Preparing for Compliance Changes in the New Year

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TODAY'S PRESENTERS

Pamela Mitroff
Senior Director of Health Reform Compliance

Pamela Mitroff joined the staff of NAHU in March 2011 as Director of State Affairs and transitioned to Senior Director of Health Reform Compliance in November 2013. In that role, Mitroff provides NAHU members consultative compliance assistance. Her role includes developing NAHU's compliance assistance services including FAQs and a blog, *Compliance Cornered*.

She has more than 30 years in the health care and workers' compensation insurance and cost control field. She is a licensed insurance producer and has held positions with a major insurance company and a third-party administrator of benefit plans for self-funded companies. She was a lobbyist for the Illinois State Chamber of Commerce.

She has a B.A. degree from Knox College and an MBA from Dominican University.

Jessica Watts
VP, Compliance Consultant, Frost Insurance

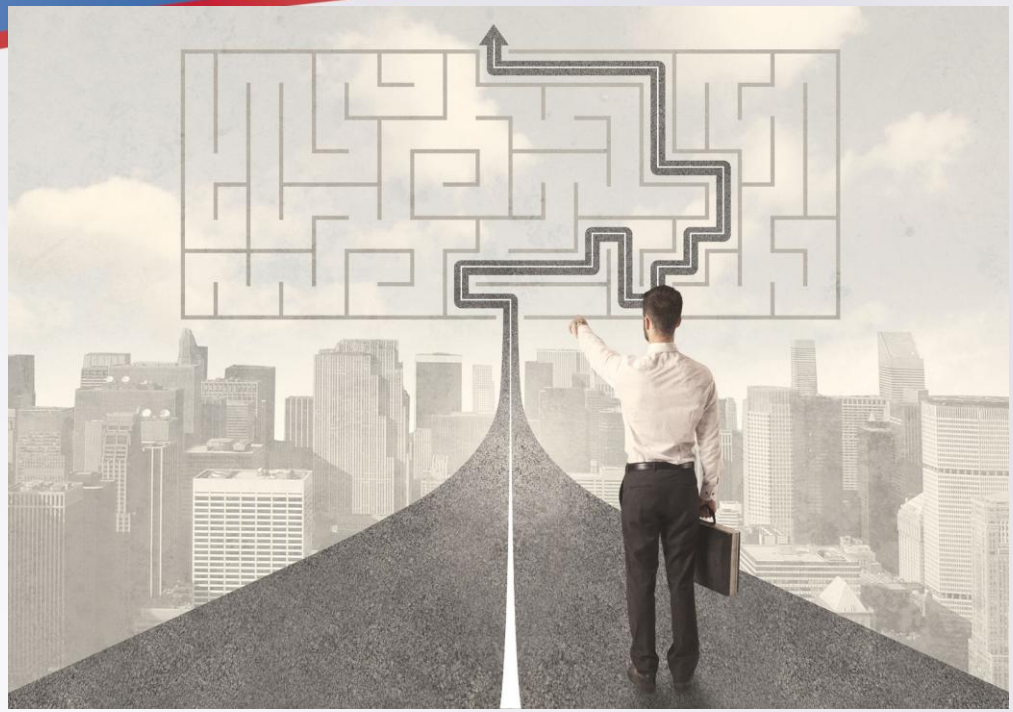
Jessica serves as the Texas statewide compliance consultant for the Employee Benefits practice of Frost Insurance. Jessica regularly consults on employee benefits matters, including health care reform compliance, for Frost clients across Texas. Previously, Jessica was Vice President, Benefits Compliance at NFP Corp. for 7 years, where she was a contributing author of the biweekly *Compliance Corner* newsletter and provided benefits compliance support under both federal and state law for clients of all sizes nationwide.

Jessica also serves as a member of the Legislative Council for NAHU, co-chairs the *Compliance Corner* working group, and serves as the Texas AHU Director of State Legislative Affairs.

Jessica has a Bachelor of Business Administration in Financial Services and Planning from Baylor University, and a Master of Science in Human Resources Management from Tarleton State University.

