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Today's Agenda

- Controlled Groups
- Voluntary Risks
- ERISA Litigation
- NJ Medicare Assessment
- Questions and future webinars

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Controlled Groups, Voluntary Benefits Risks and ERISA Litigation

What Benefits Brokers Need to Know

Presented by: Adam B. Cantor & Patrick Huston – FordHarrison LLP

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Controlled Groups: Overview

- For certain benefits purposes, a group of related employers is considered a single employer.
- Key benefits affected by these “controlled group” rules include pension benefits, 401(k) plan benefits, group health plan benefits (including ACA matters) and other welfare benefit plans.
- Purpose is to prevent employers from circumventing compliance with various legal requirements.
- When in doubt, the IRS and U.S. Department of Labor find “control.”

Types of Controlled Groups

- Parent-Subsidiary – One or more chains of organizations are connected by ownership with a common parent organization if
- (i) each of the organizations, other than the common parent organization, is owned (directly and with the application of certain constructive ownership rules) to the extent of at least 80% (considered a controlling interest) by one or more of the other organizations and
- (ii) the common parent organization owns (directly and with the application of certain constructive ownership rules) a controlling interest in at least one of the other organizations, excluding, in computing such controlling interest, any direct ownership interest by such other organizations.

Types of Controlled Groups

- Parent-Subsidiary, Cont'd
  - *Common Structures*
    - Parent owns 100% of Subsidiary 1, which owns 80% of Subsidiary 2. (Controlled group comprising Parent, Subsidiary 1, and Subsidiary 2.)
    - Parent owns 80% or more of each of Subsidiary 1 and Subsidiary 2. (Controlled group comprising Parent, Subsidiary 1, and Subsidiary 2.)
    - Parent owns 80% or more of Subsidiary 1, which owns 100% of Subsidiary 2. (Controlled group comprising Parent, Subsidiary 1, and Subsidiary 2.)
    - Parent owns 80% or more of Subsidiary 1 and 79% of Subsidiary 2. (Controlled group comprising Parent and Subsidiary 1.)

Types of Controlled Groups

- Parent-Subsidiary, Cont'd
  - *Example: Pension Plan Funding* – Parent owns 100% of Subsidiary 1, which sponsors a defined benefit pension plan, and 79% of Subsidiary 2. The plan is underfunded. Without the controlled group rules, Subsidiary 1 could fail to fund the plan, leaving participants with unfunded benefits. With the controlled group rules, if Subsidiary 1 fails to fund the plan, Parent would be compelled to do so, protecting participants. (Parent and Subsidiary 1 form a "parent-subsidiary controlled group"; Subsidiary 2 is not part of this controlled group because Parent owns less than 80% of Subsidiary 2.)

Types of Controlled Groups

- <u>Brother-Sister</u> – The <u>same</u> five or fewer individuals, trusts, or estates own (directly and with the application of certain constructive ownership rules) at least 80% (i.e., a controlling interest) of two or more organizations, but only if, counting ownership solely to the extent identical in such organizations, they also own more than 50% of each such organization (known as effective control).

Types of Controlled Groups

- Brother-Sister, Cont'd
  - *It's All about the Math!* – For instance, let's say Individual 1 and Individual 2 own Company A and Company B as follows: Individual 1 owns 75% of Company A and 30% of Company B; and Individual 2 owns 25% of Company A and 70% of Company B. Individual 1's identical ownership of Company A and Company B is 30%. Individual 2's identical ownership of Company A and Company B is 25%. 30% + 25% = 55%, which exceeds 50%, so effective control exists. Further, Individual 1 and Individual 2 collectively own 100% of each of Company A and Company B, so a controlling interest exists. Therefore, Company A and Company B form a brother-sister controlled group.

Types of Controlled Groups

- Brother-Sister, Cont'd
  - *It's All about the Math, Cont'd!* – Let's say the ownership in the last slide instead is as follows: Individual 1 owns 80% of Company A and 20% of Company B; and Individual 2 owns 20% of Company A and 80% of Company B. On these facts, each of Individual 1 and Individual 2 has identical ownership in Company A and Company B of 20%, for a combined total of 40%. Thus, even though Individual 1 and Individual 2 collectively own 100% of each of Company A and Company B, i.e., a controlling interest, the effective control test is not satisfied, as their combined identical ownership does not exceed 50%. On these facts, Company A and Company B do not form a brother-sister controlled group.

