Benefits Law Update
The Employee Benefits and Executive Compensation Group
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2014 Year-End Employee Benefit Plans Compliance Advisory

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The 2014 end-of-year rush seems somewhat less frantic than in years past. Nevertheless, with a month left in the year many employers may find themselves scrambling to meet plan amendment and notice deadlines, and planning for 2015 may still be in process for some. This summary discusses a few key developments regarding employee benefit plans – especially group health plans – for employers to consider as they finish 2014 and move into 2015.

Retirement Plans

- **Post-Windsor Amendments.** IRS Notice 2014-19 requires employers to amend their retirement plans by the end of this year to eliminate or modify the definition of "spouse" (and modify or eliminate other provisions) that are at odds with the decision of the U.S Supreme Court in the *Windsor* case. A plan document that defines "spouse" by reference to the federal Defense of Marriage Act or recognizes marriages only between persons of the opposite sex would require modification. If a plan amendment is required, it must be adopted by December 31, 2014 (for calendar year plans) and it must be effective no later than June 26, 2013. While a plan that does not contain a definition of "spouse" need not be amended to add one, many employers are choosing to add a Windsor-compliant definition with the June 26, 2013 effective date simply to avoid any questions as to the effective date of the change in law. Employers should review their retirement plans to determine whether an amendment is required by the end of this year.

- **Discretionary Amendments.** Formal amendments reflecting benefit design and other discretionary changes to retirement plans that are effective in 2014 must be adopted by December 31, 2014 (for calendar year plans). As a reminder, amendments to plan documents should always be signed *and dated* to avoid any questions later regarding the timely adoption of the amendment.

- **Cycle D Determination Letter Applications.** The deadline for Cycle D filers – employers with tax identification numbers ending in 4 or 9 and multi-employer plans – to file determination letter applications with the IRS is January 31, 2015. As we reported earlier in the year, the new version of IRS Form 5300 expands the scope of information that must be provided by an applicant, including details regarding plan amendments, plan mergers, the resolution of any compliance issues, and identification of the tax form(s) the employer uses to file its annual return. By now Cycle D employers should be well along in the preparation of determination letter applications for individually designed plans.

Health Plans and Health Care Reform

- **Amendment Deadline for Health FSA Contribution Limit.** Employers must amend their health flexible spending account (FSA) plans to incorporate the Affordable Care Act's limit on employee contributions by December 31, 2014. The limit, originally $2,500, is indexed for inflation and has

been increased to $2,550 for plan years beginning on or after January 1, 2015. As a reminder, the employee contribution limit has been in effect since the first plan year beginning on or after January 1, 2013.

- **Employer Mandate Takes Effect for Applicable Large Employers.** The employer shared responsibility requirement (or "employer mandate") under the Affordable Care Act will finally go into effect for "applicable large employers" (ALEs) – those employing 100 or more full-time employees (including full-time equivalents) – on January 1, 2015. The employer mandate will not be enforced with respect to employers with 50 to 99 full-time employees (including full-time equivalents) until 2016. Note that a small employer will qualify for this relief only if it has not (1) reduced the size of its workforce or the overall hours of service of its employees this year, or (2) eliminated or materially reduced existing health coverage, as determined under the regulation.

- **Limited Temporary Relief for Applicable Large Employers.** While the employer mandate will take effect for ALEs as of January 1, 2015, a lower threshold will apply for purposes of determining whether an ALE has offered coverage to a sufficient number of full-time employees to avoid the penalty under Code Section 4980H(a). For 2015 only, an ALE will not be subject to the penalty so long as it offers coverage to at least 70 percent of its full-time employees and their dependent children under age 26. As a reminder, the offer of coverage threshold in the ACA is 95 percent and that requirement will be applied beginning in 2016. Also, an employer that does not offer coverage for some or all under age 26 children of full-time employees (and has not offered such coverage since at least 2013) will not be subject to penalties for failure to cover dependent children in 2015 so long as the employer takes steps before the end of 2015 to provide the required coverage.