The New Administration

- Trump administration taking shape
- Congressional Republicans at the helm
- “Repeal and Replace” or “Repeal and Delay”
  - Strong desire to repeal ASAP
  - Delivers on campaign promises of new administration and Congressional Republicans
  - Key issue – how to minimize disruptions in coverage and markets
- “Stay the Course” best approach for employers until changes actually occur



Updating Compliance Facts

Changes, Timelines, New Regs and Other Compliance Tips

On the Horizon

Effective for plan years renewing on or after Jan. 1, 2017:

- Increased Affordability Safe Harbor Percentage (9.69%)
- Federal Poverty Level will be released end of January, 2017, plans beginning on or after July 1, 2017 can use new figures.
- Affordability Determination Changes for Most Employers with Cash-out Option
- Increased HSA contribution limits
- Increased Employer Mandate Penalties
- Original Employer Mandate Filing Deadlines (Mostly) Return
- Section 1557 Nondiscrimination

On the Horizon

Effective for plan years renewing on or after Jan. 1, 2017:

- EEOC Final ADA Wellness Rules (Participatory plans now limited to 30% of self-only coverage limit for disability-related inquiries)
- EEOC Final GINA Wellness Rules (inducements for spouses to complete an assessment)
- EEOC New Notice Requirement
- New Employer CHIP Notice: July 31, 2016
- Transitional Reinsurance Fee: Final Year. Payment Deadlines are Jan. 17, 2017 ($21.60) and Nov. 17, 2017 ($5.40)
- For open enrollment periods on or after April 1, 2017:
  - New SBC Templates

Affordability Measures

2015

- 9.56%

2016

- 9.66%

2017

- 9.69%

Affordability Measures

- The Federal Poverty Level figures are released every year in late January. The 2016 figures were actually released on Jan. 25, 2016. This, of course, is way too late for any employer designing plan contributions to try to come up with the correct contributions, since the plan year has already begun.
- Special rule
  - Plans can use the FPL figures in place 6-months prior to the first day of the plan year, so that employers have adequate time to establish premium amounts in advance of open enrollment period. So, a plan renewing in January 2016 will still use the 2015 poverty line numbers, while a plan renewing in December 2016 will be able to use the 2016 poverty line numbers.
- For 2017, employers renewing anytime before July 1, 2017 will be able to use the 2016 Federal Poverty Level figures.
- Complicating this further is the affordability percentage changes depending on the year. For 2016 it's 9.66% but for 2017 it's 9.69%

Penalties and Other Changes

2015

- **A Penalty**
  - $2,080
- **B Penalty**
  - $3,120

Maximum OPX* 2016

- Self- Only
  - $6,850
- Other than Self-Only
  - $13,700

2016

- **A Penalty**
  - $2,160
- **B Penalty**
  - $3,240

Maximum OPX* 2017

- Self-Only
  - $7.150
- Other than Self-Only
  - $14,300

*Family deductible subject to individual deductible limit

Upcoming Announcements?

- Last year, the IRS released important information on Dec. 16, 2015:
  - 2016 Employer Penalty Inflation Adjusted Amounts
  - Proposed 2017 OOP Limits
  - Affordability Threshold

  - Will updated information be released prior to end of year?

Warning– Inflationary Increases in DOL Penalties*

ERISA § 502(c)(10)(B)(i)	Failure by any plan sponsor of a group health plan, or any health insurance issuer offering health insurance coverage in connection with the plan, to meet the requirements of ERISA §§ 702(a)(1)(F), (b)(3),(c) or (d); or § 701; or § 702(b)(1) with respect to genetic information.	$100 per day during non-compliance period	$110 per day during non-compliance period
ERISA § 502(c)(9)(A)	Failure by an employer to inform employees of CHIP coverage opportunities under ERISA § 701(f)(3)(B)(i)(I) – each employee a separate violation.	Up to $100 per day	Up to $110 per day
ERISA § 715	Failure to provide Summary of Benefits Coverage under Public Health Services Act section 2715(f), as incorporated into ERISA section § 715 and 29 CFR 2590.715-2715(e).	Up to $1,000 per failure	Up to $1,087 per failure

