McDermott Will & Emery

Legal Update on Select Health and Welfare Plan Issues

Susan M. Nash

snash@mwe.com

Presentation to Silicon Valley Employers Forum

November 9, 2016

Agenda

McDermott Will & Emery

- Exchange Notices
- Corrections to Form 1094 and 1095
- ACA Section 1557 Issues
- EEOC Wellness Program Regulations under ADA and GINA

Health Insurance Marketplace Exchange Notices

McDermott Will & Emery

- Under the ACA, Exchanges are required to notify employers of any employees who have been determined eligible for advance payment of premium subsidy or cost-sharing reduction and enrolled in a qualified health plan on the Exchange.
- HHS and State Exchanges have begun issuing notices.
- Notice indicates that employer made no offer of coverage; made an offer of coverage that was not affordable or did not provide minimum value or employee was unable to enroll due to waiting period.

Exchange Notices

McDermott Will & Emery

- Employers are not required to appeal; grounds for appeal are limited: i.e. employee enrolled, employee was offered affordable coverage, employee was not in waiting period, etc.
- Exchange Notice is different from IRS Notice of Demand and Payment for 4980H penalties
- Notice signals to employer that they could become liable for 4980H penalty in the future
- Approaches: Do Nothing or Appeal. Do nothing is usually appropriate if Exchange information is indeed correct. Does not jeopardize future appeal rights with IRS.

Exchange Notices

McDermott Will & Emery

- Consider appealing to “set the record straight” and correct misinformation.
  - Provides record for employer to later defend against IRS Notice and Demand for Payment
  - Prevents employee from collecting additional subsidy that will have to be repaid/deducted from refund
  - Independent contractor vs. employee not addressed through Exchange appeal process; but Exchange Notice can alert employer to discrepancy in worker classification issues

ACA Reporting and Corrections

McDermott Will & Emery

- The ACA imposes reporting requirements on employers under the Employer Shared Responsibility Rules of Code Section 4980H on Forms 1094-C and 1095-C.
- ACA also obligates issuers of Minimum Essential Coverage to report on Forms 1094-B and 1095-B.
- Reporting can be combined on Form 1095-C for certain large employers.
- Most forms are filed electronically under new AIR reporting system.

ACA Reporting and Corrections

McDermott Will & Emery

- AIR system – electronic system for filing Forms 1094 and 1095 was not without errors; common error code (AIRTN500) advises filers that name or TIN does not match IRS records.
- Error message does not identify which employee or dependent information is missing.
- There are penalties for failing to file returns on time, failing to include all required information and filing incorrect information.

Information Return Penalties

McDermott Will & Emery

- The penalty for not filing an information return with the IRS generally is $260 for each return. The penalty for providing an incorrect statement to employees/enrollees is $260 for each erroneous statement. Separate penalties means errors could result in double penalties.
- In most cases, the total penalty for all reporting failures cannot exceed $3 million a year, although for violations due to "*intentional disregard*," each $260 penalty can be doubled to $520 per failure, and there is no cap on the total penalty amount.

Information Return Penalties

McDermott Will & Emery

- Correcting a reporting failure within 30 days of the due date reduces the penalty to $50 per return, with a cap of $500,000.
- For reporting failures corrected after 30 days but on or before August 1 of the filing year, the penalty is $100 per return, and the cap is $1.5 million. (The August 1 date has been extended for 2015 filings due to the reporting extension for 2015 — the deadline was extended to October 1 for forms sent to individuals and November 1 for forms sent to the IRS.)

Information Return Penalties

McDermott Will & Emery

- IRS may waive penalties if failure was due to reasonable cause and not willful neglect. One defense may be proper solicitation of TINs.
- Notice 2015-68 provides general TIN solicitation process as revised by proposed regulations

ACA Reporting and Corrections

McDermott Will & Emery

- Pursuant to Notice 2015-87, the IRS provided relief from incomplete or incorrect returns files or statements furnished to employees in 2016 for coverage offered (or not offered in 2015). Penalty relief is provided if an employer did not file or furnish accurate returns but can show it made a good-faith effort to comply with the requirements.
  - While the relief extends to incorrect statements that were timely filed, the IRS has stated informally in webinars and other presentations to the public that **correcting errors is part of the good-faith effort to file accurate and complete information returns.**
  - In the IRS view, good-faith relief does not excuse an entity from the continuing obligations to identify and correct errors in returns previously filed with the IRS. An entity must correct errors within a reasonable period of time after discovering them, generally 30-60 days after discovery.

