


**Health Care Reform and More:
2016 and Beyond**

Employers' Health Coalition of Idaho

Presented by
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THURSDAY, JANUARY 21, 2016 • BOISE, ID

Today's Topics

- Latest updates on ACA
- Two big Supreme Court decisions
- EEOC proposed wellness program regulations
- New cafeteria plan rules and the marketplace
- COBRA, marketplace, and Medicare
- Final SBC regulations
- Latest Cadillac (Chevy) tax guidance
- Cyber attacks: What's a plan to do?

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**Consolidated Appropriations
Act, 2016**

- Cadillac tax delayed until 2020
 - Payment of tax is a business expense
 - Clarifies indexing of the \$10,200/\$27,500 amounts
- Health insurer fee not collected for 2017
- Aggregation rules for church plans
 - Tied to ALE determinations for churches

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New Reporting Deadlines

- The deadline for furnishing Forms 1095-B and 1095-C to individuals changed from February 1 to March 31, 2016
- The deadline to file paper Forms 1094-B and 1094-C (and accompanying Forms 1095) with the IRS changed from February 29 to May 31, 2016

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New Reporting Deadlines (cont.)

- The deadline to file electronic Forms 1094-B and 1094-C (and accompanying Forms 1095) with the IRS changed from March 31 to June 30, 2016
 - Electronic filing is mandatory for entities required to file 250 or more Forms 1095

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FAQs on 1095 Forms

- For employees/taxpayers
 - <https://www.irs.gov/Affordable-Care-Act/Questions-and-Answers-about-Health-Care-Information-Forms-for-Individuals>
 - FAQs are useful for employee questions about the forms and federal tax returns
 - Do not need to have Form 1095 in order to file taxes

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Reporting Penalty Relief

- Trade Preferences Extension Act of 2015 increased penalties for failure to file Forms 1094 and 1095
- Relief from penalties upon showing of good faith efforts to comply
 - Relief not available for failure to file
 - Conflicting guidance on reporting of COBRA participants

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Preventive Services FAQ

- Must cover some adult obesity services as preventive services, so cannot have a blanket exclusion
- Preventive services for colonoscopies include pathology exams on polyp biopsies

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Other ACA Issues

- ACA's provision requiring automatic enrollment in health plans repealed in Bipartisan Budget Act of 2015
- Proposed regulations on minimum value require plan to provide "substantial coverage of inpatient hospital and physician services"

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Other ACA Issues (cont.)

- PCOR fee is \$2.17 per covered life
- Reinsurance contribution is \$44 per covered life

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Other ACA Issues (cont.)

- By 2017, IRS intends to adopt regulations that unconditional opt-out payments will be considered in affordability determinations
 - Employee-only premium: \$50 per month
 - Opt-out payment: \$100 per month
 - Cost of coverage: \$150 per month
- Conditional opt-out payments (require proof of other coverage) not considered

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Federal Exchange Notices

- Beginning in 2016, all exchanges operating on Healthcare.gov will notify employer if employee receives an advance payment of premium tax credits
 - State exchanges also sending these notices
- Employer response
 - Appeal to exchange (?)
 - Wait to appeal to IRS

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Claims and Appeals Procedures

- Final regulations on claims and appeals procedures for health plans
 - Some small changes from prior regulations
 - Effective for plan years beginning on or after January 1, 2017
- New proposed regulations for disability plans
 - Will require revisions to existing procedures

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New HRA Rules

- HRAs cannot be integrated with QHP
- HRA funds cannot be used for QHP premiums for former employees, even if HRA integrated during employment
- HRA funds in retiree-only HRA can be used to purchase QHP
 - However, retirees with these HRAs are ineligible for premium tax credits

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New HRA Rules (cont.)

