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CBIZ Benefits & Insurance Services

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WELLNESS LIMBO

The implications of the Equal Employment Opportunity Commission's (EEOC) wellness program regulations relating to the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) continue to remain in limbo.

In response to Court Order rendered by the U.S. District Court for the District of Columbia in the American *Association of Retired Persons (AARP) v. EEOC* challenge, the EEOC was to provide a status update to the Court by the end of March, 2018 (see our prior *Benefit Beat* articles, *EEOC Wellness Rules Back in Court*, 2/7/18, *Wellness Rule Review Fast Track*, 1/16/18 and *Wellness Rules Under Scrutiny*, 9/11/17). In compliance with that request, the EEOC has indicated that while it continues to review its options, the agency will not take any regulatory action to alter the current wellness rules at this time, in part because it is awaiting confirmation of Janet Dhillon to become the new EEOC chairperson.

While the EEOC continues to consider changes to its wellness program rules, it is leaving employers with no guidance on how wellness programs that require the collection of medical information or that require a physical exam should be handled beginning January 1, 2019, when the incentive portion of the ADA and GINA wellness program rules is vacated.

We will be addressing wellness programs in our upcoming CBIZ Benefits & Insurance Services webinar on June 19th, *Your Wellness Program and the Law: Weighing in on Compliance Issues*.

Fiduciary Rules Vacated

After numerous delays in implementation and court challenges, the Department of Labor's Employee Benefits Security Administration (EBSA) fiduciary investment advice rules were to take effect on July 1, 2019. Then, on March 15, 2018, the Fifth Circuit Court of Appeals **vacated the rules** specific to the expansion of ERISA's definition of fiduciary and the related prohibited transaction exemptions.

In accordance with the Court Order, the vacation of the fiduciary rules takes effect in early May 2018. If the rules are vacated, then the fiduciary standards would return to ERISA's five-part prior rule standards for defining fiduciary and investment advice. Under these prior rules, an individual could be deemed a fiduciary if, for a fee, he/she 1) provides advice or makes recommendations on investments 2) on a regular basis 3) in accordance with a mutual agreement or understanding that the advice 4) would serve as the primary basis for investment decisions 5) that would be individualized to the particular needs of the plan.

Any number of actions by the Department of Labor (DOL) could be taken at this point It is possible that the DOL would appeal to the full Fifth Circuit; it is also possible, as a result of a split in the circuit courts, a review by the Supreme Court could be sought.

In the meantime, the fiduciary investment advice regulations remain in effect. The only thing that is certain is that issues surrounding this matter will continue to evolve. At this point, plans should stay the course until there is clarity about next steps. In all instances, plan assets must be used for the exclusive benefit of plan participants.

Mental Health Parity: Uptick in Audits and Litigation

The final *Mental Health Parity and Addiction Equity Act of 2008* (MHPAEA) regulations have been in effect since July 1, 2014. Since that time, there appears to be an uptick in enforcement action by the law's governing agencies, as well as litigation relating to compliance with these rules.

Of particular note is the increased occurrence of plan audits initiated by the Department of Labor's Employee Benefit Security Administration (EBSA) and the Department of Health and Human Services (HHS). Evidence of enforcement activities pursued by these agencies is outlined in **EBSA's enforcement fact sheet** and **HHS' enforcement report**.

It should be noted that while HHS has jurisdiction over non-ERISA plans, such as government plans, its enforcement guidance can still be useful for plans subject to ERISA.

With regard to litigation matters relating to the MHEAPA law, much of it seems to relate to whether treatment for medical and surgical services under a group plan are comparable to mental health services. In particular, coverage for autism treatment, as well as comparable treatment of residential services are ripe for litigation. Coverage for therapy programs such as wilderness programs to address mental health needs continue to be challenged.

Because these matters continue to be unsettled, plan sponsors should use caution with their plan provisions and coverages to ensure compliance with the MHPAEA. As a reminder, the mental health parity rules apply to group health plans sponsored by employers employing 50 or more employees. Comparable rules imposed by the Affordable Care Act apply to grandfathered and non-grandfathered individual policies, and small non-grandfathered insured plans subject to the essential health benefit provisions. Compliance assistance tools are available from both **EBSA** and **HHS.**

San Francisco Annual Employer Report due April 30th

Employers subject to the San Francisco's Health Care Security Ordinance (HCSO) are required to annually report their health care expenditures to the Office of Labor Standards Enforcement (OLSE). Both the **2017 Employer Annual Reporting Form** and related **instructions** are now available on the **OLSE's website**. The deadline for submitting the Annual Reporting Form is April 30, 2018. Employers who fail to submit an annual report on time may be subject to penalties of $500 for each quarter the violation occurs.

As background, a business is subject to the HCSO if it engages in business within the City of San Francisco and employs 20 or more employees per week. Nonprofit employers with fewer than 50 employees, and small employers with fewer than 20 employees, are exempt from the HCSO. For 2018, the applicable health care expenditure rate for large businesses employing 100-plus employees is $2.83 per hour; the rate for businesses with 20-99 employees and nonprofits employing 50-99 employees is $1.89 per hour (see *Updates: San Francisco's Health Care Security Ordinance, Benefit Beat*, 10/9/17).

TAX PUBLICATIONS TO ASSIST EMPLOYERS

The Internal Revenue Service has recently updated two publications that may be of interest to employers:

- **Publication 15-B**, *Employer's Tax Guide to Fringe Benefits* (for use in 2018). This publication provides information for employers on the tax treatment of various fringe benefits including health care coverage, health savings accounts, qualified small employer health reimbursement arrangements (QSEHRA), cafeteria plans, dependent care assistance plans, educational assistance plans, and group term life insurance coverage, among other types of benefits.

  In particular, this publication reflects changes made by the Tax Cuts and Jobs Act enacted in December, 2017, specifically relating to qualified transportation and bicycle benefits (see *Tax Reform: Impact on Benefits*, *Benefit Beat*, 1/16/18, for background of these changes). Items included in this publication affirm that the employer deduction is no longer available for reimbursement amounts, including salary reduction amounts; and affirms that, for tax-exempt entities, the unrelated business income tax must be assessed on these amounts.

- **Publication 969**, *Health Savings Accounts and Other Tax-Favored Health Plans* (for use in preparing 2017 returns) provides an overview of various tax saving vehicles used to offset health care costs including health savings accounts, medical savings accounts, health flexible spending arrangements and health reimbursement arrangements.

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