



THE LATEST WORD ON EMPLOYEE BENEFITS: Update on Affordable Care Act and Wellness Programs

Presented by Kathryn A. English and Sandra R. Mihok
Eckert Seamans Cherin & Mellott, LLC

Human Resources Forum
May 19, 2016

PRACTICE AREAS:

[Employee Benefits & Executive Compensation](#)

STATE ADMISSIONS:

New York
Pennsylvania
District of Columbia

EDUCATION:

J.D., New York University School of Law, 1994
B.A., cum laude, University of Notre Dame, 1991



Kathryn A. English

MEMBER, BOARD OF DIRECTORS

VICE CHAIR, BUSINESS DIVISION

Kate English practices exclusively in the employee benefits area, working with global public companies and privately held companies of all sizes regarding Employee Retirement Income Security Act (ERISA), tax, and executive compensation matters. She provides advice and counseling concerning compliance with ERISA, tax, and other related laws, and provides support in litigation and collective bargaining. Kate represents clients before federal agencies responsible for regulation of employee benefits. She assists companies going through mergers and acquisitions with assessing liabilities related to employee benefits and determining how to best transition benefits in such circumstances. Kate also provides advice concerning compliance with the reporting, fiduciary responsibility, and prohibited transactions requirements of Title I of ERISA, and assists employers with matters relating to multiemployer plans, including multiemployer pension plan withdrawal liability.

Kate is a regular speaker on employee benefits topics.

REPRESENTATIVE MATTERS

- Represents employers on a variety of employee benefits matters, including the design and ongoing administration of qualified retirement plans, health and other welfare plans, deferred compensation plans, and stock option and other incentive arrangements, including the requirements of Internal Revenue Code Section 409A.
- Represents employers and other ERISA plan fiduciaries in proceedings before the U.S. Department of Labor, including submissions under the Department's Voluntary Fiduciary Correction Program and requests for prohibited transaction exemptions.
- Represents employers in proceedings before the Internal Revenue Service, including filings under the Service's Employee Plans Compliance Resolution System and requests for favorable determination letters for qualified plans.

- Represents employers in proceedings before the Pension Benefit Guaranty Corporation, including requests for waiver of minimum funding requirements and negotiation of liability relating to facility shutdowns.

AWARDS AND RECOGNITION

- Selected for inclusion in *The Best Lawyers in America*
- Selected for inclusion in Best Lawyers 2016 Employee Benefits (ERISA) Law "Lawyer of the Year" in Pittsburgh
- Attained an AV® Preeminent™ rating from Martindale-Hubbell

NEWS AND INSIGHTS

Speaking Engagements:

- "Health and Welfare Plan Update," co-presented with Heather Stone Fletcher, Pennsylvania Bar Institute ERISA Update, June 2015.
- "Affordable Care Act: Where Are We Now?" co-presented with Sandra Mihok, Eckert Seamans' CLE, August 2014.
- "Assessing the Health/Welfare Plan Environment," co-presented with Sandra Mihok, PBI ERISA Update, March 2013.
- "Hot Topics in Health Insurance," co-presented with Sandra Mihok, PBI 16th Annual Insurance Institute, May 2012.
- "The Clock Ticks on Health Care Reform," Eckert Seamans' CLE, August 2011.

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PRACTICE AREAS:

[Employee Benefits & Executive Compensation](#)

[Health Care](#)

[Health Insurance Portability & Accountability Act – HIPAA](#)

[Tax](#)

[Data Security & Privacy](#)

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

U.S. Court of Appeals for the Third Circuit

EDUCATION:

J.D., magna cum laude, Duquesne University School of Law

B.A., summa cum laude, University of Pittsburgh

Sandra R. Mihok

MEMBER

OVERVIEW

Sandra Mihok acts as outside benefits counsel for plan sponsors and fiduciaries, advising on special projects and day-to-day matters involving employee benefit plan administration and tax, Employee Retirement Income Security Act (ERISA), and Health Insurance Portability and Accountability Act (HIPAA). She plays a key role in her clients' fiduciary compliance management by regularly attending plan committee meetings and providing training, education, and advice.

She specializes in matters ranging from qualified retirement plans and executive compensation to health and welfare and retiree medical benefits. Sandra regularly represents clients in matters involving the Internal Revenue Service (IRS), Department of Labor (DOL), Pension Benefit Guaranty Corporation, and Department of Health and Human Services (HHS) on issues such as government audits, voluntary corrections under the IRS and DOL correction programs, and HIPAA investigations.

