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Recent Employee Benefit Developments

Amending Retirement Plans to Recognize Same-Sex Marriages
Plan sponsors need to review retirement plan documents and operations to determine whether changes are needed in response to last year's Supreme Court decision in *U.S. v. Windsor* and subsequent IRS guidance. Under most circumstances, any needed plan amendments should be adopted no later than December 31, 2014.

In *Windsor*, the Court struck down Section 3 of the Defense of Marriage Act (DOMA), which denied federal recognition to same-sex marriages. As a result, plan sponsors were required to change their plan administrative practices to provide same-sex spouses with the rights required by federal law. For example, same-sex spouses of participants in profit-sharing, 401(k) and other defined contribution plans must be treated as the default beneficiary, unless they consent to the participant's designation of another beneficiary. Refer to our prior client alert for a list of spousal rights under qualified plans that must be provided to same-sex spouses.

Following the *Windsor* decision, the IRS has released guidance providing additional direction to plan sponsors. First, the IRS issued Revenue Ruling 2013-17, which provides that couples will be treated as married for federal tax purposes if their marriage is legal where it is performed, regardless of where the couple actually resides. Next, the IRS issued Notice 2014-19, which provides guidance on plan document amendments needed to bring plans into compliance with *Windsor*.

Plan sponsors will need to review plan documents and plan operations to determine what actions to take in response to the IRS guidance.

Any plan document that defines a marital relationship in a manner inconsistent with the *Windsor* decision (such as a reference to opposite-sex spouses, or by reference to DOMA) must be amended. Even where an amendment isn't required, the IRS points out that a clarifying amendment may be useful for purposes of plan administration.

The IRS recognizes that many plan sponsors did not know which marriages were required to be recognized in the weeks immediately following the *Windsor* decision. Under the new IRS guidance, a "state of residence" standard may be used between the date of the *Windsor* decision (June 26, 2013) and the effective date of Revenue Ruling 2013-17 (September 16, 2013). Plan sponsors should review plan operations to confirm operational compliance, and to determine if any special effective date provisions are needed.

Revised Model COBRA Notices Address Optional Coverage Under Health Care Exchanges

The Department of Labor has issued revised model COBRA notices that explain the alternative coverage that may be available to COBRA-eligible individuals under the government-sponsored health insurance exchanges established pursuant to the Affordable Care Act (ACA), otherwise known as health care reform.

The model general COBRA notice (provided when a covered individual first enrolls in the plan) has been revised to include two new paragraphs indicating that a COBRA-eligible individual may be able to elect coverage under a government-sponsored health insurance exchange in lieu of electing COBRA continuation coverage and that the cost of such coverage may be cheaper than COBRA continuation coverage.

The model COBRA election notice (provided when a COBRA qualifying event occurs) has been revised to include the following information:

- A general summary of the coverage option under the government-sponsored health insurance exchanges;
- A statement that coverage under the government-sponsored health insurance exchanges may be cheaper than COBRA continuation coverage;
- The link to the federal website that provides additional information about the government-sponsored health insurance exchanges;
- Factors to consider when choosing between COBRA continuation coverage and coverage under a government-sponsored health insurance exchange; and
- Rules for switching between COBRA continuation coverage and coverage under a governmental-sponsored health insurance exchange including the prohibition against a mid-year election of coverage under a health insurance exchange if COBRA continuation coverage terminates early (e.g., for failure to pay premiums).

Employers are not required to use the revised model COBRA notices. However, the model notices are deemed to be good faith compliant with the disclosure requirements under COBRA.

Employers should either begin using the revised model COBRA notices or review and revise their customized COBRA notices to reflect the changes in the revised model documents.

Please feel free to contact us if you have questions about the revised COBRA model notices or need assistance in updating your COBRA notices.

