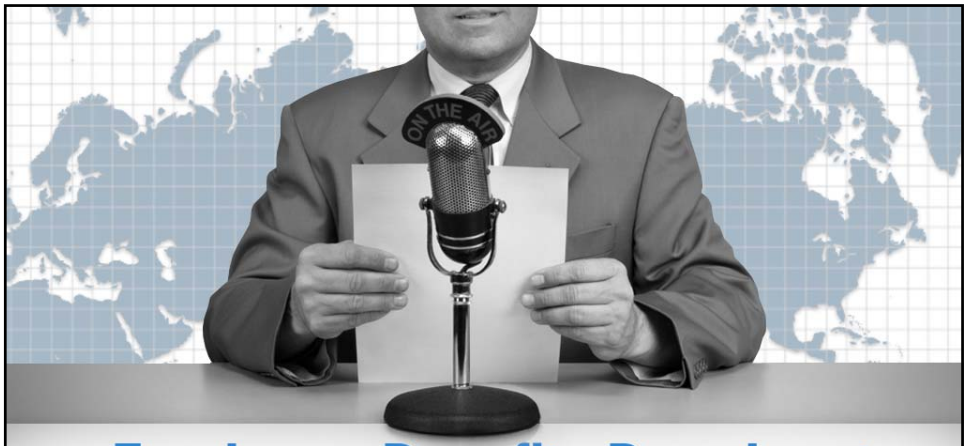

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Today's Topics

- **Headline News-** Giving Your Wellness Program a Check-Up
- **Risky Business -** Q: Can We Use the New Marketplaces to Our Advantage? A: Maybe!
- **In the Spotlight -** Year-End Reminders and Action Items

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Headline News

Giving Your Wellness Program a Check-Up

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Headline News

Wellness Programs

PROGRAM	REWARD
• Health Risk Assessments (HRAs)	• Health Plan discounts
• Biometric Screenings	• HRA or HSA contributions
• Educational Programs	• Health Plan surcharges
• Weight Management Programs	• Cash
• Smoking Cessation Programs	• Gift Cards
• Fitness Programs	

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Headline News

Focus on HIPAA Regulation

- New wellness regulations effective for plan years beginning January 1, 2014 and later
- Apply to grandfathered and non-grandfathered group health plans
- Different requirements for participatory vs. activity/outcome-contingent programs
- Your program may be a combination of some or all!

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Headline News

Three Types of Programs

1. **Participatory**
   - No reward/penalty

     OR
   - Outcome does not dictate reward

HRA, biometric tests, free monthly health seminars, payment of health club dues

2. **Activity (Physical)**
   - Walking, running, dieting

3. **Outcome- Contingent**
   - BMI, cholesterol, non-tobacco use

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Headline News

Participatory Program

- Must be made available to "similarly-situated" individuals; based on reasonable business criteria
  - Salaried vs. hourly
  - Date of hire
  - Location
- That's it!
  - No limits on reward/penalty
  - No reasonable alternatives

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Headline News

Health-Contingent Wellness Programs

Either activity and/or outcome-based

- Able to qualify for reward once per year
- Reward limited to 30% (or 50% if tobacco-related)
- Reasonably designed to promote health or prevent disease
- Reasonable alternative standard (RAS)
- Notice of availability of RAS

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Headline News

(1) Qualify for Reward Once Per Year

- If providing reward on periodic basis (e.g. per payroll period), may need to "catch up" if individual earns reward later in the year
  - Can catch-up all at once
  - Can take retro reward and pro-rate over rest of year
- Many employers impose deadlines in prior years:
  - If complete wellness program by September 30
  - Then earn reward for next plan year

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Headline News

(2) Award Limits

- Old rule: 20% of applicable premium
- New rule: 30% of applicable premium (50% if tobacco a criteria)

- Applicable premium is total cost of:
  - employee-only coverage if only employees eligible for wellness program
  - other levels if dependents also eligible for wellness program

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Headline News

(2) Award Limits (continued)

- Tobacco only: 50%
- Combination of tobacco plus other (all or nothing): 50%
- But if split out (a la carte): 20% for tobacco and 30% for all other

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Headline News

(2) Award Limits (continued)

- Must aggregate all health-contingent wellness programs

Example: Employee only premium $1,000 per month. Reward based on (1) no tobacco use and (2) biometric screening results. Reward is $300 HSA contribution plus $250 reduction in monthly premium.