REPRESENTATIVE MATTERS

- Provides plan sponsors and fiduciaries with consulting, advice, and practical solutions for the design, drafting, operation, and communication of tax-qualified retirement plans, including defined pension plans; cash balance plans; 401(k) plans; profit sharing plans; employee stock ownership plans; health, disability, life, severance and other welfare benefit programs; nonqualified deferred compensation arrangements; and governmental plans of state and local governments.
- Provides fiduciary training, education, and advice to plan administration and investment committees.
- Provides plan sponsors, fiduciaries, and health care providers with counseling and advice on privacy and data security issues under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) for employers and health care providers including negotiating business associate agreements.

- Has successfully resolved IRS, DOL, and HHS audits and investigation resulting in abated or significantly reduced penalties.
- Assists the firm's litigation department in ERISA litigation matters, including matters involving federal bankruptcy court, the federal district courts, and federal courts of appeals.

PROFESSIONAL AFFILIATIONS

- Duquesne University School of Law, Adjunct Professor of Law
- Pittsburgh Business Group on Health (PBGH), Member and Speaker
- PBGH Global Benefits Task Force
- Women's Bar Association of Western Pennsylvania
- Worldwide Employee Benefits Network

AWARDS AND RECOGNITION

- Selected for inclusion in *The Best Lawyers in America*

NEWS AND INSIGHTS

Publications:

- "ERISA's impact on data breach lawsuits," HR.BLR.com, April 2016.
- "Affordable Care Act Update: Healthcare reporting for employers," *Eckert Seamans' Construction Law Update*, Fall 2015.
- "Honeywell Lawsuit Takes Aim at Biometric Screenings," *Workforce Magazine*, December 2014.
- "Defense of Marriage Act affects benefits," co-author, Allegheny County Bar Association's *Lawyers Journal*, November 2012.
- "Forum selection challenged by recent litigation and Department of Labor efforts," co-author, *Eckert Seamans' Legal Update*, Fall 2012.
- "Beyond I Do: The Defense of Marriage Act, same-sex marriage and employee benefits," co-author, *Eckert Seamans' Legal Update*, Fall 2012.
- "IRS proposal considers the meaning of 'governmental plan,'" *Eckert Seamans' Legal Update*, Spring 2012.
- "New requirements for pension plans," co-authored with Małgorzata Kosturek, *Eckert Seamans' Construction Law Update*, Spring 2011; *Eckert Seamans' Legal Update*, Summer, 2011.
- "Does your health and wellness plan violate GINA?" *Eckert Seamans' Legal Update*, Spring 2010.
- "The Most Common HIPAA Privacy Mistakes Employers Make," *Workforce Management Magazine*, July 2008.

Speaking Engagements:

- "The Affordable Care Act: Understanding Employer Shared Responsibility and Information Reporting Requirements," co-presented with Heather Stone Fletcher, 2015 Employment Law Institute, Pennsylvania Bar Institute (PBI), November 2015.
- "Beyond the Biometrics II," Eckert Seamans Human Resources Forum, May 2015.
- "Protect My Data: Protection of Confidential Employee Information Under the Health Insurance Portability and Accountability Act," co-presented with Sandy Garfinkel, Eckert Seamans Human Resources Forum, May 2014.
- "Affordable Care Act: Where Are We Now?" co-presented with Kathryn English, Eckert Seamans' Continuing Legal Education Seminar, August 2014.
- "The Affordable Care Act Revisited: What's Hot Now," co-presenter, Eckert Seamans' Human Resources Forum, November 2013.
- "Health Care Reform: What Employers Need to Know Now," Eckert Seamans' Continuing Legal Education Seminar, August 2013.
- "Update on Affordable Care Act and Wellness Programs," Pittsburgh Business Group on Health, July 2013.
- "HIPAA Revisited: New Regulations Impact Privacy Rules and Wellness Programs," Eckert Seamans Human Resources Forum, June 2013.
- "Affordable Care Act/Health Care Update: What's Next?" Eckert Seamans Human Resources Forum, April 2013.
- "Assessing the Health/Welfare Plan Environment," co-presented with Kathryn English, PBI ERISA Update, March 2013.
- "Health Care Reform: Recent Developments & Guidance," co-presenter, Pittsburgh Business Group on Health, March 2013.
- "Health Care Reform: Cost and Benefit Considerations and Implications," co-presenter, Pittsburgh Business Group on Health, February 2013.
- "Health Care Reform: What's Next," co-presented with Paul Yenerall and Elizabeth Goldberg, Pittsburgh Business Group on Health, July 2012.
- "Hot Topics in Health Insurance," co-presented with Kathryn English, PBI 16th Annual Insurance Institute, May 2012.
- "Beyond the Biometrics," co-presenter, Eckert Seamans Human Resources Forum, November 2011.
- "Multiemployer Plans: a Legal Perspective," co-presenter, Pennsylvania Institute of Certified Public Accountants (PICPA) Construction Industry Conference, October 2011.

