



Health Legislative Update

NCCMP Annual Conference

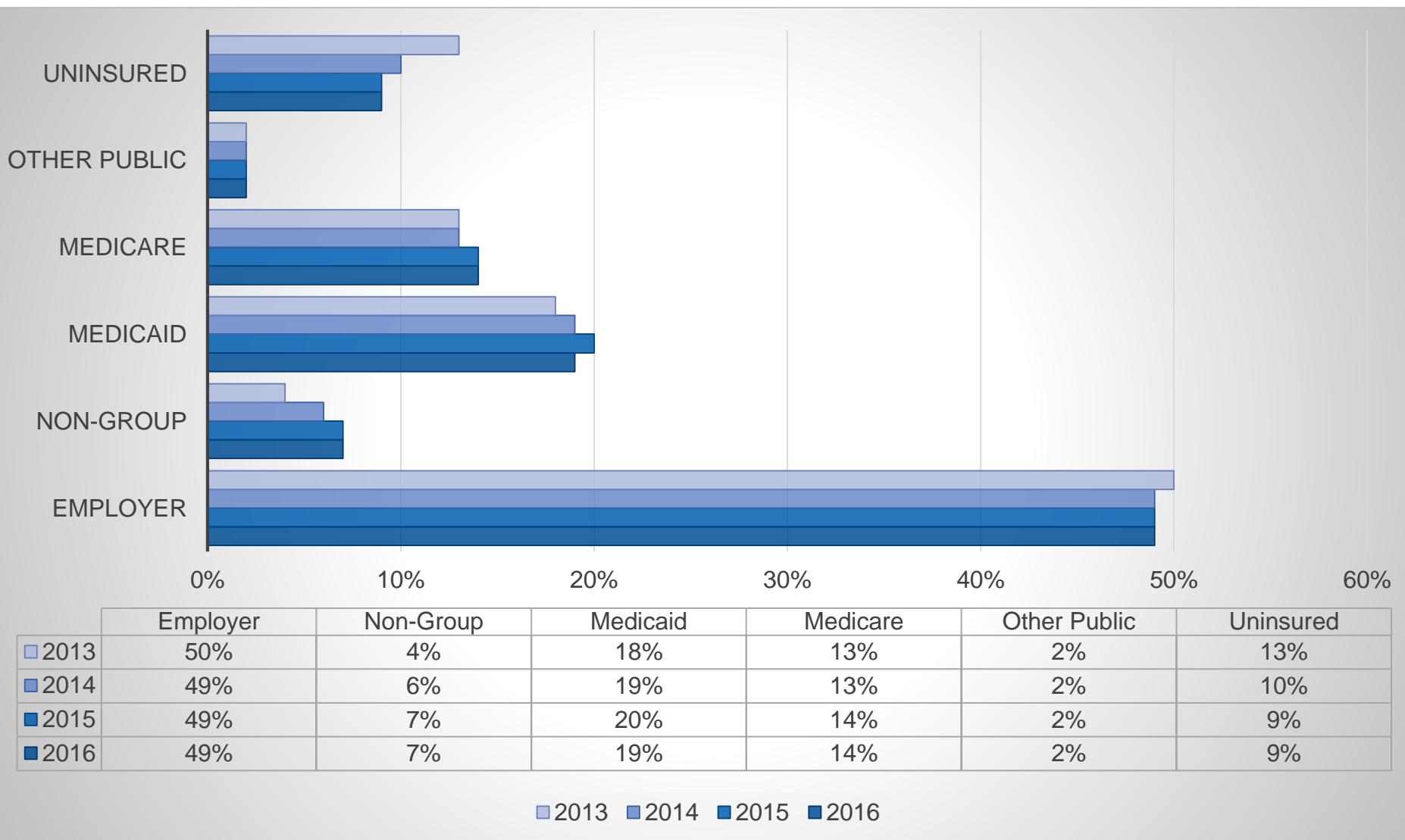
September 25, 2018

Kathryn Bakich – Segal

Carolyn Smith – Alston and Bird

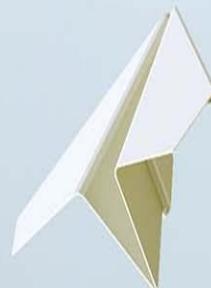
 Segal Consulting

Where America Receives Health Coverage: 2013-2016



Employers Increasingly Offer Health Coverage

- EBRI reported in September 2018 that, “After Years of Erosion, Employers Increasingly Offer Health Coverage”
- In 2017, the overall percentage of private-sector employers offering health benefits increased for the first time between 2008 and 2017, from 45% to 47%
- Nearly all large employers continue to offer coverage
- Companies with fewer than 1,000 employees are beginning to offer coverage more frequently starting in 2015, up 2.6%



Marketplace/Exchange Enrollment & Premiums 2018

- Despite much shorter open enrollment period and lack of federal funding dedicated to enrollment, enrollment dropped only slightly
 - 2017: 12.2 million
 - 2018: 11.8 million
 - <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2018-Fact-sheets-items/2018-04-03.html>
- Average premium (after tax credit) \$89/month

The screenshot shows the HealthCare.gov homepage. At the top, there's a navigation bar with links for 'Get Coverage', 'Keep or Update Your Plan', 'See Topics', 'Get Answers', 'ESPAÑOL', and 'LOG IN'. Below the navigation is a search bar. The main headline reads '2018 Open Enrollment is over. Still need health insurance?'. A subtext below it says, 'You can enroll in or change plans if you have certain life changes, or qualify for Medicaid or CHIP'. There are two green buttons at the bottom: 'SEE IF I CAN ENROLL' and 'SEE IF I CAN CHANGE'. A small note at the bottom left says, 'Looking for coverage for a small business? [Learn more](#)'. On the right side of the main image, there's a photo of a smiling man carrying a large cardboard box.

