

ABA Joint Committee on Employee Benefits

Health and Welfare Update

**What Plan Sponsors Should
Be Doing Now**

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Presented by

Andy R. Anderson, Esq. Morgan, Lewis & Bockius

Julie H. Burbank, Esq. Trucker Huss APC

Mark L. Stember, Esq. Kilpatrick Stockton LLP

Julie H. Burbank
Trucker Huss APC

Health & Welfare Plan Amendment Timing

- Proposed Section 125 Regulations make clear there is no retroactive amendment period for cafeteria plans
- Tax Court cases have held similarly in the case of health plans
 - *American Family Mut. Ins. Co. v. United States*, 815 F. Supp. 1206 (W.D. Wis. 1992)
 - *Wollenberg v. United States*, 75 F.Supp.2d 1032 (D. Neb. 1999)

Health & Welfare Plan Amendment Timing

- Treasury and IRS officials at recent ABA Tax Section Meeting informally indicated that there has never been a remedial amendment period for health and welfare plans like there is for qualified plans
 - Rationale is that the Internal Revenue Code specifically permits a remedial amendment period for qualified plans
 - No such rule in the Internal Revenue Code with respect to health and welfare plans

Health & Welfare Plan Amendment Timing

□ Upcoming deadlines

- For health and welfare plan changes that are to be effective for January 1, 2008
 - Draft and execute required plan amendments by December 31, 2007
 - Issue Summaries of Material Modification or new Summary Plan Descriptions
 - No later than 60 days after amendment effective date if change is a material modification to a health plan
 - No later than 210 days after the end of the plan year in which the change is adopted if change is NOT material

Domestic Partner Issues

- ❑ Many health and welfare plans provide benefits for domestic partners
- ❑ Domestic partner status may be determined with reference to:
 - Internal Company Affidavit
 - State Registry
 - Local Registry
 - State or local contractor laws that mandate domestic partner benefits

Domestic Partner Issues

- ❑ Many health and welfare plans now provide benefits for domestic partners
- ❑ Ongoing issues as to how a domestic partner will be defined
- ❑ Generally imputed income with respect to the employee covering a domestic partner
- ❑ May be different tax consequences for Federal and State purposes in States that recognize domestic partners

Domestic Partner Issues

- ❑ More states are now providing definitions and state registries for domestic partners
- ❑ If plan documents define domestic partner by reference to state laws they need to be updated periodically to reflect current law
- ❑ Note that this list of states continues to grow

Domestic Partner Issues

- Same Sex Marriages: Massachusetts
(*Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003))
- Civil Unions
 - Vermont – Effective July 1, 2000
 - Connecticut – Effective October 1, 2005
 - New Jersey – Effective February 19, 2007
 - New Hampshire – Effective January 1, 2008

Domestic Partner Issues

- Domestic Partners
 - California – Effective October 10, 1999
 - New Jersey – Effective January 12, 2004
 - Maine – Effective July 20, 2004
 - Washington – Effective July 22, 2007
 - Oregon – Effective January 1, 2008
- Reciprocal Beneficiaries: Hawaii (since 1997)
- Some spousal-like rights: District of Columbia

Wellness Programs

- Much activity around wellness programs in 2006, 2007 and heading into 2008
 - Common goal of employers to promote activities that will lead to a healthier workforce
 - Wellness programs are an integral part of various government health care proposals
- What's coming next?
 - On-site medical clinics (but that is a topic for a different day)

Wellness Programs

- ❑ Final regulations on HIPAA nondiscrimination and wellness programs were issued by the Departments of Treasury, Labor and Health and Human Services on December 13, 2006
- ❑ Apply for plan years beginning on or after July 1, 2007
- ❑ Calendar year plans must comply beginning January 1, 2008

Wellness Programs

- Common Wellness Programs
 - Chronic condition/disease management
 - Smoking cessation
 - Nutrition programs
 - Weight loss programs
 - On-site fitness centers
 - Health risk assessments via questionnaires
 - Often part of the open enrollment process

Wellness Programs

- Specific issues related to health risk assessment questionnaires
 - The EEOC is “very interested” in how these are being used by employers
 - Questions being asked may violate the Americans with Disabilities Act
 - Recommend that you consult with your employment lawyers before implementing mandatory health risk assessments

Wellness Programs

- General Wellness Program Issues
 - Who is responsible for the Wellness Program?
 - Benefits or HR department that is responsible for the Company's group health plan(s)
 - Company medical department
 - Company occupational health department
 - Is the Wellness Program subject to the HIPAA regulations?

