Contemporary Compliance Issues

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Transitional Reinsurance Fee Litigation

- The ACA provides for a Transitional Reinsurance Fee to be charged to "health insurance issuers, ***and third party administrators on behalf of group health plans***, are required to make payments to an applicable reinsurance entity for any plan year beginning in the 3-year period beginning January 1, 2014 . . . .
  - 42 U.S.C. § 18061(b)(1)(A), (3)(A) (emphasis added).

Contributing entity means— . . . For the 2014 benefit year, ***a self-insured group health plan . . . , whether or not it uses a third party administrator***; and for the 2015 and 2016 benefit years, ***a self-insured group health plan . . . that uses a third party administrator*** in connection with ***claims processing or adjudication*** [for more than] ***5 percent*** of claims processing or adjudication or plan enrollment . . . .

- 45 C.F.R. § 153.20 (emphasis added).

Transitional Reinsurance Fee Litigation

- *The Electrical Welfare Trust Fund, et al., v. U.S.A.*, Case No. 1:119-cv-00353-EMR (U.S. Court of Claims).
  - Filed as a class action on behalf of two different types of self-insured plans: those that use a TPA that is not an insurance company and those that are self-administered.
  - The claims for both groups were similar: 1) the TRF was an "illegal extraction" not authorized by the statute; and 2) if not, they were a "taking" prohibited by the 5th and 14th amendments.

Transitional Reinsurance Fee Litigation

- *Elec. Welfare Tr. Fund v. U.S.A.*, 155 Fed. Cl. 169, 174 (2021) – On the government's motion to dismiss and/or for summary judgment:
  - The Court refused to dismiss the illegal extraction claim by the self-administered plans for 2014 because HHS exceeded its authority under the ACA's plain language.
  - The Court dismissed the "extraction claim" by the TPA-Administered plans because HHS was acting under its authority granted by the ACA, using a *Chevron* deference analysis.
  - The Court also dismissed the "takings" claims because the TPA-Administered Plans had not specified particular property that had been taken (being required to just pay money is not generally considered a taking). The dismissal was without prejudice.
- Since then, the case has proceeded on two tracks: 1) Self-administered plans (illegal extraction) and 2) TPA-administered plans (takings).

Transitional Reinsurance Fee Litigation
Self-Administered Plans

- On June 22, 2022, the Court certified the class of "self-administered self-insured employee health and welfare benefit plans . . . " that made TRF payments for 2014. A notice to all potential class members with an "opt-in" form was sent by overnight mail on or about September 12, 2022.
- Potential class members who do not opt-in by November 14, 2022, will be excluded from the class and will not share in any recovery.
- The final membership in the class will be certified December 29, 2022.
- A class communications website was established: https://www.trplitigation.com/

Transitional Reinsurance Fee Litigation
Self-Administered Plans

- On July 15, 2022, the plans filed a motion for summary judgement on the extraction claim on behalf of the class seeking a refund for class members. As of September 13, 2022, that motion was fully briefed.
- Oral argument has not been set, and Plaintiffs have requested that the Court wait until after the opt-in period is closed to rule.

Transitional Reinsurance Fee Litigation
TPA-Administered Plans (Takings)

- The plans refiled their complaint on September 14, 2021, to revive their "takings" claim by alleging that the plan assets were "held in trust for the benefit of plan participants and their dependents deprived the funds of millions of dollars, which was to be used for the funds' general and exclusive purpose—providing health and welfare benefits to plan participants and their families . . . " and that the plans had "cognizable property interests in the funds held in the self-insured multiemployer health and welfare trust funds at issue and a reasonable expectation that the funds would be held for the exclusive benefit of fund participants and beneficiaries . . . [and] would not be taken for public use without just compensation."
- According to the current schedule:
  - A motion for class certification is due October 28, 2022.
  - Dispositive motions are due January 6, 2023, and replies are due January 20, 2023.

