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Compliance *focus*

COVID-19 is the News of the Day

We are all facing unique and unprecedented challenges as the COVID-19 virus wreaks havoc on the health of people, and the economies of countries, worldwide.

There may never have been a time when employer provided benefits were more important than they are today. Along with financial worries, the ability to access, and afford, quality health care will be one of the biggest concerns that employees have as the pandemic unfolds. How employers deal with their employees' concerns during these difficult times will have a lasting impact on the future success of the business.

On March 17, 2020, Benefit Comply established a COVID-19 resource page in partnership with Guardian HR. Benefit Comply has provided employee benefit health and welfare plan compliance guidance to employers and the insurance industry for over 10 years. We have created this page to collect and share information and guidance related to the impact of the COVID-19 pandemic on employer-sponsored benefit plans. Guardian HR, our HR compliance partner, is also contributing valuable tools, content, and insight on COVID-19 related HR and employment law matters. **We have already added a number of COVID-19 related issue briefs, alerts and FAQs and will continue to regularly update this information as the situation evolves.**

If you have not already, we encourage you to visit our site for resources that will help you navigate these complex and unprecedented issues.

You may access our resource page here: <https://benefitcomply.com/coronavirus/>

In Other News...

Recap of Other 1st Quarter Issue Briefs and Alerts

Minimum Essential Coverage (MEC) / Skinny Plans

Minimum essential coverage (MEC) plans have become synonymous with “skinny plans.” Yet virtually all employer-sponsored major medical plans satisfy the criteria for MEC under the ACA – not just skinny or limited medical plans. Most MEC plans are considered to provide minimum value under the ACA (i.e., at least a 60% actuarial value). Although this latter category of MEC plans is more limited in the coverage provided, it is important to keep in mind that most group health plan statutes and regulations still apply to them in the same way as they do to more robust major medical plans.

More here: <https://benefitcomply.com/issue-brief-minimum-essential-coverage-mec-skinny-plans/>

Break in Service Rules

When employees return to work following a leave of absence or are rehired following a termination of employment, employers must determine how to handle benefit eligibility. For small employers (fewer than 50 FTEs), benefit eligibility is handled in accordance with the plan eligibility rules. In many cases, employees are subject to a new waiting period unless the plan eligibility rules contain a rehire provision allowing for a waiver of the waiting period upon returning to work. However, applicable large employers must follow §4980H break in service rules, at least for medical coverage, to avoid potential penalties.

More here: <https://benefitcomply.com/issue-brief-break-in-service-rules/>

BENEFITS NEWS HIGHLIGHTS

- On January 17th, the Supreme Court agreed to hear an appeal related to the contraceptive mandates filed by the Little Sisters of the Poor and the Trump Administration. Specifically, the appeal is requesting a ruling stating “that the executive branch has the authority to interpret the Religious Freedom Restoration Act (RFRA) and exempt religious objectors from generally applicable legal obligations if those regulations pose a potential RFRA violation.” Click [here](#) for additional information.
- On February 3, [FAQS About Affordable Care Act Implementation Part 41](#) was released by the Departments (Health and Human Services, Department of Labor, and the Treasury). The new FAQ specifically addresses recent updates to the SBC template, instructions, and calculator.
- The IRS recently released a [private letter ruling](#) confirming that dependent care assistance accounts are subject to the irrevocability requirement under Section 125 of the tax code. The ruling further confirmed that while an employer is allowed to permit an employee to make changes to their elections midyear if they experience one of a number of permitted events, the employer is not required to permit midyear election changes due to these events.

Controlled & Affiliated Service Group Basics

The Internal Revenue Code originally established its Controlled Groups Provisions as part of the Revenue Act of 1964. In 1974, the Employee Retirement Income Security Act (ERISA) added sections to existing rules that require that all employees of commonly controlled organizations be treated as employees of a single organization for a number of benefits-related issues. Simply setting up different companies under separate tax ID numbers does not relieve related employers from being treated as a single employer under these rules.

More here: <https://benefitcomply.com/%e2%80%a2-issue-brief-controlled-affiliated-service-group-basics/>

New SAMHSA Requirements May Necessitate Changes to Business Associate Agreements

Employers that sponsor group health plans subject to HIPAA privacy and security requirements may need to review and update their business associate agreements (BAAs) as the result of changes to federal regulations governing the confidentiality of substance use disorder patient records. Specifically, if an employer-sponsored group health plan receives certain types of substance use disorder patient records and discloses these records to a vendor for purpose of payment or healthcare operations, the relevant BAA will need to contain language requiring the business associate to comply with these regulations.