Latest Word on Employee Benefits: Update on Affordable Care Act and Wellness Programs

Kathryn A. English and Sandra R. Mihok

May 19, 2016



DOL Final Fiduciary Rule

20946 **Federal Register / Vol. 81, No. 68 / Friday, April 8, 2016 / Rules and Regulations**

DEPARTMENT OF LABOR
Employee Benefits Security Administration

29 CFR Parts 2509, 2510, and 2550
RIN 1210-AB32

**Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement
Investment Advice**

AGENCY: Employee Benefits Security Administration, Department of Labor

ACTION: Final rule.

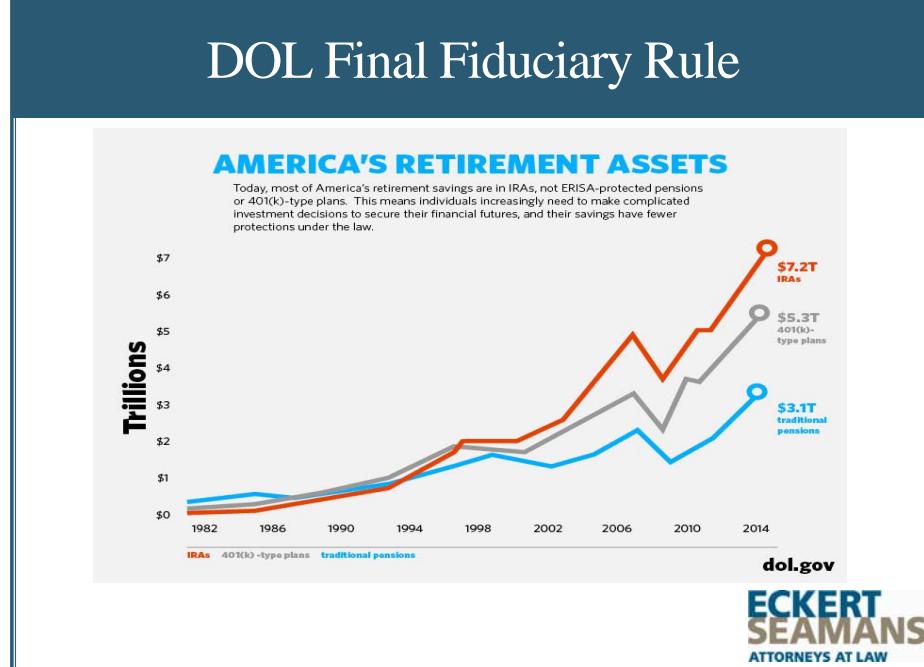
SUMMARY: This document contains a final regulation defining who is a “fiduciary” of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA or the Act) as a result of giving investment advice to a plan or its participants or beneficiaries. The final rule also applies to the definition of a “fiduciary” of a plan (including an individual retirement account (IRA)) under the Internal Revenue Code of 1986 (Code). The final rule treats persons who provide investment advice or recommendations for a fee or other compensation with respect to assets of a plan or IRA as fiduciaries in a wider array of advice relationships.

DATES: *Effective date:* The final rule is effective June 7, 2016.

Applicability date: April 10, 2017.



DOL Final Fiduciary Rule



ACA Affordability of Coverage – Opt-Out Payments

Unconditional opt-out payments will be added to the employee contribution otherwise required for self-only coverage.

Example 1:

Employee is required to contribute \$200 per month toward premium cost for self-only coverage. The employer offers a \$100 per month unconditional opt-out payment. The employee contribution for self-only coverage is \$300 (\$200 + \$100) per month.

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ACA Affordability of Coverage – Flex Credits

Flex credits that are only available for health benefits (called a **health flex contribution**) may be treated as lowering the employee's contribution for self-only coverage.

Example 2: Same employee \$200 contribution. The employer offers flex credit of \$600 for the plan year that may only be applied toward health benefits. The employee's required contribution for self-only coverage is \$150 (\$200 - \$50) per month.



ACA Reporting – Deadlines

IRS Form	Regular Deadline	Special Deadline for 2015 Reports
Form 1095-C Employee Statement (provided to employees)	January 31	March 31, 2016
Form 1094-C Transmittal Form (filed with IRS, along with Forms 1095-C)	Mail: February 28	Mail: May 31, 2016
	E-File: March 31	E-File: June 30, 2016



ACA Reporting – Statutory Penalties

How Late?	Standard Penalty	Maximum Annual Penalty
Within 30 days	\$50 per report	\$500,000
By August 1*	\$100 per report	\$1,500,000
After August 1, or not at all	\$250 per report	\$3,000,000

* For 2015 reports only, August 1 extended to October 1 for employee statements and to November 1 for filing with IRS.