- HRA may reimburse premiums for excepted benefits (dental/vision)
- Beginning in 2017, self-only GHP coverage and family HRA not integrated
 - Employee-only GHP coverage can be integrated with employee-only HRA
 - Family GHP coverage can be integrated with family HRA

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Supreme Court: *King v. Burwell*

- Issue: Are ACA's federal subsidies only available in exchanges "established by the State" and not in federal exchanges?
 - Only 14 states and DC have established exchanges
 - IRS's position was that federal subsidies are available at all exchanges

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King v. Burwell

- Supreme Court upheld IRS's position
 - Language in ACA was ambiguous
 - Thus court could look to entire ACA to determine the correct interpretation
 - Tax credits at federal exchanges must be allowed to avoid a "death spiral" in the individual insurance market

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United States v. Windsor

- Supreme Court ruled on June 26, 2013, that Section 3 of DOMA is unconstitutional
 - Ruling affected federal laws that refer to "spouse" or "marriage" without further definition
 - Federal government recognized same-sex marriages for purposes of federal law

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Obergefell v. Hodges

- On June 26, 2015, the Supreme Court held:
 - State laws banning same-sex marriage are “invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples”
 - “[T]here is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”

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Federal Law After Obergefell

- *Windsor* was a federal law case; *Obergefell* was a state law case
 - *Obergefell*'s impact on federal laws not as great as *Windsor*'s impact
- The post-*Windsor* federal guidance issued for health and welfare plans will apply
- May allow election changes in cafeteria plan for new same-sex spouse coverage

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Federal Law After Obergefell (cont.)

- Does *Obergefell* require GHP coverage for same-sex spouses if GHP covers opposite-sex spouses?
 - Insured plans and government plans: yes
 - Self-insured private employer plans: no, but Title VII may do so, at least according to EEOC
 - Church plans: no, if coverage violates religious beliefs

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What *Obergefell* Did Not Do

- Did not change federal law concerning domestic partnerships
 - Domestic partnership is not considered marriage for purposes of federal law
 - States are not required to recognize domestic partnerships from other states
 - WA does recognize domestic partnerships from other states

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What *Obergefell* Did Not Do (cont.)

- Did not change federal law concerning domestic partnerships
 - Still must impute income for employer-provided health coverage for domestic partners for federal income tax purposes and employee cannot pay premiums for domestic partner coverage on a pre-tax basis unless partner is a dependent of employee for health plan purposes

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Coverage for Domestic Partners

- Should domestic partnerships continue after *Obergefell*?
 - There are valid reasons why an individual would not want to marry a life partner
 - Monetary and legal issues: Social Security and military benefits, federal tax, community property law
 - Family: children of a former spouse/partner
 - Philosophical: personal opposition to the concept of marriage

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Proposed EEOC ADA Wellness Program Regulations

- Wellness programs are subject to regulation under a number of federal laws, including HIPAA and the Americans with Disabilities Act (“ADA”)
- EEOC has always stated that compliance with HIPAA wellness program regulations is not necessarily compliance with ADA

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Proposed EEOC ADA Wellness Program Regulations (cont.)

- ADA prohibits medical examinations and inquiries by an employer in the workplace except in limited circumstances
 - Wellness programs often include inquiries or exams (e.g., health risk assessments)
- For many years, EEOC refused to issue guidance on what wellness programs are required to do to comply with ADA

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Proposed EEOC ADA Wellness Program Regulations (cont.)

- EEOC has now issued proposed regulations on ADA compliance for wellness programs
 - No specific date given on when the proposed regulations might be effective
 - Employers may rely on the proposed regulations until they are finalized

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Proposed EEOC ADA Wellness Program Regulations (cont.)

- Regulations only apply if program involves a disability-related inquiry or a medical examination
 - Inquiry: do you have high blood pressure?
 - Exam: cholesterol test
 - However, merely asking if someone smokes is not a disability-related inquiry
 - Blood draw to detect nicotine is a medical exam

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Proposed EEOC ADA Wellness Program Regulations (cont.)

- Confidentiality rules
 - If the wellness program is a GHP, medical information that is collected can only be shared with the employer in aggregate terms that do not disclose a participant's identity, except as needed to administer the GHP
 - HIPAA privacy and security rules also still apply to protected health information

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Proposed EEOC ADA Wellness Program Regulations (cont.)