Because health-contingent only, total is $550, more than 50% = problem

Fix ⇨ Split into participation and health-contingent. If complete biometric screening, get $50 HSA contribution. If results of biometric screening meet guidelines (including no tobacco use), then get $250 HSA contribution plus $250 reduction in monthly premium.

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Headline News

(3) Reasonably Designed

- Reasonable chance of improving health, or preventing disease
- Not overly burdensome
- Not subterfuge for discrimination
- Not highly suspect in method chosen
- Does NOT need to be accredited or evidence-based clinical standards

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Headline News

(4) Reasonable Alternative Standard

- Varies depending on whether activity or outcome

Activity	Outcome
❑ RAS must be offered if: • Unreasonably difficult due to medical condition or • Medically inadvisable ❑ Can require physician verification if reasonable	❑ RAS available automatically ❑ Individual must be given opportunity to comply with personal physician recommendation

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Headline News

Reasonable Alternative Standard

RAS could be participatory program, activity program or another health-contingent program

Example: Employee fails BMI standard. RAS could be:

- series of nutrition classes (participatory)
- walking program with pedometer log (activity)
- caliper test
- 3% improvement by end of plan year (additional outcome)

Individual must be given opportunity to comply with recommendation of personal physician, if that physician requests

Need not have RAS determined in advance

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Headline News

(5) Notice of Availability

- Must disclose availability of RAS in:
  - all plan materials describing the terms of a health-contingent wellness program (but not mentioning it)
  - any notice to individual that they failed a standard
- Includes contact info and that recommendations of personal physician will be accommodated

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Headline News

Rescissions

- What to do if you find someone has lied?
  - No guidance
  - Make clear in plan materials what will happen
  - Retroactive loss of reward/retroactive imposition of penalty

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Headline News

Other Laws

- Americans with Disabilities Act
  - Disability-related questions and medical screenings prohibited unless "voluntary"
  - No EEOC guidance on when reward/penalty not considered "voluntary"
- Genetic Information Nondiscrimination Act
  - Generally, no family-history questions
- ERISA
  - Health plan or not?
  - Preemption of state lawful product laws

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Risky Business

Q: Can We Use the New Marketplaces to Our Advantage? A: Maybe!

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Risky Business

Overview

- Marketplace open enrollment October 1, 2013 through March 31, 2014*
- New Options for Employers/Plans Sponsors
- Timing is important

Enroll & Pay 1st Premium	Coverage Effective
Oct. 1, 2013 to Dec. 15, 2013	January 1, 2014
Dec. 16, 2013 to Jan. 15, 2014	February 1, 2014
Jan. 16, 2014 to Feb. 15, 2014	March 1, 2014
Feb. 16, 2014 to March 15, 2014	April 1, 2014
March 16, 2014 to March 31, 2014	May 1, 2014

* May only enroll outside of open enrollment following a "qualifying life event"

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Risky Business

Getting Individuals Off of Your Group Health Plan

Q: Can we exclude our highest claim participants/dependents from our group health plan now that they can get guaranteed-issue coverage through the Marketplace?

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Risky Business

A: Maybe…

- Cannot amend plan to exclude these individuals
  - HIPAA nondiscrimination violation
- May be able to incentivize them to drop the coverage voluntarily
  - For example, if you drop your spouse from our coverage, we will pay your spouse's Marketplace premium.

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Risky Business

But Beware of Medicare!

