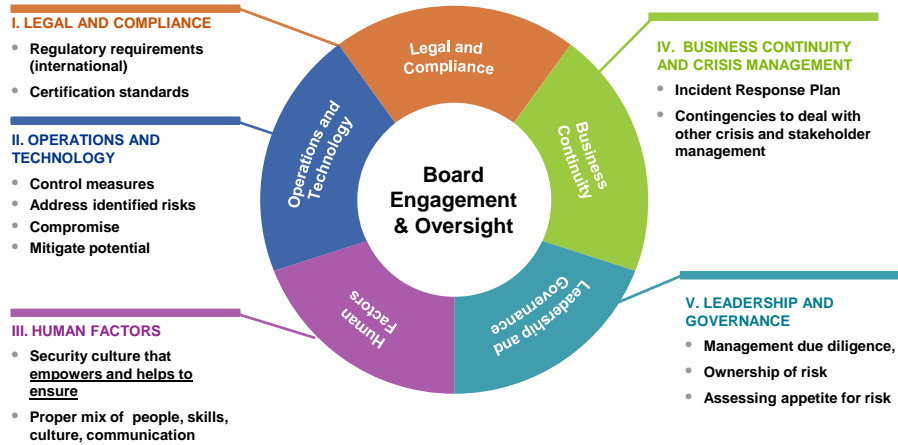
- **48 states and the District of Columbia each have their own Breach Notification Laws**
- **Significant variations (e.g., exceptions for encrypted information; risk assessment threshold)**
- **Some state's requirements are incompatible with others (e.g., Massachusetts)**
- **State Attorneys General – enforcement of state consumer protection laws**
- **Some states claim to have extraterritorial effect (California)**



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# Cyber Risk Management Framework: Oversight's Responsibility



# Evaluating Cyber Insurance

- What insurance do you have?
- What insurance do you need?
- What are the exclusions?

# Questions?



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## Participant Claims

Andrew Holly  
Bob Seng  
Dorsey & Whitney LLP



## Plan Documents

- **Why?**
  - Required by ERISA
  - Governance (claims, committees, delegation, etc.)
  - Amendment & termination
  - Etc., etc., etc.
- **Things to consider.**
  - How do they fit together?
  - How do they assign responsibilities and liabilities?
- **Examples**

## Disclosure

- **ERISA 104(b)(4):** Plan administrators must furnish copies of various documents upon request.
- **ERISA 502(c)(1):** Penalties up to \$110 per day for failure to comply with request.
- **Examples**

## Monitor

- **Fiduciary Duty:** ERISA imposes a fiduciary duty on plan sponsors to monitor the work of their TPA and other vendors. See, e.g., *Pierce v. Visteon Corp.*, 2013 WL 3225832 (S.D. Ind. 2013) (\$1.8 million in damages to employer for failure to monitor COBRA procedures)
- **Common Sense:** TPAs have control over significant assets and direct impact on employee satisfaction.
- **Examples**

## HIPAA

- **Employer Access to PHI:** Employers who want to advocate for Participants should consider whether they are allowed access to PHI.
- **Notices:** Claims notices to dependents or “authorized representatives” may require additional care.
- **Medical Experts.** Don't forget BAAs.
- **Examples**

## Recoupment

- **Why care?**
  - Plan sponsors have a fiduciary obligation to protect plan assets.
  - It can be real money.
- **Background**
  - Generally allowed.
  - Bad facts can preclude. See, e.g., *Butler v. Aetna U.S. Healthcare, Inc.*, 109 F.Supp. 2d 856 (S.D. Ohio 2000)
- **Examples**

## Disability Claims Regulations

- **Effective:** For disability claims filed on or after January 1, 2018.
- **Generally.**
  - More like health care regulations
  - Noncompliance makes it easier for claimants to go straight to court
  - May apply where not expected, e.g., retirement plans?
- **Examples**

## To Plan or Not to Plan: Practical Tips on Structuring Severance Arrangements

Liz Deckman  
Rebecca Bernhard  
Dorsey & Whitney LLP

June 8, 2017

### Tip #1 Think About Making Your Severance Arrangement an ERISA Plan

- Is your severance arrangement an ERISA plan or a payroll practice?
- There are pros to having an ERISA severance plan
  - ERISA preemption of state law
  - The plan document will have ERISA claims procedures that a participant must exhaust before he or she can file suit
  - If a law suit is filed, it must be in federal court and any trial will be decided by a judge, not a jury
  - Any claim decision by the plan administrator is usually entitled to great deference in court
    - After following ERISA claims procedures, the federal courts will uphold a plan administrator's decision on review unless the court finds the decision to be arbitrary and capricious



## Tip #1 Think About Making Your Severance Arrangement an ERISA Plan

- **But there are hurdles, too**
  - You must file a Form 5500, unless the plan has fewer than 100 participants and all payable benefits are either paid by an insurance company or from the employer’s general assets
    - “Participants” include all employees who would be entitled to benefits *if a termination occurred, not just those employees actually terminated*
  - Plans must be in writing and provide for detailed claims procedures
    - Many employers “wrap” the severance plan into the comprehensive welfare plan
  - All participants must receive an SPD