*These are just a few examples

Source: www.dol.gov/ebsa

Recent Delays

- HIT Tax Delay
  - One year deferment for calendar year 2017
  - Stabilize market?
- Grandmothered Plans Extended
  - Policy years beginning on or before October 1, 2017, provided that all policies end by December 31, 2017
  - CMS to work with states that allow this relief regarding short policy years or early renewals

Cadillac Tax - Delayed

- Delayed until 2020
- Notice 2015-16 (2/24/15)
- Notice 2015-52 (6/30/15)
- Recap - 40% excise tax on the total cost of employer-sponsored coverage over a threshold amount that will take effect for tax years beginning after 12/31/2017
- The thresholds will be approx.$10,800 for self-only and $29,100 for other than self-only coverage
- Most recent CBO estimate projects excise tax revenue at $91 billion over a decade
- 25% of revenue from tax, 75% from increased income and payroll taxes

21st Century Cures

- Many provisions in 1,000 page bill
- Two provisions of special interest to NAHU and one to watch

1. Medicare Advantage OEP restored
    - Effective January 2019
    - Key component of NAHU's Medicare Advisory Group legislative "to-do" list
2. HRAs for Small Employers (Section 18001)
    - Provisions effective 12/31/2016
    - NAHU position was neutral on this bill due to concerns about market stability
3. Mental Health Parity
    - No expansion of Mental Health Parity and Addiction Equity Act
    - Directs DOL and Treasury to issue compliance guidance related to the mental health rules and coordination by states and federal government
    - 5 violations by plan or insurer will result in audit of plans to improve compliance

"Exception from Group Health Plan Requirements for Qualified Small Employer Health Reimbursement Arrangements

- "qualified small employer health reimbursement arrangement" is one that is funded solely by an eligible employer without salary reduction
- Eligible employer one who is not an ALE
- Requires the same terms for all eligible employees
- Plan is subject to nondiscrimination requirements with change from 5 years to employee who hasn't completed 90 days of service
- Benefit may vary based on price of individual policy based on age of employee and/or family members and number of family members eligible
- Provides payment or reimbursement of eligible employee's expenses for medical care [Section 213(d)] incurred by the employee and eligible family maximum
- Annual limit $4,950 for individual employee/ $10,000 for family members
- Employers must provide notices
- Employees must advise exchanges if applying for individual coverage

Employer Reporting Requirements and Post-Mortem

BASICS OF EMPLOYER REPORTING UNDER ACA

Name of Form	Health Coverage		Employer-Provided Health Insurance Offer and Coverage			
Type of Entity – Employer or Insurer	Purpose of Form – Enforces Individual Mandate		Employer-Provided Offer and Coverage Returns	Purpose of Form -- Enforces Employer Mandate 1 each to IRS and full-time employee eligible for MEC at any time during the year Due to covered individual on or before last day of January**		
	1094-B Transmittal Form 1 per insurer or self-insured plan Due last day of February*	1095-B 1 each to IRS and covered individual covered any time during the year*	1094-C Transmittal Form 1 to IRS per ALE member	1095-C Part I Employee	1095-C Part II Employee Offer and Coverage	1095-C Part III Covered Individuals
Insured small group – less than 50 FTEs						
Insured group – more than 50 FTEs			X	X	X	
Self-insured ALE			X	X	X	X
Self-insured Non- ALE	X	X				
Insurance Company	X	X				

* Last day of February; last day of March if filed electronically

**February 1, 2016 since January 31, 2016 is a Sunday

Pdm 3/27/13

2017 Reporting Deadlines

- Pre-Thanksgiving Day reprieve from IRS
- Extension of deadline for notices to employees
  - January 31, 2017 original deadline
  - March 2, 2017 new deadline
- No delay for reporting to IRS
  - Deadline to file paper forms with the IRS will be February 28, 2017
  - Deadline to file electronically with the IRS will be March, 31, 2017
- Extension of good faith compliance standard