- Is the individual eligible for Medicare?
  - Yes?
    - Unclear whether individual will be able to enroll in Marketplace
    - Not permissible if effect is that Medicare becomes primary coverage
      - Medicare Secondary Payer Rules
  - No?
    - May be permissible
    - Consult legal counsel
      - HIPAA nondiscrimination, ADA, ERISA Section 510

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A note on timing…

- Remember to consider if the individual will even be eligible to enroll for Marketplace coverage
  - Open enrollment period
  - Special enrollment right
    - Generally not available if individual voluntarily terminates coverage

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Risky Business

"Bridging" Coverage Between COBRA and Medicare

Q: An employee is negotiating a severance package and asks whether our self-insured medical plan can bridge the coverage gap between the date COBRA coverage ends and the date the employee will be eligible for Medicare. Should we still be agreeing to do this?

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A: No

- This is no longer a valid concern
  - Employee can get Marketplace coverage
  - No pre-existing condition exclusions
- Alternative: May offer to pay for Marketplace coverage
- Note: We are not even sure COBRA will continue

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Risky Business

Exchanging Coverage Provided Pursuant to a Severance Agreement for a Cash Payment

Q: What if I have severance agreements in place pursuant to which I am offering employees continued coverage under my plan at the employee rate for three years (subsidized COBRA). Now that they can get Marketplace coverage, can I take them off of my plan in exchange for a cash payment?

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A: Maybe…

- 18-month COBRA period exempt from Code Section 409A
  - OK to cash them out up to the cost of the remaining 18 months of coverage
  - **CAUTION**: Analyze whether they can enroll in Marketplace coverage (timing).
- Time after the COBRA period subject to Code Section 409A
  - May NOT cash them out
  - Would constitute an impermissible acceleration under Code Section 409A

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Risky Business

Terminating an Employer-Sponsored Plan

Q: We are a small employer with about twenty employees and the premiums for our fully-insured health plan keep going up. What can we do?

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Risky Business

A: Get Rid of Your Plan!

- Terminate your plan and start reimbursing employees for coverage on the Marketplace
  - If you participate through the SHOP program for small employers, this can be done through your cafeteria plan on a pre-tax basis
  - If you do not participate through SHOP, this must be done on an after-tax basis

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Risky Business

A "Pay or Play" Reminder!

- Termination of this employer's plan does not subject it to any "pay or play" penalties (beginning 2015) because it does not qualify as an "applicable large employer"
- If a large employer (50+ full-time or full-time employee equivalents) took the same approach, then the employer would be subject to penalties on top of the cost of reimbursing employees for coverage

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Risky Business

Paying for Individual Coverage

Q: We have a group health plan, but certain employees are not eligible. For these employees, we allow them to either purchase private insurance coverage using pre-tax contributions they make to our cafeteria plan or reimburse them on a non-taxable basis for coverage once they submit their premium bills. Can we continue to do this if they decide to enroll in Marketplace coverage?

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A: Yes and No

- May continue to pay premiums, but
- May not pay for coverage on a tax-favored basis
  - May not allow employees to pay for Marketplace coverage (or non-Marketplace coverage, we think) on a pre-tax basis through a cafeteria plan
  - May not reimburse employees for Marketplace (or non-Marketplace) coverage on a pre-tax basis
  - May not directly pay for an employee's Marketplace (or non-Marketplace) coverage on a pre-tax basis

DOL Technical Release 2013-03 and IRS Notice 2013-54

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Risky Business

Changing Retiree Medical Arrangements

Q: We have a stand-alone comprehensive retiree medical plan. Can we get rid of it and simply start putting $15,000 per year in an HRA for our retirees?

Risky Business

A: Yes

- Stand-alone retiree-only health plans (including HRAs) are not subject to the ACA
  - Annual dollar limit prohibition and preventive services requirements
- Note: This won't work for active employees
  - Stand-alone active employee HRAs are subject to ACA
  - HRA cannot be integrated with Marketplace coverage in order to satisfy ACA requirements

Risky Business

Wrap Up

- This is somewhat "risky business"
  - Still some unknowns
  - Can be an opportunity
  - Approach with caution - Code Section 409A, HIPAA nondiscrimination rules, Medicare Secondary Payer rules, ERISA
- Important Takeaway: Consult legal counsel before exploring these options.