Uninsured Americans in 2017

- Uninsured rate remained stable between 2016 and 2017 at 8.8% (28.5 million)
- There was significant variation by state
 - The uninsured rate increased in 14 states (2016 to 2017)
- Uninsured rate is the highest among 26-year olds
- Medicaid expansion is a key factor in the uninsured rate
 - For expansion states, the uninsured rate was 6.5 percent
 - The rate was lower for those with incomes below 400% of FPL, and higher for those above 400 percent of the FPL
 - For states that did not expand their Medicaid program, the uninsured rate was 12.2 percent and increased across all income levels (both above and below 400 percent of the FPL).

White House Moves that Affect Employee Benefits

➤ White House Executive Orders

- January 20, 2017 President Trump signed an Executive Order addressing the Affordable Care Act
- October 12, 2017 Executive Order “Promoting Healthcare Choice and Competition Across the United States”

➤ Other administrative actions

- Delaying or rescinding regulations
- Modifying funding for Affordable Care Act initiatives

➤ Appointment of judges

- One (maybe two) US Supreme Court Justices
- 26 circuit court judges
- 41 district court judges
- More judges appointed than any other recent president at same point in term



Tax Cuts and Jobs Act of 2017 (Public Law 115-97)

- Enacted on December 22, 2017
- Massive changes to the Internal Revenue Code but many of the most significant proposals to modify employee benefits were not in final bill
- ACA “Individual Mandate” effectively repealed as of January 2019
 - Penalty amount changed to “\$0”
- Indexing for certain tax provisions changed
 - From CPI-U to Chained CPI-U
 - Effect will be smaller annual adjustments
 - Applies to Cadillac tax, HSAs, health FSAs



