

The ERISA Industry Committee

Washington Update

September 8, 2014



Participation Procedure

- Procedure for audience participation
- Audience will be in a “listen-only” mode
- If you wish to ask a question or make a comment, press *6 on your telephone to “un-mute” your telephone
- After speaking, please press *6 again to re-enter “listen-only” mode

Washington Update Agenda

- Welcoming Remarks
- Hill Briefing: Dani Kehoe
- Health Update
- Retirement Update
- Legal Update
- Concluding Remarks/Questions

ERIC on Social Media

- ERIC is on Twitter and Facebook and has a blog!
- Please follow us (and tell your friends and colleagues).



<https://twitter.com/ERISAIndCmte>



<https://www.facebook.com/ERISAIndCmte>



<http://erisaindustrycommittee.blogspot.com/>

- More information is available at

<http://www.eric.org/about/eric-social-media/>.

Health



ACA Reporting

- Purpose is to help IRS enforce the ACA shared responsibility provisions
 - Employer penalty
 - Individual mandate
 - Individual eligibility for premium subsidy
- Combined form for 6055 and 6056 reports
 - Most employers will use 1095-C and 1094-C
 - Humongous amounts of info required
 - Company may use substitute form

ACA Reporting, cont.

- IRS has released draft forms and instructions
 - Forms are for 2014; will be updated next summer for 2015- first coverage year for mandatory filing for large employers
 - Forms must be filed with government and sent to employees in early 2016
 - Questions still remain
 - ERIC is drafting a comment letter; please send us your questions and issues

ACA Cadillac Tax: the Spider's Web

- ACA Excise tax applicable starting in 2018:
 - Threshold: 40% excise tax on “excess benefits”, i.e., those over \$10,200 for self-only coverage, \$27,500 for family coverage
 - Adjustments for age, gender, and high-risk professions
- Caught in the web:
 - Nearly 1/3 of large employers will face tax in 2018 if no changes to current plan
 - Most large employers now making strategic decisions to comply with ACA but avoid Cadillac tax
 - Problematic because governmental guidance on tax not available

ACA Cadillac Tax, cont.

- ERIC Cadillac Tax Task Force hard at work since last April
- Task Force has now almost completed its regulatory work
 - 2 prongs: legislative route and regulatory route
 - Meeting originally scheduled with Treasury for 9/16 has been rescheduled (at their request)
 - New date: Wednesday, 9/24, 2:30 p.m. EDT

Cost-Sharing Limits

- ERIC filed a comment letter on 7/31 on the FAQs about Affordable Care Act Implementation (Part XIX)
 - ERIC requested a general rule allowing the use of any reasonable medical management technique
 - Instead of relying on the Departments to issue guidance on each particular method
 - ERIC also asked that no additional constraints be added to the use of reference-based pricing
 - Use of this approach would be permitted as long as it was “reasonable”

EEOC Weighs in on Wellness

- EEOC sues company, alleging that wellness program violates ADA
 - Employee refused to complete Health Risk Assessment and have blood work done
 - Penalty was 100% of premium; employee later fired
 - EEOC finds that company’s wellness program not “voluntary”, thus violating ADA
 - Not voluntary because employee subject to financial penalty for not participating and then was fired

EEOC and Wellness, cont.

- EEOC's position is at odds with ACA as interpreted by the Tri-Agencies (Treasury, DOL, HHS)
 - ACA limits only rewards based on achieving certain health outcomes
 - This EEOC suit not limited to health-based outcomes
 - Also: does EEOC object to incentives structured as penalties rather than rewards???
- Bottom line to EEOC: please provide guidance before suing us!

HHS

- HHS/CMS does not understand ERISA plans
 - Raise your hand if you agree with this
 - This lack of understanding has resulted in a WHOLE LOTTA problems for us
 - HPIDs
 - Controlling/sub health plans
 - Paying risk reinsurance premiums
 - HIPAA certification
 - Proof: newest ERIC poll
- Have requested a meeting with HHS
 - Contact me (gyoung@eric.org) if you would like to attend

ERIC Poll on HHS

- Over 90% of ERIC respondents have not yet applied for an HPID for their self-insured health plans
 - Deadline is 11/5
 - Almost half do not intend to apply until HHS publishes relevant guidance
 - Revealed high level of discomfort over inability to file
- Considerable frustration as well over categorizing plans as CHP or SHP

Judicial drama – the ACA

- Fate of individual tax subsidies in federally run Exchanges
 - Two dueling Circuit Court decisions announced 7/22
 - DC Circuit Court opinion in *Halbig v. Burwell*
 - 3-judge panel finds against government, determines that statutory language of ACA is clear that subsidies not permitted in non-state-run Exchanges
 - 4th Circuit Court opinion in *King v. Burwell*
 - 3-judge panel comes to opposite conclusion: individuals are eligible for subsidies on federal Exchanges
 - Found that although ACA is ambiguous, IRS was within its power to permit subsidies to be paid to individuals in federal Exchanges
 - Two district court cases pending in Oklahoma and Indiana
- BUT THIS ISN'T ALL: rehearing...en banc...maybe no split...*As the World Turns*...nuclear option...passage of time

ERIC Task Forces

- Two ongoing Task Forces
 - Preparing for the Cadillac tax
 - Meeting with Treasury on 9/24
 - COBRA in an ACA world
 - Next call: TBD
 - To join: email gyoung@eric.org

Retirement



Retirement – Legislative Update

Senate Finance Committee

Hearing on 40th Anniversary of ERISA & Updating
Pension Rules For Greater Retirement Security

- Tax Reform connection
- “Thinking outside of the box”



Retirement – Legislative Update

- S 2511 Manager's Amendment to amend ERISA section 4062(e) (Harkin)
- HR 5381 (Tiberi): nondiscrimination testing & frozen DB plans



Retirement – Regulatory Update

Treasury Department/IRS

- Hybrid Plan Regulations (rumor of release mid-September)
- Potential DB Plan De-Risking rules
- Priority Guidance plan released



Retirement – Regulatory Update, cont.