Information Return Penalties

McDermott Will & Emery

- An inconsequential error or omission is not considered a failure to include correct information. IRS further elaborates that for this purpose, “the term "inconsequential" means an error or omission that doesn´t stop the IRS from processing, correlating required information with the affected individual´s tax return, or otherwise putting the return to its intended use.”
- In addition to good-faith effort, there is a reasonable cause waiver of the filing penalties for a failure that is due to a reasonable cause and not due to willful neglect.

Information Return Penalties

McDermott Will & Emery

- To establish "reasonable cause," an entity must show that it acted responsibly before and after the failure occurred and that the entity had significant mitigating factors or the failure was due to events beyond its control.
- Significant mitigating factors include, for instance, that an entity was not previously required to file or furnish the particular type of form, and that an entity has an established history of filing complete and accurate information returns. Events beyond an entity's control include fire or other casualty that make relevant business records unavailable and prevent the entity from timely filing.

Section 1557 of the ACA

McDermott Will & Emery

- Section 1557 of the Affordable Care Act ("ACA") and its final regulations prohibit discrimination on the basis of race, color, national origin, sex, age or disability for any health program or activity, any part of which receives federal funding or assistance, or under any program or activity administered by an entity established by title I of the ACA.
- The final rule prohibits health care providers and insurers, including certain self-funded group health plans and third-party administrators, from denying health care based on gender identity or denying treatment or access to facilities for sex-specific ailments.

Section 1557 of ACA

McDermott Will & Emery

- A "Covered Entity" is
  - An entity that operates a health program or activity, any part of which receives federal financial assistance from the Department of Health and Human Services ("HHS");
  - An entity established under Title I of the ACA that administer a health program or activity;
  - Programs or activities administered by HHS
  - For an entity principally engaged in providing or administering health services or health insurance coverage or other health coverage**, *all*** of its operations are considered part of the health program or activity

Section 1557

McDermott Will & Emery

- 1557 applies to group health plans sponsored by an employer; if:
  - The employer is principally engaged in providing or administerting health services, health insurance coverage or other health coverage and receives federal financial assistance from HHS; e.g. group health plan sponsored by a health care system.
  - The employer is receiving federal financial assistance from HHS to fund its group health plan; e.g. employer receiving Retiree Drug Subsidy under Medicare Part D and EGWPs.
  - The employer operates a health program or activity that receives federal financial assistance (employer is not primarily engaged in providing or administering health program or activity).

ACA Section 1557

McDermott Will & Emery

- Covered Entities shall not, in providing or administering health-related insurance or other health-related coverage:
  - Deny, cancel, limit, or refuse to issue or renew a health-related insurance plan or policy or other health related coverage, or deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, on the basis of race, color, national origin, sex, age, or disability;
  - Have or implement marketing practices or benefit designs that discriminate on the basis of race, color, national origin, sex, age, or disability in a health-related insurance plan or policy, or other health-related coverage;

ACA Section 1557

McDermott Will & Emery

- Deny or limit coverage, deny or limit coverage of a claim, or impose additional cost sharing or on the limitations or restrictions on coverage, for any health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that an individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available;
- Have or implement a categorical coverage exclusion or limitation for all health services related to gender transition; or
- Otherwise deny or limit coverage, deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, for specific health services related to gender transition if such denial, limitation, or restriction results in discrimination against a transgender individual.

ACA Section 1557

McDermott Will & Emery

- What are the Administrative Requirements of the Final Rule?
  - Covered Entities are required to provide Meaningful Access to Individuals with Limited English Proficiency.
  - Covered Entities are required to provide effective communication and physical and electronic access to individuals with disabilities.
  - Covered Entities are required to implement Grievance Procedures and Appoint a Compliance Coordinator.
  - Covered Entities are required to provide Notice of Compliance and Available Services on website and in “significant publications”.

ACA Section 1557

McDermott Will & Emery

- The Final Rule is generally effective July 18, 2016, or, if provisions of the rule require changes to health insurance or group health plan benefit design, the rules are effective the first day of the first plan year beginning on or after January 1, 2017. The rule's notice requirements are effective within 90 days of the effective date, or October 16, 2016.
- Title VII concerns for non-covered entities.

