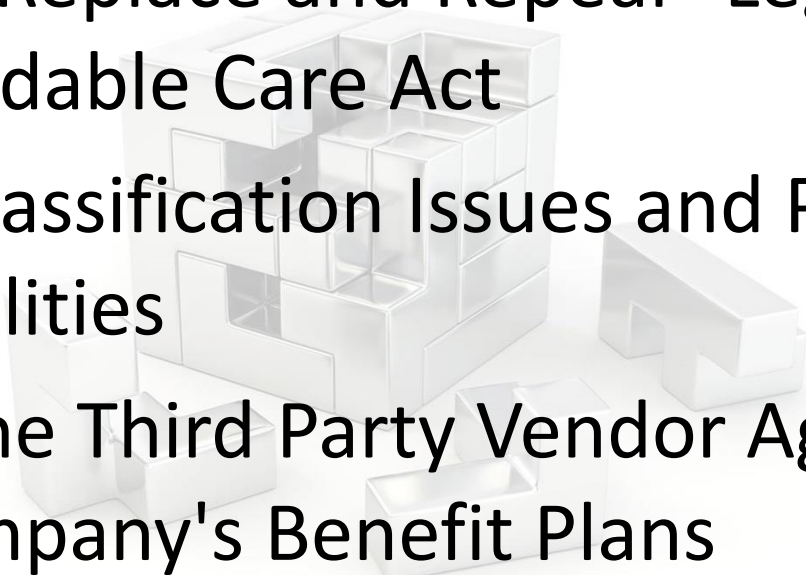




Hot Topics in Employee Benefits

Today's Topics

- Update on “Replace and Repeal” Legislation for the Affordable Care Act
 - Employee Classification Issues and Potential Benefit Liabilities
 - Trends for the Third Party Vendor Agreements for Your Company's Benefit Plans
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What's happening with the ACA?

- Affordable Care Act enacted in 2010
 - Most ACA changes now in effect relating to minimum coverage mandates and penalties for companies, employees and group health plans
 - Future impact of “Cadillac Tax” for high-value health plans still looming and currently scheduled to take effect in 2020

What's happening with the ACA?

- Trump administration seeks prompt “repeal and replace” of most ACA requirements
- May 2017: House Republicans re-propose and then approve American Health Care Act (AHCA)
 - Stiff opposition expected in Senate
- In its current form, AHCA would make a number of key changes to the ACA framework for companies and their group health plans

What would the AHCA do?

- Eliminate the ACA individual and employer coverage mandate penalties
- Impose a continuous coverage penalty in 2019 on those who have a gap in coverage of more than 63 days
- Phase out the Medicaid expansion under the ACA
- Reinstate the employer deduction for the Medicare Part D subsidy
- Repeal the ACA tax credit in favor of an age-based tax credit
- Repeal the ACA cost-sharing subsidies in 2020
- Delay the “Cadillac Tax” until 2025
- Reinstate the full Code Section 162(m) deduction for compensation plans for insurance company executives

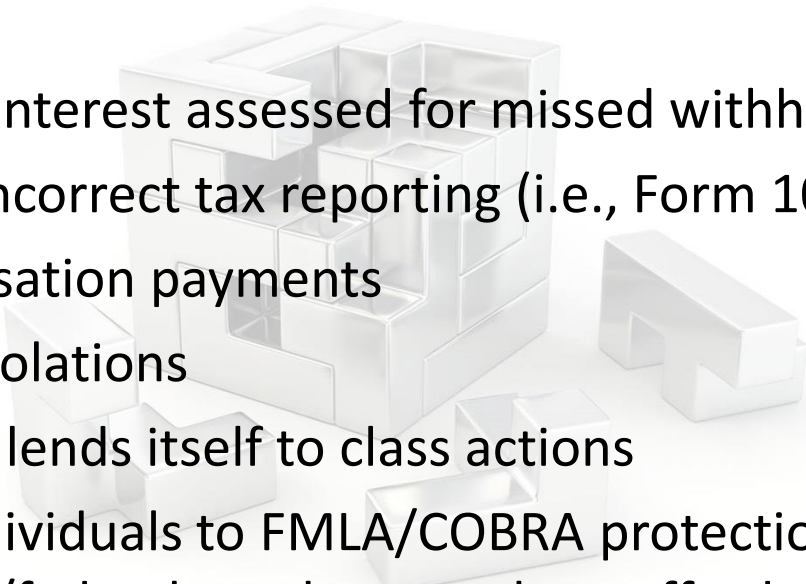
What does this mean for employers?