ACA Reporting – Relief from Penalties

From Form 1095-C/1094-C Instructions:

Relief from penalties. For 2015 reporting, the IRS will not impose penalties on a filer for reporting incorrect or incomplete information if the filer can show that it made good faith efforts to comply with the information reporting requirements for 2015. No relief is provided in the case of reporting entities that cannot show a good faith effort to comply with the information reporting requirements or that fail to timely file an information return or furnish a statement. However, consistent with the existing information reporting rules, reporting entities that fail to timely meet the requirements still may be eligible for penalty relief if the IRS determines that the standards for reasonable cause under section 6724 are satisfied.



Wellness Plans – Where Do Things Stand?

- The ACA changed the incentives that could be offered under wellness plans.
- If a wellness program is “health contingent” = activity-based or outcome-based, the total financial reward/penalty that may be given to a participant is limited to 30% of the total premium cost of the employee’s coverage.
- Permits family member participation with discount based on 30% of cost of family coverage, or 50% if the wellness program that includes tobacco cessation.
- There is no limit for programs that only require participation and do not require a certain outcome for the reward/penalty “participation only programs”



Health Contingent Programs

- Annual Qualification: Must give participants ability to qualify for the reward at least once per year. Retroactive qualification may be needed for those who require reasonable alternatives.
- Reasonable Alternatives: For activity based, must provide a reasonable alternative or waive the standard for those for whom the standard is unreasonably difficult or medically inadvisable. For outcome based, must provide reasonable alternatives for all participants.
- Reasonable Design: Must be reasonably designed to promote health or prevent disease. Reasonable chance of improving health or preventing disease, not overly burdensome, not highly suspect in method chosen to promote health or prevent disease.
- Notice of Other Means to Qualify for Reward: Must describe other means to get the reward in program materials. Notice must include contact information and statement that an individual's personal physician will be accommodated.



Wellness Plan Update - EEOC

- Wellness plans are also subject to the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).
- The ADA says that a wellness plan can only require employees to provide medical information or undergo a medical examination if the job-related and consistent with business necessity. Two exceptions:
 - Voluntary or
 - Safe harbor based on sponsoring a bona fide benefit plan for underwriting, classifying or administering risk.
- Under GINA, an employer cannot offer an inducement to obtain "family medical information".
- The Equal Employment Opportunity Commission (EEOC) has the authority to enforce the ADA and Title II of GINA.



EEOC Rulemaking

- EEOC issued proposed rulemaking in April, 2015. Final Rule issued on May 16
- EEOC proposal on financial incentives: ADA allows employers to offer incentives up to 30 percent of the cost of employee-only coverage to employees who participate in a wellness program which asks disability related questions or requires medical exams, and/or for achieving health outcomes.
- There is no parallel provision permitting 30% of family coverage cost if family members participate, nor is there an increase to 50% for smoking cessation.
- Smoking Cessation: EEOC states that program that merely requests if smoker/non-smoker does not ask disability related questions or require medical exams.
- NEW! Final Rule makes additional changes incentive provisions



EEOC Rulemaking

- **When is a health program considered "voluntary"?** In addition to the limit on financial incentives, for programs with medical exam or disability-related inquiries, an employer:
 - may not require employees to participate;
 - may not deny access to health coverage or benefits under its health plans for non-participation; and
 - may not take any other adverse action or retaliate against, interfere with, coerce, intimidate, or threaten employees.
 - A wellness program that is part of a group health plan must also provide notice to employees that details information about what medical information will be obtained, how it will be used, who will receive it, and the restrictions on disclosure.
 - Final Rule: Plan years on and after January 1, 2017



EEOC Rulemaking-Reasonable Design

- The EEOC Proposed Rule requires that a wellness program be reasonably designed to promote health or prevent disease.
- Conducting a biometric screening for the purpose of alerting employees to health risks is acceptable, using the aggregate data to design and offer health programs aimed at specific conditions prevalent in its workforce is also fine.
- If the employer collects medical information (i.e. health risk assessment) but does not provide any follow-up information or advice to employees or use the data to design health programs, the wellness program would not be reasonably designed.
- Using program to predict future health costs is not acceptable



EEOC and Wellness Open Issues

- How does GINA impact spousal participation in a wellness program?
- Will Employee-only 30% rate be final regardless?
- What about the bona fide benefit plan safe harbor?