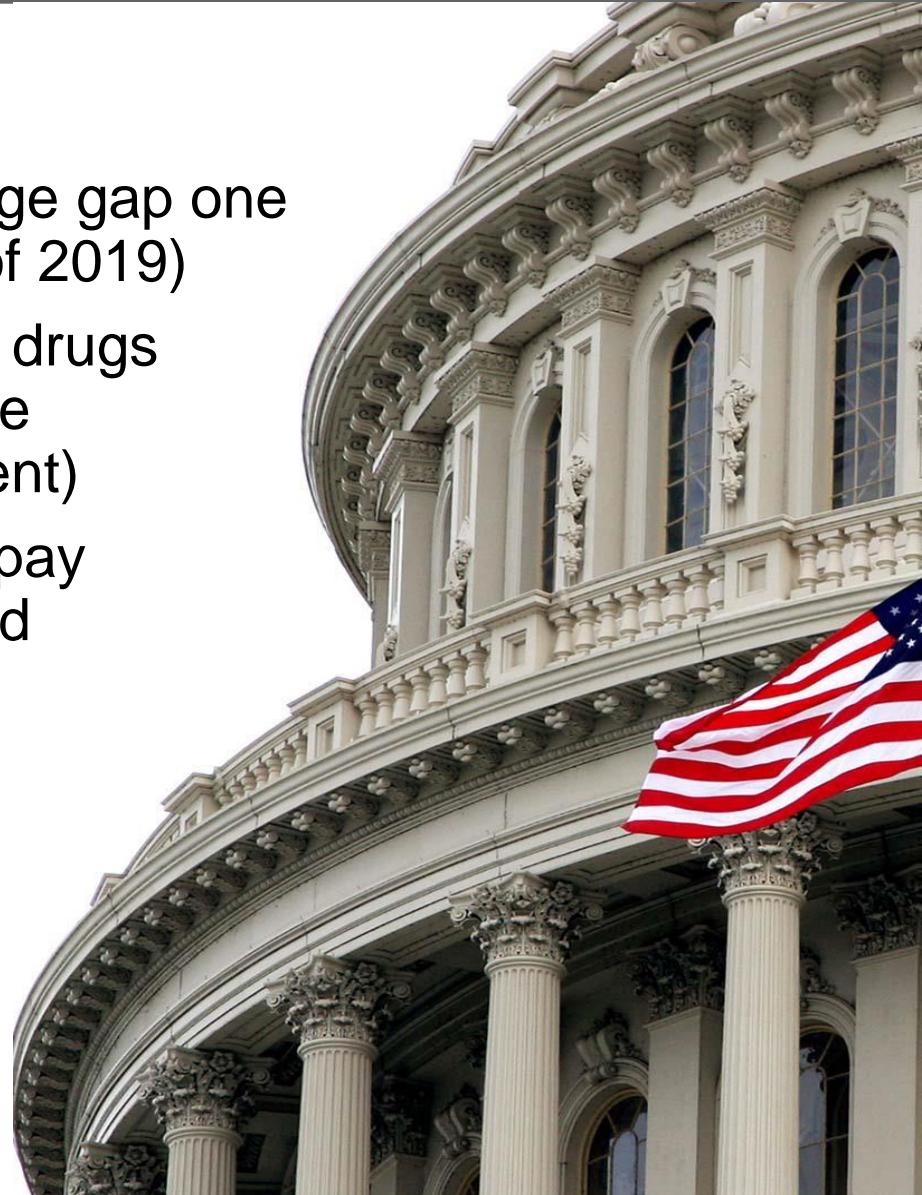
Continuing Resolution (Public Law 115-120)

- Enacted on January 22, 2018
- Main purpose was to temporarily extend government funding through February 8, 2018
- ACA excise tax on certain high-cost health plans (the “Cadillac tax”) is delayed two additional years, until January 1, 2022
- The health insurance premium tax is suspended during 2019
- The medical device tax is suspended for two additional years (2018 and 2019)



Bipartisan Budget Act of 2018 (Public Law 115-123)

- Enacted February 9, 2018
- Closes the Medicare Part D coverage gap one year early (at end of 2018 instead of 2019)
 - For 2019, manufacturers of brand drugs must pay 70 percent of costs in the coverage gap (instead of 50 percent)
 - In 2020 and beyond, patients will pay 25 percent of the cost of brand and generic drugs in the gap
- Further increases Medicare Part B and D premiums for people with adjusted gross incomes of \$500,000 or more (\$750,000 for couples)