Types of Controlled Groups

- Brother-Sister, Cont'd
  - *Example: Applicable Large Employer (ALE) Status under ACA* – Doctor 1 owns 100% of each of Medical Practice A and Medical Practice B. Medical Practice A has 25 full-time employees. Medical Practice B has 25 full-time employees. Without the controlled group rules, neither Medical Practice A nor Medical Practice B would be subject to the ACA because neither Practice, standing alone, has at least 50 full-time employees. With the controlled group rules, Medical Practice A and Medical Practice B would be deemed a single employer – on account of comprising a brother-sister controlled group – with 50 full-time employees and the ACA would apply.

Types of Controlled Groups

- Affiliated Service Group (ASG) – Two types, an "A Org" and a "B Org". An A Org ASG consists of a designated first service organization (FSO) and another organization (the A Org) that is a shareholder or partner in the FSO and either regularly performs services for the FSO or is regularly associated with the FSO in performing services for third persons. A B Org ASG consists of an FSO and another organization (the B Org) if (a) a significant portion of the B Org's business is the performance of services for the FSO and (b) at least 10% of the interests in the B Org is owned by highly compensated employees of the FSO.

Types of Controlled Groups

- Affiliated Service Group (ASG), Cont'd
  - *Example 3: Doctor's Office 401(k) Plan* – Doctor X owns 100% of Medical Practice Y, which owns 75% of Medical Support Service Company Z. Medical Practice Y employes all the doctors, of which there are five, all of whom are highly compensated, and no one else. Medical Support Service Company Z employs all the nurses and administrative and billing staff, of which there are 100, none of whom are highly compensated, and no one else. The 401(k) plan benefits only – and all – the employees of Medical Practice Y. At the very least, Medical Practice Y and Medical Support Service Company Z form an A Org ASG, as the former has an ownership interest in the latter and the two organizations regularly work together to provide medical services to patients. Because these entities would be treated as a single employer, the 401(k) plan would fail both minimum coverage and nondiscrimination testing.

Types of Controlled Groups

- Management Group – A group comprising (i) an organization for which the principal business is performing on a regular and continuing basis (for example, for more than one year) management functions for one organization (or for one organization and other organizations related to that one organization) and (ii) a separate organization (and related organizations) for which the management functions are performed by the organization described in (ii).

Voluntary Benefits Risks

- Schlichter Law Firm Sues Companies and Brokers. In December 2025, Schlichter Bogard LLC ("Schlichter"), filed four class action lawsuits against (i) employers (CHS/Community Health Systems, Inc., Laboratory Corporation of America Holdings; United Airlines, Inc.; and Universal Servies of America, LP d/b/a Allied Universal) making accident, critical illness and hospital indemnity insurance products available to their employees for purchase, at the election and sole cost of their employees, and (ii) the benefits brokers (Gallagher Benefit Services, Inc.; Willis Towers Watson US LLC; Mercer Health and Benefits Administration, LLC; and Lockton Companies, LLC) assisting such employers in providing such benefits by identifying insurance carriers, screening bids by the carriers, and/or administering such benefits.

Voluntary Benefits Risks

- Schlichter Law Firm Sues Companies and Brokers, Cont'd
  - The lawsuits alleged multiple violations of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), including, in the case of the brokers, breach of fiduciary duty and *per se* and self-dealing prohibited transactions.

Voluntary Benefits Risks

- Schlichter Law Firm Sues Companies and Brokers, Cont'd
  - The remedies sought against the brokers include, principally, imposition of personal liability for excessive premium costs borne by the employees and commissions received by the brokers, disgorgement of profits reaped by the brokers and restoration of the same to the "plan" (ostensibly, the employees who purchased the insurance products), removal of the brokers from their roles in administering such benefits (e.g., issuing RFPs to insurance carriers, conducting enrollment, selecting insurance carriers, claims assistance, and employee education), surcharge against the brokers (essentially, make-whole payments from the brokers to the "plan"), and award of attorneys' fees.

Voluntary Benefits Risks

- Why Voluntary Benefits: Aren't They Exempt from ERISA?
  - Schlichter's class action lawsuits follow similar lawsuits for excessive fees in 401(k) plans.
  - ERISA applies to employee welfare benefit plans, particularly health-related benefits, which tend to throw off larger commissions to brokers than other types of welfare benefits.
  - A group insurance/group-type insurance exemption may apply.

Voluntary Benefits Risks

- What Is the Group Insurance/Group Type Insurance Exemption? An employee welfare benefit plan does not include a group or group-type insurance program offered by an insurer to an employer's employees if four requirements are met:
  - No contributions are made by the employer;
  - Participation in the program is completely voluntary for employees;
  - The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer; AND
  - The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions.

