Worksite Clinic – Legal Refresher

- **ERISA**: Clinic not an ERISA plan if facility limited to treatment of minor injuries/illnesses or rendering first aid in the case of work accidents

- **COBRA**: Health clinics generally are group health plans subject to COBRA, but not if it is an on-site first aid facility limited to treating employees for illness or injury incurred during working hours at no charge to the employee

- **HIPAA & Related Laws**: Considered an “excepted benefit” and therefore not a “plan” subject to portability or privacy requirements, Mental Health Parity, Women’s Health & Cancer Rights Act, and Newborns’ & Mothers’ Health Protection Act, **but…**

- A Clinic may be a health care provider which is a covered entity for **HIPAA Privacy & Security Rule** purposes if it conducts electronic standard transactions

- **Tax & Reporting Issues**:
  - Employer-provided coverage under an accident or health plan is excluded from employees’ income
  - W-2 Reporting – special transition rule: include if clinic is a group health plan and charge a COBRA premium for continued use
Worksite Clinic Coverage May Limit HSA Eligibility

- To be eligible to make HSA contributions, individual generally must be covered by a high deductible health plan ("HDHP") and not have any non-HDHP coverage

- Limited exceptions for “permitted other coverage” (e.g., dental, disability, vision) and preventive care (e.g., well-child care, immunizations, tobacco cessation, ACA-mandated preventive care)
  - IRS guidance also permits EAPs, disease-management programs, and wellness programs if benefits not significant (e.g., short-term counseling for issues affecting job performance, diabetes management, stress management, health screenings)

- Problematic if the clinic provides significant medical benefits for free or at a reduced cost – this is a facts and circumstances determination:
  - Employer operates an on-site clinic that provides physicals, immunizations, allergy injections, non-prescription pain relievers, and treatment for injuries caused by workplace accidents >>> these benefits do not limit HSA eligibility
  - Hospital permits employees to receive care at its facilities and waives all deductible and co-pays >>> these are significant medical benefits which do limit HSA eligibility
Potential Strategies for HDHP/HSA Coordination

- Limit clinic benefits: providing preventive care, “permitted” coverage, and similar “insignificant” benefits will not destroy HSA eligibility

- Offer only post-deductible coverage: can offer all types of medical benefits after individual has satisfied IRS minimum deductible
  - $1,300 ($1,350 in 2018) for self-only coverage; $2,600 for family coverage ($2,700 in 2018)
  - plan deductible may be higher

- Charge Fair Market Value: determine FMV for the services provided
Worksite Clinics & the “Cadillac Plan” Excise Tax

- Beginning in 2020, a 40% nondeductible excise tax on high-cost health coverage to be imposed on the “coverage provider” - tax applies to an employee’s “excess benefit” – the amount the cost of applicable coverage exceeds a statutory threshold (initially set at $10,200 for individuals and $27,500 for families)

- Generally, coverage provided by on-site medical clinics is subject to this tax
  - 2010 Congressional report suggests that intent was to have an exception for on-site medical clinics that offer only “de minimis” medical care

- Initial IRS guidance: IRS “anticipates” proposed regulations will provide for such an exception
  - Would avoid burden on calculating cost of coverage for on-site clinic medical care offering limited services
Worksite Clinics & The Cadillac Plan Excise Tax – Many Open Questions

- What can a clinic offer and still be excluded as “de minimis” medical care?
  - One possibility: COBRA excludes certain on-site medical clinics providing first aid
  - IRS has requested comments on how to define “de minimis”:
    • Nature/scope of benefits or
    • A specific dollar limit on the cost of services provided, or
    • Both (or other?)

- Additional guidance is needed on how the tax will apply
Wellness Program Rules Continue to Evolve

- Under Final ADA Rule, wellness programs must:
  - Be reasonably designed to promote health or prevent disease
  - Be voluntary (note new guidance on incentives if program is a group health plan)
  - Keep employee medical information confidential
  - Provide reasonable accommodations (absent undue hardship)
  - Notify employees about how their medical information may be used (if program is a group health plan)

Caution: while there is some overlap in the EEOC ADA rule and the HIPAA Wellness Rules, compliance with one rule will not automatically mean compliance with the other.
What is “Voluntary” for ADA Purposes?

- Cannot deny coverage or limit benefits under a plan (includes limiting people to particular benefits packages) if employee does not participate.
- Cannot take any adverse employment action or retaliate against employees (e.g., for refusing to participate in the program or for filing a charge with the EEOC concerning the program).
- If program is part of a group health plan, can offer incentive of up to 30% of total cost of employee self-only coverage.
AARP v. EEOC

- AARP challenged the EEOC regulations, asserting that the incentive penalized employees and their spouses who choose not to fill out medical questionnaires or undergo medical screenings and violated their privacy.

- District Court granted summary judgement in favor of the AARP on August 22, 2017.
  - Concluded that the EEOC failed to give a reasoned explanation for its interpretation of the term “voluntary”.
  - Order does not vacate the EEOC regulations.
What about Health Care Reform 2.0?

▪ Repeal/replace?

▪ Budget reconciliation may be used to address health care reform and tax reform, but this process has limitations
  - Law must address spending, revenue, or debt levels
  - Note September 30th deadline

▪ Repeal of the Cadillac Tax seems to have broader bi-partisan support than many other ACA reforms
  - But how would we pay for it?
    • Estimated that the Cadillac tax will bring in approximately $90 billion of revenue over the next decade
Regulatory Process Continues...Slowly

- Trump Executive Order on ACA (January 20, 2017)
  - “To the maximum extent permitted by law, [the IRS, DOL, and HHS]... shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the [ACA] that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.”

- Regulatory agencies not yet fully staffed
- How long do we wait for possible legislative changes?
Questions