

A Better Partnership®



# Legal Update Employee Benefits

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# Affordable Care Act



# Repeal and Replace?

- **Executive Order 13765**
  - ◆ Calls for minimizing burden of ACA pending repeal
- **Failed attempts**
  - ◆ American Health Care Act (AHCA)
  - ◆ Better Care Reconciliation Act
  - ◆ Obamacare Repeal Reconciliation Act
  - ◆ Health Care Freedom Act



# Repeal and Replace?

- **Executive Order 13813** (10/12/17)
  - ◆ Association Health Plans
  - ◆ Short-term, limited duration insurance
  - ◆ Health Reimbursement Arrangements
- **Ending of insurer reimbursements**
  - ◆ Insurers scrambling to raise rates to make up for lost funding.
  - ◆ Will there be a bi-partisan bill to restore?



# Repeal and Replace?

- **Implications for Employers?**

- ◆ IRS letter 2017-0013:

- “The Executive Order does not change the law; the legislative provisions of the ACA are still in force until changed by Congress, and taxpayers remain required to follow the law and pay what they may owe.”



# ACA Reporting

- **New forms now available:**
  - ◆ 1095-C
  - ◆ 1094-C
  - ◆ Instructions
- **No substantive changes**
- **Deadlines:**
  - ◆ 1095-C: 1/31/18
  - ◆ 1094-C: 2/28/18 (paper); 4/2/18 (electronic)



# ACA Penalties

- **2015 ACA Penalties**

- ◆ 4980H(a):  $\$2,080 \times \#FT - 30$

- ◆ 4980H(b):  $\$3,120 \times \# FT$  receiving subsidy

- **Notices going out “late 2017”**



# Exceptions to Contraceptive Mandates

- **New interim final regulations**
  - ◆ Expanded religious exemption
  - ◆ New moral exemption
  - ◆ Plan can opt out completely from providing contraceptive coverage.
  
- **Lawsuits pending**





# Disability Claims Procedures

- **Proposal to delay effective date!**
  - ◆ Scheduled for 1/1/18 effective date
  - ◆ Would be delayed until 4/1/18
    - May be rescinded, modified, or retained in whole.



# Gender Identity/Gender Dysphoria

- **ACA Section 1557/Civil Rights Act Title VII**
  - ◆ Court has blocked HHS regulations
  - ◆ EEOC interpretation of Title VII:
    - › Cannot have blanket exclusions that discriminate against transgender employees
    - › Courts in disagreement



# ACA Fees for 2018

- **PCORI Fees: \$2.39 per covered life\***
- **Insurance Fees**
  - ◆ Back after a one-year hiatus for 2017
  - ◆ \$14.3 billion to be remitted by insurers (estimated to be approx. 3% of premiums).
- **No more transitional reinsurance fees!**
  - ◆ But final payments may be due 11/15/17.

\*applies for plan years ending on or after October 1, 2017 and before October 1, 2018.



# ACA Limits for 2018

- **ACA Affordability for 2018**
  - ◆ Rate of pay/W-2 safe harbors: 9.56%
  - ◆ Federal Poverty limit safe harbor: \$96.08
- **ACA penalties:**
  - ◆ 4980H(a): \$2,320 (\$193.33/mo)
  - ◆ 4980H(b): \$3,480 (\$290/mo)



# ACA Limits for 2018

- **Out of Pocket maximums\*:**
  - ◆ Individual: \$ 7,350
  - ◆ Family: \$14,700

\*out-of-pocket limits for HDHPs paired with HSAs are lower.



# Non-ACA Developments



# 2018 Inflation Adjusted Limits

- **HDHP/HSA limits**

- ◆ HDHP deductible threshold: \$1,350/\$2,700
- ◆ HDHP out-of-pocket max: \$6,650/\$13,350
- ◆ HSA contribution limits
  - > Single coverage: \$3,450
  - > Family coverage: \$6,900
  - > Catch-ups: \$1,000



# 2018 Inflation Adjusted Limits

- **Qualified Transportation Fringe Benefits**
  - ◆ Car pooling/transit pass limits: \$260/month
  - ◆ Qualified parking limit: \$260/month
- **Adoption Assistance limits:**
  - ◆ Annual maximum reimbursement: \$13,840
  - ◆ Phase out: \$207,580 - \$247,580





# 2018 Inflation Adjusted Limits

- **Health FSA contribution limit: \$2,650**
- **Dependent Care FSA limits:**
  - ◆ Married filing singly: \$2,500
  - ◆ Married filing jointly: \$5,000



# Tax Reform and H&W Benefits

- May eliminate or further limit tax-free benefits for:
  - ◆ Adoption assistance programs?
  - ◆ Education assistance programs?
  - ◆ Dependent care assistance programs?
  - ◆ Transportation fringe benefits?



