

The ERISA Industry Committee

Washington Update

November 10, 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



Congress and the ACA: 2015

- Repeal ACA?
 - Likely to go through Congress again, but hit wall of presidential veto
 - Still no real Republican alternative
- “Smaller” ACA fixes possible
 - Repeal employer mandate
 - Eliminate (alter?) Cadillac tax
 - Change definition of full-time employee to 40 hours/week rather than 30
 - Repeal medical device tax

ACA to SCOTUS again

- Fate of individual tax subsidies in federally run Exchanges
 - Two dueling Circuit Court decisions announced 7/22
 - DC opinion later vacated, so no “split” in Circuit Courts
 - Full DC Circuit Court will re-hear on December 17
 - Friday, 11/7: SCOTUS decides to take case
 - Unusual step when no split; many see political overtones
 - Likely timeline: oral arguments in March, final decision at end of June, 2015
 - Impact of adverse court decision could be substantial

EEOC fires salvo against mainstream wellness programs

- EEOC files for a TRO against Honeywell, alleging that wellness programs violate ADA and GINA
 - Follows two other EEOC suits filed recently
 - Honeywell employees required to complete biometric screening or face financial penalties of several hundred dollars
 - Spouses also required to complete screening
 - Honeywell wellness programs meet ACA and HIPAA standards

EEOC, cont.

- EEOC ADA claim
 - Honeywell wellness program not “voluntary” because employees who do not complete screening face large financial penalties
- EEOC GINA claim
 - Honeywell violates GINA because employees are incentivized to provide family medical history/genetic information about their spouses
- Show us the rules!!!
- Judge dismisses EEOC request for TRO/PI
- Join us for a FocusOn call to discuss 11/13

Troublesome HHS issues

- Health Plan Identifiers (HPIDs)
 - Deadline for HPID applications was November 5, now **delayed indefinitely**
 - New HHS FAQ: Plan sponsor may now get one HPID for one ERISA plan or wrap plan
 - Can also use “old” method of one Controlling Health Plan = one HPID
 - No HPID necessary for FSA, HSA, Cafeteria plans, and most HRAs
 - May delegate task for securing HPID to a vendor
- Transitional Risk Reinsurance Programs (TRRP)
 - Annual Enrollment and Contributions Submission Form must be submitted by November 15

Not-quite-so-skinny plans

- Treasury and HHS clamp down on “skinny Minimum Value” plans
 - Plans that don’t cover hospitalization and/or physician visits
 - These plans sometimes able to wiggle through HHS Minimum Value Calculator
 - Calculator will be fixed next year in HHS final regulations to prevent this outcome
 - Small group of plans grandfathered

New FAQ on Premium Reimbursement Arrangements

- Employers may not give cash to employees to buy plan in individual market
 - Would be considered plan subject to ACA and ERISA
 - No difference if money is pre- or post-tax
- Employers also may not offer employees with high claims risk a choice between plan and cash
 - Discriminatory, but not “benign discrimination”
- Employees not eligible for subsidies in 105 reimbursement plans set up by employers to buy individual policies

HHS guidance on stop-loss

- State regulation of stop-loss has raised ERISA preemption concerns
- NAIC model law prohibits sale of stop-loss insurance with annual attachment point <\$20,000 or 110% of expected claims
 - Different rule for small groups (<51 members)
- DOL TR 2014-01: no ERISA preemption where state law prohibits stop-loss contracts with attachment points “below specified levels”
 - DOL not aware of any challenges to 10 states taking NAIC approach

DOL FAQ RBP

- DOL issues guidance on Reference Based Pricing
 - Important for determining application of OOP limits under the ACA
 - FAQ says they will consider “all the Facts & Circumstances” to see if RBP is reasonable
 - Some factors that will be considered:
 - Is there time for person to make decision?
 - Does it apply to emergency services?
 - Is number of providers adequate?
 - Do enough providers meet quality standards?
 - Is there an easily accessible exceptions process?
 - Does the plan adequately disclose important info about the RBP?

