Employee Benefits & Workers' Comp News

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Affordable Care Act Update

As this issue went to press, the Supreme Court was hearing arguments in *King v. Burwell*, which could decide the fate of the Affordable Care Act (ACA). Meanwhile, other changes have affected administration of the ACA.

No More Skinny Plans: In past issues, we've discussed so-called skinny plans, or medical plans that large employers have argued would fulfill their requirement to provide affordable medical coverage to employees. The ACA requires individual and small group health plans to cover certain preventive services and to cover a list of "essential health benefits." Large employer plans don't have this requirement. Instead, they must provide coverage that is affordable and meets minimum value standards, which means covering at least 60 percent of the total cost of medical services for a standard population.

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This Just In

The ruling in the case *Tibble v. Edison International* could bring greater scrutiny to 401(k) plan fees and fiduciary duties toward participants. The Supreme Court recently heard arguments in the case. Plaintiffs claim that administrators of Edison's retirement plan breached their fiduciary duties by offering plan participants retail-class mutual funds, when identical institution-class mutual funds were available at lower cost.

The district court where the case originated granted summary judgment for Edison. It reasoned that the plaintiffs' claim was time-barred under ERISA, the Employee Retirement Income Security Act. ERISA requires plan participants to file lawsuits for

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Skinny plans cover the required preventive services, but do not provide hospitalization benefits, which is one of the most costly "essential benefits." These plans save money…and some meet the minimum value standard.

In late February, the Department of Health and Human Services (HHS) finalized a proposed rule that requires employer-sponsored health plans to cover hospitalization benefits. It said a plan that does not offer hospital benefits "is not a health plan in any meaningful sense." This means large employers offering only a skinny plan would be subject to the ACA's penalties of up to $3,000 per employee.

Employees covered by these plans now officially lack qualifying coverage, which would make them subject to penalties. Many of these workers are in low-wage industries, such as restaurants and retail. HHS is granting them relief, allowing them to receive subsidies to buy comprehensive individual coverage.

HHS is allowing employers that signed contracts before November 4, 2014 to retain these plans for this year.

Health Reimbursement Arrangements Okay…for a Few More Months: Small employers with health reimbursement arrangements (HRAs) have gotten a temporary reprieve from the Obama administration. In late February, the Internal Revenue Service and Treasury Department announced that they will not levy penalties against small businesses that use standalone HRAs until July. This will give small employers more time to change their plans.

HRAs allow employers to reimburse employees for qualified healthcare costs with before-tax dollars, benefitting both employer and employee. Since the implementation of the Affordable Care Act (ACA), though, employers using standalone HRAs are subject to fines. HRAs have annual limits, which violates the ACA's prohibition on health plans with annual limits.

The federal agencies overseeing the ACA—the Departments of Health and Human Services, Treasury and the IRS—determined that employers can offer an HRA to active employees if they are also covered by a group health plan that complies with ACA rules. Under the new rules, an HRA can reimburse non-essential health benefits, such as Medicare premiums and/or deductibles. Employers can offer standalone HRAs to retirees.

IRS Begins Working on Details of "Cadillac Plan" Tax: To fund coverage subsidies, the ACA includes a tax on so-called "Cadillac" health plans. These high-cost health plans insulate individuals from the cost of their health care.

The ACA specifies the 40 percent excise tax will apply to plans that cost more than $10,200 for self-only coverage and $27,500 for family coverage. In insured plans, the health insurer will pay the tax; in self-insured plans, the plan sponsor, usually the employer, will pay. The IRS must create rules implementing the tax, which goes into effect in 2018, so many details remain unknown at this point.

In a notice issued on February 23, the IRS defined "applicable coverage" for purposes of the tax. The notice clarified that it does not matter whether the employer pays all, or any premiums, for the plan. Even if the employee pays for coverage with after-tax dollars, if the employer sponsors the plan, the tax will apply. Types of plans the Cadillac tax will apply to include:

- Health FSAs (flexible spending arrangements)
- Archer Medical Savings Accounts
- Health Savings Accounts (not including certain contributions by individuals)
- Government group health plans covering civilian employees. (This excludes military coverage.)
- Coverage for on-site medical clinics, except for clinics that provide only de minimis medical care

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breach of fiduciary duties within six years of when the breach occurred. At question is whether fiduciaries have a duty to monitor investments on an ongoing basis, if the initial investment was made more than six years earlier. If the Supreme Court agrees that plan fiduciaries have an ongoing monitoring responsibility, it could open the door to more fiduciary breach lawsuits.