Health Plan Identifier Deadline Approaching

Large health plans ($5 million in claims) are facing a deadline of November 5, 2014 to secure a health plan identifier number from CMS. The requirement arises under HIPAA privacy. While insurers are expected to secure identifiers for fully insured plans, the requirement also applies to self-insured plans. Sponsors of these plans should be certain to obtain the required identifying number from CMS. Please contact a Thompson Coburn employee benefits attorney if you want more information about this requirement.

Reinsurance Fees

Group health plans that provide major medical coverage will be assessed a "transitional reinsurance fee" for 2014, 2015 and 2016. The fee is $63 per participant per year for 2014, $44 per participant per year for 2015 and still to be set for 2016. Participant counts are based on the first nine months of each year must be submitted to HHS by November 15, 2014, 2015, and 2016.

Plans that provide "excepted" benefits (e.g. EAPs, or stand-alone dental or vision plans) are exempt, as are so-called "skinny" plans that do not provide "minimum value." (Generally, "minimum value" means that the plan's share of the total cost of plan benefits is at least 60%.) Additionally for 2015 and 2016 only, self-insured plans that are also self-administered (generally large multiemployer plans) are exempt from the fee.

For insured plans, the insurer is responsible for paying the fee. For a self-insured plan the plan is responsible, but may use a third-party administrator to transfer the fees.

An "ACA Transitional Reinsurance Program Annual Enrollment and Contributions Submission Form" will be available on pay.gov on which the participant count and other information must be submitted and the form will auto-calculate the contribution amount. HHS will offer training on this process. There are four methods for determining the average number of participants – these are the same methods that may be used to calculate the Patient Centered Outcomes Research Institute (PCORI) Fee.

The fee is due in two installments. For 2014, the first installment in the amount of $52.50 per participant is due January 15, 2015. The second installment of $10.50 per participant is due in the fourth quarter of 2015. For 2015, the two installments will be $33 per participant due January 15, 2016 and $11 per participant due in the fourth quarter 2016.

The fee can be passed on to participants or paid from plan assets. It is deductible as a business expense.

The purpose of the fee is to raise a total of $25 billion, $20 billion of which will be paid to insurers who are offering coverage in the individual market for higher risk populations. The remaining $5 billion is to be paid to the U.S. Treasury for the costs of the early retiree reinsurance program (ERRP).

Group Health Plans - HIPAA Business Associate Agreements

Final regulations issued by the Department of Health and Human Services in 2013 included changes to the HIPAA privacy, security and breach notification rules. Among others, the final regulations included the following changes:

- Expanded the definition of "business associate" to include any entity that creates, receives, maintains or transmits protected health information ("PHI"); and
- Made business associates directly subject to designated portions of the rules.

Documentary compliance with the final regulations was generally required by September 23, 2013, including new or updated business associate agreements ("BAAs"). A special transition rule applies to BAAs that were in place as of January 25, 2013 and not modified between March 25, 2013 and September 23, 2013. BAAs qualifying for transition rule are deemed compliant with the final regulations until the earlier of (i) the date the BAA is renewed or modified, and (ii) September 22, 2014.

Now is the time for employers to review each of their group health plans to identify business associates, determine whether up-to-date BAAs are in place, and take steps to establish new or modified BAAs as needed by September 22, 2014.

Hobby Lobby Decision

On June 30, 2014, the Supreme Court of the United States in a 5-4 decision ruled in Burwell v. Hobby Lobby Stores, Inc. that, because of the Religious Freedom Restoration Act, the contraceptive mandate under the Affordable Care Act cannot be imposed on a closely held, for-profit company in violation of the religious beliefs of the company's owners. The decision directly impacts only certain closely-held companies. The long-term impact of the decision is uncertain. Justice Kennedy

concurring in the opinion of the Court emphasized the narrowness of the decision while Justice Ginsberg writing in dissent asserted that the decision had "startling breadth."

If you have questions regarding the above-referenced decisions, deadlines, or other employee benefits issues, please contact your Thompson Coburn attorney or a member of Thompson Coburn's Employee Benefits Group.

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