Introduction

Overview

The four primary classes deserving attention are these: (a) the prohibited class; (b) the protected class (including those classified by health status), (c) a class as determined by the Federal Trade and Commerce Laws and (d) new classes introduced by ACA (providers, consumers and insurers).

The five benefit arrangements that are to be tested are these: (a) medical reimbursement plan; (b) full-flex cafeteria plan; (c) premium only plan; (d) flexible spending account and (e) dependent child assistance plan.

This Text considers all of the dimensions of discrimination that affect health care plans. All health care plans are included regardless of how they are (a) funded (fully insured or self-funded, e.g.), (b) administered (TPA or ASO, e.g.); (c) structured (medical reimbursement, cafeteria, e.g.); (d) sponsored (corporate or partnership, e.g.); (e) benefits offered (medical, dental, e.g.); (f) size (over 100 lives or under 100 lives, e.g.) or (g) provider network arrangements (PPO, HMO, e.g.)

Certain dimensions of discrimination are not considered: (a) state-related issues; (b) benefits such as death, AD&D, LTD or STD; (c) routine administrative or regulatory issues; (d) deferred or tax-qualified plans or (e) special funding arrangements (VEBA or MEWA).

So as to offer a large body of details in *digestible bites,* the text is divided as follows (a) the Sections are in more-or-less outline format; (b) the *heavy-duty* reading is assigned to the Appendices and (c) five computer-based work-products (one for each of the five types of benefit plans above-cited).

Essence of Discrimination Testing

The goal of discrimination testing is to discern whether a particular class of individuals has been treated differently than is mandated by law or regulations. Numerous protocols to accomplish this testing are available or proscribed. For purpose of this text, such protocols are found in various parts of the U.S. Code.

Legal Background

With respect to discrimination that might favor the prohibited class, the primary statutes are Internal Revenue Code Sections 105(h), 125 and and 129. With respect to discrimination that might disfavor the protected class, the primary laws are the numerous Civil Rights and Equal Pay Acts. With respect to discrimination that might disfavor the older worker, the primary statute is the Age Discrimination in Employment Act.

the final hours leading to the passage of ACA, the House Reconciliation changes In added to HR3590 a Section 10101 that introduced a new Section 2716 to the PHSA. This new Section requires that all health care plans (other than self-funded) to meet the discrimination requirements (Benefits Test only) of IRC Section 105(h).

Past Practices

For the most part, self-funded medical reimbursement plans have gone untested. Plan sponsors did not have the incentive to do it; the practitioners as a consequence did not push for it, the carriers found it economically advantageous to ignore it; the regulators created rules that were too complex and expensive for them to enforce; it has not been a required item on the Form 5500; the accountants did not have it on their audit checklist; and too few understood it.

New Scope or Definition

In recent years, the scope of and the definitions with discrimination have expanded: (a) subject benefit plans have grown in number (cafeteria and premium option plans, flexible spending accounts and dependent child assistance plans), (b) members qualifying for the protected class have increased and (c) ERISA-protected plan design freedoms are now under attack for permitting discrimination (HIPAA, mental parity, e.g.). Moreover, in recent years, new signs of interest in discrimination testing are appearing: (a) Sarbanes-Oxley and risk management, (b) growing audit interest, (c) globalism, (d) new regulatory *rumblings*, (e) rising concerns of benefit attorneys and (f) new opportunities for cybernetics/IT to do the *heavy lifting* involved with the testing.

There are new and enormously significant recent changes that impact on health plan discrimination:

1. The denial to fully insured plans of their traditional federal antitrust *free pass* that occurred when PPACA amended the McCarran Ferguson Act.

2. The large volume of (a) anti-insurer or anti-employer and (b) pro-consumer health care plan changes introduced by ACA.

3. Recent Supreme Court decision (*MetLife v. Glenn)* that made the issue of conflicted interest a most significant one.

Sarbanes-Oxley and Risk Management

The Intent of this statute is clear and even a rudimentary understanding of risk management would dictate the following: i.e., any management decision short of knowing for certain that a subject health care is or is not discriminatory is indefensible as being too risky. Treating risk management as though it were not important has no place in our new health care plan millennium. At the present time, an increasing sense of urgency to get serious with such testing

is coming from (a) the regulators, (b) the benefit attorneys and (c) **risk managers. The writer** asserts that ignoring discrimination might at times be a Sarbanes-Oxley infraction.