Employer Reporting 2017

- Forms and instructions for 2016 now available
- Few changes from last year
  - Conditional offers of coverage to spouses reported by new codes
  - New schedule to solicit SSNs (TINs)
    - Upon completing application
    - 75 days later
    - December 30 of year after initial ask

Non-Compliance Penalties

Type of Failure	Per Form Penalty	Annual Maximum Large/Small Business
Filed less than 30 days late	$50	$529,500/$185,000
Filed before August 1	$100	$1,589,000/$529,500
Filed August 1 or later	$260	$3,178,500/$1,059,000
Intentional Disregard	$520	No Cap

"Good faith" standard extended!

Affordability: Cash Opt-Outs

- Guidance provided on Dec. 18, 2015, IRS Notice 2015-87

- Prior to 2017:
  - If employee has the option to elect taxable cash in lieu of benefits….
  - That amount counts as an **employer contribution**

- Effective 2017:
  - If employee has the option to elect taxable cash in lieu of benefits…
  - That amount counts as an **employee contribution**

Example: Cash Out Option

	Pre 2017	2017+
EE Only Premium	$200	$200
If EE waives, ER pays EE	$150	$150
EE's cost of coverage	$200	**$350**
Line 15	$200	**$350**

Starting in 2017, an employer would need to reevaluate their affordability strategy if they have a cash out option

Opt-Outs

- Flex-credits/contributions
  - Classic Section 125 cafeteria plan
  - Employer contributions
  - Employee uses employer's flex-credits/contributions to purchase qualified benefits

- If employee can only use contributions **towards health plans** (medical, dental, vision, health FSA)**= employer contribution**

- If employee can use contributions **towards all qualified plans** (DCAP, life, disability, etc.)**= no employer contribution**

Opt-Outs

- Cash-out, opt-outs or “cash in lieu” must be added to the employee contributions to determine affordability “Cash in lieu” arrangements after 12/16/15 must include opt-out
- New regulations issued defining conditional opt-outs such as employee providing proof of having coverage through spouse – *discussed on next slide*
- Recent Court case finds that cash-in-lieu amount must factor into overtime rate of pay
- Bottom line – legal guidance recommended

Opt-Outs – What are the options

- The easiest opt-out plan administratively is an “unconditional opt-out” arrangement. An unconditional opt-out doesn’t have strings such as requiring proof of other coverage for an employee waiving coverage.
  - Must be included as part of affordability calculation

Opt-Outs – What are the options

- Conditional opt-out is an “eligible opt-out arrangement”
  - Conditioned on:
  1. The employee declining to enroll in the employer-sponsored coverage and
  2. The employee providing reasonable evidence that the employee and all other individuals for whom the employee reasonably expects to claim a personal exemption deduction for the taxable year or years that begin or end in or with the employer’s plan year to which the opt-out arrangement applies (employee’s expected tax family) have or will have minimum essential coverage (other than coverage in the individual market, whether or not obtained through the Marketplace) during the period of coverage to which the opt-out arrangement applies.

Opt-Outs – What are the options

- The IRS intends to propose regulations addressing situations like this where there is an unconditional opt-out payment conditioned solely on the employee declining coverage under the plan. It is anticipated that the proposed regulations will also address and request comments on the treatment of opt-out payments that are conditioned not only on the employee declining employer-sponsored coverage but also on satisfaction of additional conditions (such as the employee providing proof of having coverage provided by a spouse's employer or other coverage). The IRS expects any regulations will be effective prospectively, following the issuance of regulations.

- Implications here under Section 125- not clear how these will be resolved. Section 125 says that if the employer requires the participant to verify they have other coverage in order to receive the "cash-out"- then the employee doesn't really have a choice, and everyone is taxed on the amount of cash they "could have" received.