Wellness Programs

- General Wellness Program Issues
 - Is the Wellness Program part of the Company's group health plan?
 - If yes, it should be addressed in the Plan document and SPD
 - Incentives such as premium discounts or smoker surcharges should be clearly documented

Wellness Programs

- General Issues related to Wellness Programs
 - If the Wellness Program is not part of your group health plan, does the Wellness Program create a stand alone group health plan?
 - ERISA definition of group health plan

Wellness Programs

- General Issues Related to Wellness Programs
 - If the Wellness Program does create a stand alone group health plan, it may be subject to ERISA's reporting and disclosure requirements, COBRA, HIPAA, etc.
 - Or it may qualify as a HIPAA "excepted benefit"

California Military Spouse Leave Law

- ❑ California Assembly Bill 392 was signed by Governor Schwarzenegger on October 9, 2007
- ❑ Effective immediately
- ❑ Affects employers with 25 or more employees in the United States

California Military Spouse Leave Law

- Applies to California employees who
 - work an average of 20 or more hours per week; and
 - whose spouses are members of the U.S. Armed Forces who have been deployed to a combat theater or combat zone; or
 - whose spouses are members of the National Guard who have been deployed during a period of military conflict

California Military Spouse Leave Law

- Eligible employees may take up to 10 days of unpaid leave when their spouse is on leave from deployment

California Military Spouse Leave Law

- Requirements to take leave
 - Eligible employee must provide notice to the employer no later than two business days after getting official notice that spouse will be on leave from deployment
 - Eligible employee must provide written documentation certifying that the spouse will be on leave from deployment for the period the employee is requesting leave

San Francisco Laws – Paid Sick Leave

□ Paid Sick Leave Ordinance

- Administrative Code Chapter 12W
- Effective February 5, 2007
- For details see:

http://www.sfgov.org/site/uploadedfiles/olse/SickLeaveOrdinance/PSLO_FAQ_POSTED.pdf

San Francisco Laws – Health Care Security Ordinance

- Health Care Security Ordinance
 - Administrative Code Chapter 14
 - Requires covered employers to make health care expenditures for their covered employees; and
 - Mandates the San Francisco Department of Public Health (DPH) to create the Health Access Plan (HAP)
 - Now called *Healthy San Francisco*.

San Francisco Laws – Health Care Security Ordinance

- Scheduled to become effective:
 - January 1, 2008, for employers with 50 or more employees; and
 - April 1, 2008, for for-profit employers with 20 or more employees

San Francisco Laws – Health Care Security Ordinance

- ❑ For 2008, "covered employees" include any person who has been employed by his or her employer for at least 90 calendar days and performs at least 10 hours of work per week within the geographic boundaries of the City and County of San Francisco
- ❑ For 2009, the 10 hours reduces to 8 hours

San Francisco Laws – Health Care Security Ordinance

- Health Care Security Ordinance
 - The Golden Gate Restaurant Association is challenging the Employer Spending Requirement of the Ordinance
 - A hearing was held on November 2, 2007
 - For details see:
 - http://www.sfgov.org/site/olse_index.asp?id=45168

Mark L. Stember
Kilpatrick Stockton LLP

Overview

- General Principles.
- New 2nd Circuit SPD Rule.
- Plan Document Provisions.
- Unique Situations.

Health Plan Litigation Overview

Participant Population

- Not creating a culture of litigation.
- Retirees have time on their hands.

General Issues

- Update plan documents and SPDs timely.
- Any ambiguity will be used to create an issue where one would not have existed before.
 - Align plan document and SPD language.
 - Align language within plan and SPD.
 - Align benefit newsletters and enrollment guides.

2nd Circuit SPD Rules

- Old Rule: *Devlin v. Empire Blue Cross*, 274 F.3d 76 (2nd Cir. 2001).
 - No reservation of rights causes modification issues.
 - Benefit modification and employer contribution modifications.

- A New Twist: *Frommert v. Conkright*, 433 F.3d 254 (2nd Cir. 2006); remand 472 F.Supp. 2d 452 (WDNY 2007).
 - Plan amendments are not effective until participants are officially informed via SPD or SMM.

2nd Circuit SPD Rules – cont.

□ Frommert Takeaway.

- Employers governed by the 2nd Circuit should communicate plan changes via SPD or SMM prior to effective date.
- Employers with employees in the 2nd Circuit should do the same.

Benefit Newsletters and Enrollment Guides

- Benefits Newsletters.
 - Ambiguity issue.
 - Disclaimers.
 - Official plan documents control.
- Enrollment Guides.
 - Opportunity to communicate plan changes.
 - Make your enrollment guide an SMM.
 - Disclaimers.

Plan Document Provisions

- Overview of Goals.
 - Reduce plaintiff arguments.
 - Fully exhaust administrative claims process.
 - Restrict potential for litigation.

Plan Document Provisions – cont.

- Plan amendments.
 - Review and revise amendment procedures in plan document.
 - Follow amendment procedures in plan document.
 - Wrap plans.
 - Incorporate SPDs by reference.
 - List SPDs incorporated into plan.
 - SPD should automatically amend the plan document as published.
 - Update SPDs prior to effective date of amendment.

Plan Document Provisions – cont.