Voluntary Benefits Risks

- About What Aspects of the Exemption Should Brokers Be Concerned?
  - Compliance is an employer responsibility.
  - Employer strongly encouraging participation – goes to voluntariness.
  - Employer endorsing/recommending particular voluntary benefit(s).
  - Employer collecting premiums outside payroll deduction.
  - Employer receiving discount from insurer or broker on main group health plan costs (premiums payable to insurer; claims administration/processing fees payable to broker) in connection with permitting particular voluntary benefit(s) to be offered.

Voluntary Benefits Risks

- What Might Brokers Consider Doing to Mitigate Risks?
  - Educate their employer customers on compliance obligations under the exemption – non-endorsement disclaimers might be a place to start.
  - Review their commission compensation models (particularly in relation to loss ratios – receiving "high" commissions from insurers that deny a disproportionately large percentage of claims can be problematic).
  - Analyze the scope of their efforts in designing an employer's voluntary benefits offerings or negotiating the terms thereof with insurers.
  - Request insurer to issue policy to employer that contemplates individual policies being offered to employees.
  - Review communications to employees, including emails, benefits brochures and summary plan descriptions, to ensure voluntary benefits are not described as ERISA plans and employer does not put insurer's program on its letterhead.

Voluntary Benefits Risks

- Final Thoughts. You have a business to run. Litigation risk is something about which to be concerned, but so is running your business. In short, maintain perspective and reach out to legal counsel to advise you, when necessary or appropriate.

ERISA Litigation: What's on the Horizon?

- Excessive Fees under 401(k) Plans – Still a thing; next term, U.S. Supreme Court should hear *Anderson v. Intel Corporation Investment Policy Committee*, in which it is being asked to address the pleading standard in an investment underperformance case (i.e., do the plaintiffs have to allege a meaningful benchmark to survive a motion to dismiss)!
- Use of Forfeitures to Reduce Employer Contributions in 401(k) Plans – Mixed bag, so far.
- Imprudent Selection of Pharmacy Benefit Managers (PBMs) – Focus is on cost of PBM services, effect of such cost on drug prices, and not engaging in prudent process under ERISA.

New Jersey Enacts Employer Medicaid Assessment Law (P.L. 2026, c.23)

New Law Affecting Employers with New Jersey Employees

New Jersey Employer Medicaid Assessment Law

- **Effective July 1, 2026**
- **Annual assessment on employers with 50 or more employees**
  - Where employees or dependents of employees are enrolled in a NJ Medicaid program
- **No exemptions for employers headquartered outside of New Jersey**
  - Employers with New Jersey-based workers may be impacted even if their principal place of business is located elsewhere
- Exemptions:
  - Developmental disabilities
  - Intellectual disabilities
  - Permanent physical disabilities

New Jersey Employer Medicaid Assessment Law

- **Additional Exemptions Effective July 1, 2027**
  - Employees employed fewer than 90 days
  - Part-time employees
  - Per diem employees
  - Temporary employees
  - Seasonal employees
- **Transition Rule**
  - If assessment is imposed prior to July 1, 2027 for exempted individuals, employers may be eligible for a refund or a credit toward future liabilities.
  - Note that procedures and rules have not yet been published.

New Jersey Employer Medicaid Assessment Law

Employer Size of 50 – 249 Employees

Annual Assessment of $325 per enrolled Medicaid beneficiary

Employer Size of 250 – 499 Employees

Annual Assessment of $525 per enrolled Medicaid beneficiary

Employer size of 500+ Employees

Annual assessment of $725 per enrolled Medicaid beneficiary

New Jersey Employer Medicaid Assessment Law

- **Rules have not been published yet, but the law:**
  - Does not require employers to report Medicaid enrollment
  - Does not explain specific methodology the State will use
  - Raises potential privacy concerns; employers generally do not have access to Medicaid enrollment information for employees and their dependents
- **The law does have significant Anti-Retaliation Protections. Employers may NOT:**
  - Consider Medicaid enrollment status when making hiring decisions
  - Use Medicaid enrollment information when making promotion or advancement decisions
  - Take adverse employment action against employees, dependents, or applicants because of Medicaid enrollment.
    - Employees and applicants may seek enforcement of these protections under the New Jersey Civil Rights Act

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Questions?

August Webinar: Bad Actors
September Webinar: Medicare as creditable coverage, with an actuary

Thank you!

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