## Tip #1 Think About Making Your Severance Arrangement an ERISA Plan

- **How to tell if your severance arrangement an ERISA plan or a payroll practice**
  - Need an “ongoing administrative scheme” for ERISA coverage
    - Is there only a lump sum payment or a series of periodic payments
    - Is there a case by case analysis to determine eligibility for benefits
    - What is the term of the plan? Is it ongoing or for a single event, like a plant closing?
    - Do managers have discretion in administering the plan?
- **Generally, the less discretion and administration necessary to implement the arrangement, the more likely it is simply a payroll practice, rather than an ERISA plan**

## Tip #2 Don't Become an ERISA Retirement Plan

- **Under DOL regulations, a severance plan will be a welfare plan and not a retirement plan (subject to all of the trust and vesting requirements) if:**
  - **Benefits are not contingent directly or indirectly upon the employee's retiring. (e.g., requiring that all eligible employees have a specified age and/or years of service);**
  - **The total amount of payments does not exceed 2 times the employee's annual compensation; and**
  - **Except in the case of an employee whose service is terminated in connection with a "limited program of terminations," all payments to the employee are completed within 24 months after termination.**

## Tip #3 Don't Forget about 409A

- **409A governs deferred compensation by imposing strict limitations on among other things, the timing and manner of permitted payments**
- **If there is a 409A failure, individuals may have to pay additional income tax on the amount of the deferral, interest, and a surtax equal to 20% of the amount included in income**

## Tip #3 Don't Forget about 409A

- **Severance arrangements may be subject to 409A so think about using an exemption**
  - Short term deferral
    - All severance payments made within 2-1/2 months after termination of employment
  - 2 times 2 exception
    - A series of payments equal to not more than twice the employee's pay (or the qualified plan compensation limit, currently \$270,000) that are made within two years after termination of employment
  - Need involuntary termination or a 409A good reason termination to be able to use these exemptions
- **Watch out for agreeing to pay for continued medical coverage over a period of time, especially if your plan is self insured and the continued coverage is taxable**

## Tip #3 Don't Forget about 409A

- **Timing of releases is important**
  - If severance pay conditioned on signing a release, need to have a time limit on when the release must be signed, otherwise the employee can affect the timing of payment by either signing the release quickly or delaying to a later date
  - The release must specify a fixed payment date after termination of employment or a specified period no longer than 90 days when the severance payment will be made or commence (with special rules if the payment period can go into another tax year)
  - If the release is not signed and returned timely, severance is forfeited

## Tip #4 Written Severance Provisions are Important

- **Although lack of written plan terms may seem to give more discretion in paying severance benefits, having no written plan may actually restrict the right to amend or terminate benefits, particularly if the arrangement is an ERISA plan**
  - Many cases have held that informal severance arrangements give rise to past practices under which terminated employees claim similar severance benefits
- **Make sure that the plan document gives the administrator the discretion to make all eligibility and benefit determinations, enabling the employer to have the benefit of deferential review of those determinations in the event of a lawsuit**

## Tip #4 Written Severance Provisions are Important

- **Think about including the following types of provisions in your written plan terms:**
  - A reasonable statute of limitations for filing a lawsuit challenging the plan administrator's denial of a claim
  - Specify which state's law will govern the interpretation of the plan
  - Specify the forum in which litigation may be brought
  - Stipulate that claims or disputes are subject to arbitration (after exhausting the claim procedures)

## Tip #4 Written Severance Provisions are Important

- **Severance agreement contents**
  - Terms of severance payments
  - Non-disparagement requirements
  - Non-compete requirements
  - Confidentiality provisions
  - Release of claims
  - Other details surrounding the separation
- **Severance agreement considerations**
  - EEOC rules and guidance regarding waivers and confidentiality
  - SEC requirements regarding release of whistleblower claims
  - ADEA/OWBPA requirements
- **Minnesota or other state requirements**
  - MHRA requirements – time to consider and to revoke

## Tip #5 Consider Employment Law Issues

- **Federal laws**
  - **Anti-discrimination protections: cannot avoid via contract language**
    - May be able to provide for alternative dispute resolution procedures (arbitration provisions)
  - **Must allow federal agencies to proceed with their procedures**
    - Include carve out language for EEOC, SEC whistleblower claims
    - DOL must approve FLSA settlements
  - **ADEA/OWBPA requires special provisions for release of claims in severance agreements**

## Additional Thoughts

- **Severance**
  - Common to provide for severance in variety of employee agreements – check all applicable documents!
  - Example of generally acceptable language:
    - “Executive shall be eligible for and severance equal to 12 months of base salary (as set in the year before termination) provided executive signs and does not rescind a general release of claims and abides by the terms of the release (which may include covenants not to compete and non-solicitation).”
  - Examples of issues:
    - Consider reasonableness of severance (especially important for a tax-exempt organization)
    - Consider whether severance needs to be disclosed (public companies)
    - Consider section 457
      - Limits on bona fide severance
    - Consider section 280G

## Second Annual Forum on Employer Sponsored Benefits

# Thank You!