



The Alliance Learning Circle
ACA Uncertainty: What's an Employer to Do?

March 14, 2017

John Barlament
Quarles & Brady LLP
John.Barlament@quarles.com
414.277.5727

The slide features the same Quarles & Brady LLP logo in the top right. The background is a lighter version of the globe and geometric shapes seen in the first image. The text is centered and presented in a clean, professional font.

Agenda

- Presidential orders and regulatory actions
- Congressional actions
- American Health Care Act
- Data privacy and security issues / HIPAA
- Grab bag of ACA, other benefit law changes
 - ACA Section 1557
 - QSEHRAs
 - New disability regulations
 - ACA tweaks
 - Mental health parity update
 - Wellness plans
 - Form 5500 proposed changes

Quarles & Brady LLP

3

Available Regulatory Measures

- Regulatory Moratorium
 - Virtually every new president issues a freeze on new and pending regulations
 - The moratorium that President Trump issued has little impact on employee benefit plans because most regulations issued under the Obama administration are already final
- Eliminating Existing Regulations
 - The President cannot unilaterally overturn existing, final regulations by executive order
 - Revocation or modification of regulations requires public notice and a comment period
 - Executive orders
 - Cannot overturn existing regulations or law
 - Do not create new law
 - Are not enforceable in the courts

Quarles & Brady LLP

4

Available Regulatory Measures

- Executive Orders (cont.)
 - Three Trump executive orders that potentially affect employee benefit plans
 - Minimizing the Economic Burden of the Patient Protection and Affordable Care Act
 - Directs agencies to take available actions to minimize burden of the ACA, including to waive or defer related taxes and penalties
 - Reducing Regulation and Controlling Regulatory Cost
 - Directs agencies to identify two regulations for repeal for each new rule proposed
 - Enforcing the Regulatory Agenda
 - Direct agencies to establish task forces to evaluate existing regulations and identify regulations that eliminate or inhibit job creation, are outside or unnecessary, impose costs that exceed benefits or that create an inconsistency or otherwise interfere with regulatory reform
 - Little to no immediate impact on employers
 - Will not necessarily have the effect of speeding up revocation or replacement of regulations but can expedite judicial or regulatory action when a rule is not yet in effect or applicable

Quarles & Brady LLP

5

2015-16 Republican Bills / Ideas

- 2015 reconciliation bill, Restoring Americans' Healthcare Freedom Reconciliation Act of 2015
 - Passed House and Senate, vetoed by President Obama
- Would have:
 - Effectively repealed individual mandate and Employer Shared Responsibility Rule ("ESR Rule") by reducing penalties to \$0
 - Repealed Exchange subsidies (with 2-year transition)
 - Repealed Medicaid expansion (with a delay)
 - Repealed Cadillac tax
 - Eliminated prohibition on over the counter ("OTC") reimbursements and \$2,500 health FSA limit
- Political pushback after January 2017 Congressional Budget Office ("CBO") report predicted, if bill enacted:
 - 18 million lose coverage within one year (32 million in 2026)
 - 25% - 50% increase in health premiums in one year (individual)

Quarles & Brady LLP

6

Other Bills / Republican Ideas

- "Straight repeal" option (prior slide) is still favored by right-wing portion of Republican party
 - E.g., Ted Cruz has called for that along with, in 2016 debate:
 - Selling of insurance across state lines
 - "Race to the bottom" effect?
 - Expand use of health savings accounts ("HSAs")
 - "De-linking" health coverage from employment (no real details)
 - Straight repeal opposed by Republican leaders, Democrats, other interest groups
- Patient Freedom Act
 - Proposed January 23, 2017 by Senators Cassidy (R-LA) and Collins (R-ME)
 - Repeal individual mandate and ESR Rules
 - Allow states to choose:
 - Reinstate ACA (with mandates, but possibly limited subsidies)
 - Market-based alternative (default): "Skinnied down" HDHP; federal funds into HSAs; automatic enrollment to manage adverse selection risk
 - Go it alone (states choose what to do, with no federal funding)

Quarles & Brady LLP

7

"A Better Way: Health Care"