- Plan amendments – cont.
 - Restatement argument.
 - Restatement of plan causes existing delegations to become ineffective because plan restatement creates new amendment process (even if existing process not changed).
 - Means next amendment to plan is not properly adopted.
 - Draft proper plan language that provides an amendment or restatement does not affect existing delegations to amend.

Plan Document Provisions – cont.

- Exhaustion of Administrative Remedies.
 - Argument: Participants do not have to file an administrative claim for a non-benefit claim / issue.
 - Argument: Claim and appeal language does not provide for non-benefit claims and appeals.
 - Non-benefit claims.
 - Improper plan amendments.
 - Plan interpretation issues.

Plan Document Provisions – cont.

- Exhaustion of Administrative Remedies - cont.
 - Plan document and SPDs should provide any claim, issue or matter with respect to the plan must follow claim and appeal process.
 - Plan document and SPD should allow plan administrator to follow benefit claim process or institute a new procedure for non-benefit claims.

Plan Document Provisions – cont.

□ Claims Limitations

- Statute of limitations under state law will apply unless the plan document provides for a different limitations period.
- ERISA plan document limitations period will preempt state law.
- Claims period must be reasonable.
 - Doe v. Blue Cross & Blue Shield of Wisconsin, 112 F.3d 869 (7th Cir. 1997).
 - Northlake Regional Medical Center v. Waffle House System Employee Benefit Plan, 160 F.3d 1301 (11th Cir. 1998).

Plan Document Provisions – cont.

Claims Limitations – cont.

- Appeal completion date is a moving target.
- Service date is a static date.
 - Must include claims and appeal period.
 - Two years from completion of appeal versus four years from service date.
- Must include separate limitation period for non-benefit claims.

Plan Document Provisions – cont.

- Restriction on Venue.
 - Bernokow v. Xerox Long Term Disability Plan, 2006 WL 2536590 (CD Cal. 2006).
 - Must be reasonable and related to plan.

Dependent Audits

- ❑ Successful Dependent Audits.
- ❑ Plan before starting the audit.
 - Plan documents and SPDs.
 - ❑ Cooperation requirements.
 - ❑ Termination or suspension of participation for fraud / misrepresentation.
 - ❑ Repayment of claims for ineligible.
 - ❑ Dependent rules.
 - Full-time students.
 - Disabled children.
 - Foster children / legal guardians.
 - Amnesty periods.

Fraud

- Plan documents and SPDs.
 - Termination or suspension of participation.
 - Repayment of improper claims.
- Ineligible Dependents.
- Neighborhood health card.
- Filing false claims.

Rights of Reimbursement

- Auto insurance issues.
 - Proper plan document and SPD language.
 - Is underinsured and uninsured coverage insurance if not specifically named.
 - No fault states – COB issues.
- Sue for benefit repayment if can't find the recovery.

Andy R. Anderson
Morgan, Lewis & Bockius

Cafeteria Plans

- Document by 12/31/2008—but what to document?
 - Final regs not expected until after June
 - There are, though, many steps that can be taken now
 - Start by stepping back and analyzing broader design, pricing, and coverage issues
 - Mix in a dollop of state law, too

Cafeteria Plans

- Start at the beginning:
 - Why have a cafeteria plan?
 - Pre tax premiums (ER FICA savings, too)
 - Choose between tax-free and taxable benefits
 - i.e. opt out credits
 - Spending Accounts
 - Medical
 - Dependent Care
 - Transportation
 - Adoption

Cafeteria Plans

- Bottom Line:
 - If employees pay for employer coverage, do it on a pre-tax basis!
 - Opt Out Credits create design flexibility
 - Everyone can benefit from a medical FSA
 - New opportunity to buy individual coverage on a pre-tax basis
 - State Law mandates
- **All** employers should have a cafeteria plan

Cafeteria Plan

- Who should be in the plan?
 - All employees with medical coverage
 - All employees?
 - Consider MA, CT, MO, RI—more to come
 - Consider new pre-tax opportunity for individual coverage
- What should it provide?
 - Only ER coverage?
- How should benefits be priced?
 - Same for all employees?

Cafeteria Plan

- Likely Changes—and steps to take now:
 - GTL imputed income
 - Vacation day buy/sell rules
 - Get it in writing
 - End grace period?
 - Root out nonqualified after-tax benefits
 - Focus on delayed eligibility
 - Dependent care spend-down after termination
 - Debit card vendor rules
 - Discrimination analysis

Medicare Part D

- Revised creditable coverage notices
 - See:
http://www.cms.hhs.gov/CreditableCoverage/10_CC_afterFeb15.asp#TopOfPage
- Employer Part D Notice to CMS
 - See: http://www.cms.hhs.gov/CreditableCoverage/40_CCDislcasure.asp#TopOfPage
- Employer reconciliation of 2006 Part D Subsidy
 - Postponed until March 31, 2008
 - Audit accuracy of vendor?