



Top 10 Employee Benefits Issues for 2019 and Beyond

Lori Oliphant
Winstead

Jim Prince
McAfee & Taft

Luis Velez
Dept. of Labor

Association Health Plans

- **Concerns regarding affordability of coverage available for small businesses and self-employed individuals**
- Small businesses participate in the small market, which can be costly
- Participation in a larger plan (pool) can provide economies of scale
- In order to be a single plan governed by ERISA, the plan must be maintained by an employer or bona fide association

Association Health Plans *(cont'd)*

- New AHP rules allow small employers (and self-employed individuals) within same industry or geographic location to participate in larger risk pools
 - Increased negotiating power
 - Consolidated compliance efforts
- Not a new concept, but prior law is more restrictive
 - Members of group had to have “commonality of interest”

Association Health Plans *(cont'd)*

- AHP constitutes a MEWA under ERISA and state law
 - Even if self-insured, the AHP will become subject to state insurance regulations
 - MEWAs are a DOL Enforcement Initiative!!
- Similar concepts proposed in retirement plan context for “open” multiple employer plans (MEPs)

Health Reimbursement Accounts

- **Affordable Care Act restricts use of HRAs and prohibits employer from integrating HRAs with individual health coverage for purposes of satisfying employer mandate**
- Applicable large employers are required to offer minimum essential coverage that satisfies minimum value and affordability standards
- HRAs constitute minimum essential coverage, but violate the prohibition on annual limits and preventive care mandates unless they are integrated with qualifying group health coverage

HRAs *(cont'd)*

- Proposed rule would allow HRAs to be integrated with individual health coverage
- Alternatively, the proposed rule would allow employers to offer an “excepted benefit HRA”, if
 - the employer makes other group health plan coverage available to the HRA participants,
 - no more than \$1,800 (indexed after 2020) is newly available to each participant for each plan year,
 - the HRA does not reimburse premiums for individual health coverage, non-COBRA group coverage, or Medicare Parts B or D; and
 - the HRA is made available under the same terms and conditions to all similarly situated individuals.

HRAs *(cont'd)*

- These are mutually exclusive alternatives
- The regulations are proposed to apply for plan and taxable years beginning on or after January 1, 2020, and may not be relied on before they are final

ACA Repeal

- ACA – Individuals must maintain minimum essential coverage or pay a penalty (tax). This is the individual mandate.
- Supreme Court in 2012
 - Individual mandate is constitutional because it is a tax
- Tax Cuts and Jobs Act
 - Amended the Internal Revenue Code to make the amount of the tax \$0
 - Left the individual mandate language in place

ACA Repeal *(cont'd)*

- *Texas v. United States*
 - Northern District of Texas
 - Judge Reed O'Connor
 - Red states v. blue states
- Theory
 - Individual mandate was previously upheld as a **tax** by the Supreme Court
 - Congress amended the ACA to remove the tax related to the individual mandate
 - Individual mandate was a key pillar of the ACA

ACA Repeal *(cont'd)*

- Result
 - Individual mandate is unconstitutional
 - Individual mandate is not severable from the rest of the ACA
 - The entire ACA is repealed
 - Enforcement stayed, pending appeal

Mental Health Parity Requirements

- **Questions arising regarding coverage of:**
 - **Applied Behavioral Analysis (ABA) Therapy**
 - **Wilderness Therapy**
 - **Gender Dysphoria**
- Group health plan may not impose quantitative or nonquantitative limitations on mental health/substance use benefits provided under the plan that are more restrictive than the limitations imposed on medical/surgical benefits in the same category.
 - Rule does not mandate coverage of mental health/substance use benefits
 - BUT refer to other laws such as ACA and ADA for coverage mandates

Mental Health Parity Requirements

(cont'd)

- Examples of nonquantitative limitations:
 - Medical management procedures
 - Fail-first requirements
 - Preauthorization/advance notice requirements
 - Rx formulary design
 - Probability of improvement
- DOL Enforcement Initiative!!

Hardship Withdrawals

- **Distributions of 401(k) deferrals prior to severance from employment are restricted, but withdrawals “on account of hardship” that meet regulatory conditions are permissible**
- Under prior rules, sources of hardship distributions were limited, participants were required to exhaust available plan loans prior to taking a hardship distribution, and participants in safe harbor plans were required to forgo new contributions for six months following the distribution

Hardship Withdrawals *(cont'd)*

- Effective for plan years beginning in 2019, hardship distributions can be funded from qualified nonelective contributions (QNECs), qualified matching contributions (QMACs), and earnings; participants will no longer be required to take a loan prior to requesting a hardship distribution (but you can include it); and the six-month prohibition on new contributions is removed (but can be deferred to 2020).