Pending Changes to ACA Taxes and Penalties

Taxes and Penalties

- Individual mandate penalty is now “zero”—What will happen to the employer mandate?
- Other ACA taxes in the mix:
 - Medical device tax
 - Health insurance premium tax (Amount ranges based on book of business of the insurance company)
 - Fee on manufacturers and importers of branded prescription drugs
 - Medicare tax on investment income (3.8 percent)
- Excise tax on high-cost plans (“Cadillac Tax”)



Excise Tax on High-Cost Plans

IRC Section 4980I

**Effective
in 2022**

- 40% tax on excess over threshold
- Based on total cost of coverage—Employer plus employee cost/premium share

**Cost
Threshold
for Tax
(Indexed
after 2018)**

- \$10,200 Single, \$27,500 Family
- Multiemployer plans use higher family threshold
- Increased by \$1,650 Single, \$3,450 Family:
 - For retired individuals age 55 or older and not eligible for Medicare
 - If majority of employees covered by the plan are:
 - » Engaged in a high-risk profession (list in statute), or
 - » Employed to repair/install electrical or telecommunications lines

Legislative Efforts to “Repeal and Replace” the Affordable Care Act

- In late July 2018, the House passed two bills to repeal the ACA’s medical device tax, extend the moratorium on the health insurance tax to 2022, and expand access to “copper” plans; the Senate did not act
- House of Representatives now considering the **“Save American Workers Act”** (HR 3798)
 - Congressional Budget Office projects that the legislation would increase the federal deficit by \$58.5 billion over 10 years
 - Vote scheduled for week of September 24
 - Senate is not expected to take up the bill before the end of the year

Save American Workers Act – (HR 3798)

- Would suspend the employer mandate from 2015 through 2018
- Would change the definition of “full-time employee” to refer those who work 40 hours/week or 174 hours/month (instead of 30 hours/week or 120 hours/month under current law)
- Would change reporting requirements
- Would delay the Cadillac tax by an additional year, from 2022 to 2023



Latest Litigation Challenging ACA

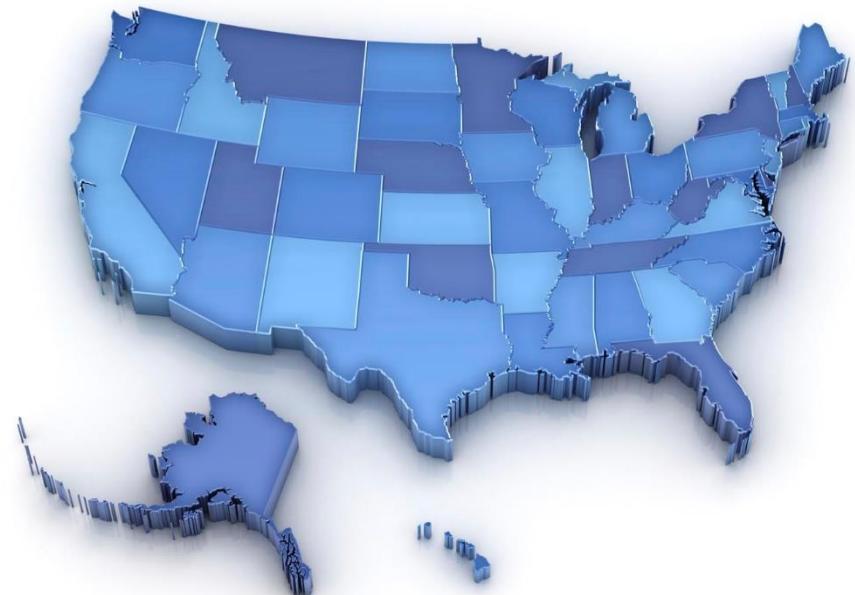
- Republican state attorneys general from 20 states and two individual plaintiffs filed lawsuit in federal court in Texas alleging that once the individual mandate penalty was zeroed out by Congress, the individual mandate is unconstitutional; and the entire ACA should also be struck down
- In June, the Department of Justice declined to defend the constitutionality of the individual mandate or the other ACA provisions (guaranteed issue, community rating, and the ban on preexisting condition exclusions and discrimination based on health status)
- Democratic state attorneys general from 16 states and DC intervened in the case and argued that the individual mandate remains constitutional and, even if it is not, it is severable from the ACA, allowing the ban on preexisting conditions and other provisions to stand
- Hearing was held September 5, 2018