Opt-Outs – What are the options

- However, if an employer does not currently offer a cash-out option for declining coverage, if they put one in place after Dec. 16, 2015, then they will need to include the mandatory opt-out amount as part of the employee's required contribution when calculating affordability of coverage. For this purpose, an opt-out arrangement is treated as adopted after Dec. 16, 2015 unless:
  - The employer offered the opt-out arrangement for a plan year including Dec. 16, 2015
  - A board, committee or similar body or an authorized officer of the employer specifically adopted the opt-out arrangement before Dec. 16, 2015, or
  - The employer previously provided written communications to employees on or before Dec. 16, 2015 indicating that the opt-out would be offered to employees in the future.
- If an employer satisfies these requirements and previously had an opt-out payment in place, then the opt-out payment will not be treated as increasing the employee's required contribution for affordability purposes.

HRA Changes

- Effective Jan. 1, 2017, HRA reimbursements now hinge upon enrollment in the group health plan.
- IRS Notice 2015-87 said that an HRA is only available to individuals who are enrolled in both the HRA and the employer's group health plan.

- **Example**: An employee has self-only coverage. That employee cannot request reimbursement for medical expenses for a spouse or dependents since the employee does not have family coverage through the employer.

HRA Changes

- Best Practice (2017 forward): Design eligibility for the HRA to be continuously tied to individuals covered under the employer's group health plan, so that eligibility for expense reimbursement will automatically adjust when an employee makes a mid-year election change for coverage.
- Transition relief is *over*: The IRS allowed a transition period to comply with this change.
  - Pre-2017: HRAs could continue to reimburse expenses of family members not enrolled in the employer's other group health plan based on the terms of the plan as of Dec. 16, 2015 (the date of the notice) for plan years beginning before Jan. 1, 2017.
  - 2016 Reporting Impact: All size employers are responsible under Section 6055 to report HRA coverage as minimum essential coverage for each individual who received reimbursements from the HRA but was not enrolled in the employer's group health plan.

Section 1557

Effective for plan years starting on or after Jan. 1, 2017, regulations prohibit a health program or activity from discriminating against individuals based on *race, color, national origin, sex, age or disability.* For this purpose, a health plan or health insurance is considered a health program or activity and is prohibited from denying or limiting coverage or eligibility, imposing additional cost sharing or imposing a discriminatory benefit design based on one of the identified factors.

Importantly, the regulations provide that sex discrimination includes discrimination based on gender identity. Plans are prohibited from a benefit design that includes a blanket exclusion for services related to gender transition

Training Materials are now available- http://www.hhs.gov/civil-rights/for-individuals/section-1557/trainingmaterials/index.html

2017 HSA Limits Increased

- IRS Rev. Proc. 2016-28
- HSA Inflation Adjusted Amounts
  - 2017 Self-only contribution limit: $3,400 (up from $3,350)
  - 2017 Family contribution limit: $6,750 (no change)
  - 2017 Self-only statutory deductible: $1,300 (no change)
  - 2017 Family statutory deductible: $2,600 (no change)
  - 2017 OOP Self-only: $6,550 (no change)
  - 2017 OOP Family: $13,100 (no change)

2017 COLA Adjustments

- Health FSA's- first adjustment in 2 years:
  - $2,600
- Small Business Health Care Tax Credit.
  - Average annual wage level at which the tax credit begins to phase out for eligible small employers will be $26,200 (was $25,900 in 2016)
  - Maximum average annual wages to qualify for the credit as an "eligible small employer" for 2017 is $52,400 (was $51,800 in 2016).
- Penalty for failure to maintain Minimum Essential Coverage:
  - $695 (no change from 2016).

SBC Updates

- "Culturally and Linguistically Appropriate" County Information Updated!
- *New Templates! Begin using for first open enrollment periods occurring in April, 2017*
  - Additional coverage example –The new version includes a third coverage example that addresses coverage for a foot fracture so that a consumer understands what a plan covers in an emergency scenario.
  - Clearer and more detailed language describing certain coverage components (e.g., services covered before the deductible is met, embedded deductibles for family coverage, and OOP limits).