# Wellness Programs

- **AARP v. EEOC**

- ◆ Is 30% incentive still voluntary?
- ◆ Court: EEOC failed to justify 30% threshold for voluntariness.
  - › EEOC must reconsider and justify threshold



# Mental Health Parity

- **Eating Disorders**

- ◆ Considered mental health condition
- ◆ requires parity with medical/surgical benefits

- **Information to participants**

- ◆ <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/mental-health-parity/mhpaea-disclosure-template-draft.pdf>



# Claims Disputes

- Include in SPDs and claims correspondence:
  - ◆ Forum selection clauses
  - ◆ Shorter limitations periods
- Include in claims correspondence:
  - ◆ Extensions of time frames for making decisions



# HIPAA Privacy and Security



# OCR's Basic Cybersecurity Expectations

- Strong Passwords
- Training
- Multi-factor authentication
- Updates and patching
- Lock devices not in use
- Portable device security



# OCR's Basic Cybersecurity Expectations

- Educating workforce on threats and trends
- Prompt reporting of possible cybersecurity threats
- Security incident procedures and response plans
- Immediate response to security incidents





# HIPAA enforcement

- OCR enforcement increasing:
  - ◆ 2015: \$6 million in fines (6 resolutions)
  - ◆ 2016: \$20 million in fines (15 resolutions)
  - ◆ 2017 (through 11/11/17): \$17 million



# 2017 HIPAA Enforcement

- **Center for Children's Digestive Health**
  - ◆ No business associate agreement with vendor.
- **Metro Community Provider Network**
  - ◆ No risk assessments/risk management plans
- **Memorial Healthcare System**
  - ◆ Failed to terminate login credentials



# 2017 HIPAA Enforcement

- **MAPFRE Life Insurance**
  - ◆ Loss of unencrypted PHI on portable device
- **Presence Health**
  - ◆ Late breach notices
- **St. Luke's-Roosevelt Hospital Center**
  - ◆ Improper disclosure to patient's employer



# EU's GDPR

- Personally identifiable information collected from individuals in the EU
  - ◆ Adequate controls to assure protection.
  - ◆ Cross-border transfer issues.
  - ◆ Vendor contracting requirements.
  - ◆ Notice to individuals
  - ◆ Individual rights (including right to be forgotten)
  - ◆ Breach notification (72 hours)



# Retirement Plans & Executive Compensation



# General Comments

- **Big Picture Items –**

- ◆ Tax reform
  - › 401(k) Rothification?
  - › Executive compensation
- ◆ Effects of the change in administrations
  - › The DOL fiduciary regulation
  - › State-run plans for private sector employers
- ◆ Continued fee litigation
- ◆ IRS cutbacks



# Tax Reform - Tax Cuts and Jobs Act

- **No major 401(k) change**

- ◆ HB-Permanent closed plan nondiscrimination testing (frozen DB plans)
- ◆ HB-In-service withdrawals at age 59 ½ from DB plans
- ◆ HB-Hardship withdrawals expansion (no 6 month suspension; QNEC/QMAC/earnings available)
- ◆ HB-Extended rollover period for plan loans
- ◆ SB-No catch-up if compensation > \$500,000



# Tax Reform - Tax Cuts and Jobs Act

- **Major executive compensation changes proposed in HB...**
  - ◆ Repeal of 409A; transition period
  - ◆ New 409B – taxed on vesting; including NQDC, stock options and SARs
  - ◆ No performance-based comp exception to 162(m) \$1M deduction limit; 20% penalty on tax-exempts over \$1M in exec comp





# Tax Reform - Tax Cuts and Jobs Act

- **Major executive compensation changes withdrawn by House Ways and Means Committee**
- **Similar changes remain in Senate Bill**



# Tax Reform - Tax Cuts and Jobs Act

- **Repeal of Fringe Benefit Deductions**
  - ◆ Transportation, entertainment, meals, recreation, employee achievement awards
  - ◆ Dependent care assistance programs
  - ◆ Qualified moving expenses
  - ◆ Adoption & tuition assistance programs
  - ◆ Contributions to Archer MSAs



# The Fiduciary Rule

- **Procedure –**
  - ◆ June 9 effective date postponed
  - ◆ DOL Temporary Enforcement Policy; appears transition period will continue through June 30, 2019
  - ◆ The SEC wildcard