- June 2016 37-page outline from House Speaker Paul Ryan (R-WI)
- Effect
 - Repeal ACA -- Not clear if some provisions, such as age 26, would be kept
 - Expand HSAs -- Increase contribution limits, catch-up contributions for spouses
 - Expand HRAs – Could reimburse individual insurance premiums
 - Idea recently became reality for small employers with qualified small employer HRA ("QSEHRA")
 - Deal with adverse selection through extending HIPAA's "continuous coverage" rule to individual market
 - If gap in coverage, appears coverage could be denied
 - Cap employee exclusion for employer-sponsored coverage
 - No explicit limits, but note that geographic adjustment would occur
 - HSA contributions do not count towards cap
 - Health care "backpack" – "Universal, advanceable, refundable tax credits" if no Medicare, Medicaid or employer offer
 - High-risk pools

Quarles & Brady LLP

8

Empowering Patients First Act

- Introduced multiple times by Rep. Tom Price (R-GA), now HHS Secretary
 - Similar to Paul Ryan's plan
 - Repeal ACA
 - Provide refundable, fixed tax credit (increasing with age, not income)
 - Expand HSAs
 - Cap employee exclusion for employer-provided coverage
 - Deal with adverse selection through continuous coverage rule
 - Repeal Medicaid expansion
 - Block-grant to states for high-risk pools
 - Allow sale of insurance across state lines

Quarles & Brady LLP

9

Patient CARE Act

- 2015 outline of a bill from Senators Burr (R-NC), Hatch (R-UT) and Upton (R-MI)
- Repeal ACA
- Prohibit lifetime limits (but not annual limits)
- Change 3:1 insurance age-rating to 5:1, then let states handle
- Children covered until age 26
- Deal with adverse selection through HIPAA-like rules
- "Targeted tax credits" for employees at a small business (or large employer, but no offer of coverage)
- Age-adjusted, advanceable, refundable tax credit for individuals up to 300% of federal poverty line
- Sale of insurance across state lines
- Cap employee income exclusion -- \$12,000 individual; \$30,000 family

Quarles & Brady LLP

10

Stated Goals of President Trump

- "Health Care to Make America Great Again" webpage (now deleted):
 - Repeal ACA
 - Sale of insurance across state lines
 - Individuals can fully deduct health insurance premiums
 - Expand use of HSAs
 - Require provider price transparency
 - Block-grant Medicaid to states
 - Allow importation of prescription drugs
- Also proposed
 - "Insurance for everybody"
 - "Much lower deductibles"
 - "I'm not going to cut Medicare or Medicaid. Every other Republican is going to cut"

Quarles & Brady LLP

11

Republican's Three Step Process

- Phase One: Use reconciliation process to pass some changes to ACA
 - Process only requires 50 votes (VP Pence tie-breaker) in Senate, rather than filibuster-proof 60
 - Republicans have 52 Senators
 - Can only make certain changes which impact budget
 - Limits what changes can be made
 - E.g., as discussed later, AHCA does not technically repeal Employer Shared Responsibility ("Pay or Play") rules and individual mandate
 - Just sets the penalties to \$0
 - Tax cuts in this process also lead to option for greater tax cuts (again by reconciliation) later in the year (tax reform)
- Phase Two: HHS, IRS, DOL Secretaries tweak rules which can be tweaked
 - Many items in ACA called for Secretary to create rule
 - So, as long as formal process followed, those can be changed

Quarles & Brady LLP

12

Republican's Three Step Process

- Phase Three: Use legislative process for non-reconciliation items
 - E.g., selling insurance across state lines; prescription drug negotiation by federal government, perhaps?
 - Will need to pass Senate, so 8+ Democratic votes likely will be needed
 - President Trump has said he will hold "stadium-size" rallies to put pressure on Democratic Senators from Republican-leaning states
 - Could result in other changes for employer plans at that time
- "Stopgap" measures being considered – no major employer impact
 - Plan Verification and Fairness Act (1/27/2017)
 - Require verification of Exchange special enrollment eligibility
 - State Age Rating Flexibility Act of 2017 (1/27/2017)
 - Expand age-based insurance rating from 3:1 – 5:1
 - Health Coverage State Flexibility Act of 2017
 - Shorten insurance grace period from 3 months to 1-month, generally
 - Work on all have slowed as Republicans focus on AHCA