- Participation in the wellness program must be voluntary
 - Cannot require an employee to participate
 - Cannot deny GHP coverage if employee does not participate
 - Cannot take adverse employment actions against an employee who does not participate

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Proposed EEOC ADA Wellness Program Regulations (cont.)

- Incentive to participate in the wellness program cannot exceed 30% of total cost of employee-only coverage
 - Applies to wellness programs that are regulated by ADA and are part of a GHP, even if they are just “participatory” programs
 - Incentive for smoking-cessation program can be up to 50% if it does not involve medical exam (like blood test for nicotine)

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Proposed EEOC ADA Wellness Program Regulations (cont.)

- Compare to HIPAA rules on incentives
 - HIPAA allows maximum of 30% of total cost of family coverage if dependents can participate in the wellness program
 - Incentive for all smoking-cessation programs can be up to 50% of coverage
 - HIPAA restrictions on incentives do not apply to “participatory” wellness programs

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Proposed EEOC ADA Wellness Program Regulations (cont.)

- If wellness program is part of a GHP, employer must provide a notice explaining:
 - Type of medical information to be obtained and the use of the information
 - Restrictions on disclosure of the information and the parties who will have access to it
 - Methods used to ensure that information is not improperly disclosed

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Proposed EEOC GINA Wellness Program Regulations (cont.)

- Health information of spouse considered to be “genetic” information under current regulations
- Proposed regulations would allow incentive to employee whose spouse is in GHP if certain conditions met
 - No incentive allowed in exchange for health information on employee’s child

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Enrolling in the Marketplace

- Marketplace open enrollment for 2017
 - November 1, 2016 - January 31, 2017
 - Effective date of coverage dependent upon enrollment date: Idaho deadlines
 - Enroll 11/1/2016 to 12/15/2016: coverage effective 1/1/2017
 - Enroll 12/16/2016 to 1/15/2017: coverage effective 2/1/2017
 - Later enrollments: coverage effective 3/1/2017
 - May change open enrollment dates in future

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Special Enrollments at the Marketplace

- Special enrollment triggering events
 - Losing minimum essential coverage (“MEC”)
 - Example: loss of employer-provided GHP
 - Loss does not include voluntary termination or termination due to failure to pay premiums
 - Marriage, birth, adoption, or divorce
 - Newly eligible or newly ineligible for federal subsidies

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Special Enrollments at the Marketplace (cont.)

- Complete list of special enrollment periods in Your Health Idaho
 - <https://www.yourhealthidaho.org/howtoenroll/special-enrollment/>

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Special Enrollment Rules at the Marketplace

- General rules
 - 60 days to enroll after the triggering event
 - Effective date of ID coverage
 - If you enroll from 1st to 15th of a month, 1st day of the next month
 - If you enroll after 15th of the month, generally 1st day of second month
 - Exceptions, such as birth or adoption: effective retroactive to date of birth or adoption

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Special Enrollment Rules at the Marketplace (cont.)

- Loss of MEC: special enrollment period is 120 days
 - 60 days before loss of coverage and 60 days after loss
 - Coverage must be effective 1st day of month after enrollment, if enrollment is before loss of MEC

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Special Enrollment Rules at the Marketplace (cont.)

- Example:
 - Child turns 26, loses GHP on April 30
 - Child can enroll in QHP beginning March 2 until June 29
 - Child enrolls in QHP in March or April, coverage begins May 1 (no break in coverage)
 - Child enrolls in May, coverage begins June 1

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Loss of Special Enrollment Right

- Election of COBRA = loss of marketplace special enrollment right
 - Another special enrollment right when COBRA terminates for reasons other than non-payment of COBRA premiums
- Enrolling in spouse's or parent's plan = loss of marketplace special enrollment right

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Transitions from GHP to QHP at End of a Plan Year

- Plan participants voluntarily dropping GHP coverage to move to marketplace at end of the GHP's plan year
 - Calendar year plans
 - Drop GHP during employer's open enrollment
 - Enroll in QHP during marketplace open enrollment early enough so that QHP is effective January 1

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Move to QHP During Plan Year

- Two requirements for switching from GHP to QHP during plan year
 - Change in status event under cafeteria plan rules allowing participant to drop GHP
 - Marketplace enrollment opportunity (open enrollment period or special enrollment triggering event) enabling participant to enroll in QHP

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Move to QHP During Plan Year (cont.)