Hardship Withdrawals *(cont'd)*

- Additional changes may need to be addressed:
 - Amend safe harbor event for casualty loss to disregard Code Section 165(h)(5) limitations
 - Add expenses incurred following a disaster that occurs in a FEMA designated area
 - Require participant representation of financial need

Birth Control Coverage

- **2010** – Affordable Care Act preventive care requirement
- **2011** – Health Resources and Services Administration (HRSA) guidelines
 - Contraceptive mandate
- **2011 – 2012** – IRS, DOL and HHS – Exemption for “religious employers”?
- **2014** – Hobby Lobby – Religious Freedom Restoration Act
- **2014** – IRS, DOL and HHS – “Religious employers” include closely held for-profits with religious objection
 - Self-certification requirement

Birth Control Coverage *(cont'd)*

- **2017** – Interim Final Regulations
 - Sincerely held moral conviction
 - No notice and comment period; enjoined for failure to follow Administrative Procedures Act
- **2018** – Final Regulations
- **1/14/2019** – *Pennsylvania v. Trump*
 - Eastern District of Pennsylvania
 - Stay of enforcement nationwide
 - APA failures
 - Regulations are inconsistent with statute

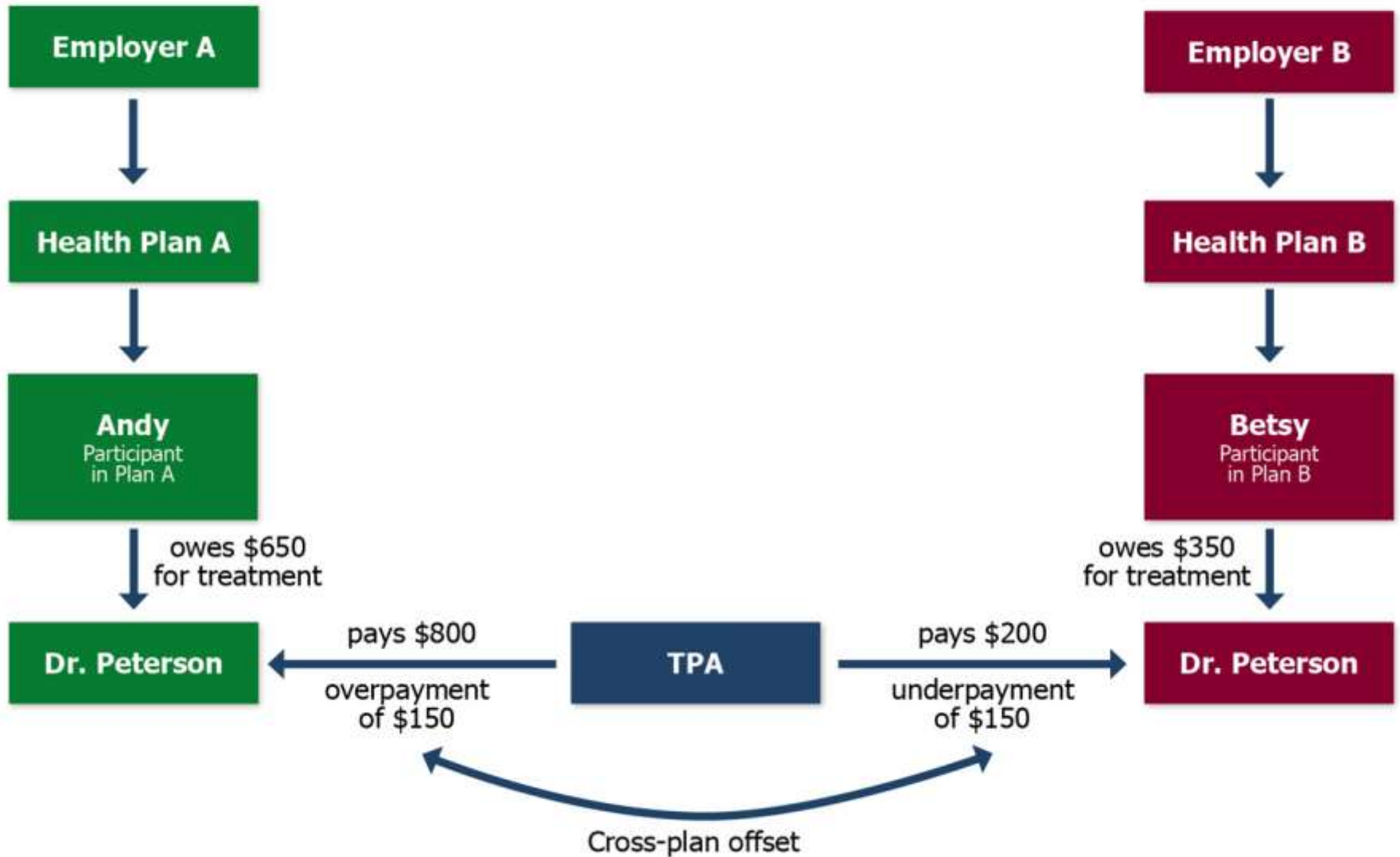
Prescription Drug Costs

- **Prescription drug costs continue to increase each year**
- Benefit plans continue to incorporate designs to address increasing costs:
 - Repricing
 - Purchasing cooperatives
 - Pharmacy benefit carve-outs (PBMs)
 - Formulary changes
 - Prior authorizations
 - Step therapy
 - Negotiating specialty drug vendor contracts
 - Terminating retiree coverage

Prescription Drug Costs *(cont'd)*

- **Additionally, the government is concerned that rebates paid to pharmacy benefit managers result in a conflict of interest**
- Proposed rule prohibits the receipt of rebates by PBMs who provide Medicare and Medicaid benefits
 - DOL Enforcement Initiative
- Expected to trickle down to employer-sponsored plans
- But effect of change is uncertain. Higher premiums? Higher costs?

Cross-Plan Offsetting



Problems

- Dr. Peterson can balance bill Betsy for \$150
- DOL says:
 - Cross-plan offsetting violates fiduciary duties
 - To use Plan assets exclusively to pay benefits; and
 - To act exclusively in Plan participants' interests
 - Potentially self-dealing using Plan assets for TPA's own benefit
- Court of Appeals ruled against TPA and Plan because Plan document didn't provide for cross-plan offset

What To Do

- Ask TPA if it employs cross-plan offsetting
- Check Plan documents to determine if cross-plan offsetting is permitted