Practical Urgency for Testing

Unexpected consequences from the discovery of a plan that was found to be discriminatory might include the following: (a) as the result of the failure of the Benefits test, a HCI receives a W-2 with a sharp increase in the Block 1 earnings amount because of a large paid benefit putting such individual in jeopardy with the IRS or perhaps in bankruptcy, (b) as the result of the failure of the eligibility test, the plan sponsor shows a large number of unexpected increases in the amounts reported in Block 1 of the W-2 Forms of some 25% of its employees, (c) the plan sponsor will face harsh penalties if found guilty of discriminating against the protected class (e.g., race, creed, national origin, age) and (d) the plan sponsor will also face unpleasant consequences if found guilty of discriminating by health-related factors or by tenure, e.g., as described in HIPAA or the ACA. A new instance of discrimination results when a plan fiduciary has conflicted interest(s) that are not disclosed; the justification for this logic is the Supreme Court decision in *MetLife v. Glenn*. The act of discrimination is due to the fact that such conflicted interests weakens the standing of the fiduciary should a legal contest occur; non-disclosure thereof discriminates against those who have a reason to know but are not told.

Complexity of the Testing Rules

The rules set forth in the laws, regulations and ruling are complex for a variety of reasons; (a) the role that the individual may play in the testing drama will vary depending on the (i) test (eligibility, benefits, fair cross-section, classification, e.g.) and (ii) benefit (self-funded medical reimbursement, cafeteria, premium-only, flexible spending account, dependent assistance, e.g.), (b) the characteristics of the individual will also determine such role: i.e., (i) being a shareholder and the extent of such ownership, (ii) being an officer, (iii) being a special-status employee (part-time, seasonal, newly-employed, under age 25, protected by a labor-negotiated agreement, or certain non-resident alien workers, e.g.), (iv) having special employment status (leased, self-employed, partners, retired, COBRA independent contractors, sole proprietors, Sub-S owner and (v) being or not being a plan participant, and (c) the organizational structure of the entity: (i) Chapter C, limited liability, non-profit or Sub-S Corporation, e.g., (ii) controlled organizations under special IRC Section 414 rules, (iii) partnership, (iv) church and (v) government entity, e.g. For each of these terms, there are lengthy definitions some of which are near-circular or facts/circumstances in nature. Some of the tests consist only of (a) a set of principals with a safe-harbor example while others are very lengthy and involved.

Advances in Cybernetic/IT

What is needed and hopefully will soon be available is: (a) a web-based work-product, (b) that is available directly to all plan sponsors, vendors, professionals and practitioners, (c) that is user-friendly and accessible, (d) that will bring order out of the confusion, (e) that will serve as a decision model, (f) that is private and secure and (g) that can be relied upon in its assertion that

the plan is or is not free of discrimination to the satisfaction of the relevant professionals (regulators, accountants, and attorneys).

Role of Globalism

Audit practices in the United States and abroad are not uniform. Our *casual* approach with respect the discrimination may not be agreeable to, say, the British auditors.

Shifting Roles of Professionals

The past practices of discrimination testing have been largely left to the primary players – either or both the accountant and the attorney. The testing procedure has, as a consequence, been a rather expensive and arduous experience, hardly one eagerly sought by the plan sponsor. The testing practices are changing somewhat in that the HR staff, an actuary, a risk manager, a broker/consultant or a computer/IT specialist are often directly involved.

Increasing Aggressiveness of the regulators

Regulators include the Internal Revenue Service, the Department of Labor, the Department of Health and Human Services and the Department of Veterans Affairs. It is the assertion of the writer that (a) the focus on, (b) the money and resources devoted to, (c) the political and social implications of health care financing systems will *ratchet* up the activities of the Regulators. Their ulterior motive may be to find failure with what we have in whatever **way possible so as to *usher* in single-payer.**

Patient Protection and Affordable Care Act of 2010 (ACA)

ACA deals with discrimination in several ways: (a) expanded to and made more explicit the treatment of the protected class (b) extended the requirements of IRC Section 105(h) to fully insured plans as respects the benefits test and (c) through ACA added three new classes for discrimination testing: consumers, insurers and providers. These are changes of enormous significance and must not be taken lightly. See Appendix F – ACA Discrimination Changes for more detailed analysis.