- First new cafeteria plan rule (voluntary)
 - May allow participant to drop GHP to move to QHP during a marketplace open or special enrollment period
 - This effectively eliminates the first requirement on the previous slide
 - QHP coverage must be effective no later than first day after GHP coverage is revoked

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Move to QHP During Plan Year (cont.)

- Example
 - Employee marries on June 15
 - Special enrollment period in marketplace
 - Employee and new spouse enroll in QHP effective July 1
 - Okay to allow employee to drop coverage under the GHP as of June 30
 - QHP coverage effective the next day, July 1

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Move to QHP During Plan Year (cont.)

- Second new cafeteria plan rule (voluntary)
 - May allow employee to drop GHP when work hours are expected to drop below 30 hours a week, even if employee’s reduction in hours does not result in loss of coverage under GHP
 - Mainly for employers using look-back measurement and stability periods: employee in stability period may not be able to afford GHP coverage when hours reduced

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Move to QHP During Plan Year (cont.)

- Second new cafeteria plan rule (voluntary)
 - New coverage must begin no later than first day of second month after GHP coverage was revoked
 - New coverage may be QHP or may be other MEC, such as the GHP at the spouse’s employer

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Move to QHP During Plan Year (cont.)

- Example of second new cafeteria plan rule
 - Employee in stability period for 2016
 - Employee’s hours drop to 15 hours a week
 - Employer may allow employee to drop GHP coverage to move to a QHP or to move to GHP of employee’s spouse

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Preventing Gap After Loss of GHP Coverage

- First option: advance knowledge of loss of GHP
 - May enroll in QHP up to 60 days in advance of loss of MEC
 - Example:
 - Planned retirement on April 30, on which date GHP coverage will be lost
 - Enroll in QHP in March or April for effective date of May 1

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Preventing Gap After Loss of GHP Coverage (cont.)

- Second option: loss of GHP is a surprise
 - Enroll in QHP first (while still have special enrollment right)
 - Elect COBRA, and then stop COBRA when QHP is effective
 - Example:
 - Employee terminated and loses GHP on April 12
 - Enroll in QHP on May 5 for June 1 effective date
 - Elect COBRA from April 13 to May 31

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Preventing Gap After Loss of GHP Coverage (cont.)

- Third option: elect COBRA
 - Then move to QHP during the next open or next special enrollment period
 - Terminate COBRA when QHP is effective
 - Example:
 - Child turns 26 and loses GHP coverage 7/20/15
 - Child elects COBRA and drops it effective 12/31/15
 - Child enrolls in QHP during open enrollment effective 1/1/16

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Moving from QHP to GHP

- Enroll in GHP during open or special enrollment periods
- Drop QHP coverage as of the effective date of GHP coverage
 - QHP can be dropped at any time

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COBRA or QHP?

- If loss of GHP coverage is due to COBRA qualifying event, should the participant choose COBRA or QHP?
- Issues to consider
 - Eligibility for federal subsidies for QHP
 - Mere eligibility for COBRA does not disqualify person from federal subsidy
 - Electing COBRA = no federal subsidy

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COBRA or QHP? (cont.)

- Issues to consider
 - Electing COBRA: never a gap in coverage
 - Age: COBRA for older persons, QHP for younger persons?
 - Ability to pay for COBRA on pre-tax basis
 - COBRA disability extension (150% of cost): these families likely better off with QHP
 - Quality of coverage under GHP/QHP

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Medicare and Marketplace

- Medicare and marketplace do not mix
 - No Medicare supplements or Part D prescription drug plans sold at marketplace
 - Crime to sell new QHP to person on Medicare Part A and/or Part B
 - Person receiving Social Security retirement benefits automatically enrolled in Medicare Part A
 - Medicare beneficiaries can purchase dental coverage at marketplace

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Medicare and Marketplace (cont.)