GINA Rulemaking

- EEOC issued proposed regulations under GINA in October, 2015; Final issued on May 16
- Expands on existing GINA regulations issued in 2008
- Only provides guidance under Title II of GINA which relates to employers
- Treasury, Labor and HHS have jurisdiction over Title I of GINA which relates to group health plans



Genetic Information

- Title II restricts employers ability to request, require or purchase genetic information
- Genetic information includes, for example:
 - Information about genetic test
 - Information about genetic tests of family members
 - Requests for and receipt of genetic services by an individual or family member
 - *Information about the manifestation of a disease or disorder in family members of an individual “family medical history”. Family members include spouse and children.*



Voluntary Wellness Program

- Exception to GINA prohibition is for voluntary wellness programs.
- Prior to proposed regulations inducements were prohibited
- Proposed rule: inducements for family medical history of spouse BUT NOT children
- GINA does not apply to inducements made available in exchange for an employee's spouse engaging in certain activities that do not require obtaining information about current or past health status, such as attending a weight loss or nutrition program or exercising a certain amount each week.
- NEW! EEOC permits inducements for stand-alone wellness programs



Spousal Participation

- The spousal participation may be in the form of a medical questionnaire or a medical exam (i.e. biometric test) or both
- No inducement for spouse providing his or her own genetic information, including results of genetic tests
- Spouse must provide prior, knowing, voluntary and written authorization
- Authorization form must describe GINA's confidentiality provisions

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Type of Inducement

- Inducements must be tied to a health plan
- Inducements may be financial or in-kind (i.e. time-off awards, prizes and other items of value)
- Reward or penalty

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Amount of Inducement – ADA and GINA

- 30 percent of the total cost of
 - (1) self-only coverage under the group health plan in which the employee is enrolled (including both employee and employer cost), if enrollment in the plan is a condition for participation in the wellness program;
 - (2) the lowest cost self-only coverage under a major medical group health plan offered by the employer (including both employee and employer cost), where the employer has more than one group health plan, but enrollment in a particular plan is not a condition for participating in the wellness program; or
 - (3) the second lowest cost Silver Plan available on the Exchange in the location that the employer identifies as its principal place of business if the employer offers no group health plan. In this last instance, the maximum inducement to the employee and the spouse is equal to 30 percent of the cost of covering an individual who is a 40-year-old non-smoker.



Amount of Inducement

- EXAMPLE:
- The total cost of employee-only coverage is \$6,000 and the family coverage is \$14,000.
- Total incentives may not be more than \$1,800 (30% of \$6,000) for the employee. Total spousal incentive may not be more than \$1,800.



Litigation

- On December 31, 2015, the federal district court in the Western District of Wisconsin ruled in EEOC v. Flambeau that an employer's wellness program that required employees to complete a Health Risk Assessment and submit to a biometric screening as a requirement to enroll in the company's health plan did not violate the Americans with Disabilities Act (ADA).
- The decision is based on Section 501(c) of ADA's "bona fide benefit plan safe harbor"



Litigation

- The relevant statutory provision reads as follows:

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law



Litigation

- EEOC has appealed to Seventh Circuit
- If the Seventh Circuit affirms the Flambeau decision on appeal, state of law remains same in Seventh and Eleventh circuits: Alabama, Florida, Georgia, Illinois, Indiana and Wisconsin. (11th Circuit Seth v. Broward County)
- If the Seventh Circuit sides with the EEOC, the issue could go to the Supreme Court



EEOC Final Rule - FAQ

- What is the ADA's "safe harbor" provision, and does it apply to wellness programs that include disability-related inquiries or medical examinations?
- The ADA's safe harbor provision allows insurers and plan sponsors (including employers) to use information, including actuarial data, about risks posed by certain health conditions to make decisions about insurability and about the cost of insurance. Such practices have to be consistent with laws governing insurance and cannot be a subterfuge to evade compliance with the ADA. Without the safe harbor, these practices would violate the ADA by treating some individuals with disabilities less favorably than individuals without those disabilities. Many of the insurance practices the safe harbor permitted at the time of the enactment of the ADA, such as denying health coverage for individuals with pre-existing conditions or charging some individuals in group health plans more than others because of their health conditions, are now unlawful under the Affordable Care Act.
- The safe harbor provision does not apply to employer wellness programs, since employers are not collecting or using information to determine whether employees with certain health conditions are insurable or to set insurance premiums. The final rule adds a new provision explicitly stating that the safe harbor provision does not apply to wellness programs even if they are part of an employer's health plan.



Questions?

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