Actuarial Assumption "Freshness" Litigation

- *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 206 (2d Cir. 2007) – Although the Court generally accepted the proposition that actuarial assumptions needed to be reasonable, it stated: "ERISA does not specifically require that retirement plans periodically adjust their actuarial interest rates. If a plan were required to do this, an employer potentially could manipulate the benefits provided to a participant, particularly in a year in which interest rates were extraordinarily high."
- *Belknap v. Partners Healthcare System, Inc.*, 2022 BL 73947, 2022 Us Dist Lexis 38381 (D. Mass. Mar. 04, 2022), *appeal voluntarily dismissed pursuant to settlement* (Aug. 30, 2022) – Dismissed because, unlike other parts of ERISA and the Internal Revenue Code and their accompanying regulations, Section 204(c)(3) does not require "reasonableness."
- *Smith v. Rockwell Automation, Inc.*, 438 F. Supp. 3d 912 (E.D. Wis. 2020) – Court refused to dismiss ("ERISA *does* state that plans must provide certain benefits in actuarially equivalent forms, which implies that the benefits will be calculated using reasonable actuarial assumptions.") Subsequently dismissed because the plaintiff did not show harm, followed by an apparent settlement.

MPRA Suspension Litigation

- *King v. U.S.*, 159 Fed. Cl. 450 (2022) – Vested participants in the New York States Teamsters Pension Plan sued the U.S. contending that the reduction in their benefits under MPRA was an unconstitutional "taking."
- The government moved to dismiss contending that that the claim lacked two requirements for a taking: 1) Plaintiffs did not identify a constitutionally cognizable property interest; and 2) there was no government action constituting a taking.
- In denying the government's motion:
  - The Court ruled that participants have a cognizable property interest based upon their contractual rights to the full amount of their vested benefits, notwithstanding the extensive government regulation of such benefits.
  - The Court also rejected the argument that there was no government action, since it had to approve the benefit suspensions.
  - The Court did dismiss the Plaintiffs' claims that the plan had acted as an agent for the government either because of government inducements or coercion.
- The Court reserved the issue whether the alleged taking was "physical" or "regulatory", where the latter provides the government with more flexibility in what it can do.
- Despite its rulings, the Court has postponed the case to determine the effect of ARPA's FSA relief on the Plaintiffs' claims (the Plan's application is under PBGC review).

IRS Voluntary Correction Program Update

- 90-Day Pre Examination Pilot Program
  - When the IRS schedules an examination, it will give the plan 90 days to make sure its house is in order. If it isn't, the plan is expected to either self-correct (if permitted) or enter into a closing agreement, while only paying the fees required under the Voluntary Correction Program.
  - If the plan responds within the 90 days, the IRS will either issue a closing letter or perform either a limited or full scope examination.
  - If the plan doesn't respond, the IRS will schedule a full scope examination.
- The program began in June 2022, and the Service will review and determine whether to make it permanent.

Proposed PTE Procedure Changes

- PTE Procedure Changes – Notice of Proposed Rulemaking: Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications, 87 Fed. Reg. 14722 (March 15, 2022).
- DOL proposed:
  - Elimination of off-the-record, anonymous pre-application conferences.
  - Automatic denial of applications if either the Plan or anyone connected to the transaction is ***under investigation by any governmental authority for any reason.***
  - 2% compensation limit and potentially onerous insurance requirements for independent fiduciaries.
  - Automatic denial of withdrawn applications.
- The comment period closed May 31, 2022.
- A hearing was held Sept. 15, 2022, and the comment period reopened; it will close again approximately 2 weeks after the transcript of the hearing is published in the Federal Register.
- The NCCMP both filed a comment and testified.

Proposed QPAM Changes

- Proposed Amendment to PTE 84-14 (the QPAM Exemption), 87 Fed. Reg. 45204 (July 27, 2022), would require:
  - That existing QPAMs must make a one-time report to DOL of each entity relying on it under the exemption. Updates are only required if the entity changes its name.
  - That QPAM agreements include indemnification clauses requiring QPAMs to reimburse plans for damages from any violation of law, contract, or failure of the QPAM to remain eligible as the result of a criminal conviction, and provisions for termination by the plan without penalty following such a conviction.
  - Expands the definition of prohibited criminal convictions, both domestically and in terms of foreign convictions that are equivalent.
  - The 10-year ineligibility period extends from the date of the conviction.
  - The start of the ineligibility period also begins a one-year wind-down period during which existing clients can continue to rely on the exemption while it seeks a permanent solution.