- **Maximum 90-day Waiting Period.** Earlier this year the IRS, DOL, and HHS issued final regulations concerning the 90-day limit on waiting periods for health insurance coverage. The agencies caution that compliance with the waiting period regulations will not necessarily result in compliance with the employer mandate, which requires large employers to offer affordable, minimum value coverage to eligible full-time employees by the first day of the employee's fourth full calendar month of full-time employment. The final rules are effective for plan years beginning on or after January 1, 2015, though the 90-day waiting period limit is effective as of the first plan year beginning on or after January 1, 2014.

- **Identification of Full-Time Employees.** As a reminder, an employee working at least 30 hours per week (or a monthly equivalent of 130 hours) is considered "full-time." Recall that for these purposes, an hour of service is any hour for which an employee is paid, or entitled to payment, for the performance of duties, vacation, holiday, illness, disability, layoff, leave of absence, and the like. Work done by students under a government subsidized work study program, by members of religious orders subject to a vow of poverty, and by certain volunteers will not, however, count as hours of service in determining full-time employee status. The final regulations published earlier this year allow an employer to identify full-time employees based on data from a specified look back period (the "measurement period") and then lock in the employee's status for a future period (the "stability period"). In general, each employee who works an average of 30 hours per week during the measurement period will be considered a full-time employee during the stability period regardless of number of hours the employee works during the stability period. The permitted length of the measurement period and the stability period varies depending on whether the individual employee is an ongoing employee or new employee, and whether a new employee is variable-hour or seasonal. (For this purpose, "seasonal" employees must have customary annual employment of

no more than six months.) For stability periods beginning in 2015 an employer may, regardless of the length of the stability period, use a measurement period of as few as six consecutive months as long as the measurement period began no later than July 1, 2014 and ends no earlier than 90 days before the first day of the 2015 plan year.

- **Information Reporting under Code Sections 6055 and 6056 Takes Effect.** Beginning with the 2015 plan year all plan sponsors, insurers, and governmental units must file information returns under Code Section 6055 (minimum essential coverage) and Code Section 6056 (employer sponsored coverage). Employers subject to the employer mandate should report on Form 1095-C and the related Form 1094-C transmittal, completing the entire Form if the plan is self-funded and only a portion of the Form if the plan is insured. Similar requirements apply to employers who sponsor self-funded plans but are not subject to the employer mandate, providers of government-sponsored coverage, and insurance carriers, but different forms are used. All entities subject to reporting must also provide an informational statement to covered individuals. The final regulations allow simplified reporting for employers meeting certain requirements. Note that reporting applies as of January 1, 2015, regardless of whether and when an employer becomes subject to the employer mandate.

EEOC Challenges to Wellness Programs

With three high profile cases now pending in federal court, the Equal Employment Opportunity Commission (EEOC) has made it clear that it believes employers may have become too aggressive in the design and administration of their wellness programs. (**We reviewed the cases in a recent webinar.**) Each case alleges that participation in the programs was not "voluntary." The latest case, *EEOC v. Honeywell Int'l Inc.*, is causing anxiety among employers who have adopted programs with similar designs, even though most commentators agree that the design under attack (which includes the use of biometric screenings) would meet the requirements of final regulations issued by the IRS, DOL, and HHS. Employers with extremely aggressive wellness programs – programs that effectively exclude employees from health plan coverage if certain health factors are present or impose excessive penalties – should take note of the EEOC's hard line positions regarding the scope of the ADA and the Genetic Information Nondiscrimination Act of 2008 and may wish to consider the risk of potential litigation in moving forward with their programs. Employers who have adopted more moderate wellness programs should be able to stay the course and await the outcome of the pending cases.

In the meantime, we offer the following recommendations to employers who wish to continue to offer a wellness program:

- Design the wellness program to comply with the final wellness program regulations under HIPAA. These regulations establish fairly clear parameters for both participatory and health contingent wellness programs. Do not exceed the maximum financial rewards allowed under the final wellness regulations.
- If possible, structure the wellness program to be a part of the group health plan (as opposed to being a stand-alone program) so as to take advantage of the safe harbor under the Americans with Disabilities Act that allows for the limited use of health related information to underwrite and classify risks.
- If the wellness program is intended to evolve over a period of years, from modest to aggressive, consider delaying this evolution until the EEOC cases are resolved.
- Share only aggregated and de-identified protected health information with the plan sponsor.

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