- Medicare and marketplace do not mix
 - A Medicare-eligible person who is enrolled in GHP will not incur Medicare Part B penalties (increased premiums) for failure to enroll in Medicare Part B when first eligible to do so
 - A Medicare-eligible person who is enrolled in QHP will incur such penalties
 - Reason: QHP is individual, not GHP, coverage

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Medicare and Marketplace (cont.)

- Medicare and marketplace do not mix
 - Prescription drug coverage under QHP is not necessarily creditable coverage for Medicare Part D
 - A Medicare-eligible person who is enrolled in QHP that does not provide creditable coverage will incur penalties (increased premiums) if the person does not enroll in Medicare Part D when first eligible

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Employers and Marketplace: Active Employees

- Premiums for QHP for an active employee cannot be paid on a pre-tax basis (using cafeteria plan, HRA or otherwise)
- Employers cannot pay or reimburse employees for QHP premiums, pre-tax or after-tax
 - Employers can raise salaries of employees

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Employers and Marketplace: Retirees

- QHP for pre-65 retiree could be paid by former employer
- Could use funds in retiree-only HRA to pay QHP premium on pre-tax basis
 - Retiree-only plans not subject to ACA rules
- Nothing at marketplace for post-65 retirees
 - Medicare supplements instead of QHPs

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New SBC Rules

- New regulations on summary of benefits and coverage ("SBC")
 - Applicable for
 - First open enrollment period beginning on or after September 1, 2015
 - First plan year beginning on or after September 1, 2015 (January 1, 2016 plan year)
 - However, new SBC template has not yet been issued (expected this month)

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New SBC Rules (cont.)

- Insurance companies must include a web address where copies of the actual group certificate of coverage can be obtained
 - Sample can be posted if final certificate not ready
- SBC can be delivered electronically as part of the enrollment process
 - Paper copy must be provided upon request

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Cadillac (Chevy) Tax

- Most health plans are considered
 - Contributions to health FSAs, HSAs, Archer MSAs and HRAs
 - After-tax contributions by employee to HSAs not counted
- HIPAA-excepted benefits not counted
 - Dental and vision benefits excepted if employee is allowed to reject the coverage
 - Separate premium no longer required

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Managing Cadillac Tax Risks

- Unbundle vision and dental benefits from major medical coverage
 - Allow employees to reject dental and vision benefits
- Terminate or lower maximum allowable annual contribution to the health FSAs, HSAs, Archer MSAs and HRAs

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Managing Cadillac Tax Risks (cont.)

- Provide fewer benefits in medical plan
 - More difficult because of requirements of ACA
 - No lifetime or annual limits
 - Limits on out-of-pocket maximums
 - Requirements to provide preventive care and essential health benefits

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IRS Speaks on Cadillac Tax

- New IRS notice on Cadillac tax implementation
 - IRS requests comments on a variety of issues
 - Valuation methods for "cost of coverage"
 - Statutory limit in situation where some of the coverage is employee-only and other coverage is employee plus one

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Cyber Attacks: The Criminals Are Winning!

- Jumbo breaches by GHPs
 - Anthem and Premera
 - Also affected other BCBS plans throughout country
 - Perhaps now the question is not if a breach will occur, but when
 - Costs for a GHP to respond now around \$300 per affected person

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Increased HIPAA Enforcement

- Phase 2 audits to begin in 2016
- Larger fines
 - \$3.5 million fine for insurance company
 - \$850,000 fine for theft of laptop
 - \$750,000 fine for theft of unencrypted backup tapes

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Preparing for the Next Breach

- What are GHPs doing?
 - Heightened security and breach due diligence when hiring a TPA or other service provider
 - Obtaining cyber liability insurance for the plan and requiring business associates of the GHP to have cyber liability insurance
 - Contracting with breach vendors (*i.e.*, computer forensic companies and identity theft protection firms) in advance

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Prevention of Breaches

- Limit data collection to legitimate business purposes
- Be true to your word on data use and disclosure
- Encrypt data in motion and at rest if feasible
- Perform periodic risk assessments
- Train all personnel to recognize sensitive information and security threats/vulnerabilities
- Implement access, media and device controls

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Questions?

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