Department of Labor

RFI on Brokerage Windows

Released August 21st

Comments due November 19th

- Scope of investment options
- Application of fiduciary disclosure requirements?
- Demographic info on participants choosing brokerage windows



Retirement – Regulatory Update, cont.

Department of Labor

RFI on Brokerage Windows

Released August 21st

- Selection process for brokerage window/provider
- Costs
- What information is currently available for participants regarding investments



Retirement – Regulatory Update, cont.

Department of Labor

RFI on Brokerage Windows

Released August 21st

Next Steps

- FocusOn Call to discuss ERIC comments
- Possible survey(s) on specific questions included in RFI



Retirement – Regulatory Update, cont.

Department of Labor

Issues in the ‘queue’

- Lifetime Income & Benefits Statements
- Conflict of Interest



Retirement – Regulatory Update, cont.

PBGC

- PBGC reaction to S. 2511 on amending 4062(e)
- Executive Director position - open



Retirement – Misc. Items

ERIC submits Letter to the Editor –
Washington Post

- August Letter to the Editor criticizes pension smoothing as “gimmick”
- ERIC submits & Washington Post prints response



Legal



Monitoring Investments

- Supreme Court asked to hear case on:
 - Impact of statute of limitations on monitoring plan investments
 - Fiduciary deference for non-benefit claims
- Solicitor's Office recommended that Court hear monitoring, but not deference issue
 - Argued fiduciaries have continuing duty to monitor
 - Implied that *Tussey v. ABB* may be better case for deference issue
- Supreme Court often follows Solicitor's recommendation

Tibble v. Edison Int'l, No. 10-56406 (9th Cir. 2013); *Tussey v. ABB, Inc.*, No. 12-2056 (8th Cir. Mar. 19, 2014)

ERISA Preemption

- Mixed results from Circuit Courts of Appeals
 - 6th Circuit – State law imposing tax on health claims is not preempted
 - 3rd Circuit – Prevailing wage act is not preempted
 - 2nd Circuit – State law prohibiting subrogation and reimbursement for fully insured plans is not preempted
 - 1st Circuit – Law requiring maintenance of apprentice programs is preempted
- Critical issue for plans; facts of each case are critical

SIIA v. Snyder, No. 12-2264 (6th Cir., Aug. 4, 2014); *New Jersey Carpenters v. Tishman*, No. 2-13-cv-00379 (3^d Cir., Jul. 28, 2014), *Wurtz V. Rawlings Company LLC*, No. 13-1695-cv (2^d Cir., Jul. 31, 2014); *Merit Construction Alliance v. City of Quincy*, No. 13-2189 (1st Cir., Jul. 16, 2014)

Fiduciary Deference

- Ninth Circuit considered standard when review fiduciary's denial of a benefit
- Court said it must consider “all of the relevant circumstances”
- Previously only considered whether there was “any reasonable basis” for fiduciary's decision
- Even if reasonable basis for decision, may not be upheld given other circumstances

*Pacific Shores Hospital v. United Behavioral Health, No. 12-55210
(9th Cir. 2014)*

Upcoming ERIC calls

- FocusOn call on *Telehealth: the Legal and Regulatory Obstacles*
 - Wednesday, September 17, 2:00 p.m. – 3:30 p.m. EDT
- ERIC Legal/Litigation Call
 - Wednesday, October 1, 2:00 p.m. – 3:30 p.m. EDT
 - Topics to be reviewed: Fiduciary responsibilities, deference and claims exhaustion, and equitable remedies
- Washington Update call
 - Monday, October 6, 11:00 a.m. – noon EDT



Upcoming ERIC meetings

- ERIC meeting with Treasury on the ACA Cadillac Tax
 - Date: September 24, 2014
- ERIC meeting with CMS/HHS on NUMEROUS problems
 - Date: TBD
- ERIC Health and Retirement Committee meetings
 - Wednesday, October 15 (afternoon)
- ERIC General Membership meeting
 - Thursday, October 16 (all day)
- ***BIG ERIC PARTY***
 - Wednesday, October 15 (evening)



To receive ERIC updates

- If you are an employee of an ERIC member company and would like to receive your own copy of our emails and notifications of future events, please let us know by writing to Adreanne Cooper at ERIC (acooper@eric.org.)
- In this email, please include your contact information or signature block, and please indicate whether you wish to receive information on retirement issues, health issues, legal issues, or any combination of the above.

For further information

- **Debra Davis**, Vice President, Benefits
 - ddavis@eric.org
 - **Direct dial: 202/627-1925**
- **Kathryn Ricard**, Senior Vice President, Retirement Security
 - kricard@eric.org
 - **Direct dial: 202/627-1930**
- **Gretchen Young**, Senior Vice President, Health Policy
 - gyoung@eric.org
 - **Direct dial: 202/627-1920**
- ERIC main phone: 202/789-1400