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In the Spotlight

Year-End Reminders and Action Items

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In the Spotlight

Health and Welfare Plans

- 2014 Affordable Care Act ("ACA") requirements
  - Coverage for individuals participating in approved clinical trials
    - May not deny participation in an approved clinical trial
    - May not deny, limit, or impose additional conditions on the coverage of routine patient costs for items and services furnished in connection with participation in the clinical trial
    - May not discriminate against any qualified individual who participates in a clinical trial
  - Action Item: Review SPDs and plan documents to ensure they do not impermissibly deny coverage in approved clinical trials and do not deny routine patient costs related to participation in clinical trials. Revision to definition of experimental/investigational procedure exclusions may be needed.

In the Spotlight

Health and Welfare Plans (continued)

- 2014 ACA requirements (continued)
  - Remove (already-restricted) lifetime and annual dollar limits on essential health benefits
    - Essential health benefits include: ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health and substance use disorder services (including behavioral health treatment), prescription drugs, rehabilitative and habilitative services and devices, laboratory services, preventive and wellness services and chronic disease management, pediatric services (including oral and vision care)
    - Further guidance on definition of essential health benefits is expected

In the Spotlight

Health and Welfare Plans (continued)

- 2014 ACA requirements (continued)
  - No pre-existing condition exclusions ("PCEs")
    - HIPAA already restricted PCEs
    - ACA has prohibited PCEs for participants under age 19 since 2010 (1-Jan-11 for calendar year plans)
  - No waiting periods longer than 90 days
  - For grandfathered plans, remove exclusion of children eligible for other employer-sponsored coverage

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In the Spotlight

Health and Welfare Plans (continued)

- 2014 ACA requirements (continued)
  - Reinsurance contributions for funding reinsurance programs
    - Applies to both grandfathered and non-grandfathered plans providing major medical coverage [Note: Oral presentation states that grandfathered plans are exempt from the reinsurance contribution fee. That was a misstatement—grandfathered plans are required to pay the reinsurance contribution fee, as indicated on this slide.]
    - Contributions required for 2014, 2015, and 2016
    - For 2014: $63/year/covered life
- Health FSA "Use it or lose it" rule can be relaxed to allow ≤$500 carryover at plan sponsor's discretion
  - Cannot be combined with a grace period
  - If carryover is to be allowed in 2013, amendment needed by end of 2014

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In the Spotlight

Health and Welfare Plans (continued)

- 2014 ACA requirements chart

Requirement	Grandfathered Plans	Non-Grandfathered Plans	Group health plans	Insurers	Excepted Benefits
Clinical trials	Does not apply	Applies	Applies	Applies	Does not apply
No annual or lifetime dollar limits on essential health benefits	Applies	Applies	Applies	Applies	Does not apply
No preexisting condition exclusions	Applies	Applies	Applies	Applies	Does not apply
No waiting period longer than 90 days	Applies	Applies	Applies	Applies	Does not apply
Remove exclusion for children with other employer-sponsored coverage	Applies	N/A (non-grandfathered plans were not allowed to have this exclusion)	Applies	Applies	Does not apply
Reinsurance contributions	Applies	Applies	Applies	Applies	Does not apply (generally)

- [Note: Oral presentation states that grandfathered plans are exempt from the reinsurance contribution fee. That was a misstatement—grandfathered plans are required to pay the reinsurance contribution fee, as indicated on this slide.]

