


Game Change 2014: Preparing Your Health and Welfare Plans

Western Pension & Benefits Council
Seattle Chapter Meeting

Presented by:
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TUESDAY, SEPTEMBER 17, 2013

Today's Topics

- DOMA and the *Windsor* Decision
- New HIPAA Privacy Rules
- New HIPAA Wellness Program Rules
- Health Care Reform
 - Review of first 4 years (in 3 minutes or less)
 - What's new for 2014
 - Delay of employer pay-or-play penalties

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Windsor: Demise of DOMA

- Section 3 of DOMA is unconstitutional
 - Federal government will now recognize same-sex marriages for purposes of federal law
 - 13 states and DC, as well as many foreign countries, allow same-sex marriages
 - 37 states not allowing same-sex marriages not required to recognize same-sex marriages

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Controlling State Law

- To determine whether a couple is married, the federal government will use one of two possibilities
 - State of celebration (state in which the marriage occurred)
 - State of residence (state in which the couple currently lives)

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Controlling State Law: Example

- Couple married in Washington, lives in Oregon
 - State of celebration rule: couple is married
 - State of residence rule: couple is not married
- Federal government likely not to use the same rule across the board, but same-sex married couple living in same-sex marriage state will be married for all federal law purposes
 - Couples in non-same-sex marriage states likely will be married under some federal laws and not others

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IRS Windsor Guidance

- For all federal tax purposes, the federal government will use the state (and country) of celebration
 - Same-sex married couples will be recognized as married under the IRC no matter where the couple lives or works
 - No marriage recognition to domestic partnerships or civil unions

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IRS Windsor Guidance and Health Plans

- Employer contributions for coverage of same-sex spouse and children of same-sex spouse are tax-free to employee
- Employee's contributions for coverage for same-sex spouse and children of same-sex spouse may be paid on a pre-tax basis through a cafeteria plan

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IRS Windsor Guidance and Health Plans

- Employers must stop imputing income as of September 16, 2013
- Employers may under-withhold for rest of 2013 (but correction must be done by December 31, 2013)
- Employees need to file amended tax returns for previous years (no employer correction)

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IRS Windsor Guidance and Health Plans

- Employers do not need to issue amended W-2s for prior tax years
- Employers can recover employment taxes they paid on imputed income
 - IRS will announce a special administrative procedure for this purpose

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IRS Windsor Guidance and Health Plans

- Other spousal rights in IRC: COBRA, HIPAA special enrollment
- Employee may now use HSA, HRA and health FSA funds for expenses of same-sex spouse and same-sex spouse's children
 - Waiting for more guidance on these issues
 - Effective date: January 1 or September 16?
 - Also DCAP and other fringe benefit issues

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IRS Windsor Guidance and Qualified Retirement Plans

- Federal spousal rights in retirement plans differ depending on type of plan
 - QDROs
 - Right to consent to non-spouse beneficiary
 - Joint and survivor annuities
- IRS to issue guidance on retroactive effect on retirement plans and any necessary plan amendments

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Employee Communications on Demise of DOMA

- Contact employees with same-sex partners covered by health plan to see if they are married
 - Correct withholdings
- At open enrollment (or other appropriate time) explain effect of the ruling to all employees
 - Employers may not know all employees in same-sex marriages

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New HIPAA Privacy Rules

- HIPAA Omnibus Privacy Regulations issued in January 2013
- Compliance date: September 23, 2013
- Highlights of new rules
 - New enforcement rules
 - \$1.75M fine for health plan that returned copiers to leasing agent without stripping out protected health information ("PHI") from hard drives
 - \$1.5M fine for theft of unencrypted laptop
 - \$1.7M fine for USB hard drive stolen from employee's car

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New HIPAA Privacy Rules

- Major expansion of entities subject to the privacy and security rules
 - Most of the rules apply to business associates
 - New rule: rules apply to subcontractors of business associates
 - Example:
 - Third-party administrator hires subrogation subcontractor
 - Subrogation subcontractor hires law firm
 - Law firm hires document storage company
 - Document storage company hires shredding company
 - All are subject to HIPAA privacy and security rules

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New HIPAA Privacy Rules

- Individuals have a right to inspect and copy their PHI
 - Individuals now have a right to have their PHI sent to a third party
 - Individuals now have a right to electronic copies of their PHI

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New HIPAA Privacy Rules

- Action items
 - Amend business associate agreements
 - Revise and distribute new notice of privacy practices
 - Revise plan's privacy and security policies
 - Revise plan's breach notification policy
 - Train workforce on new rules

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HIPAA Wellness Program Rules

- Applicable to a wellness program that is, or is part of, a group health plan
- Three types of wellness programs
 - Participatory
 - Reward for attending cooking classes
 - Health-contingent: activity-only
 - Reward for walking
 - Health-contingent: outcome-based
 - Reward for not smoking