Proposed QPAM Changes

- New requirements and restrictions on obtaining individual exemptions following a disqualification, including an independent audit to ensure that the QPAM fully complied with its obligations during the wind-down period.
- The QPAM's authority over investment decisions must be complete – other parties must not have authority to override or supplant those decisions.
- Capitalization requirements for QPAMs are significantly increased:
  - Equity minimum is increased from $1M to $2.72M.
  - Assets under management minimum are increased from $85M to $135.87M.
- The comment period would have closed Sep. 26, but has been extended to October 11. A hearing will be held on Nov. 17, 2022, and the comment period will reopen at that time.

Public Health Emergency – Can we live with it or can we live without it?

- PHE has been extended to October 2022
- Likely to be extended at least once more, through January 2023
- Department of Health and Human Services (HHS) will give at least 60 days' notice of expiration

National Health Emergency expected to expire in February 2023

- Will require review of COVID-19 benefits, notices, and individual disclosures

Plan Obligations

- Timeframes must be disregarded during the Outbreak Period:
  - Beginning March 1, 2020, and ending the earlier of 1) one year from the date an individual is first eligible for the relief, or 2) 60 days after the announced end of the COVID-19 National Emergency
- Provisions sunsetting include:
  - COVID-19 Testing without cost-sharing
  - Over-the-Counter COVID-19 Testing
  - Coverage of preventive services and vaccines in and out-of-network by non-GF plans
  - Expanded telehealth offerings to those not eligible for group health plan coverage
  - Certain MHPAEA quantitative testing related to COVID coverage
  - Ability to waive certain wellness standards related to COVID

COVID-19 Challenges

- HHS announced August 30, 2022
  - More than three in four Americans have received at least one COVID-19 vaccine shot; therapeutics are available within 5 miles of 90% of Americans; and testing is readily accessible
- Cost implications
  - Federal government will transition responsibility to the private sector to pay for:
    - Vaccines (early 2023)
    - Therapeutics, including Lagevrio (early 2023) and Paxlovid (mid-2023)

Gender Dysphoria, the EEOC, and Section 1557

- Gender-affirming care includes care for transgender individuals that may include, but is not necessarily limited to, counseling, hormone therapy, surgery, and other services designed to treat gender dysphoria or support gender affirmation or transition
- Exclusions of services because of an individual's sex assigned at birth, gender identity, or gender recorded could be challenged under:
  - Americans with Disabilities Act
  - ACA Section 1557
  - Title VII of the Civil Rights Act
    - The EEOC cites the Bostock decision as it continues to take the position that employment discrimination based on sexual orientation or transgender status constitutes discrimination prohibited by Title VII
- Multiple cases being litigated; plaintiffs are generally winning

1557 Proposed Rule

- Rule proposed August 4, 2022, comments due October 3, 2022
- Would expand scope of covered entities
- Would reinstate notification obligations concerning language assistance
- Would require disability accommodation in benefits
- Plans could not deny or limit health coverage to individuals based upon the individual's sex assigned at birth, gender identity, or gender otherwise recorded
- Would require written policies and procedures

Limitations on Outpatient Dialysis/DaVita

- On June 21, 2022, the U.S. Supreme Court held in *Marieta Memorial Hospital Employee Health Benefit Plan v DaVita* that a group health plan that provides limited benefits for outpatient dialysis for all participants on a uniform basis does not violate the Medicare Secondary Payer Act
- Marieta's plan provided for reimbursement for kidney dialysis and dialysis related claims at 125 percent of Medicare
- The Supreme Court held that:
  1. Marietta's plan did not differentiate between individuals with ESRD and those without the disease, because it provides the same benefits to both groups, and
  2. Because the plan provides the same outpatient dialysis benefits to all plan participants, whether or not a participant was entitled to or eligible for Medicare, the plan cannot be said to "take into account" whether its participants are entitled to or eligible for Medicare

The Dialysis Industry's Response

- Legislation has been introduced that would amend Title XVIII of the Social Security Act's MSP provisions, Restore Protections for Dialysis Patients Act (H.R.8594)
- The legislation would create a new coverage mandate for ESRD that would provide that a plan violates the MSP rules if the plan "limits, restricts, or conditions the benefits the plan provides for renal dialysis services as compared to the benefits the plan provides for other medical services"
- Bills were introduced in the House by Representatives Yvette Clarke (D-NY) and Jodey Arrington (R-TX) and Senators Menendez (D-NJ) and Cassidy (R-LA) in the Senate (S 4750)
- Could significantly increase leverage for kidney dialysis companies and increase costs for health plans

Questions?