

The ERISA Industry Committee

Washington Update

July 13, 2015



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

ERIC Antitrust Policy

As a reminder, all ERIC meetings and activities are to be conducted in full compliance with the ERIC Antitrust Policy. The antitrust laws prohibit competitors from agreeing on prices to be charged or otherwise taking steps that harm free and fair competition among them. While ERIC's primary mission and activities are entirely consistent with the antitrust laws, if you have any concerns about a particular topic or discussion, please raise it with ERIC staff.

Washington Update Agenda

- Welcoming Remarks
- Hill Briefing: James Brandell
- Health Update
- Retirement Update
- Concluding Remarks/Questions

Health



SCOTUS decision in *King v. Burwell*

- *King v. Burwell*: are health care subsidies available for individuals enrolled in plans through federally facilitated Exchanges?
 - Majority opinion by Chief Justice Roberts; 6-3 decision, finds that subsidies *are* available in states with federal Exchanges
 - Burning dissent by Justice Scalia: “interpretive jiggery poker”
 - Decision avoids chaotic upheaval in Exchanges
 - Could spell the end of upending Obamacare through judicial action
 - 2016 Presidential election still a question mark
- Entertaining and very informative FocusOn call on *King v. Burwell* by Tony Shelley of Miller & Chevalier

Congressional activity post *King v. Burwell*

- Removes some bargaining chips in Congressional efforts to change Obamacare
 - Repeal efforts likely to continue, but may lose steam
- Considerable support remains for:
 - Repeal of ACA medical device excise tax
 - Repeal of ACA 40% excise tax
 - Streamlining/simplifying ACA reporting
 - Other changes to ACA

SCOTUS decision on DOMA

- *Obergefell v. Hodges*: Must states permit same-sex marriage, and must they recognize same-sex marriages performed outside of their jurisdictions?
 - Justice Kennedy writes 5-4 majority opinion finding that states must permit and recognize same-sex marriage
 - Blistering dissents from 4 other justices
- Tom Meagher of Aon Hewitt and Rich Stover of Buck Consultants guide us through DOMA intricacies on ERIC FocusOn call

DOMA decision's impact on retirement plans

- Much less impact than original *Windsor* decision from 2013

DOMA decision's impact on health plans

- Principal impact is on imputation of state income on non-employee spouse
 - Spouses no longer subject to state income tax on health benefits
 - Key question is effective date: does SCOTUS decision apply as of decision date, for all of 2015, or earlier???
- Still does not require employers to offer health benefits to same-sex couples

DOMA decision's impact on health plans, cont.

- Some states have issued guidance on their approach to taxation
 - Ohio
 - Nebraska
- Fate uncertain about rule in many localities requiring companies to provide domestic partner benefits as prerequisite for contracting with locality (e.g., SF and Key West)

ERIC poll on DOMA

- Members surveyed pre-SCOTUS decision in June, 2015
- Results:
 - Company offers *health* benefits to same-sex couples: **93%**
 - Company offers *health* benefits to opposite-sex couples: **62%**
 - Company offers *retirement* benefits to same-sex couples: **55%**
 - Company offers *retirement* benefits to opposite-sex couples: **38%**

ERIC poll on DOMA, cont.

- Company offers health or retirement benefits to same-sex couples in civil unions: **83%**
- Company grosses-up payments for domestic partners who are taxed on health benefits:
 - Same-sex couples: **14%**
 - Opposite -sex couples: **7%**

ERIC poll on DOMA, cont.

- Is company likely to drop domestic partner benefits if same-sex marriage is legal in all states?
 - Yes, for same-sex couples: 22%
 - Yes, for opposite-sex couples: 3%
 - No, we will not drop benefits for domestic partners: 69%
- Many localities (e.g., SF and Key West) require domestic partner benefits as a prerequisite for contracting with jurisdiction – will this change???

ACA OOP limit

- Out-of-pocket limits on cost-sharing for any individual in family coverage in group health plans, self-funded or insured, cannot exceed self-only ACA OOP limit
 - 2015 limits: \$6600 self-only, \$13,200 family
 - 2016 limits: \$6850 self-only, \$13,700 family
 - Effective date of new policy: PYBOOA 1/1/16

ACA OOP limit, cont.