- Post-ACA requirements for group health plans still unknown for 2018 and beyond
 - Form 1094/1095 reporting requirements continue
- Trump administration also expected to provide additional flexibility to companies for offering HSA and FSA plans to employees
- Companies may want to review health benefit and prescription drug designs in light of proposed changes under AHCA

Employment Classifications and Employee Benefit Liabilities

- Employers have increasingly sought to reduce employment costs by replacing employees with independent contractors
- Creates many risks for employers
 - In recent years, the IRS and DOL have announced specific audit initiatives centered on employee misclassifications
 - Cross-referrals for additional enforcement through other regulatory agencies
 - Employee misclassifications can also result in state agency audits of employers for compliance with worker's compensation, unemployment, and other state laws

Potential Employer Liabilities

- Employment taxes (e.g., FICA/FUTA withholdings) and income tax withholding
 - Penalties and interest assessed for missed withholdings
 - Penalties for incorrect tax reporting (i.e., Form 1099 vs. W-2)
 - Worker's compensation payments
 - Unemployment violations
 - FLSA (overtime) – lends itself to class actions
 - Entitlement of individuals to FMLA/COBRA protections and other rights under state/federal employment laws afforded to employees
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Examples of Potential Employee Benefit Liabilities

- For larger companies and their group health plans, ACA currently requires offer of qualifying health insurance to at least 95% of full-time employee
- If enough independent contractors should be classified as full-time employees, significant ACA risks and penalties may apply if it causes the company to fall below the 95% coverage threshold

Examples of Potential Employee Benefit Liabilities

- Potential ACA penalty each year is generally **\$2,000 (as indexed for inflation) times all full-time employees**
 - Example: If Company has 1,000 full-time employees, **potential ACA penalty each year is almost \$2 million** (i.e., \$2,000 times 1,000 full-time employees)
 - Only takes one misclassified individual who gets coverage through ACA health exchange (and qualifies for an ACA tax credit) to trigger the entire penalty!
- May also cause issues with insurance companies/TPAs for company's health and other welfare benefit plans

Examples of Potential Employee Benefit Liabilities

- For pension and 401(k) plans, misclassified individuals may bring claims for retroactive benefits they would have received had they been considered employees instead
- Individuals may bring claims for retroactive vesting and benefit accruals
- May require company to make restorative company contributions (plus missed investment earnings)
- May cause issues with IRS discrimination/coverage testing
- In addition to the costs for the additional pension/401(k) benefits, this may lead to large penalties if the misclassifications are found upon audit by the IRS

Recommendations

- Categorize typical independent contractor scenarios and estimate number of individuals in each category
- Review small samplings of IC agreements from each category and determine potential risks to the company
- Determine whether adjustments to employment practices and/or revisions to IC agreements can be made to mitigate potential penalties to the company for higher-risk scenarios

Recommendations

- Review employee benefit plans and determine corrective options
 - Consider whether clarifying language limiting impact of employee misclassifications should be inserted
- Preservation of attorney-client privilege is critical if outside vendor is used to review IC agreements
 - Consider having outside counsel retain vendor to maintain full privilege

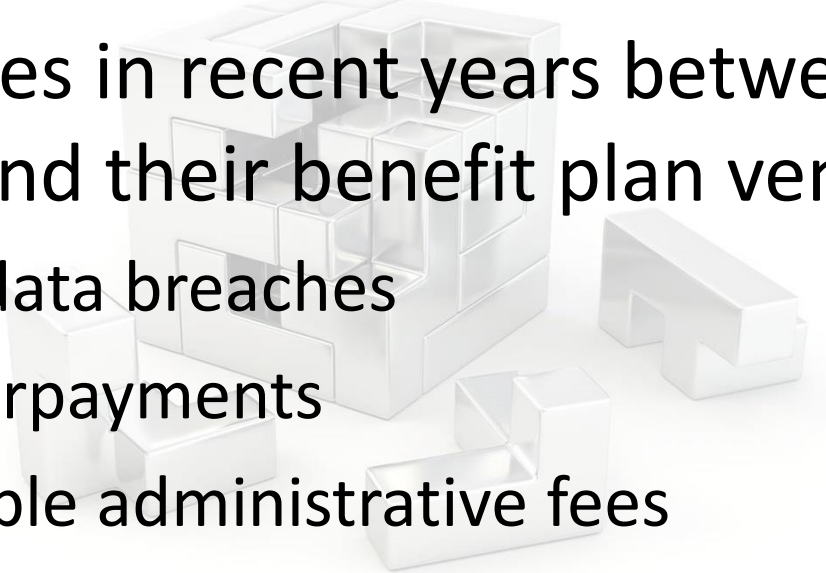
Benefit Plan Vendor Agreements

- DOL requires companies to conduct “regular review” of service providers to their ERISA plans
 - Periodic benchmarking and monitoring of plan costs is critical for satisfaction of ERISA fiduciary obligations
 - Must also ensure that indemnification and other key commercial terms in vendor agreements are reasonable

Benefit Plan Vendor Agreements

- Traditional sources of profit margin for TPAs have eroded in recent years
 - Greater reliance on plan services agreements to shift value from employers
- Services agreements are now much more detailed and complicated with nuanced contract language
 - Used as a vehicle to “disclose” or provide notice of business practices

Benefit Plan Vendor Agreements

- Significant increase in number of lawsuits and other disputes in recent years between employers and their benefit plan vendors
 - Employee data breaches
 - Benefit overpayments
 - Unreasonable administrative fees
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Benefit Plan Vendor Agreements

- More important than ever to review the key terms of the vendor agreements for your company's benefit plans
 - Reasonableness of fees
 - Data security/ownership and breach notification procedures
 - Provider's compliance with law and express ERISA fiduciary acknowledgement (if appropriate)
 - Remedial provisions such as indemnification protections audit procedures, and contract termination rights
- Consider periodic RFP or other "market check" mechanism