ERIC poll on staffing agency fees

- Basic question:
 - How are companies responding to the IRS rule that staffing agency fees be higher for employees who enroll in staffing agency health coverage than for those that don't enroll?
 - Using blended rates for covered and non-covered?
 - Higher rate for family than self-only coverage?
 - Key response: avoid at all costs that these staffing agency employees are considered common-law employees of the employer (client)

ERIC comment letter on ACA 6055/6056 reporting

- Simplify the whole thing because government didn't issue guidance in time to establish new systems for 2015!
- Still need lots of clarification: who must file what form for whom?
 - And when can we use substitute forms?
- “Simplified” methods really don't work

Retirement



Retirement – Legislative Update

Post-Election Overview

Senate Finance Committee

Senate HELP Committee

House Ways and Means

House Education and Workforce



Retirement – Legislative Update

- S 2511 Manager’s Amendment to amend ERISA section 4062(e) (Harkin)
- HR 5381 (Tiberi): nondiscrimination testing & frozen DB plans
- S. 2855 (Portman & Cardin) The Retirement Security Preservation Security Act: nondiscrimination testing & frozen DB plans



Retirement – Legislative Update

Wyden/Harkin Letter to Agencies on De-risking Activities

Treasury/DOL/PBGC/CFPB

- Advance notice to participants & notice (risks/loss of spousal & PBGC protection/limit of state guarantee associations)

Retirement – Legislative Update

- New standards for employers in choosing annuity provider to replicate ERISA protections
- Specific disclosure when retirees are offered lump sums including warnings of risk of outliving their assets, loss of spousal protections & tax consequences of lump sums



Retirement – Regulatory Update

Treasury Department/IRS

- Notice 2014-66 TDF with deferred annuities in asset make-up (October 22, 2014)
- Hybrid Plan Regulations (effective 1/1/16); proposed rules on transition rules (comments due 12/18/14)
- IRS hearing on proposed transition rules – January 9, 2015



Retirement – Regulatory Update

Treasury Department/IRS

- New guidance on rollovers in Notice 2014-54 and proposed regulations
 - Would modify the rules for distributions from Roth accounts
 - Amounts paid in a direct rollover would no longer be treated as a separate distribution from any amounts paid to the participant
- Comments due December 18th



Retirement – Regulatory Update, cont.

Department of Labor

- Filed joint comment letter on Oct. 15 regarding due date for annual fee disclosures charts
- RFI on Brokerage Windows - Comments due November 19th (released August 21st)
 - FocusOn call held on October 30th
 - Draft comment letter



Retirement – Regulatory Update, cont.

- BW-only plans – do raise concerns
- Large plans offer variety of investment options to meet diverse needs of participants
- No new burdensome investment disclosure related to BW – (safe harbor for no monitoring notice for BW?)



Retirement – Regulatory Update, cont.

- No additional fiduciary requirements on plans that include designated investment options & BW
- DOL should support plans that comply with spirit and letter of ERISA



Retirement – Regulatory Update, cont.

Department of Labor

Issues in the ‘queue’

- Lifetime Income & Benefits Statements
- Conflict of Interest
- 40th Anniversary of ERISA celebration at EBSA- October 21st



Retirement – Regulatory Update, cont.

PBGC

- PBGC information collection activity relating to “actions taken to cash out or annuitize benefits for certain former employees”
- Revision of 2015 filing procedures & instructions
- Comments by November 24th
- ERIC FocusOn call held on November 6, 2014
- ERIC comment letter strategy



Legal



Statute of Limitations

- 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 agreed to hear only statute of limitations / monitoring issue
- ERIC filing a brief in the case

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

Venue Selection Clauses

- 6th Circuit held a plan document can limit where participants can file suit to where the plan administrator is located
- ERISA's rules are built around the reliance on the terms of the plan document
- Court held no deference for DOL positions enunciated through briefs.
- Participants can challenge the reasonableness of a venue selection provision, including whether:
 - provision was obtained by fraud, duress, or other unconscionable methods;
 - the specified court would ineffectively or unfairly handle the case; and
 - the specified court would be so seriously inconvenient as to be unjust

Smith v. Aegon Companies Pension Plan, ___ F.3d ___, No. 13-5492, 2014
US App. LEXIS ____ (6th Cir. Oct. 14, 2014)

Upcoming ERIC calls

- FocusOn call on the *Impact of EEOC Suits on Workplace Wellness Programs*
 - Thursday, November 13, 2:00 p.m. – 3:30 p.m. ET
- De-risking FocusOn call
 - Monday December 8, 4 p.m. – 5:30 p.m. ET
- Washington Update call
 - Monday, December 8, 11:00 a.m. – noon ET



Upcoming ERIC meetings

- ERIC Health and Retirement Committee meetings
 - Wednesday, April 15, 2015 (afternoon)
- ERIC General Membership meeting
 - Thursday, April 16, 2015 (all day)

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.

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