- ERIC has sent a letter to the tri-agencies
 - No statutory justification for “clarification”
 - “Clarification” did not follow APA
 - Should immediately withdraw rule
- ERIC has met four times with the agencies and Administration on this
 - Also working with many in Congress to seek support for our efforts
- Collaborating with NCB toward same goal

New reporting penalties

- Trade Act substantially increases penalties for W-2 and ACA reporting infractions
 - Applies to returns and statements required to be filed after 2015
 - Many penalties more than double, e.g.:
 - Penalty for failure to furnish return goes from \$100/return to \$250; total penalty increased from \$1.5M to \$3M
 - Penalty for corrections made within 30 days goes from \$30 to \$50; max increases from \$250,000 to \$500,000

Extension of HCTC

- Trade Preferences Extension Act of 2015 extends Health Coverage Tax Credit through 2019
 - HCTC pays for 72.5% of health premiums for individual and family
 - HCTC available to certain workers displaced by trade and some individuals age 55 and up who receive PBGC payments

Regulatory activity

- Tri-agencies finalize changes to final ACA 2012 Summary of Benefits and Coverage (SBC) regulations proposed last December
 - Fairly minor changes generally applicable to participants and beneficiaries who enroll/re-enroll in coverage after 9/1/2015
 - Final revisions to SBC template, instruction guide, uniform glossary, still coming; will apply for post-2016 plan years
- Tri-agencies also finalize ACA preventive services regulation
 - Largely addresses contraceptive coverage, incorporates guidance from SCOTUS
 - Minor changes to other provisions reflecting published FAQ
- Treasury issues Notice 2015-43 to provide interim guidance on expat plans

ERIC comment letter on wellness

- Filed with EEOC on June 18
 - Big thank-you to teams from Pillsbury Winthrop Shaw Pittman and Morgan, Lewis, & Bockius
- Key points
 - EEOC regs should conform as closely as possible to ACA regs on wellness
 - No limits on “participatory” programs
 - Rewards should reflect family coverage as well as self-only
 - Effective date should be no earlier than 2017
 - Employers should be permitted to use “gateway” designs in their benefit programs
 - EEOC should not impose limits on wellness programs offered outside of group health plan
- Next up: EEOC proposed regulation on GINA

ERIC poll on wellness

- Over 92% of responding ERIC members sponsor a wellness program
 - Wellness program is part of group health plan for >75%
 - 2/3 permit spouses to participate
 - 98% offer incentives in conjunction with wellness program
 - 60% offer incentives only in participatory programs, 10% only for health-contingent programs, and 30% for both

Service Contract Act

- Still unclear as to how companies with SCA employees can count their benefits/payments for purposes of ACA shared responsibility
 - ERIC has sent many letters to agencies; met with Treasury last summer; brought up issue in meetings since
 - New meeting with DOL scheduled for Monday, July 27
 - Contact me if you would like to attend

The Dread HHS Health Plan Identifiers

- HIPAA created Health Plan Identifiers (HPIDs)
- HHS asks for comments on using HPIDs in health plan enumeration and in electronic health care transactions
 - Is policy change warranted?
- ERIC has pushed to eliminate HPID use by large employers
 - Comment letter just circulated

SCOTUS takes new preemption case

- *Gobeille v. Liberty Mutual Insurance Co.*
- Core issue: Vermont state law requires reporting by all health plans, insured and self-funded
 - Reporting required on claims data, member eligibility, providers, other info relating to Vermont residents
- 2nd Circuit found in favor of Liberty Mutual; Vermont appealed to SCOTUS
- Fundamental ERISA issue; significant concern that SCOTUS will further narrow preemption

Telehealth: State Activity Update

- Delaware enacts legislation requiring coverage parity
- New Hampshire bill would change definition of telemedicine and practice standards
- Arkansas Board of Medicine gears up to implement recent legislation
- Texas Medical Board continues rulemaking on telehealth



Telehealth: Federal Activity Update

- Medicare Telehealth Parity Act of 2015 would create pathway to expand telehealth services under Medicare
- Broad 21st Century Cures bill lightly touches telehealth
 - More reports on challenges and barriers
 - Encourages state collaboration on licensure

Retirement



Retirement – Legislative Update

Tax Reform

- Senate Finance Committee Working Groups release reports
- Savings & Investment (Mike Crapo R-ID)/(Sherrod Brown D-OH)



Retirement – Legislative Update

- Report focused on Private Retirement System
- Non-controversial/bi-partisan issues
- Refer to legislative proposals; but no official endorsement
- Next steps



Retirement – Legislative Update

Three Areas of Focus:

- increasing access to tax deferred retirement savings;
- increasing participation and levels of saving;
- discouraging leakage while promoting lifetime income



Retirement – Regulatory Update

Treasury Department/Internal Revenue Service

- Proposal to significantly curtail determination letters for individually designed plans still in play
- Hybrid Plan Regulations (effective 1/1/16); proposed rules on transition rules – timing?
- PEP plan rules
- No timeframe on mortality tables
- Rules on frozen defined benefit plans & nondiscrimination testing



Retirement – Regulatory Update, cont.