ACA Section 1557

McDermott Will & Emery

- Determine Covered Entity Status
- Discuss Compliance Plan with TPA
- Plan for Notice and Communication Requirements
- Review Benefit Plan Design and Make Necessary Amendments
- Communicate Plan Design Changes
- Adopt Procedures to comply with Administrative Requirements

Americans with Disabilities Act

McDermott Will & Emery

- The Equal Employment Opportunity Commission ("EEOC") is responsible for enforcing the ADA
- The ADA prohibits discrimination against individuals with disabilities and defines a disability as:
  - A physical or mental impairment that substantially limits one or more major life activities of such individual;
  - A record of such an impairment; or
  - Being regarded as having such an impairment

Americans with Disabilities Act

McDermott Will & Emery

- The ADA generally prohibits employers from making disability-related inquiries or requiring medical examinations unless they are:
  - Job related; and
  - Consistent with business necessity
- ADA permits employers to conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site

EEOC Enforcement Action

McDermott Will & Emery

- ***EEOC v. Honeywell***: EEOC argued that financial "penalties" for those who did not complete biometric screening violated the ADA even though plan complied with ACA wellness regs: (i) $500 surcharge for employee; (ii) $1,000 tobacco surcharge for employee; (iii) $1,000 surcharge if spouse did not complete HRA; (iv) forfeit HSA contribution of $1,500.
- Honeywell's plan design was ACA/HIPAA compliant but EEOC claimed program was not "voluntary"
- Honeywell ultimately prevailed; Court denied motion for preliminary injunction; Case died

EEOC Enforcement Action (cont'd)

McDermott Will & Emery

- ***EEOC v. Orion Energy Systems***: loss of employer subsidy plus $50 surcharge if no biometrics taken
- ***EEOC v. Flambeau***: loss of coverage if no biometrics taken
- ***Seff v. Broward County***: ADA's bona fide group health plan safe harbor provision permitted incentives

ADA Wellness Regulations

McDermott Will & Emery

- In response to wide spread criticism of the EEOC's approach to enforcing its laws through litigation without first issuing regulations, the EEOC issued final wellness program regulations on May 17, 2016
  - Proposed regulations issued April 20, 2015
- Provides guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that include disability-related inquiries and/or medical examinations

ADA Wellness Regulations

McDermott Will & Emery

- Applies to all employee wellness programs that include **disability-related inquiries and/or medical examinations**
  - Does not matter whether wellness program is part of a group health plan or employee is enrolled in group health plan (ACA/HIPAA only applies to wellness programs that are GHPs)
- Incentive limits apply to both participatory and health-contingent wellness programs (different from ACA/HIPAA rules)
- Incentive limits include both financial and in-kind incentives
  - No exclusion for de minimis value incentives
- Incentives may be in the form of either a reward or penalty

ADA Wellness Regulations

McDermott Will & Emery

- Program must be voluntary
  - Employer cannot require participation
  - Employer cannot deny coverage under GHP or any benefit option for failure nonparticipation
  - Employer cannot take any adverse employment action or retaliate against employees who do not participate or who fail to achieve certain outcomes

ADA Wellness Regulations

McDermott Will & Emery

- Incentive/penalty cannot exceed 30% of total cost of self-only coverage; no additional percentage increase for tobacco cessation (unless no medical testing) or family coverage (different than HIPAA/ACA rules)
- Required Notice; HIPAA privacy notice will likely not suffice
- Program must promote health or prevent disease
- Nondiscriminatory in operation

ADA Wellness Regulations

McDermott Will & Emery

- ADA incentive limits – wellness program incentives cannot exceed:
  - 30 percent of the total cost of self-only coverage (including both the employee's and employer's contribution) where participation in a wellness program depends on enrollment in a particular health plan
  - 30 percent of the total cost of self-only coverage when the covered entity offers only one group health plan and participation in a wellness program is offered to all employees regardless of whether they are enrolled in the plan
  - 30 percent of the total cost of the lowest cost self-only coverage under a major medical group health plan where the covered entity offers more than one group health plan but participation in the wellness program is offered to employees whether or not they are enrolled in a particular plan
  - 30 percent of the cost to a 40-year-old non-smoker of the second lowest cost Silver Plan (available under the Affordable Care Act) in the location that the employer identifies as its principal place of business, where the covered entity does not offer a group health plan or group health insurance coverage