IRS Enforcing ACA Employer Penalty for 2015, 2016

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- IRS continuing enforcement of employer penalties
 - IRS sending Form Letter 226J to inform employers of penalties for 2015
 - Letter 226J includes month-by-month calculation of 4980H(a) or 4980H(b) penalty
 - Based on the employer's Form 1095-C/1094-C filings and information from employees' tax returns about whether they received a premium assistance tax credit for Exchange/Marketplace coverage
 - Employers that receive this letter have 30 days to respond to IRS (but can ask for extra time)
 - If employer doesn't respond or doesn't convince IRS that no penalty is owed (or that penalty should be lower), IRS will send out demand for payment

States Enacting Individual Mandates

- Four states have enacted a state “individual mandate” requiring individuals to purchase health coverage:
 - Massachusetts (2006)
 - Vermont (2020)
 - District of Columbia (2019)
 - New Jersey (2019)
- Several other states are considering an individual mandate, including:
 - California, Connecticut, Hawaii, Maryland, Minnesota Rhode Island, and Washington



“Surprise” Balance Billing Laws

- New Jersey law requires providers and insurers to make certain disclosures about whether services are in-network and limits billing for out-of-network care for emergency/urgent services
 - Law allows self-insured plans to opt-in
- Bipartisan group of Senators recently introduced the “Protecting Patients from Surprise Medical Bills Act”
- Bill would address billing for various issues including:
 - Emergency care services from an out-of-network provider provided at an out-of-network facility;
 - Non-emergency care services from an out-of-network provider at an in-network facility
- Impact on multiemployer plans unclear



“Medicare for More” Proposals

- Choose Medicare Act (Sen. Merkley (D-OR), Murphy (D-CT))
 - Would create a new Medicare Part E that individuals and employers could purchase
 - Would be offered on Marketplace/Exchanges as a public option
 - Would cover Medicare benefits plus extra benefits (e.g., maternity)
- Medicare X (X is for extended, extra, Exchange) (Sen Kaine (D-VA), Bennet (D-CO))
 - Would include a public option on the Marketplace/Exchanges
 - Would offer extra benefits
 - Gradual roll-out, first to individuals, then to small employers
- Medicare for All (Sen. Sanders (D-VT))
 - Path to “single payer”
 - Would replace existing employer coverage
 - Employers could offer supplemental benefits only



HHS Blueprint to Lower Drug Prices

- HHS sent proposed regulation relating to whether drug rebates violate federal anti-kickback laws to OMB on July 18, 2018
 - Not known what is in regulation, scope likely limited to Medicare/Medicaid
 - Impact on employer-sponsored coverage unknown
 - On July 19, Express Scripts, CVS Health, and UnitedHealth Group lost a combined \$5 billion in market cap
- HHS Secretary Alex Azar requested that FDA Commissioner Scott Gottlieb establish a working group to examine how to safely import prescription drugs from other countries under limited circumstances (single-source drugs that are off-patent or off-exclusivity)
- Senate September 10 voted 98-2 to ban pharmacy “gag clauses” (in PBM contracts) which prohibit pharmacists from telling patients when paying cash for a drug would be cheaper than using their insurance
 - House Energy and Commerce Committee also voted to approve bill

Addressing the Opioid Epidemic

➤ Opioid epidemic

- White House Initiative
- Congress considering legislation (could be bipartisan)
- Key themes:
 1. Treatment and reimbursement
 2. Tools to prevent overprescribing and abuse
 3. Screening, education, and communication



https://waysandmeans.house.gov/uploadedfiles;brady_neal_roskam_levin_white_paper.pdf