Lockheed Martin recently settled a case involving fees in retirement accounts for $62 million. Plaintiffs' attorneys said it was the largest settlement ever in a lawsuit over fees in retirement plans.

- Retiree coverage
- Multiemployer plans
- Indemnity plans, when payment for coverage is excluded from gross income or a deduction is allowed. This would include most critical illness coverage, dread disease insurance (such as cancer insurance), and hospital indemnity plans or other health plans that pay a specified amount per occurrence or claim.

The IRS also states that it expects that executive physical programs and health reimbursement arrangements (HRAs) will likely be included in the definition of applicable coverage.

The Department of the Treasury and IRS are inviting comments on this initial notice and will issue further notice on the calculation and assessment of the tax.

For more information on the Affordable Care Act and how it affects your organization's benefits programs, please contact us.

FLMA Leave Benefits Now Apply to Employees in Same-Sex Marriages

In February, the U.S. Labor Department updated the Family and Medical Leave Act's (FMLA) definition of spouse. This extends the benefits under the FMLA to workers in legal same-sex marriages, regardless of where they live.

The Department of Labor's rule change updates the FMLA so the law complies with the U.S. Supreme Court ruling in *United States v. Windsor.* That ruling struck down the federal Defense of Marriage Act provision that defined "marriage" and "spouse" as limited to opposite-sex marriage for purposes of federal law.

Before this rule change, the regulatory definition of "spouse" did not include same-sex spouses if an employee resided in a state that did not recognize the employee's same-sex marriage. Under the new rule, eligibility for FMLA leave depends on the law of the place where the marriage was entered into. This "place of celebration" provision allows all legally married couples, whether opposite-sex or same-sex, to have consistent federal family leave rights regardless of whether the state in which they currently reside recognizes such marriages.

Enacted in 1993, the FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. Employees can take leave for their own medical needs or to take care of a family member who has a serious health condition.

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What are "covered employers"? The FMLA applies to any employer that employs 50 or more workers in a 75-mile radius each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

Which employees are eligible? Employees can take FMLA leave if they have worked for an FMLA-qualified employer for at least 12 months and have worked for at least 1,250 hours over the previous 12 months.

How much leave can workers take? Eligible workers can take up to 12 weeks of leave per year.

What can employees take leave for? Eligible employees can take leave for their own serious health conditions, to care for a family member (spouse, child or parent) with a serious health condition, or for childbirth, adoption or foster care. Workers can take leave consecutively or intermittently. Leave may run concurrently with workers' compensation, short-term disability and salary continuation.

What is "a serious health condition"? The FMLA defines this as incapacity or treatment that involves inpatient care (an overnight stay) in a medical care facility, as well as subsequent treatment related to inpatient care. It also includes any period of incapacity due to pregnancy, a chronic serious health condition or a health condition lasting more than three days that requires treatment by a health care provider. The FMLA also applies to absences to receive multiple treatments to address serious conditions.

What other responsibilities do employers have? Employers that provide health benefits must continue them during an employee's leave. Following the 12 weeks of unpaid leave, employers must reinstate the employee in the same job or an equivalent one. Employers that deny or restrict an employee's rights under FMLA may be liable for lost wages and benefits, as well as damages and legal fees. Keep in mind that medical privacy rules apply to FMLA, and safeguard any medical information.

The employer has the ultimate responsibility of designating FMLA-eligible leave as FMLA leave based upon information furnished by the employee. You may not wait to designate FMLA leave after the leave has been completed and the employee has returned to work, unless you are: (1) awaiting medical certification to confirm a serious health condition, (2) unaware that leave was for an FMLA reason, and later receive employee requests for additional leave or (3) unaware of the situation and the employee notifies the company of the FMLA leave within two days after returning to work.

To complicate things, many states have their own family or medical leave laws. State leave laws may be more generous in certain areas, including: (1) employee hours requirement (1,000 vs. 1,250 hours), (2) the minimum number of employees required for the law to apply (15 vs. 50 workers) and (3) the definition of family member (to include in-laws). You'll want to check to make sure that your leave policies comply with state laws.

For more information on the FMLA and other compliance matters, please contact us.

Bullying: Another Form of Workplace Violence

A bully in your workplace can affect morale, increasing stress levels for fellow employees—and possibly increasing your workers' compensation costs.

The Workplace Bullying Institute defines workplace bullying as "repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators. It is **abusive conduct** that is:

- Threatening, humiliating, or intimidating, or
- Work interference — sabotage — which prevents work from getting done, or
- Verbal abuse."