Quarles & Brady LLP

13

American Health Care Act ("AHCA")

- Introduced March 6 in House
- Somewhat tepid support initially by President Trump
 - Now says "This is the bill"
 - But also that it is open for "negotiation" ... But then on 3/10 Sean Spicer said that there would not be "negotiation"
 - Right-wing Republicans continue (3/12) to threaten to sink bill
 - Bottom line: Republicans likely will make their push with this bill
- So, what's in it?
 - Many provisions deal with non-employer-specific items
 - E.g., "block-grant" Medicaid funding and roll back ACA expansion
 - Eliminates \$600B in taxes (high earners; tanning tax; medical device tax)
 - Average tax cut of \$0 for households in bottom 90% (those making \$208,500 or less)
 - Top 0.1% (making \$3.75M+) average tax cut of \$165,090 (Tax Policy Center)
 - Easier to make additional Republican-favored tax cuts later in 2017 /2018 through reconciliation process (i.e., no Democrats needed)
 - Because the "baseline" for federal revenue has decreased
 - E.g., Paul Ryan's tax reform proposal would provide a \$3 trillion tax cut; President Trump has called for \$6.2 trillion tax cut

Quarles & Brady LLP

14

AHCA Employer Impact

- Reduces individual mandate penalty to \$0 (effective 1/1/2016)
 - To provide incentive to individuals, insurers "shall" charge 30% surcharge for 12 months if no "continuous coverage" (i.e., gap of at least 63 days without coverage)
 - For employers, will likely mean reporting of coverage (perhaps on W-2, form similar to 1095-C or maybe HIPAA certificate of creditable coverage)
 - Because now gaps in coverage become relevant again
 - No minimum value requirement for this coverage, apparently (so true "bare bones" policy may satisfy the rule)
- Insurer age rating increases to 5-1 from 3-1
 - Protests from AARP and other lobbying groups
 - Mainly an issue for individual policies (not employer plans)

Quarles & Brady LLP

15

AHCA Employer Impact

- Tax credits to individuals to buy insurance
 - \$2,000 - \$4,000 per year, cap of \$14,000 per family
 - Varies by age (e.g., under 30 is \$2,000; 60+ is \$4,000)
 - Begin phasing out at \$75,000 single / \$150,000 family
 - Decrease by \$100 per \$1,000 in extra income
 - Five oldest family members taken into account
 - No credit for a month if "eligible for other specified coverage"
 - "Other specified coverage" is coverage under a "group health plan"
 - But excluding excepted benefits and COBRA coverage
 - So, does coverage under an HRA prevent tax credit? EAPs? FSAs? Wellness? Expensive coverage? Not minimum value?
- Will be winners and losers under these changes (in comparison to ACA coverage)
 - HHS Secretary Tom Price (3/12/2017): "Nobody will be worse off financially" under AHCA, but Kaiser Family Foundation projections (upcoming slides) don't show that
 - Congressional Budget Office ("CBO") report released 3/13/2017

Quarles & Brady LLP

16

CBO Report

- CBO report makes it more difficult – arguably – to pass AHCA
- CBO is a non-partisan federal agency that predicts economic and other effects of legislation
 - Currently run by a Republican chosen by Republican House
- Prediction: 14 million fewer Americans with insurance in 2018
 - 24 million by 2026
 - Much of it in individual market and Medicaid
- Includes 3 – 5 million decrease in employer-sponsored coverage
 - Due to ESR Rule / individual mandate going away
 - And tax credits being available to individuals
- In 2018 and 2019, average premiums for policyholders in individual market goes up 15% - 20% higher than would under ACA
- By 2020, premiums go down, so that by 2026 average premiums 10% lower than under ACA
 - Due to older, less-healthy population dropping out and becoming uninsured (leaving healthy / young in individual market)
 - Also lesser coverage expected

