

The discrimination pitfall advisers may not be paying attention to

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SAN DIEGO — CEO Jennifer Berman cofounded MZQ Consulting in 2014 with the initial mission of providing high quality ACA reporting services. At the start she realized that the information needed to do the employer mandate recording aspect didn't exist in one cohesive place.

“Payroll information obviously came from payroll systems, coverage information from benefits administration systems and the information about how plans were constructed were really something that were in the hands of the employer or the broker,” says Berman, who is also a benefits attorney. “We had a very unique philosophy on how to approach that and built a boutique service that was able to work with any provider to get accurate and complete 1094s and 1095s.”



Jennifer Berman

While MZQ started out in the ACA reporting world it has since branched out into benefits compliance more generally, creating solutions that allow employers to comply with ERISA.

Berman sat down with *Employee Benefit Adviser* during the National Association of Health

Underwriters 2019 annual convention to discuss what she's seeing in the benefits space and the trouble that advisers may find themselves in.

What trends are you seeing in the benefits space?

I'm definitely seeing some new innovative payment structures being driven right now. I think one big trend there would be referenced based pricing plans. What we are referring to is Medicare reimbursement rights. So you're looking at what Medicare would pay and the plan is establishing what it pays in reference to the Medicare pricing. It really shifts the paradigm because at that point, the provider doesn't get to drive the price anymore.

What has surprised you most in your career?

When I started my career working for a large law firm I was shocked by how many employers didn't follow rules that had been in the law since 1974. The requirement that employers have and distribute plan documents has been around forever, but compliance has been weak. There's been more enforcement activity in the last 10 years since ACA and now we're starting to see employers begin to meet the challenges posed by ERISA.

What other areas can get advisers into trouble?

Non-discrimination testing. There's a substantial body of law around discrimination in employee benefits that's not the way that we would

typically think about discrimination. It's discrimination in favor of highly compensated employees. At the core of that is the fact that employee benefit plans are tax-preferred. So employees and employers don't pay taxes, when it's built correctly, on the value of the benefits being provided. There are very complex rules on how and when employers can have different sets of benefits for different sets of employees. Those rules are designed to make sure you're not giving better benefits to highly compensated management employees as sort of preferred folks.

I deal with this all the time and one place where I dealt with it pretty extensively would be in the case of a merger. I had a situation a few weeks ago where a hospital system was acquiring another small hospital and the benefits were completely different. In this particular situation the buyer wanted to make sure they could keep the seller on their existing plan and not have to fold them into their existing plan. The testing had to be done to make sure there was a relatively consistent dis-

tribution of highly compensated and non-highly compensated employees within that group. In that case the testing was done and it was fine.

That was an example of when things work. There are many examples of when things don't work. Oftentimes that's driven by management's desire to actually discriminate under this law.

What are the top legal pitfalls employers and brokers can fall into when it comes to benefits?

The single biggest is failing to understand that this is a heavily regulated industry. There's a lot that can go wrong, but there are simple solutions that allow you to avoid that. ERISA at its core and the benefits law at its core is contract law. It's a contract between the employer and employee and your plan documents are that contract. Not taking the time to make sure the contract is in place is a huge area. The other big one, for large employers with 50 or more employees, is either not completing their employer mandate filings or not doing them correctly.