Opioid Initiatives

- President's Commission on Combatting Drug Addiction and the Opioid Crisis
 - Established March 2017
 - Declared opioid crisis nationwide public health emergency
 - Issued a final report including 56 recommendations
 - Held an Opioid Summit in March, 2018
 - President's 2019 budget proposal includes 13 billion in funds to fight the opioid crisis
- The Interdict Act was enacted in January, 2018 to combat the illegal importing of synthetic opioids
- HHS received 2018 funding and issued a five point strategy for addressing the opioid epidemic
- The FDA also issued an action plan and timeline

Legislation to Address Opioid Epidemic

- Senate on September 17 voted 99-1 to pass legislation to address the opioid epidemic
 - Senate bill must be reconciled with a House-passed legislative package that combines more than 50 opioid-related bills
 - Leaders hope to have final legislation to President in October
- Senate bill, the “Opioid Crisis Response Act of 2018,” includes more than 70 bills
 - Expands access to opioid treatments
 - Promotes the development of alternative treatments for pain
 - Help prevent the entry of illicit drugs into the United States
 - Authorizes FDA to require drug manufacturers to use special safety packaging for opioids, such as sealing them in plastic blister packs and restricting doses to three to seven days
 - Expands program that authorizes first responders to administer naloxone
- Key difference between the bills: privacy concerns, ability of nurse practitioners and physician assistants to prescribe medication-assisted treatment (MAT)

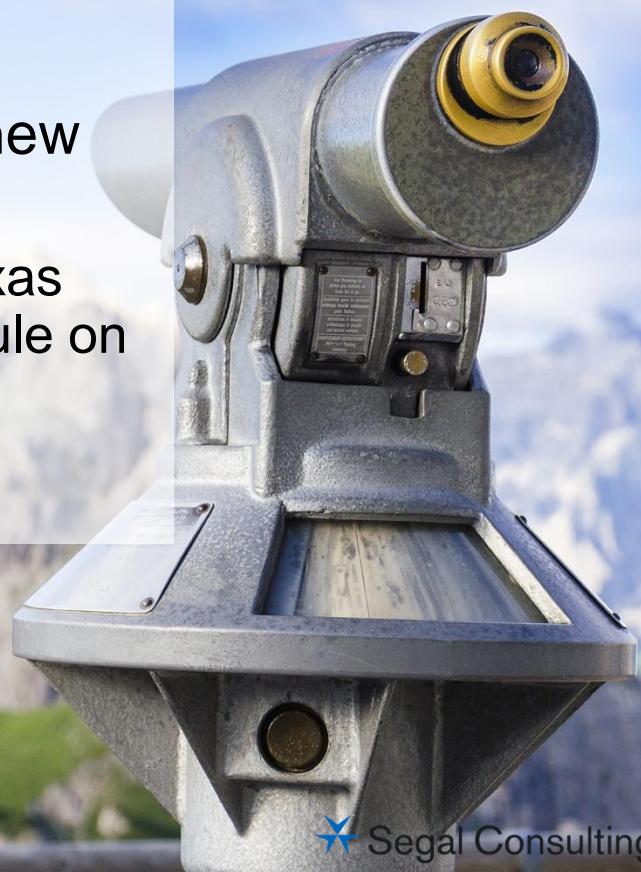
Enforcement Activity Continues

- Both DOL and CMS continue active programs to audit group health plans – multiemployer & large public sector plans are key targets
- Focus includes:
 - Grandfathered status
 - Mental Health Parity and Addiction Equity Act Compliance – particularly treatment limitations like preauthorization or network restrictions
 - HIPAA special enrollment
 - ACA group mandates



Coming Attractions

- Guidance on ACA Cadillac tax
- More MHPAEA guidance as required under 21st Century Cures Act (enacted December 2016)
- Guidance on Health Reimbursement Arrangements (HRAs)
- ACA Section 1557: HHS likely to propose new nondiscrimination rule
 - HHS currently enjoined by federal court in Texas from enforcing Obama Administration's final rule on transgender benefits



Questions?