Quarles & Brady LLP

17

CBO Report

- Reduce federal deficits by \$337 billion over 10 years
 - Key for using reconciliation
 - Reduction mainly through Medicaid cuts (about 25% over 10 years)
- Republican reaction varied
- Paul Ryan praised portions of it
 - "I'm pretty encouraged by it. It actually exceeded my expectations" (presumably over \$337 billion savings)
- White House rejected report as inaccurate
 - HHS Secretary Price: "Strenuously disagree" with report
 - Also that it fails to consider Phases Two and Three
 - Not unexpected – CBO only considers actual legislation
- Most Republicans who commented expressed concern
 - Sen. Gardner (R - CO): "We've got work to do here"
 - Sen. Hatch (R - Utah): "Naturally, I'm concerned"
 - Democrats, of course, criticized results
- One CBO example: 64-year-old earning \$20,000 sees her premium cost go from \$1,700 to \$14,600 under AHCA (750% increase)

Quarles & Brady LLP

18

Winners / Losers by Income

Figure 1

How House Republicans' health reform plan might shift average health insurance tax credits, based on income and age, in 2020



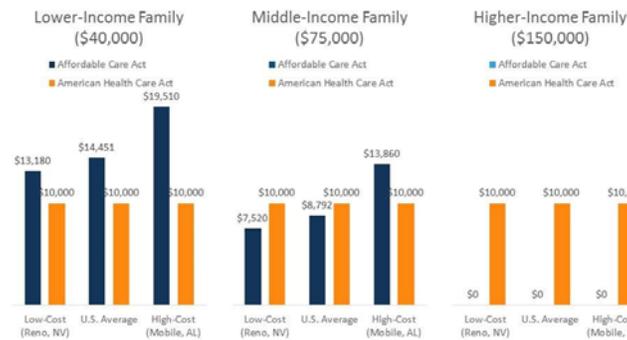
Source: Kaiser Family Foundation analysis. Note: Data for Affordable Care Act represent the average tax credit available across all counties in the United States, at a given age.



Winners / Losers by Geography and Income

Figure 3

How House Republicans' health reform plan might shift health insurance tax credits for a family of four, by income & geography, 2020



Source: Kaiser Family Foundation analysis. Notes: Data represent the tax credit available for a family of four with two 40-year-old adults and two kids. In the 2017 ACA exchange markets, premiums in Reno, NV and Mobile, AL are approximately representative of the 25th and 75th percentile, respectively. 2017 ACA premiums were increased according to National Health Expenditure projections for direct purchase.



AHCA Employer Impact

- Will tax credits cause employers to drop coverage?
 - Kaiser Family Foundation: In 2016, average family cost about \$18,100
 - Employees paid about \$5,300; employers paid about \$12,800
 - Take a family of four (income within \$75,000 / \$150,000 limits). Dad is 42, Mom is 39, kids are 10 and 12. Tax credit = \$9,500 (dad is \$3,000; mom is \$2,500; kids are \$2,000 each) – compared to \$12,800 employer contribution
 - Will the employer drop the coverage? Provide extra compensation for difference between tax credit and its contribution (e.g., bonus of \$3,300 (\$12,800 - \$9,500))? (\$3,300 is a lot cheaper than \$12,800!)
- On the other hand, for a single, 25-year-old employee, credit is only \$2,000, so may not be worth the hassle
 - That type of employee may be an "actuarial gain" under employer's plan anyways
 - May also be more difficult to administer / manage if have varying offers to different types of employees
 - Would it raise nondiscrimination issues?
- If employers dropped coverage, would Republicans try to reinstate an ESR-like rule, to mandate that employers offer coverage?

Quarles & Brady LLP

21

AHCA Employer Impact

- ESR Rule penalty drops to \$0
 - Retroactive to 2016 (but not 2015)
 - No change, for now, to 1094 / 1095 filing requirement
 - Presumably this could be removed in Phase Three
 - Will coverage which was offered to 30-39 hour employees because of ACA be eliminated? Collective bargaining issues? If eligibility rules reference "measurement periods", eliminate references?
 - Will employers stop tracking who is an ACA "full-time" employee?
- New reporting – Employer reports on W-2 whether, on a month-by-month basis, an employee was "eligible for other specified coverage"
 - This is considerably easier than ESR Rule, but will require month-by-month tracking of eligibility (presumably in 2020)
 - Could raise some difficult tracking issues
 - E.g., employee who declined coverage has a special enrollment event (birth of new child in March 2017) but does not elect coverage (or even tell employer). Must employer track and report that?
 - Also mid-year upon request of employee (timing, form TBD)