ADA Wellness Regulations

McDermott Will & Emery

- Wellness program must be reasonably designed to promote health or prevent disease – program satisfies this standard if:
  - It has a reasonable chance of improving the health of, or preventing disease in participating employees, is not overly burdensome, is not a subterfuge for violating the ADA or other laws prohibiting employment discrimination, and is not highly suspect in the method chosen to promote health or prevent disease
  - The information collected is actually used to design a program that addresses at least some of the conditions identified

ADA Wellness Regulations

McDermott Will & Emery

- Program is not reasonably designed if "it exists mainly to shift costs from the covered entity to targeted employees based on their health or simply to give an employer information to estimate future health care costs"
- Facts and circumstances test to determine whether program is reasonably designed to promote health or prevent disease

ADA Wellness Regulations

McDermott Will & Emery

- ADA incentive limits only apply to the employee (GINA regulations apply to spousal participation in a health risk assessment and prohibit incentives for dependent children)
- ADA incentive limits are not applicable to wellness programs that do not require disability-related inquiries or medical examinations
  - Program where employees self-identify whether they use tobacco (maximum 50% HIPAA wellness incentive may apply)
  - Participatory only programs where incentive is based on attending nutrition, weight loss, or smoking cessation classes

ADA Wellness Regulations

McDermott Will & Emery

- Notice requirements:
  - Must be written so employee whose medical information is being obtained is reasonably likely to understand it
  - Describes the type of medical information that will be obtained and the specific purposes it will be used for
  - Describes the restrictions on the disclosure of the employee's medical information, the employer representatives or other parties it will be shared with, and how the employer will ensure it is not improperly disclosed (including whether the wellness program complies with HIPAA)
- EEOC issued a model notice in June

ADA Wellness Regulations

McDermott Will & Emery

- ADA confidentiality requirements apply
  - Wellness program information can only be used as necessary to administer the program
  - Information regarding an employee's medical history may only be provided to the employer in aggregate terms that do not disclose, or are not reasonably likely to disclose, the employee's identity
  - Medical records should be kept in separate files from personnel records

Genetic Information Nondiscrimination Act (GINA)

McDermott Will & Emery

- The Genetic Information Nondiscrimination Act ("GINA") was signed on May 21, 2008 and became applicable to group health plans for plan years beginning after May 21, 2009
- GINA Title I applies to health plans
- GINA Title II applies to employers

GINA

McDermott Will & Emery

- GINA prohibits group health plans and health insurance issuers from:
  - Adjusting premiums or employer contribution amounts for a group on the basis of genetic information
  - Requesting or requiring an individual or a family member to undergo genetic testing
  - Requesting, requiring or purchasing genetic information for underwriting purposes
  - Requesting, requiring or purchasing genetic information for any purpose before an individual's enrollment under the plan

GINA

McDermott Will & Emery

- Under GINA "genetic information" includes:
  - An individual's genetic tests
  - Genetic tests of an individual's family members
  - Family medical histories – the manifestation of diseases or disorders among an individual's family members
  - Information obtained through genetic services such as genetic tests, genetic counseling, genetic education
- GINA defines a family member to include first, second, third, and fourth degree relatives of the individual, as well as the individual's "dependents"
- The term "dependent" includes "any individual who is or may become eligible for coverage under the terms of a group health plan because of a relationship to a participant"

GINA

McDermott Will & Emery

- Final regulations on GINA's applicability to employer-sponsored wellness programs issued May 17, 2016
  - Proposed regulations issued October 30, 2015
- Address the extent to which an employer may offer an employee an incentive (financial or in-kind) in the form of a reward or a penalty when the employee's spouse provides information about the spouse's manifestation of disease or disorder as part of a health risk assessment ("HRA") administered in connection with an employer-sponsored wellness program
- Similar to ADA requirements, but spousal authorization required for participation in HRA

GINA

McDermott Will & Emery

- May not offer an incentive for a spouse to provide their own genetic information (including results of genetic tests)
- May not offer an incentive for a spouse to provide information about the manifestation of disease or disorder or genetic information about an employee's children (including adult children)
- The HRA must be in connection with the spouse's receipt of health or genetic services offered by the employer
- May offer an incentive to an employee for a spouse to provide information about their manifestation of a disease or disorder
- The spouse must provide prior, knowing, voluntary, written authorization
- The authorization must describe the confidentiality protections and restrictions on the disclosure of genetic information

Questions

McDermott Will & Emery