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HIPAA Wellness Program Rules

- Major changes from previous rules
 - Maximum reward increased from 20% to 30% of total premium (50% for non-smoking rewards)
 - Health-contingent outcome-based programs must offer alternative method to all who do not otherwise qualify for reward and must pay for the cost of the alternative method
 - Prior law: only had to offer alternatives to persons for whom program was inadvisable or unreasonably difficult due to a medical condition

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HIPAA Wellness Program Rules

- Example: reward for non-smokers
 - All smokers must be offered a reasonable alternative (smoking cessation program)
 - Plan must identify and pay the cost of smoking cessation program
 - Smoker gets 100% of reward upon completion of program, whether or not smoker quits smoking
 - No reward required if smoker drops out of program
 - Repeat next year

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First Four Years of HCR

- No aggregate lifetime dollar limits
- Children eligible for health plans until 26
 - Coverage tax-free through end of year in which child turns 26
- No pre-existing condition exclusions (“PCEs”) for children under 19
- First payment of PCO fee
 - \$1 per covered life, \$2 next year

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First Four Years of HCR

- Summary of benefits and coverage (“SBC”)
- Health FSA limit: \$2,500 (indexed) per employee per plan year
- W-2 reporting: cost of health coverage reported in Box 12, Code DD
- Medical loss ratio rules
- Restrictions on rescissions

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First Four Years of HCR

- New internal and external review rules
- Rules on designation of primary care physicians
- Emergency room payment requirements
- Preventive care covered at 100%, including contraceptive care for women and certain non-prescription drugs (folic acid and aspirin)

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First Four Years of HCR

- Supreme Court ruling on PPACA
 - Still various court challenges to PPACA provisions
- Early Retiree Reinsurance Program (“ERRP”) has come and gone
- Medicare tax increases for high-income taxpayers and deduction for Medicare retiree drug subsidy eliminated

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Exchange Notice

- Notice to employees and new hires on exchanges
 - Explanation of exchange and services provided
 - Eligibility for premium tax credits
 - Impact of purchasing through exchange
- Distributed by October 1, 2013, to all existing employees and new hires as of October 1, 2013
 - Beginning of open enrollment period for exchanges

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Exchange Notice

- Applicable to employers subject to Fair Labor Standards Act
- Distributed to all employees
 - Even if not eligible for health plan (e.g., part-time employees)
 - No distribution to dependents

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Exchange Notice

- Two model notices are available
 - Employers offering health plan
 - Employers not offering health plan
- Notices require specific information on employer and employer's health plan
 - Should contain information on the plan for 2014 (not 2013)
- New model COBRA election notice also available

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SBC for 2014 Coverage

- New SBC template for 2014 (distributed at the end of 2013)
 - Adds data elements requiring plan to disclose whether it
 - Constitutes minimum essential coverage; and
 - Provides minimum value
 - No new coverage examples

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2014: Clinical Trials

- Plans may not deny right to participate in clinical trials
 - Must cover routine patient costs provided to participants not in a clinical trial
 - May not discriminate against the individual based on participation in the trial
 - Good-faith compliance, no regulations before 2014

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2014: Provider Discrimination

- Cannot discriminate against any health care provider acting within the scope of its license
 - Does not require plans or insurers to accept all types of providers into a network
 - Does not apply to provider reimbursement rates
 - Good-faith compliance, no regulations before 2014

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2014: 90-Day Waiting Period

- Maximum 90-day waiting periods
 - Waiting period is a period of time that must pass before an otherwise eligible person is allowed to enroll
 - Eligibility conditions (full-time status) will not count toward 90 days
 - No requirement to provide coverage to part-time employees

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2014: 90-Day Waiting Period

- Maximum 90-day waiting periods
 - No violation if employee is slow to enroll
 - Enrollment must be available by the 90th day, even if the middle of the month
 - Many plans are changing to the first day of the month following 60 days
 - Cumulative service hours of not more than 1,200 acceptable as eligibility requirement
 - Enrollment must be offered within 90 days

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2014: PCEs

- No pre-existing condition exclusions for anyone (not just children)
 - HIPAA certificates of creditable coverage no longer required after December 31, 2014

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2014: Required HRA Integration

- No aggregate lifetime dollar or annual dollar limits allowed
- HRAs would violate these rules
 - Previous waiver program for HRAs and mini-meds ends
- Retiree-only HRAs still okay
 - Retiree-only plans exempt from most of health care reform

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2014: Required HRA Integration

- HRAs will violate rules unless “integrated” with a health plan without dollar limits
- What does “integration” mean?
 - HRA limited to employees enrolled in a health plan
 - Mere eligibility for health plan is not enough
 - Enrollment in an individual policy is not enough
 - Can HRA be integrated with more than one plan?

