

CLIENT ALERTS

Compliance Efforts in 2016

1.8.2016

An ounce of prevention is worth a pound of cure

~ Benjamin Franklin

When every dollar counts for an organization, particularly in a fragile recovering economy, modest proactive compliance expenditures can reduce the risk of substantial fines and costs. With the New Year, healthcare providers and most private and public employers face a new round of compliance efforts under a seemingly “alphabet soup” of regulations and regulators: HIPAA, ACA, ERISA, IRS (Tax Code), CMS, HHS, DOL, SEC and countless others. With an apparent never-ending to-do list, maintaining your organization’s commitment to compliance can be daunting.

In a series of upcoming Client Alerts and a complimentary webinar, Butzel Long has fielded a cross-disciplinary team of Health Care and Employee Benefits attorneys and ERISA/Employee Benefits litigators to facilitate your organization’s compliance efforts.

While not an exhaustive list, the following is a starting point of considerations for your business’s 2016 compliance efforts under HIPAA, ACA, ERISA and related provisions of the Tax Code:

- **HIPAA Training**—Under the applicable HIPAA Rules, covered entities and business associates must conduct periodic (at least annually) **training** of its workforce. We can provide such training or assist in compiling training materials for your organization.
- **HIPAA Risk Assessment**—The HIPAA Regulations mandate annual risk assessment to address potential Privacy and Security issues. We can guide organizations to publicly available tools to address this requirement and to avoid substantial penalties that can flow from the failure to do so, such as the penalties assessed on University of Washington

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Medicine for data breaches involving employees at its teaching hospital.

- **“Playing Good Defense” in anticipation of Audits:** The number of HIPAA audits is expected to rise in 2016 and beyond. Waiting for the proverbial axe to fall is unwise, particularly in light of the significant penalties that have been or will be imposed for massive data breaches in 2015 affecting patients, health care plan participants and federal government employees. Add in the potential for civil liability, such as that in play in the multi-district class action litigation stemming from the Anthem data breach circumstances, and the effects can be devastating. DOL audits are also expected to rise, as the EBSA steps up its efforts to improve the quality of reports filed with 5500s in an era of transparency. We can assist in reviewing your policies and procedures for compliance and preferred practices to reduce the risk of a negative HIPAA or DOL audit or to minimize the potential for penalties if an agency comes knocking at your door.
- **Updates to Business Associate Agreements and business operations to comply with the Telephone Consumer Protection Act (TCPA):** Covered entities subject to HIPAA’s marketing limitations must adhere to both the TCPA mandates and HIPAA regulations. As noted in a prior Butzel Long Alert, recent Declaratory Rulings from the FCC, Business Associate Agreements must be updated to clarify the procedures to follow for non-marketing informational calls relating to health care and to address TCPA mandates relating to marketing activities performed on behalf of a covered entity.
- **General Compliance & FWA Training**—Medicare Part C & D providers (MCOs and Prescription Drug Plan Sponsors), as well as their first-tier, downstream and related entities (FDRs) are required to conduct general compliance and fraud, waste and abuse (FWA) training at least annually (and within 90 days of hire). Any entity that qualifies for such training must ensure that appropriate training is conducted and documented.
- **“Happy New Year” from the IRS:** The IRS rang in the New Year with a series of regulatory guidance documents that will affect employee welfare and pension benefit plans, as well as exempt organizations that offer benefit plans to their employees.
- **ACA Reporting Deadline Changes:** The IRS has recently extended the deadlines by which employers must furnish reports to individuals and file reports with the IRS regarding 2015 health plan coverage. The 2015 Form 1095-B (which describes the provider’s health coverage) and the 2015 Form 1095-C (which describes the offer and coverage of the employer) need not be furnished to individuals until March 31, 2016. These 2015 Forms (along with their respective transmittal sheets – the Form 1094-B and the Form 1094-C) need not be filed with the IRS until May 31, 2016 (if the employer is not filing electronically) or June 30, 2016 (if the employer is filing electronically).
- **ACA Mandates and Shared Responsibility Issues:** The IRS recently issued important guidance on the treatment of employer-provided health coverage pursuant to ACA. For example, for existing plans, beginning with the January 1, 2017 plan year:
 - *Treatment of Opt-Out Cash when Calculating Affordable Health Coverage:* If your company’s cafeteria plan provides opt-out cash, the amount of the opt-out cash is added to an employee’s required contribution for health coverage when determining whether an employee is eligible for an ACA premium subsidy. This treatment might cause your company to be liable for an ACA

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penalty for failure to provide affordable coverage. (In general, if the employee's "required contribution," combining opt-out cash with other employee contributions, exceeds 9.5% of the employee's income, the employee's group health coverage is not affordable. The employee becomes at risk for a shared responsibility tax if the employee joins a marketplace plan and utilizes the subsidy.)

- *Treatment of Flexible Credits when Calculating Affordable Health Coverage:* If your company's cafeteria plan gives employees flex credits to purchase non-health coverage, the company may not treat the flex credit as reducing an employee's required contribution for health coverage when determining whether an employee is eligible for an ACA premium subsidy. This treatment might cause your company to be liable for an ACA penalty for failure to provide affordable coverage.
- *Family HRA Integration:* If your company provides a health reimbursement arrangement ("HRA") to reimburse the medical expenses of an employee's spouse and/or dependents, the IRS will not consider this HRA as integrated with your company's self-only group health plan coverage.

Plan sponsors with such arrangements should strongly consider alternatives to their current benefit structure during 2016 to avoid possible penalties and taxes.

- **"Cadillac Tax" Delay & Deductibility:** In December, President Obama signed into law a two-year delay on the assessment of the ACA "Cadillac Tax," extending its implementation until 2020. The tax will now also be deductible. Indexing of the Cadillac Tax thresholds will start in 2018. While it is possible that Congress and the next president may eliminate the Cadillac Tax, the tax is also a major source of revenue under ACA through increased taxes.

In the meantime, organizations should continue to plan for the 2020 imposition of the Cadillac Tax. For example, organizations should revisit whether to replace retiree medical coverage with VEBAs or individual Medicare supplemental policies, whether to continue to encourage enrollment in high deductible health plans paired with health savings accounts, and/or whether to implement plan re-design measures to reduce health plan costs, such as reduction of spousal subsidies, increase of spousal surcharges, and the shifting of costs to the employee (through higher co-pays, deductibles and out-of-pocket maximums). Organizations should also seek a reassessment of the accounting consequences of the now deductible and delayed Cadillac Tax, especially pertaining to retiree medical coverage.

With the New Year, it is an opportune and important time to keep abreast of changes in the applicable laws and regulations that govern your entity's operations generally and to ensure your workforce is aware and trained.

Assessing what is required and implementing a timeframe for doing so now will ensure that any issues identified along the way can and will be remedied timely and efficiently. The list above is by no means exhaustive, but is intended to jump-start your efforts in this New Year. In the immortal words of Benjamin Franklin—*An ounce of prevention is worth a pound of cure.*

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Butzel Long will be hosting a complimentary webinar in early February 2016 exploring these concepts in more detail. Stay tuned for specific information regarding the date and time of the webinar. For more information about these topics or your organization's specific 2016 compliance requirements, please contact your regular Butzel attorney or any of the attorneys listed below. Let us know how we can help.

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