More here: <https://benefitcomply.com/issue-brief-new-samhsa-requirements-may-necessitate-changes-to-business-associate-agreements/>

Court Vacates Portions of HIPAA Regulations & Guidance Related to Individual Right of Access

On January 23, 2020, in *Ciox Health, LLC v. Azar, et al.*, a federal district court vacated portions of the HIPAA Omnibus Final Rule of 2013 related to an individual's right of access to their health records. Specifically, the court order vacated the "third-party directive" within the individual right of access provisions because it went beyond the scope of the Health Information Technology for Clinical and Economic Health Act of 2009 (HITECH) by expanding the type of protected health information (PHI) that must be a third party without valid written authorization. The court also found that in guidance issued in 2016, HHS inappropriately implemented fee limitations on requests to transmit protected health information (PHI) to a third party.

More here: <https://benefitcomply.com/compliance-alert-court-vacates-portions-of-hipaa-regulations-guidance-related-to-individual-right-of-access/>

BENEFITS NEWS HIGHLIGHTS

- Click [here](#) for an article discussing "several district court decisions from 2019 that involve mental health treatment claims, including recent cases addressing the interaction between ERISA and mental health parity statutes."
- On February 21, 2020 the IRS released [Memorandum 20200801E](#), in which it concludes that penalties due by employers under §4980H (the employer mandate) are not subject to any statute of limitations.
- The Kaiser Family Foundation released [10 FAQs on Prescription Drug Importation](#) on February 24, 2020.
- In January of 2019 we asked, "How far do employer plan sponsors have to go to effectively disclose breaches of fiduciary duty?" This was in response to the Ninth Circuit Court of Appeals' decision to reverse a district court's grant of summary judgment in favor of an ERISA plan sponsor in *Sulym v. Intel Corporation Investment Policy Committee*. On February 26, 2020 the Supreme Court weighed in on the question and affirmed the Ninth Circuit's finding that "actual knowledge" means plaintiff must actually be aware of the information. However, the Court did clarify that a plan sponsor's evidence of disclosure is still relevant to proving actual knowledge.

The Supreme Court Agrees to Hear Important ACA Case

The Supreme Court has announced that it will hear *California v. Texas* (formerly known as *Texas v. United States*) during its next term. The Court will consider whether to affirm the lower court's ruling that the individual mandate portion of the Affordable Care Act (ACA) is unconstitutional. More importantly, the Court will decide whether the individual mandate is severable from the rest of the ACA. If it is not, the entire ACA could be ruled unconstitutional.

More here: <https://benefitcomply.com/compliance-alert-the-supreme-court-agrees-to-hear-important-aca-case/>

HHS Announces Proposed Increase to Cost-Sharing Maximums

The Centers for Medicare & Medicaid Services (CMS), a part of the Department of Health and Human Services (HHS), has released the proposed Notice of Benefit & Payment Parameters for 2021. The notice announces an increase to cost-sharing (out-of-pocket) maximums under healthcare reform.

More here: <https://benefitcomply.com/compliance-alert-hhs-announces-increase-to-cost-sharing-maximums/>

Quarterly Q&A

Q. If an employer has to reduce hours or put employees on a temporary leave of absence due to economic conditions or a lack of work related to COVID-19, are the employees still eligible for benefits? What if employment is terminated?

A. For employees who are furloughed, but still employed, the answer depends upon the plan eligibility rules and whether there are any leave of absence policies which extend benefit eligibility. If the employees no longer meet plan eligibility requirements or qualify for a leave of absence which extends benefit eligibility, coverage may need to be terminated and COBRA offered unless the employer coordinates a benefit extension with the carrier or stop-loss vendor.

For employees who are laid off (employment is terminated), even if it is expected to be temporary, the former employees will no longer meet the plan eligibility requirements, and therefore coverage may need to be terminated and COBRA offered. As mentioned above for a furlough, the employer could extend benefit eligibility temporarily beyond employment if the carrier or stop-loss vendor is willing to cooperate.

More information may be found in our issue brief found on our COVID-19 resource site, here: https://benefitcomply.com/wp-content/uploads/2020/03/COVID19SickLeaveFurloughsLayoffs_Mar2020.docx.

NOTE: The DOL has advised that employers who have furlough or lay-off employees will generally not have to offer such employees Emergency Paid Sick Leave or Expanded FMLA as provided under the new legislation. The DOL indicates this is true whether the furlough/lay-off is due to lack of business or because it was required to close pursuant to a Federal, State, or local directive. See Q&As 23-28 here – <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.