What the January 20, 2017 Executive Orders Say and Do Not Say

01.23.17

ACA Related Executive Order

The Affordable Care Act Executive Order signed by the new president on January 20, 2017 talks about minimizing the economic burden of the ACA, but when it directs the Secretary of Health and Human Services and the heads of all other executive departments and agencies with authorities or responsibilities under the ACA to waive, defer, grant exemption from or delay implementation of any provision or requirement of the ACA, it is only with respect to fiscal burdens on a Sate, or a cost, fee, tax, penalty or regulatory burden on one of the following: "individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products or medications." It does not direct any relief toward employers in general or toward applicable large employers, many of whom have self-insured health plans which would not be captured by the "purchaser of health insurance" category.

Until further direction of relief is received, this directive does not appear to relieve any employer from an obligation to file or furnish Forms 1095-C or the related transmittal form, nor does it relieve "applicable large employers" under Code section 4980H from the employer shared responsibility tax as the executive order does not direct relief to employers or applicable large employers from any regulatory burden under the ACA. It also does not appear to permit employers to make changes in plan design to eliminate any ACA mandated coverage (e.g., no pre-existing condition exclusion, coverage of dependent children to age 26, no annual or lifetime limits, the new health plan claim, appeal and external review procedures, coverage of certain treatments for life threatening illnesses, etc.).

Until there is further guidance from the IRS, Plan sponsors should still plan on complying with the Form 1095-C furnishing and filing requirements, if the employer is a member of an applicable large employer. Employers should consider waiting to make changes to the internal terms of their health plans as it is not clear what relief from which ACA requirements is available to employers under this Executive Order. Employers will want to consider implications under the HIPAA nondiscrimination regulations that will still be in effect and wait to see what the repeal will do, such as reinstating HIPAA provisions that the ACA removed or obsoleted (e.g., certificates of creditable coverage).

While this order also encourages state flexibility and the development of open and free markets for health care and health insurance and preserving maximum options for patients, there is no further explanation. Any existing regulation will need to be addressed through he required notice and comment process required for changing regulations, so we should not expect the process of removing the actual ACA legal regulations to happen quickly.

New Administration's Regulatory Freeze Pending Review

Following standard operating procedures for a new administration, on Friday, a "Memorandum for the Heads of Executive Departments and Agencies" was issued putting a freeze on the federal regulatory process (the "Regulation Memo"). The order stops heads of agencies from forwarding any regulations on to the Office of the Federal Register ("OFR") for publication until the new administration reviews and approves the regulation. It withdrew all regulations that were at the OFR to review them, to the extent permitted.

For any regulations that had been published in the Federal Register but that were not yet effective, the effective date was postponed by 60 days for review and consideration by the new administration. This raises questions regarding a couple of recent regulations impacting disability and retirement benefits.

Disability Based Claim and Appeal Procedure Final Regulation

It appears that the Department of Labor's Disability Based Claim and Appeal regulations that were published on December 19, 2016, and were effective on January 18, 2017, but which do not apply until a claim is submitted on or after January 1, 2018, may have been carefully designed to miss this delay. The effective date of the regulation makes this regulation outside of the scope of the Regulation Memo and thus at this point it appears that it will still be continuing as a

final regulation. Plan sponsors should review not only disability plans, but also plans that have rights based upon a disabled status, such as 401(k), pension and other plans, to determine which plans may need to be amended and what processed need to be changed to stay in compliance with the new regulation's requirements. Stay tuned as well for other developments in this new administration.

401(k) Safe Harbor Proposed Regulation Modification- Not Impacted

The new proposed regulations clarifying that a qualified matching contribution or a qualified non-elective contribution to a safe harbor 401(k) plan become vested not when the employer makes such contribution to the plan, but when such a contribution is allocated to a participant's account in the plan, would not be impacted by the memo because it is only proposed and does not have an effective date until it is published in final form.

There may be other regulations impacted, but these are two of the most recent that clearly impact employee benefit plans and their administration.

The conflict of interest/fiduciary ever growing regulatory package is not within the scope of this alert and the future of that package is still to be determined.

2017 will be an interesting year. To borrow a quote from a famous baseball player, it might be déjà vu all over again...

Contacts:

Greta Cowart
214.745.5275
gcowart@winstead.com
Nancy Furney
214.745.5228
nfurney@winstead.com
Lori Oliphant
214.745.5643
loliphant@winstead.com
Marsha Clarke *(Admitted in MO and IL)*
214.745.5877
mclarke@winstead.com