



Wespath

BENEFITS | INVESTMENTS

HEALTHFLEX SUMMIT—SEPTEMBER 2018

ACA/Legal Update



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ACA Update

- Only one change to the Affordable Care Act
 - Individual mandate penalty reduced to zero, starting January 1, 2019
- Multiple changes to regulations
 - Little impact on conference-sponsored health plans
- Various lawsuits pending
 - Suit about cost-sharing reduction subsidies dismissed but could be refiled
- “Silver loading” permitted for 2019



What Is Silver Loading?

FIRST:

ACA

Exchange insurance companies must reduce the cost-sharing required of low-income individuals who enroll in a silver plan

Obama Administration

Paid subsidies for companies providing these CSRs*

Trump Administration

Stopped paying CSR subsidies

*CSRs—Cost-sharing reductions

THEN:

- Premiums increased to make up for lost CSR subsidies
- Most increased premiums only on the silver plan, which is the benchmark for setting premium tax credit amounts (“Silver loading”)

RESULT: Premium tax credits (PTC) increased; many used their PTC to enroll in a bronze plan (with no out-of-pocket premium)

Public Exchanges



Big Picture:

Exchange premiums generally up, but Exchanges seem stable



Current Status:

Individuals with subsidies are largely not affected by premium increases

Networks with available Exchange policies tend to be narrower

House Passes Bills

July 25: House Passed 2 Bills

Both would amend law regarding HSAs

- Higher contribution limits
- Other changes to make HSAs easier to use
- Did not repeal or further delay Cadillac Tax
- Did not repeal employer mandate

Senate action uncertain



Americans with Disabilities Act of 1990: Employers may not discriminate on the basis of disability



Not Okay: Medical examinations and disability inquiries

Okay: Voluntary medical examinations as part of an employee health program

But what is “voluntary?”

GINA—Genetic Information Nondiscrimination Act

Title II: Employers

Unlawful employment practice for an employer to request, require or purchase genetic information with respect to an employee or a family member

EXCEPTION: Health services offered as part of wellness program; employee must provide “voluntary” written authorization



GINA 2016 Regs for Employers

Title II Regulations (EEOC)

- Employer may offer inducement to employee whose spouse provides information about spouse's disease or disorder
- Prior, knowing and voluntary written authorization of spouse required

Note: Possible question regarding application to Title I (GHPs—not EEOC jurisdiction)



2016 ADA Regs

Wellness program incentive of up to **30%** of cost of self-only coverage allowed

Program will be considered “voluntary” even if it’s “health-contingent”



Fly in the Ointment

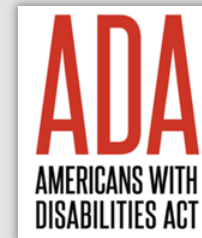
Effective date: January 2, 2019:

Court vacated the EEOC final (employer) regulations under the ADA and GINA regarding wellness program incentives*

*AARP v. EEOC, 2017 WL 6542014 (D.D.C.2017)

March 30, 2018 Status Report

EEOC advises court that it has no current plan to issue another set of rules by any date certain



Impact of Lacking Regulations

Less Clarity

- ADA still prohibits employers from asking for disability-related information/medical exams
- GINA still prohibits collection of genetic information
- No regulations = Lack of clarity regarding government view

Plan sponsors may want to touch base with counsel, particularly if they set their own incentive levels

Risks

Lawsuit by Employee or Spouse

- Employee could claim incentives so high that participation in program not “voluntary”
- Spouse could claim incentive to employee for spouse medical history is improper collection of genetic information

Lawsuit by EEOC

- **Consider:** EEOC argued to Court that its regulations should be upheld







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