# The Fiduciary Rule

- **Substance –**
  - ◆ The “best interest” standard
  - ◆ Rollovers
  - ◆ Winners and losers
  - ◆ Parallel SEC enforcement



# The Fiduciary Rule

- **Reality –**
  - ◆ Investment providers have changed their practices already
    - › Empower disavowing fiduciary status!
    - › Fidelity embracing it (sort of ...)
  - ◆ Plan sponsors are highly sensitized
    - › Participants too (especially Millennials)
  - ◆ Private litigation



# Fee Litigation

- **General Themes –**
  - ◆ Share class selection
  - ◆ Active v. passive funds
  - ◆ Suitability of stable-value funds
  - ◆ Recordkeeping charges
    - › Asset-based recordkeeping fees
  - ◆ Excessive revenue-sharing



# Fee Litigation

- ◆ Lack of process for determining reasonableness of fees
  - › Failure to obtain expert advice
- ◆ Committee effectiveness



# Fee Litigation

- **Specific Cases Worth Noting –**
  - ◆ Aon fee-sharing arrangement with Financial Engines
  - ◆ T. Rowe Price use of proprietary in-house funds
  - ◆ JP Morgan Chase fees paid to affiliates and business partners
  - ◆ Voya charged with excessive fees in small plan





# IRS Determination Letter Changes

- **IRS Cutbacks**
- **Move to Pre-Approved Plans**
- **Private “Determination Letters”**
- **IRS Enforcement Policy –**
  - ◆ Build on prior, approved plan document
  - ◆ Private opinion letter as evidence of good faith, good internal controls?
  - ◆ Use “tricks” to create a “new plan”?



# IRS Determination Letter Changes

- **Impact on corporate transactions**
- **CPA audits**



# 2018 Retirement Plan Limits

| <u>Limit</u>                | <u>2018</u>      | <u>2017</u>      |
|-----------------------------|------------------|------------------|
| <b>401(k)/403(b)/457</b>    | <b>\$18,500</b>  | <b>\$18,000</b>  |
| <b>DC 415 Max</b>           | <b>\$55,000</b>  | <b>\$54,000</b>  |
| <b>Annual Comp. Limit</b>   | <b>\$275,000</b> | <b>\$270,000</b> |
| <b>Catch Up Limit</b>       | <b>\$6,000</b>   | <b>\$6,000</b>   |
| <b>DB 415 Max</b>           | <b>\$220,000</b> | <b>\$215,000</b> |
| <b>Key Employee</b>         | <b>\$175,000</b> | <b>\$175,000</b> |
| <b>HCE</b>                  | <b>\$120,000</b> | <b>\$120,000</b> |
| <b>SIMPLE</b>               | <b>\$12,500</b>  | <b>\$12,500</b>  |
| <b>SIMPLE Catch Up</b>      | <b>\$3,000</b>   | <b>\$3,000</b>   |
| <b>Wage Base</b>            | <b>\$128,700</b> | <b>\$127,200</b> |
| <b>80% (5.4% threshold)</b> | <b>\$102,960</b> | <b>\$101,760</b> |
| <b>20% (4.3% threshold)</b> | <b>\$25,740</b>  | <b>\$25,440</b>  |
| <b>IRA</b>                  | <b>\$5,500</b>   | <b>\$5,500</b>   |
| <b>IRA Catch Up</b>         | <b>\$1,000</b>   | <b>\$1,000</b>   |



# Retirement Security and Lifetime Income

- **Savings Rates and Preparedness for Retirement –**
  - ◆ Lack of knowledge and bad assumptions
  - ◆ Lack of resources, including student loan debt
  - ◆ Change in expectations for retirement



# Retirement Security and Lifetime Income

- **Longevity risk and potential solutions**
  - ◆ Default investments with lifetime income features
  - ◆ Annuities
  - ◆ Delayed retirement and part-time work
  - ◆ Modify plan to allow systematic and ad hoc withdrawals



# Hardships

- **Summary v. Source Documents**
- **IRS Memo**

<https://www.irs.gov/pub/foia/ig/spder/tege-04-0217-0008.pdf>



# Cyber Security

- **It's happening –**
  - ◆ Fraudulent loans
  - ◆ Ransomware
  - ◆ Access to participant data
- **What to do –**
  - ◆ Analyze
  - ◆ Indemnification from third-party providers
  - ◆ Insurance



# Questions & Answers

**Thank you!**

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