- Ask TPA if Plan can opt out of cross plan-offsetting

Cybersecurity

- **Increased enforcement efforts by OCR**

	2016	2017
# of complaints	146,345	171,161
#/% of cases resolved	143,230 (97%)	164,252 (98%)
Settlements/penalties	\$48,679,700	\$75,229,182
Investigations with no violation	17,905	11,386
Referrals to DOJ	596	664

Cybersecurity *(cont'd)*

- Most prevalent compliance issues:
 - Impermissible uses and disclosures of PHI
 - Lack of administrative safeguards of EPHI
 - Lack of individual access to their PHI
 - Lack of technical safeguards

Employee Misclassification

- **Utilization of independent contractors and contingent workforce can create liability exposure under benefit plans**
- Benefit plan requirements relate to coverage for employees
 - Employee Retirement Income Security Act of 1974, as amended
 - Internal Revenue Code of 1986, as amended

Employee Misclassification *(cont'd)*

- Employer penalties imposed under ACA for failure to offer minimum essential coverage to full-time employees
- Penalties for failure to report taxes and deposit withholding can apply
- Joint employer liability under labor laws may be implicated
- IRS guidance looks to facts and circumstances to determine whether entity directs and controls the individual's work schedule and job performance
 - Similar guidance under ERISA

Employee Misclassification *(cont'd)*

- Leased employees can be considered “common law employees” for these purposes
- Employees covered under professional employer organizations (PEOs) are generally employees of the recipient organization
- Employers should be consistent with their classification of individuals performing similar duties and retain documentation of decisions

Missing and Unresponsive Participants

- Department of Labor Guidance (DOL–FAB 2014-01)
 - Expressly for terminated defined contribution plans
 - Search methods
 - Certified mail
 - Plan related and employer records
 - Beneficiary
 - Free electronic search
 - Other cost-effective methods

Missing and Unresponsive Participants

(cont'd)

■ IRS Guidance

- Field directive – Audit standards regarding required minimum distributions (RMDs)
- No challenge of failure to make a distribution if:
 - Searched plan and sponsor records
 - Certified mail
 - Used search method
 - Commercial locator
 - Credit reporting
 - Proprietary internet search tool

Missing and Unresponsive Participants

(cont'd)

- PBGC Missing Participant Program
 - Applies to terminating defined contribution plans
 - Diligent search required
 - Fees
 - \$35/participant
 - No fee if account less than \$250