In a 2014 survey, the Institute found that 27 percent of respondents had current or past experience with workplace bullying. Further, respondents reported that 72 percent of employers denied, discounted, encouraged, rationalized or defended bullying.

So What's the Big Deal?

Unlike harassment based on protected characteristics, such as age, race and sex, no laws specifically prohibit bullying, unless the

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behavior becomes physical. Still, the ongoing nature of bullying can lead to stress. In its 2007 poll of bullying in the workplace, the Institute found that 45 percent of the targets of bullying suffered stress-related health problems. Workers under stress are more likely to experience claims, and stay out of work longer when out on claim.

Charles Tenser, an attorney specializing in workers' compensation cases, said, "Whether workplace bullying could result in a successful workers' compensation claim would depend upon several factors. If the workplace bullying were deemed to be so pervasive that it constituted a fact of employment, then injuries arising from workplace bullying could be deemed to arise out of and in the course of employment, and be compensable under workers' compensation statutes."

Bullying could also contribute to workplace violence, if an unstable person "snaps" in response to bullying. "Employees that become aggressive see it as a way of getting even for something," said Tom Tripp, a professor of management and operations at Washington State University in Vancouver and co-author of "Getting Even: The Truth About Workplace Revenge—And How to Stop It," in an interview with Business Insurance magazine. "They [bullied employees] feel they've been unjustly treated by the organization and they want to find a way to make it right."

For these reasons, all employers should have a zero-tolerance policy toward bullying and address bullying behavior appropriately. Steps include:

1. Notify employees and supervisors alike that the company will not tolerate bullying.
2. Encourage reporting of bullying or threatening behavior.
3. Encourage management to have an "open door" policy to stay involved with day-to-day interactions.
4. Appoint someone (ideally, someone from human resources with experience in dealing with interpersonal conflicts) to immediately investigate all reports of bullying.
5. Take appropriate action, from soliciting apologies to reassigning positions to termination, if warranted.
6. Educate employees on what constitutes inappropriate or harassing behavior.
7. Ensure management takes a "top down" approach to modeling appropriate behavior.
8. If your company has an employee assistance program, utilize the expertise of your EAP provider in investigating, intervening and providing education on bullying.
9. Create a written no-bullying policy; include your policy in employee handbooks and post it in prominent locations throughout the workplace.
10. Make your workplace safer by taking all complaints of bullying seriously and taking appropriate steps to remedy it.

A zero-tolerance policy toward bullying can improve workplace morale and safety. For more suggestions on improving safety, please contact us.

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How Do Workers' Comp Policies Differ from Other Insurance?

Workers' compensation insurance differs from other types of insurance in several important ways.

1. No annual or per-claim limits. Most insurance policies have annual and (sometimes) per-claim limits. After the policy pays out its maximum amounts, the insured must pay the difference out of pocket. With workers' compensation, you might pay a per-claim deductible, but after the claim exceeds the deductible, you will have no additional out-of-pocket costs. Why is that?

   A workers' compensation policy specifically covers the benefits state law requires an employer to pay an injured worker. So no matter how much you owe an injured worker in lost time and/or medical benefits, the policy will pay.
2. No time limits. Your workers' compensation policy will cover an injured worker for his/her entire life. If an injury that occurred during your employ recurs or needs further treatment, your policy will cover it…regardless of how long it's been since the injury occurred.
3. Your coverage never becomes outdated. Unlike other business insurance coverages, which can have limits that are too low for your current needs or fail to cover important risk exposures, you do not need to update your workers' compensation policy whenever the law changes. Because your policy covers all legitimate workers' compensation claims filed by your covered employees, it automatically covers any benefit increases or additional benefits that state law requires you to pay.
4. It's no-fault. The so-called "exclusive remedy" makes workers' compensation one of the first types of no-fault insurance. Under the exclusive remedy doctrine, an employee gives up the right to sue the employer for any workplace injuries in exchange for guaranteed coverage under state workers' compensation law. This minimizes conflict, saves time, reduces legal costs and guarantees coverage for all workers with legitimate workplace injuries.

Keep in mind that workers' compensation policies are state-specific. If you have employees in more than one state or who spend significant amounts of work time in another state, please ask us for more information on your coverage options. In addition, workers' compensation laws don't apply to all employees, including contract employees. Employer's liability coverage can help fill this coverage gap. Please contact us for more information. ■

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