Quarles & Brady LLP

22

AHCA Employer Impact

- Over-the-counter ("OTC") medications, under ACA, cannot be tax-free under a Health FSA, HRA or HSA
 - Unless have prescription or it is for insulin
 - Effective January 1, 2018, rule would be eliminated
 - Presumably would need to amend plan on or around then, if employer desired
- ACA required employers that received retiree drug subsidy ("RDS") to take into account those RDS payments for tax deduction purposes
 - AHCA would allow employers that sponsor retiree plans to no longer take those into account (i.e., would boost tax deduction employer can take)
 - Effective January 1, 2018

Quarles & Brady LLP

23

AHCA Employer Impact

- Cadillac tax delayed until 2025 (from 2018 originally, then 2020)
 - Earlier, leaked draft would have taxed value of employer health plan coverage above certain, 90% level
 - Thankfully, removed from final AHCA bill
 - But, will CBO score (showing that bill does not pay for itself) pressure Republicans to re-introduce that tax?
 - Is this intended to "bend the cost curve" or just to generate revenue?
- HSAs boosted
 - Increase annual limit to out-of-pocket maximum limits under related HDHP (\$6,550 for self-only; \$13,100 for other) (effect. 1/1/2018)
 - Increase from current limits of \$3,400 and \$6,750
 - Both spouses can make catch-up contributions to same HSA
 - Effective January 1, 2018
 - For HDHP coverage which "begins", medical expenses within 60 days of that date are eligible expenses if HSA established in that time period
 - Is this a one-time opportunity? What if had HDHP coverage, went to non-HDHP, then back to HDHP? Break in employment "cure" it?
 - Non-medical expense distribution tax drops to 10% from 20%

Quarles & Brady LLP

24

AHCA Employer Impact

- Health FSA contribution limits no longer capped
 - ACA had capped them (\$2,600 in 2017)
 - Effective January 1, 2018 no cap
 - May need IRS guidance on how to address non-calendar-year FSAs
- COBRA subsidy
 - Tax credits noted above (\$2,000 - \$4,000 per family member) also available for "unsubsidized" COBRA coverage
 - "Unsubsidized" = "no portion of the premiums for which are subsidized by the employer"
 - Bit circular – can severance agreement provide cash payments?
 - "COBRA" includes state programs that provide comparable rules
 - Not available for health FSA / "substantially all" excepted benefits
 - Married couples must file joint returns
 - Plan must not be "grandfathered"
 - Plan cannot cover abortion (other than necessary to save life of mother or due to rape / incest)
 - Plan administrator must "certify" coverage meets these rules
 - Time, place, method TBD

Quarles & Brady LLP

25

What Remains of ACA?

- Quite a lot – this is not a full "repeal" or "replace"
- No annual / lifetime limits on essential health benefits
- No pre-existing conditions
- No excessive waiting periods
- Expanded claims / appeal rules
- Preventive care at first-dollar
- Cover children until age 26
- No rescissions
- SBCs
- Increased wellness plan discounts
- Section 1557 nondiscrimination rules
- Many other "suspended" or "ignored" ACA provisions, such as certification of HIPAA compliance; nondiscrimination rules for fully-insured plans
- Essentially, **ACA remains in full force unless specifically noted**

Quarles & Brady LLP

26

What Could Be Coming in Phases 2 and 3?

- Preventive care benefits
 - Contraceptive coverage seems like it could be taken away / reduced
 - Or perhaps broader expansion of "religious exemption" for employers
- What exactly is an "essential health benefit" and how is it determined?
- Selling insurance across state lines
- QSEHRAs – without the "small employer" piece?
- Further expansion of HSAs?
- "Privatize Medicare" (Paul Ryan)
- Other changes needed once insurance industry reacts?
- Big questions:
 - Will this actually work?
 - Why is it believed to work / what is the theory?
 - What exactly are AHCA's goals?
 - HHS Secretary Price (3/12), asked to define "success" of AHCA
 - "It means more people covered than are covered right now"
 - "At an average cost that is less"