Notice 2015-49: Bans of Lump Sum Windows to Participants in Pay Status

- Notice states IRS is planning to amend rules to section 401(a)(9) to limit such transactions
- Effective July 9, 2015



Retirement – Regulatory Update, cont.

Exceptions:

- Program was authorized/adopted by board or similar committee prior to July 9th
- Program is covered by PLR or determination letter issued by IRS prior to July 9th
- Program was communicated to plan participants in writing with intent to implement prior to July 9th
- Program was adopted under agreement between plan sponsor and employee representative under collective bargaining agreement prior to July 9th



Retirement – Regulatory Update, cont.

- Takeaways:
 - Change of interpretation or proposed rule with notice & comment ?
 - Retroactive effective date
 - Impact on Large Employers

FocusOn call – Tuesday July 21st 2pm – 3:30pm
ET with Covington



Retirement – Regulatory Update, cont.

Department of Labor

Definition of Fiduciary Proposed Rule (released 04/16)

- ERIC FocusOn Call held on June 11th WITH DOL
- ERIC comment letter circulating (2nd draft)
- Comments due July 21st
- Hearing: week of August 10 (up to 4 days)
- Meeting with DOL on July 6th – employer sponsor issues



Retirement – Regulatory Update, cont.

Department of Labor

Definition of Fiduciary Rule, cont.

- ERIC Comment Letter:
 - Investment education carve-out and specific plan investment options
 - Informal comments of employees of companies to co-workers
 - Narrow Definition of Recommendation
 - Call center employees
 - Preamble questions: HSAs (treatment to continue) etc.
 - Effective date of new regulation and liability before date of final regulation



Retirement – Regulatory Update, cont.

Department of Labor

Other Issues in the ‘queue’

- Lifetime Income & Benefits Statements
- Brokerage window regulations
- Report on Plan Audit Quality

Retirement – Regulatory Update, cont.

Employee Expenses Charged to Trust Survey

- Member request to survey ERIC members on employee expenses (if any) charged to plan trust
- Survey closes July 14th



Retirement – Regulatory Update, cont.

Securities and Exchange Commission

- July 1 proposal to require public companies who restate financials (for accounting purposes) and therefore overpaid executive compensation to recover excess payments
- Create and disclose “clawback” policies or face de-listing/forfeit FINRA membership
- Applies to “executive officers”



Retirement – Misc.

State Activity – De-risking

- Connecticut enacts law to protect benefits under group annuity contract (signed July 2nd)
- HB 6772; Public Act 15-167
- Prohibits creditors to reach plan participants under group annuity contract purchased by ERISA-covered plan
- Previous versions included expanded disclosure – NOT included in final bill

Legal

Bond v. Marriott International

- US Court of Appeals 4th Circuit
- ERIC filed amicus brief with US Chamber & ABC (filed July 2nd)
- Court should reaffirm settled rule for application of statute of limitations in absence of formal denial of ERISA benefits
- Top-hat provision of ERISA does not require that the qualifying plan be composed exclusively of management or highly-compensated employees.



Legal

Other Amicus Brief Requests

- *Harris v. Amgen Inc.*: stock drop case petitioning cert. in Ninth Circuit decision against Amgen. Plaintiffs (former Amgen employees) allege the company violated its fiduciary duties under ERISA by failing to take action once it allegedly learned of adverse non-public information about the
- *Gobeille v. Liberty Mutual Insurance Co.*: US Supreme Court agreed to hear case involving application of Vermont reporting law to a self-funded group health plan.

Upcoming ERIC calls

- FocusOn call: Discussion of the impact of the ACA 40% excise tax on onsite medical clinics
 - TOMORROW, Tuesday, July 14, 2:00 p.m. – 3:30 p.m. EDT
- *Third Thursday* call of ERIC Health Policy Committee
 - Thursday, July 16, 4:00 p.m. – 5:00 p.m. EDT
- FocusOn call: Treasury Notice Banning Lump Sum Windows for Participants in Pay Status
 - Tuesday, July 21, 2:00 p.m. – 3:30 p.m. EDT
- Washington Update call
 - Monday, September 14, 11:00 a.m. – noon EDT



Upcoming ERIC meetings

- Washington Reps
 - TODAY, Monday, July 13, 3:30 – 4:30 p.m. EDT
 - Location: ERIC offices, Washington D.C.
- ERIC General Membership and Committee meetings
 - October 14 and 15, 2015
 - Location: Washington, D.C.

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