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In the Spotlight

Health and Welfare Plans (continued)

- Updated cost-of-living-adjustments for health and welfare plan limits

Limit	2014	2013
Health Flexible Spending Account	$2,500	$2,500
Dependent Care Assistance Program (if not MFS)	$5,000	$5,000
Dependent Care Assistance Program (if MFS)	$2,500	$2,500
HDHP Minimum Annual Deductible: Self-only / Family	$1,250 / $2,500	$1,250 / $2,500
HDHP Out-of-Pocket Maximum: Self-only / Family	$6,350 / $12,700	$6,250 / $12,500
HSA Maximum Contribution: Self-only / Family	$3,300 / $6,550	$3,250 / $6,450
HSA Catch-Up Contribution	$1,000	$1,000
Archer MSA Contribution Minimum: Self-only / Family	$1,430 / $3,262.50	$1,397.50 / $3,225
Archer MSA Contribution Maximum: Self-only / Family	$2,112.50 / $4,912.50	$2,080 / $4,837.50

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In the Spotlight

Retirement Plans

- Code Section 436 amendments
  - Delayed in November 2012; Many employers have already made the required plan amendment
  - IRS sample amendment available in Notice 2011-96
- Remove automatic revocation of beneficiary designation upon legal separation
  - Plan qualification rules require spousal death benefit and spousal consent for change in beneficiary
  - IRS recently clarified that legal separation removes spousal consent requirement, but does not eliminate separated spouse's right to death benefit
  - Separated spouse is entitled to spousal death benefit unless employee waives spousal death benefit and specifically names a different beneficiary
  - Plans should be amended to either (i) remove provisions that revoke spousal beneficiary designation upon legal separation or (ii) clarify that revocation does not affect spouse's right to spousal death benefit

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In the Spotlight

Retirement Plans (continued)

- Hurricane Sandy Disaster Hardship Distribution Amendments
  - In Announcement 2012-44, IRS provided relief from certain procedural requirements for hardship distributions and loans made for needs arising from Hurricane Sandy
  - Amendments only needed for plans that made Hurricane Sandy hardship distributions and/or loans and *did not previously* provide for hardship distributions and/or loans; such plans must be amended to allow hardship distributions and/or loans by 31-Dec-13
- Amendments to reflect in-plan Roth transfers pursuant to the 2012 Taxpayers Relief Act due by 31-Dec-13
- The 2012 Taxpayers Relief Act amended the Code to allow in-plan Roth transfers of amounts that were not otherwise distributable, including employer contributions and rollover contributions (future IRS guidance expected)

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In the Spotlight

Retirement Plans (continued)

- Adopt plan amendments to reflect discretionary changes to plan design or operation
- Same-sex marriage amendments likely required following *Windsor* decision
  - Plans must operate in compliance with *Windsor* decision and IRS guidance pertaining to decision as of 16-Sep-13
  - IRS has stated that it will provide future guidance regarding necessary plan amendments. IRS "anticipates that the future guidance will provide sufficient time for plan amendments and any necessary corrections so that the plan and benefits will retain favorable tax treatment for which they otherwise qualify" (Rev. Rul. 2013-17)
- Cycle C Determination Letter 31-Jan-14 filing deadline for individually-designed plans with plan sponsors EINs ending in 3 or 8

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In the Spotlight

Retirement Plans (continued)

- Updated cost-of-living-adjustments for retirement plan limits

Limit	2014	2013
Annual Compensation	$260,000	$255,000
Elective Deferrals	$17,500	$17,500
Catch-Up Contributions	$5,500	$5,500
Defined Contribution Limits	$52,000	$51,000
ESOP Limits	$1,050,000 / $205,000	$1,035,000 / $205,000
Highly-Compensated Employee Threshold	$115,000	$115,000
Defined Benefit Limits	$210,000	$205,000
Key Employee	$170,000	$165,000
457 Elective Deferrals	$17,500	$17,500
Control Employee (board members or officer)	$105,000	$100,000
Control Employee (compensation-based)	$210,000	$205,000
Social Security Taxable Wage Base	$117,000	$113,700

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Thank You

- A copy of the PowerPoint presentation and a multimedia recording will be available on Foley's website early next week: **http://www.foley.com/employee-benefits-broadcast-november-2013/**
- Those seeking Kansas, New York & New Jersey CLE credit must complete the Attorney Affirmation form. Email the form & the 5-digit code announced in the program to **ekemmeter@foley.com** immediately following the program.
- We welcome your feedback. Please take a few moments before you leave the web conference today to provide us with your feedback: **https://www.surveymonkey.com/s/N95PV6X**

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