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# 2017 HEALTH CARE OUTLOOK AND ISSUES FOR GOVERNMENTAL HEALTH CARE AND WELLNESS PLANS

September 13, 2017



California | Illinois | Michigan | Minnesota | Texas | Washington, D.C.

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# FATE OF OBAMACARE

# Fate of Obamacare

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- Congress efforts to repeal and replace are over (for now)
- Fate of Obamacare, however, still up in air
  - Congress focus on other issues distracts from reconciliation on health care funding
  - Non-enforcement threats on key parts of Obamacare
  - Continued exodus of insurers in Marketplace
- Congress' bipartisan support to strengthen and stabilize markets
  - Federal financing of cost-sharing reimbursements to insurers
  - Making it easier for states to obtain ACA waivers
  - Tax exemptions to insurers entering Marketplace where little to no competition
  - Recreating the reinsurance program, previously funded by health plans (including employer-sponsored plans)

# HIPAA PRIVACY AND SECURITY CONCERNS

# HIPAA Impact on Employer Sponsored Health Plans

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- All employer-sponsored health plans are Covered Entities (CE) subject to HIPAA Privacy and Security Rules
- Employer, as sponsor of CE, at a minimum needs:
  - HIPAA Plan Amendment and Certification
  - HIPAA Policies and Procedures
  - HIPAA Notice of Privacy Practice, Authorization Form, Complaint Form
  - HIPAA Business Associate Agreements
  - Identification of HIPAA Officials (including Privacy Officer, Security Officer, Contact Person and Authorized Employees)
  - Workforce training, confidentiality agreements with Authorized Employees and implementation of HIPAA Policies and Procedures when handling PHI

# HIPAA Audits Currently Underway!

## HIPAA Privacy and Security Concerns

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- HIPAA Audit Program will review the policies and procedures adopted and employed by CE and their business associates to meet selected standards and implementation specifications of the Privacy, Security, and Breach Notification Rules
- “Desk Audits” – means that HHS solicits information from selected CEs and BAs remotely (no site visit... yet)

# HIPAA Civil Penalties

## HIPAA Privacy and Security Concerns

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- Dollar range based on intent
  - Violation not known – min. \$100 per violation
  - Violation due to reasonable cause – min. \$1,000 per violation
  - Violation due to willful neglect, corrected – min. \$10,000 per violation
  - Violation due to willful neglect, not corrected – min. \$50,000 per violation
- Capped at \$1.5 million annually for same type of violation
- Enhanced penalties already in force under interim final regulations

# HIPAA Additional Penalties

## HIPAA Privacy and Security Concerns

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- Criminal Penalties:
  - Up to \$250,000 fine and 10 years in prison (Intentional)
  - Individuals (not CE) may be convicted
  - State AG can bring action against any person whose HIPAA violations pose a threat to or harm one or more residents of the state
- Individuals will have right to obtain a percentage of any civil monetary penalty or monetary settlement collected (HHS regulations expected within next 2 years)
- Statutory damages are \$100 per violation with a cap of \$25,000 for a calendar year for same type of violation
- Separate violation occurs each day for continuing violations



# HIPAA Police

## HIPAA Privacy and Security Concerns

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- Historically, HHS would receive a complaint from a disgruntled employee and would consider investigating

### **But, under HITECH...**

- HHS is required to audit covered entities regarding HIPAA privacy and security compliance and to *formally investigate a covered entity upon receipt of a complaint*
- Under final regulations, BA can now be directly liable for penalties

# **UPDATES ON EMPLOYER SHARED RESPONSIBILITY RULES – PAY OR PLAY MANDATE – IRC 4980H**

# Indexing

## Employer Shared Responsibilities – IRC 4980H

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- ALE may be subject to a monthly excise tax if one of its FTEs receives subsidized health insurance from the Marketplace
- 4980H(a) penalty (ALE not offering substantially all FTEs MEC) - 2018 increase to \$2,320 (\$193.33/month) (2017 = \$2,260)
- 4980H(b) penalty (ALE's offer of MEC is unaffordable or not MV to FTE) – 2018 increase to \$3,480 (\$290/month) (2017 = \$3,390)
- Affordability – 2018 safe harbor percentage decreases to 9.56% (2017 = 9.69%)
  - e.g., FLP affordability monthly rate is \$96.08 (*i.e.*, 9.56% of 2018 single FPL rate of \$12,060) (2017 = \$95.93)