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2014: Individual Mandate

- Individuals must pay tax if they, their spouses, or their tax dependents do not have “minimum essential coverage”
 - Greater of percentage of income OR dollar amount multiplied by number of uncovered family members
 - 2014: 1% or \$95 (not to exceed 300% of \$95)
 - 2015: 2% or \$325
 - 2016: 2.5% or \$695
 - Capped at national average bronze-level plan premium
 - Flat dollar amount for individuals under 18 is half of these amounts
 - Tax imposed on monthly basis

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2014: Individual Mandate

- Minimum essential coverage includes
 - Any employer-sponsored group health plan
 - Any government-sponsored plan, including Medicare Part A, Medicaid, CHIP, TRICARE
 - Policies in the individual market
 - State risk pool
 - Medicare Advantage
 - Self-funded student plans

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2014: Individual Mandate

- Exemptions for:
 - Religious conscience
 - Health care sharing ministry participants
 - Taxpayers with income below filing threshold
 - Individuals who cannot afford coverage (contribution exceeds 8% of household income)
 - Compare to other affordability tests (9.5% of household income; 9.5% of wages)
 - Members of Indian tribes

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2014: Premium Tax Credit

- Federal subsidy to help individuals purchase insurance at the exchanges
 - HHS plans to pay premium tax credit amount directly to insurer to partially pay premiums when due

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2014: Premium Tax Credit

- Eligibility for premium tax credit
 - U.S. citizens and legal residents whose income is between 100% (133%) and 400% of federal poverty level
 - \$46,000/individual; \$94,000/family of four
- But not eligible if:
 - Offered enrollment in an “affordable” employer-sponsored group health plan providing minimum value (“MV”);
 - Offer also disqualifies all dependents who are eligible for the plan if they are also tax dependents of employee
 - Actually enrolled in an employer-sponsored health plan (regardless of MV or affordability); or
 - Eligible for other coverage (such as Medicare Part A, Medicaid) ³⁹

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2014: Premium Tax Credit

- Minimum value: Health plan pays at least 60% of the total allowed costs of plan benefits
- Affordable coverage: Cost for employee-only coverage of lowest health plan option does not exceed 9.5% of household income
 - No affordability test for family coverage

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One-Year Delay of Pay-or-Play

- Originally announced in a blog
 - Really?
- Information reporting requirements
 - IRC §§ 6055 and 6056
 - Require reporting by insurers, self-funded plans, government agencies and large employers to IRS and to employees

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One-Year Delay of Pay-or-Play

- Proposed regulations have been issued under IRC §§ 6055 and 6056
 - IRS trying to streamline reporting requirements
 - Would allow electronic reporting to employees, but only if employer has obtained prior consent of employee

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2014 2015: Pay-or-Play Penalties

- Employer pay-or-play penalties apply to “applicable large employers”
 - Averaged 50 or more full-time equivalents on business days during previous calendar year
- Two types of pay-or-play penalties
 - No coverage penalty: IRC § 4980H(a)
 - Insufficient coverage penalty: IRC § 4980H(b)
 - Only apply for failure to offer coverage to full-time employees (30 hours/week, 130 hours/month)

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2014 2015: VHS Employees

- Proposed regulations for variable hour and seasonal (“VHS”) employees
 - Measurement periods to determine whether these employees are full time
 - 3-12 months
 - These should start in 2014 for purposes of pay-or-play penalties in 2014

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One-Year Delay: Action Items

- Delay eligibility changes relating to definition of FTE (30 hours a week)
- Delay changes to make plan affordable or provide minimum value
- Delay measurement periods for VHS employees until 2014, for stability periods in 2015

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2014: TRP Fee

- Transitional Reinsurance Program (“TRP”) fee
 - To assist insurers who provide individual insurance to high-cost enrollees
 - To repay federal government for ERRP
- HHS will collect \$25B from 2014 to 2016 from health insurers and self-funded health plans
 - TRP fee is per capita (per covered life)
- Insurance company pays for insured plans, plan administrator for self-funded

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2014: TRP Fee

- TRP fee for 2014
 - \$5.25 per month (or \$63 per year) per covered life in major medical coverage
 - TRP fee will be lower in 2015 and 2016
- TRP fee not payable for persons whose coverage is secondary to Medicare
 - Retirees and COBRA participants

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Other Issues on Delayed List

- Automatic enrollment for large employers
 - Delayed until after 2014
 - Enforcement moved to EBSA
- Nondiscrimination rules for insured plans
 - HCR requires these rules for non-grandfathered plans to be “similar” to the rules for self-funded health plans
 - Enforcement delayed until regulations issued

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QUESTIONS?

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