Employer CHIP Notice

- Typically updated Jan. 31 and July 31 each year
- *Always ensure you are using most current version*
- Most recent: July 31, 2016
- Expires: Dec. 31, 2016 (notice has been extended month-by-month for last 3 months).

Employer Marketplace Notice

- Continues to be required within 14 days of new hire
- Note: Current form expires Jan. 31, 2017, watch for an updated form soon!
- https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/FLSAwithplans.pdf

EEOC Guidance

- Final wellness rules under the ADA and GINA impact any programs that tie incentives to employees either responding to disability-related inquiries or completing medical examinations, which can include HRAs and biometric screenings.
- These final rules are effective for plan years beginning on or after Jan. 1, 2017, and here are the big takeaways:
  1. These wellness programs are subject to a maximum incentive limit of 30% of the total cost of self-only coverage, regardless of whether the program is participatory or health-contingent.
  2. Employers must provide notice to employees that clearly explains what medical information that will be obtained, how it will be used, who will receive it, and the restrictions on its disclosure.
  3. Employers sponsoring these wellness programs are subject to additional confidentiality requirements, including the requirement that they only receive medical information or history collected by the wellness program in aggregate form and that disclosure of individuals only occur when necessary to administer the health plan.

EEOC Guidance

- A wellness program that includes disability-related inquiries or medical examinations and qualifies as an employee health program will be considered "voluntary" only if the employer (or other covered entity) meets four requirements:
  - It does not require employees to participate.
  - It does not deny coverage under any of its group health plans or particular benefits packages within a group plan for non-participation. Similarly, the employer cannot limit the extent of benefits, generally, for employees who do not participate. The EEOC regulations refer to this type of impermissible structure as a "gateway plan"
  - It does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees within the meaning of Section 503 of the ADA.
  - **It provides employees with a prescribed notice.**

The Notice

- Effective as of the **first day of the first plan year beginning on or after January 1, 2017**, an employee health program that requires medical exams or makes disability-related inquiries will not be considered voluntary unless the employer (or other covered entity) provides a notice that—
  - Is written in language reasonably likely to be understood by the employee from whom medical information is being obtained;
  - Describes the type of medical information that will be obtained and the specific purposes for which the medical information will be used; and
  - Describes the restrictions on the disclosure of the employee's medical information, the employer representatives or other parties with whom the information will be shared, and the methods that the covered entity will use to ensure that medical information is not improperly disclosed.
- The EEOC has issued a sample notice.

Compliance Reminders

- ACA compliance is not solely health plan compliance
- Variable hour employees
  - Reflect in job postings and job descriptions
- Handbooks
  - Review for exclusion of temps, interns, etc.
  - Useful to help document “offer of coverage”
  - No call No show provision needs to reflect variable hours
- Orientation period
  - Process to determine employee has successfully met it?
- Reporting errors corrections
  - SSN or other error on reporting may be correct in other systems

Get Prepared for Audits

- Update/Prepare plan documents
- Review and support employee classifications and independent contractor classifications
- Memorialize decisions
  - Measurement methods/periods, orientation periods, waiting periods
  - Safe harbors
  - Premium calculations
- Maintain proof of enrollment materials
- Maintain proof of offers of coverage and waivers
- Identify key personnel to address issues

Coming Attractions/Tips?

- Proposal to change Form 5500 -- target 2019
  - End small employer exclusion for filing
  - Schedule J added
    - Eligibility for plan – who was coverage offered to
    - Benefits offered
    - Funding of plan
    - Rebates or reimbursements and how used
    - COBRA offers and elections
- Compliance info
  - SPDs current
  - HIPAA compliance
  - GINA, etc.
- Tip – Compliance Assistance Guide from DOL 60 plus page self-compliance tool – www.dol.gov/ebsa/compliance_assistance.html
- Assess whether you're a "covered entity" for Section 1557 nondiscrimination requirements

QUESTIONS

You may ask your question in the questions box at any time.

PREPARING FOR COMPLIANCE CHANGES IN THE NEW YEAR

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