# Monthly v. Look Back Measurement Method

Employer Shared Responsibilities – IRC 4980H

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- FTE status under IRC 4980H based on an average of 30 or more hours a week, determined under either MMM or LBMM
- MMM:
  - Uncomplicated method – FTE if hours are 130+ in CM
  - Plan terms do not need to reflect use of MMM; shouldn't impact plan eligibility terms
  - Attractive for ALE offering MEC to  $\geq 95\%$  all FTEs
- LBMM:
  - Regulated method of tracking hours with nuanced rules
  - Plan terms must reflect LBMM because determines eligibility
  - Attractive to ALE excluding employees who could work 130 or more hours during one or more months (e.g., VHE, PTE, SE)

# Misclassification of Workers

## Employer Shared Responsibilities – IRC 4980H

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- IRC 4980H assessments based on common law employee status
- Could face significant IRC 4980H excise taxes if IRS determines that workers from staffing agencies, professional employer organizations, independent contractors, etc. are really your common law employees
- Minimize this risk by amending written agreements to clearly reflect:
  - facts supporting which entity is the intended common law employer
  - indemnification protections for IRC 4980H or 6056 liabilities
  - Separate line item for health coverage fee
- Operate relationship in a manner that supports intended common law employer status

**UPDATES ON ACA REPORTING  
IRC SECTIONS 6055 AND 6056  
(FORMS 1094/1095-B AND 1094/1095-C)**

# Changes for 2018 Filings

ACA Reporting under IRC 6055 & 6056 (Forms 1094/1095-B/C)

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- No deadline extension:
  - 1095-B/C deadline of January 31, 2018
  - 1094-B/C deadline of February 28, 2017 or March 31, 2017 if filing electronically (required if 250 or more 1095s issued)
- No substantive changes, but:
  - Removed references to certain expired transitional relief
  - Incorporated Notice 2017-9 excusing ALE from correcting 1095C for *de minimis* error in reporting dollar amounts on line 15
  - Reflect affordability percentages for 2017 (9.69%)
  - Clarified no line 16 code indicating that an employee was offered but declined MEC
  - Continues existing interim relief for multiemployer plans

# Important Issues for Electronic Filing of 1094/1095

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- Must use the “AIR” (cannot use FIRE)
- Acceptable format for transmission is XML (returns will not be accepted electronically in any other format)
- Each transmission is limited to 100MB, transmissions larger than 100MB must be split
- You must submit the ACA Application for Transmitter Control Code (TCC) for at least two individuals as Contact and two as Responsible Person (can be same two for each title) (once designated, can use same from year to year)



# Penalties for 1094/1095

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- Significant penalties for failure to provide or file correct forms (unless granted a penalty waiver due to reasonable cause not willful neglect)
  - \$260 per form if fail to provide correct form to employee plus
  - \$260 per form if fail to file correct form with IRS (up to max of \$3,193,000/year)
  - Could be more if intentional disregard
- Still furnish and file if missed due dates, as IRS will take into consideration when determining whether to abate penalties for reasonable cause

## **OTHER UPDATES FOR EMPLOYER-SPONSORED WELFARE PLANS**

# Indexing

## Other Updates for Welfare Plans

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- Health FSA max contribution not announced yet (2017 = \$2,600)
- ACA Maximum OOP limits increase
  - 2018 is \$7,350/\$14,700 (increased \$200/\$400)
- 2018 HDHP-HSA Limits
  - Minimum deductible \$1,350/\$2,700 (increased \$50/\$100)
  - Maximum OOP \$6,650/\$13,300 (increased \$100/\$200)
  - Maximum Contribution \$3,450/\$6,900 (up \$50/\$150)