Quarles & Brady LLP

27

House Committee on Education and Workforce

- On March 9, approved three bills
- Preserving Employee Wellness Programs Act
 - Bill will proceed to a vote by the full House
 - Attempts to harmonize various rules applicable to employer wellness programs by indicating that plans in compliance with HIPAA and the ACA will not violate the Americans with Disabilities Act or Genetic Information Nondiscrimination Act
 - Would effectively nullify recent EEOC ADA and GINA regulations
 - Likely good for businesses, but concern about "overreaching"
 - March 2017 articles in NY Times and Washington Post cast bill as allowing employers to essentially mandate "genetic information" on employees
- Small Business Health Fairness Act – small employers can band together in association plans and provide self-insured coverage
- Self-Insurance Protection Act – stop-loss generally not "health insurance"

Quarles & Brady LLP

28

Data Privacy and Security Issues

- Office for Civil Rights ("OCR") is enforcement arm of HHS
- Enforces HIPAA Privacy and Security rules
- Has had consistent, bi-partisan pressure from Congress to more strictly enforce HIPAA rules
- Began Phase 2 audits last year
 - Primarily "desk audits", some "on-site" will occur
- Impacts both group health plans and business associates
 - Business associate piece is new
 - Prior HIPAA audits did not focus too much on group health plans – presumably true here also
- Sample audit letters posted on HHS web site
 - "Best practice" to review these and do "mock audit"
- Common problems are lost laptops, lack of training and failure to conduct security risk assessment
 - Feb. 2017: \$5.5M penalty against hospital for breach of 115,000 records and failure to terminate log-in privileges of former employees

Quarles & Brady LLP

29

Data Privacy and Security Issues

- HHS issued "ransomware" guidance last year
 - Several references to NIST guidance (can be exacting and difficult, especially for employers with little sensitive information)
 - Generally says that if you are hit with ransomware it is a breach (improper "disclosure" of PHI)
 - Unless show "low probability that the PHI has been compromised"
 - Seek opinion from IT consultant?
 - Should ransomware be reported to FBI? Third parties (e.g., www.nomoreransom.org)?
- Cloud service providers are business associates (2016 guidance)
- Nov. 2016: ERISA Advisory Council (appointed by DOL Secretary) issued "Cybersecurity Considerations for Benefit Plans"
 - Establish a strategy
 - Identify data (how accessed, used)
 - Consider frameworks (e.g., NIST)
 - Establish process considerations (protocols and policies about testing, updating, reporting)
 - Customize strategy
 - Consider other laws

Quarles & Brady LLP

30

Data Privacy and Security Issues

- Contract with service providers
 - Define security obligations
 - Identify reporting and monitoring responsibilities
 - Conduct periodic risk assessments
 - Verify if provider has cyber security program
- Insurance
 - Evaluate whether cyber insurance is needed / levels
- Two recommendations to DOL
 - Make report available to plan sponsors / fiduciaries / service providers
 - Provide information to benefits community to educate them on cybersecurity risks and approaches for managing risks
 - No DOL guidance yet on this
- Does this information / report become a "default" standard to prove that ERISA fiduciaries were acting "prudently"?

Quarles & Brady LLP

31

Data Privacy and Security Issues

- State privacy laws
 - Big question is whether they are preempted by ERISA
 - Of course, non-ERISA must follow
- 47 of 50 states have data breach notification laws
 - Usually triggered when improper use or disclosure of Social Security number and name
 - Often can go beyond HIPAA
 - E.g., report to State Attorney General
- 2016 Supreme Court case (*Gobeille*) held that state information reporting laws preempted by ERISA
 - Lends support to argument that breach reporting also preempted
- Several reports of plans being victims of various electronic attacks
 - November 2016: UFCW Local 655 Food Employers Joint Pension Plan ransomware attack
 - Often leads to litigation by affected plan participants
 - But harm difficult to show, so many cases thrown out
 - March 2017: *Fero v. Excellus Health Plan* – divide plaintiffs into "mis-use" and "non-misuse" (after three years) plaintiffs (latter thrown out)

Quarles & Brady LLP

32

QSEHRAs

- As part of 21st Century Cures Act, qualified small employer health reimbursement arrangements were created
- Allow employees to purchase individual health insurance policies
 - Before law, that could have created HIPAA and other issues
- Very clear that they are not "group health plans" under ERISA, Code, COBRA, etc.
 - Does that make them more likely to be subject to state law?
- Employers offering it must provide an annual written notice to employee at least 90 days before start of year
 - March 2017: For 2017, IRS not enforcing until further notice
- Funding must be through direct employer contributions
 - No salary reductions allowed
- Certain nondiscrimination rules must be followed
- Only for small employers
 - Those not subject to ESR Rules – generally less than 50 full-time employees
- Will this be expanded to large employers?

