Recent Health Plan and Other Updates

10.14.15

Much Ado About the Cadillac Tax

Recently there have been many parties, including certain presidential candidates, weighing in on the Affordable Care Act's Excise Tax on High Cost Health Benefits under Code section 4980I, also known as the Cadillac Tax. While we have received two notices from the Internal Revenue Service (the "Service") this year soliciting comments on what should be included and on whom it should be assessed as a "coverage provider", we do not have the proposed rules for how it will be calculated or assessed to guide us in making adjustments to benefits or in contract negotiations with vendors, third party administrators, insurers or collective bargaining units, all of which are potentially impacted depending on how the "coverage provider" is defined as the parties potentially being assessable for the Cadillac Tax .

While it makes a good sound bite to call for repeal of the Cadillac Tax, it is important to remember that it was part of the mechanism for funding the Patient Protection and Affordable Care Act (the "Affordable Care Act" or the "ACA") and if that source of funding the costs of the ACA is removed, Congress would need to replace it with another source of funding and they might look to eliminate the preferential tax treatment of other benefits to provide that funding. Be careful about what you ask for…

Employers should still work on controlling benefit costs to avoid the imposition of the Cadillac Tax because it will take a great deal of cooperation in Congress to eliminate the Cadillac Tax and find the necessary funding replacement.

As you look toward preparing for the Cadillac Tax, it helps to be mindful of the lessons we learn from those who start down the path before us. The City of Sterling, Illinois recently made efforts in this area with two of its collective bargaining units reaching agreement with one on new language for the CBA and not with the other and winding up in interest arbitration. This arbitrator's decision reminds us that benefits and labor must work together on strategies for dealing with the Cadillac Tax because in this case the arbitrator did not allow the employer to have the ability to adjust benefits without negotiation as it had requested with the second collective bargaining unit with whom it was addressed the issue. The arbitrator considered the language the City of Sterling had agreed to with the other collective bargaining unit on the subject which did not permit the City to have the ability to change with only a meet and confer. This is a lesson in the need to develop a carefully considered strategic approach to addressing the Cadillac Tax in light of each employer's workforce demographics. The City of Sterling arbitration decision only binds the parties to that arbitration and is not precedential for anyone else, just illustrative of one strategy and its consequences.

PCORI Tax Rate Increased

The Service issued Notice 2015-60 announcing that the PCORI fee for plans for each plan year ending after October 1, 2015 and before October 1, 2016 is $2.17 per person. While it is not a big change in the amount, I mention it so you have it for budgeting purposes for next year.

Health Care Tax Credit Percentage Changes

The percentage of income that an individual has as the floor in calculating his eligibility for the premium assistance he may be eligible for under the health care tax credit was increased to 9.66% of household income for those with household income between 300% and 400% of the federal poverty line. While this percentage was increased, there was again no increase in the percentage used by an employer to determine if the coverage it offers is affordable under one of the safe harbors for the employer shared responsibility tax (also called the pay or play tax).

So while there is an adjustment for individual health care tax credit calculation, it only impacts an employer by changing which employees might be eligible for the premium tax credit and might be able to trigger the employer shared responsibility tax by purchasing coverage on the Marketplace and obtaining premium assistance by slightly raising the household income limit for obtaining the credit. Thus, it will become important by potentially increasing the number of employees that might be eligible for the health care tax credit on the marketplace and that may increase claims from the Service assessing the employer shared responsibility payment under Code section 4980H(b).

Privacy Breaches

There continue to be more reports of HIPAA Privacy and Security breaches. The Office for Civil Rights in the Department of Health and Human Services has announced it will be starting another round of audits. Since the stories of the most recent hacks continue to pop up in the news, be sure to work with your plan vendors to insure that your plan's data is protected with the current standards for security and work with your IT department and financial people to be sure there is funding to keep data on your systems protected with appropriate security measures.

While HIPAA Privacy and Security does not apply to your other benefit plans, many other plan vendors also receive personally identifiable information such as name, address, compensation, social security number and employers should work with the vendors on such plans to ensure the data remains safe and protected in the vendors hands and when transmitted.

The Independent Contractor v. Employee Issue

The determination of whether one is an independent contractor or an employee continues to be a vexing problem. The U.S. Department of Labor Wage and Hour Division ("DoL") issued a detailed memorandum on the factors it considers in making such determination for purposes of the Fair Labor Standards Act (minimum wage and overtime calculation). The DoL has agreed to share the information from its investigations with the Service in a Memorandum of Understanding. The DoL has also entered into agreements with a majority of the states to share information with their labor regulating bodies regarding worker misclassification. The Service has recently been updating its webpages on worker misclassification as well. All of these indicate an increased regulatory focus on the worker classification issue.

While some of the terminology used in deciding in which bucket an individual falls is similar between the various laws, because the underlying purposes of the statutes driving the DoL and the Service regulatory efforts are different, the same term may actually have some similar and some different meanings when used by the separate agencies. The NLRB has also issued a recent decision on whether an individual is an employee or independent contractor for purposes of whether or not the individual can organize in a collective bargaining unit which also utilizes some very similar terminology and concepts under yet another law with a different focus (*Sisters' Camelot*, 363 NLRB No. 13). A comparison of the criteria to evaluate status under each of these federal statutes reveals both similarities and sometimes similar terms with underlying differences. (Note the NLRB is not part of the data sharing, its criteria just seemed very similar to tax considerations.)

Employers need to be aware that when dealing with one agency on worker classification, the information the employer provides may be shared with other agencies enforcing other laws. Thus the responses to any one agency should be carefully considered in light of the sharing.

If an employer decides to reclassify an individual as an employee under the Service's classification settlement program, that program re-characterizes not only for employment tax purposes, but also for employee benefit plan purposes and for purposes of passing the safe harbor for offers of coverage under the employer shared responsibility tax.

Adding additional individuals as employees who are full-time and who were not offered coverage to the employer's data on coverage offered may result in an employer that had been close in meeting the safe harbor to avoid the failure to offer coverage penalty (70% in 2015 and 95% in 2016 and later years), in being subject to the $2,000 times 1/12th per full time employee per month penalty for failure to offer coverage to a sufficient number of full-time employees.

If an agency reclassifies an individual as an employee, the employer should be prepared for additional outreach efforts from other governmental agencies. Employers operate in a giant web where for every action, one should expect a reaction. As the regulating agencies work on new initiatives, employers need to review operations as well because it is always good to have a good defense.

Assignment of Benefit

Frequently individuals assign their right to receive payment of benefits for medical services they receive to a health care provider. In September, the Third Circuit weighed in on the extent of the right assigned and joined the First, Fifth, Sixth, Ninth and Eleventh Circuits in finding that assignment of the a participant's right to payment of a medical claim, includes the right to sue for payment under ERISA section 502(a)(1) because this increases patient's access to health care. The court noted that assignment of the right to payment was sufficient to give the health care provider the right to pursue payment of the claim in court. (See *N. J. Brain & Spine Ctr. v. Aetna* (3rd Cir. 2015).