# New Summary of Benefits & Coverage

## Other Updates for Welfare Plans

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- ACA requires group health plans to furnish SBC to participants and beneficiaries
- Agencies revised SBC template, instructions, glossary and other materials for open enrollment periods beginning on or after April 1, 2017
- Improvements include additional coverage example and language and terms to improve consumers understanding of their health coverage
- Available at:
- <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/sbc-template-final.pdf>

# Wellness Programs

## Other Updates for Welfare Plans

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- Employers need to determine if wellness programs, initiatives and rewards comply with applicable laws, including ACA/HIPAA, ADA, GINA, ERISA, federal and state tax laws
- EEOC Wellness Regulations under ADA/GINA
  - Generally effective January 1, 2017
  - Employer incentives to employees for responding to disability-related inquiries or having a medical examination
  - Includes requirements on reasonable design, voluntary participation, confidentiality, and limits on incentive amounts
  - Notice must be sent before disability-related inquiry is made – model is available at <https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm>

# Transgender Health Coverage

## Other Updates for Welfare Plans

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- Under Obama Administration, ACA Section 1557 and Title VII clearly provide protection from discrimination based on LGBT/sexual orientation
- Under Trump Administration, may find less enforcement action by HHS of ACA 1557 nondiscrimination requirements
- EEOC commission members continue to be a majority of Democrats; expect continued enforcement of Title VII's protection of LGBT rights

# Transgender Health Coverage – cont'd

## Other Updates for Welfare Plans

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- Group health plan should remove:
  - categorical exclusion of services related to gender transition
  - provisions denying benefits for medically appropriate, gender-specific healthcare simply based on gender identity (e.g. plan should not deny treatment for ovarian cancer for a transgender male or deny well-women care, when medically appropriate, for a transgender female)
  - provisions categorically excluding gender transition services as experimental or cosmetic.
- Could continue to apply medical management protocol and medically necessary standards

# Opt-Out Cash Payments

## Other Updates for Welfare Plans

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- Employer's can still offer taxable cash payment in lieu of group medical coverage
- Cannot make it contingent on employee purchasing health insurance policy in the individual markets
- Could impact the MEC's affordability determination, depending on:
  - eligible opt-out arrangement
  - unconditional opt-out arrangement
- Notice 2015-87 relief applies to opt-out arrangements adopted prior to 12/17/2015 so that affordability does not need to include opt-out amount (regardless if unconditional or conditional) until final regulations are issued
- May not issue final regulations; uncertainty for opt-out arrangements adopted after 12/16/2015



# Cadillac Tax

## Other Updates for Welfare Plans

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- Nondeductible 40% excise tax when value of employer-sponsored coverage in excess of statutory thresholds
  - \$10,200 for self-only;
  - \$27,500 for family
- Delayed from 2018 until 2020, but tax reform likely to eliminate completely

# **RESPONSIBLE RETIREMENT REFORM FOR LOCAL GOVERNMENT TASK FORCE**

# Purpose of Task Force

## MI Local Government Taskforce

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- Governor Snyder created in 2017 with objective of addressing MI local governments' unfunded liabilities estimated at:
  - \$7.46 billion for pension
  - 10.13 billion for OPEB
- Drive collaboration among legislators, state and local government officials, employee representatives, pension managers and insurance professional:
  - Ensure financial stability and effective delivery of local gov't services
  - Meeting commitments made to employees in coming decades

# Main Recommendations

## MI Local Government Taskforce

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- Greater reporting and transparency must be required of all local units for full understanding of size & scope of problem
- Pension and OPEB fiscal stress test to alert and assist local units in crafting solutions to best serve residents while meeting funding obligations and protecting benefits for employees and retirees
- Create Municipal Stability Board to assist in review of finances and develop corrective action plan for local units
- When offered, local units should meet minimum requirements to prefund OPEB normal costs for new hires

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