Quarles & Brady LLP

33

ACA Section 1557

- Applies to "health programs and activities" that receive certain federal financial assistance
 - Best example is Medicare Part D reimbursements
- If it applies, cannot discriminate on basis of race, color, national origin, sex, age or disability
- Regulations clarify that "sex" discrimination includes plans that fail to cover gender reassignment surgery
 - Starting for plan years beginning on or after 1/1/2017
- Recent court case put a hold on this mandate, at least for now
 - But could be changed at a moment's notice (how much lead time would you need to cover this?)
- Also a detailed notice, in multiple languages, needs to be included in various locations
 - Possibly on every explanation of benefits
- Federal contractors face similar rules
 - Per June 2016 Office of Federal Contract Compliance Programs regulation

Quarles & Brady LLP

34

Disability Plans

- If you are a church-related entity, review some of the new cases on whether plan is subject to ERISA
 - E.g., Feb. 2017, Loyola Marymount (Catholic-affiliated university) sued in state court
 - Question turned on whether ERISA preempted state law claims
 - Court refused to grant Loyola's motion to dismiss
- Final claims procedure regulations issued (December 2016)
 - In general, make it more burdensome on employers and disability administrators
 - Generally effective in 2018 (with two minor exceptions)
 - Adverse benefit determinations must contain a discussion of decision, including basis for disagreeing with any disability determination by a physician
 - If plan fails to strictly follow claims procedures, de novo review
 - Exception for de minimis, non-prejudicial; good cause or beyond plan's control; ongoing good faith exchange of information; not reflective of pattern or practice
 - Perhaps set up procedures to document these exceptions?

Quarles & Brady LLP

35

Disability Plans

- No conflict of interest in reviewer
- Notice must be culturally and linguistically appropriate (if at least 10% of workforce has predominant language other than English)
- Prior to decision on appeal, plan must provide claimant, free of charge, any new or additional evidence considered, relied upon, or generated by plan
 - Along with any new rationale for a denial
 - Claimant then given opportunity to respond to such new evidence or rationale
- Regulation became effective 1/18/2017
- For claims from 1/18/2017 – 12/31/2017, plan must:
 - Provide specific rule, guideline, etc. plan relied upon in making adverse determination or state that it will be provided upon request
 - Will continue into 2018
 - If claim is denied based on medical necessity, experimental treatment or similar rule, notice must provide explanation of it or state that it will be provided upon request

Quarles & Brady LLP

36

ACA Tweaks

- IRS continues to struggle with issue of how to treat "opt-out" arrangements for purposes of determining if coverage is "affordable"
 - Prior IRS guidance (Notice 2015-87) gave relief to employers while IRS considers it
 - Dec. 2016: IRS extends relief again
- Deadline for furnishing 1095-B and 1095-C to individuals was extended by 30 days
 - From 1/31/2017 to 3/2/2017
 - No changes to IRS deadlines
 - Paper was due 2/28/2017; electronic due 3/31/2017
 - 30-day extension possible through Form 8809
 - What if you have 250+ to file with IRS but do it on paper?
 - Good faith penalty relief renewed for 2016-related filings

Quarles & Brady LLP

37

ACA Tweaks

- Final OSHA regulations on non-retaliation for Exchange subsidy (Oct.)
 - Clarify that employee "receives" a tax credit if merely eligible for subsidy (even if do not receive it)
 - Continue to state that no notice is required to be posted
 - Employees must file within 180 days of alleged violation
- Will we see penalties under the ESR Rules?
 - IRS hinted that notices would be sent out soon
 - But so far very limited impact
 - Given Republican control and AHCA terms, very possible that no penalties will be assessed, ever
- DOL, IRS FAQs, Part 31 (April 2016)
 - Lots of little details and points
 - E.g., bowel preparation medication must be paid on 100% basis as "preventive" for individuals receiving colonoscopy
- DOL, IRS FAQs, Part 34 (October 2016)
 - Request for comments on what, exactly, must be covered for tobacco cessation products ("preventive care" under ACA)
 - Various MHPAEA FAQs

Quarles & Brady LLP

38

New SBC

- ACA added summary of benefits and coverage ("SBC")
 - AHCA does not affect the SBC
- Generally effective for first plan year beginning on or after April 1, 2017
 - E.g., January 1, 2018 for a calendar year plan
- New coverage example included
- Questions on first two pages are slightly changed
- Uniform glossary is slightly changed
 - No new terms, but definitions for existing terms slightly modified
- Likely cannot try to modify existing SBC – best approach is to start fresh with new template
 - Template provided in Word format, so easily customized

Quarles & Brady LLP

39

Mental Health Parity

- Generally requires "parity" (or maybe "super-parity) between mental health / substance use disorder benefits and medical / surgical benefits
- 21st Century Cures Act
 - Directs HHS, DOL, IRS to issue more guidance in this area, with illustrative examples
 - Must be finished by December 2017, updated every 2 years
 - Action plan to coordinate federal and state enforcement
 - If plan sponsor violates parity rules at least 5 times, mandatory audit
 - Report to Congress every year on serious violations
 - GAO report to Congress in three years on how well enforced
 - "Clarification" on eating disorders
 - If plan covers eating disorder benefits, including residential treatment, plan must make sure follows MHPAEA
 - Apparently effective immediately (Dec. 2016)
- Also new FAQs from October 2016

Quarles & Brady LLP

40

Mental Health Parity -- Enforcement

- 2016 enforcement:
 - 191 plans reviewed for Mental Health Parity and Addiction Equity Act ("MHPAEA") compliance
 - 44 cited for violations
- Typical problems
 - "Unfair penalties" – e.g., prior authorization more stringent
 - "Inequitable Residential Treatment Exclusions" – e.g., easier to receive extended care expenses for medical / surgical at skilled nursing facility
 - Are mental health providers abusing this rule?
 - "Overly stringent prior authorization requirements" – e.g., for all mental health services
 - "Improper written treatment plan requirements"
 - "Unnecessary delays in treatment" – e.g., had to wait 5 days on whether out-of-network provider could be seen

Quarles & Brady LLP

41

Wellness Plans

- Final EEOC, ADA-related regulations from mid-2016
- If you have not reviewed your wellness plans, should do so
- Often require changes
- As noted previously, still a "disconnect" between HIPAA wellness regulations and ADA wellness regulations
- AARP sued to prevent regulations from taking effect on 1/1/2017, but lost
 - Argued that wellness discounts, etc. cause plan not to be "voluntary" (i.e., pro-employee, not pro-employer, position)
- EEOC v. Flambeau – January 2017
 - EEOC sued because employee lost coverage for failing to timely complete health risk assessment
 - Employer defended on "bona fide benefit plan safe harbor" grounds
 - EEOC rejects this argument; previously upheld in Seff case
 - Trial court agreed with employer
 - 7th Circuit dodged issue
 - Held it was moot because employee reinstated; resigned; employer discontinued program

Quarles & Brady LLP

42

Form 5500 Changes

- Large set of regulations proposed in 2016, relating to 2019 plan year filings
- Comment period extended until December 2016 (from October)
- Would create significant changes
- New Schedule J
 - Indicate types of health benefits offered / funding method
 - Includes details on employer v. employee contributions
 - Use of trust v. payment from general assets of employer
 - COBRA questions
 - Insurer refund questions
 - Grandfathered or not
 - HDHP, FSA or HRA status
- Financial and claims information
- List TPAs, stop-loss carriers, other service providers
- Answer questions on compliance with various laws (HIPAA, GINA, MHPAEA, ACA, etc.)

Quarles & Brady LLP

43

Questions?

Quarles & Brady LLP

44

Thank you!

John Barlament
Quarles & Brady LLP
John.Barlament@quarles.com
414.277.5727

Quarles & Brady LLP

45 45

Quarles & Brady LLP



© 2015 Quarles & Brady LLP - This document provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this document. You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.