Compliance *focus*

In this issue

Introduction

This issue of Compliance Focus feels reminiscent of a simpler time - before Covid-19, when employers just had to focus on the basics. Okay, so "the basics" as they relate to employer health and welfare benefits aren't always so simple! But they are more familiar, and from that perspective, we hope the information provided in this issue brings a sense of relief after the flurry of laws, regulation, guidance, and changes over the past six months. Here, we discuss how employers might take advantage of recent regulatory flexibility with respect to open enrollment notices and disclosure; we review the issue briefs/alerts we've issued over the past 3 months on an array of familiar topics (the ACA, MLR rebates, employer reporting, etc.); and we answer one of the most common questions we receive about the different contribution rules for HSAs, FSAs and DCAPs. You can also view some important benefits highlights from this quarter.

Employer Notice Flexibility During Open Enrollment

One of the good things to come out of the blizzard of rules and regulations that have been issued in response to the COVID-19 pandemic is DOL Notice 2020-1. In this notice, the DOL recognizes that employers face unique challenges this year when trying to provide required notices and disclosures to employees.

In response, the DOL has provided flexibility in how notices and disclosures can be provided during the Outbreak Period. Remember that the Outbreak Period runs until 60 days after the national emergency is declared over by the Federal government.

During the Outbreak Period the DOL will not enforce the normal ERISA notice and disclosure requirements as long as "*the plan…act[s] in good faith and furnish[es] the notice, disclosure, or document as soon as administratively practicable under the circumstances. Good faith acts include use of electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites*."

The DOL also states that the Department of Health and Human Services (HHS) has agreed to provide similar flexibility for requirements contained in the Public Health Service Act (PHSA) to plans not subject to ERISA, and the IRS will also take a similar approach to notice requirements under its jurisdiction.

How Could this Help During Open Enrollment Season?

Many employers have furloughed, but not laid off, large numbers of employees. Some of these employees may not have online access to the employer's systems that meets the DOL electronic disclosure safe harbor requirements. The flexibility to provide information in other means could help in this situation.

We are particularly interested in the ability to post the information on "continuous access websites." For example, an employer could post their benefits book and Summary of Benefits and Coverage (SBC) on the company website, then inform employees that they believe have internet access where to find the information.

Obviously, employers need to make a reasonable effort to provide important plan information to participants, but this flexibility and enforcement relief is welcome news for employers struggling with employee communications during these difficult times.

In Other News…

Recap of 3rd Quarter Issue Briefs and Alerts

Supreme Court Ruling – Contraceptive Exemption

After several years of debate, the Supreme Court ruled in favor of the HHS final rules allowing for an exemption for employers with a religious or moral objection to providing coverage for contraceptive coverage. The exemption, at least for now, is available to most non-governmental organizations who would prefer not to provide group health plan coverage for contraceptives.

More here: https://benefitcomply.com/supreme-court-ruling-contraceptive-exemption/

Record Retention Requirements & Considerations

Employers often ask, "How long should I retain my employee benefits–related records?" It comes as no surprise that there is not an easy answer to this question because of the applicability of different laws, regulations, and situations specific to a particular business. For example, depending on the type of records being retained, ERISA, the ACA, and the Internal Revenue Code all impose specified record retention requirements. In addition, states may also impose document retention standards. Finally, having records necessary to defend the employer in the event of a lawsuit must also be considered.

Very few employers are going to align record-keeping procedures specifically with each existing requirement. Rather, most will create an easier-to-administer approach that maintains most records for a minimum specified period. Understanding the details of certain requirements will help employers better design an approach that is manageable and that minimizes risk to the employer.
More here: https://benefitcomply.com/record-retention-requirements-considerations/

BENEFITS NEWS HIGHLIGHTS

- On July 8, the Internal Revenue Service (IRS) issued Notice 2020-54, requiring employers to report qualified sick leave and family leave wages paid to employees under the Families First Coronavirus Response Act (FFCRA) on 2020 W-2s in Box 14 or on a separate statement. The guidance also provides employees who are also self-employed with information necessary to claim qualified sick leave equivalent or qualified family leave equivalent credits under the FFCRA.

- On July 13, the IRS released draft versions of the 2020 Forms 1094-C and 1095-C. The 1095-C has been modified for 2020 to accommodate offers of coverage for an Individual Coverage Health Reimbursement Arrangement (ICHRA), including eight new Line 14 codes.

- On July 15, the IRS and Employee Benefits Security Administration (EBSA) and the Department of Health and Human Services (HHS) issued a proposed rule that would amend the 2015 final grandfathering regulations to provide greater flexibility for making changes to fixed-amount cost-sharing requirements without jeopardizing grandfathered status if those changes are necessary to satisfy IRS requirements for high deductible health plans (HDHPs). The Departments concurrently issued a set of Frequently Asked Questions (FAQs) regarding the proposed rule.

- On July 16, the DOL announced that its Wage and Hour Division (WHD) made revisions to its optional-use FMLA forms that simplify and streamline the completion process. Changes included revisions to the Combined Eligibility Notice/Notice of Rights and Responsibilities; the Designation Notice; the Certification of Health Care Provider form; and Certification of Military Family Leave form. The updated forms can be found here.

2021 "Affordability" Percentage

.

More here: https://benefitcomply.com/2021-affordability-percentage/

Supreme Court Ruling – Title VII Nondiscrimination Rules

The recent Supreme Court decision in *Bostock v. Clayton County* (6/15/2020) may require employers to reconsider who is eligible for, and what coverage is available under, employer-sponsored benefits. The Court held that Title VII protection against employment discrimination based on sex should extend to discrimination based on an individual's sexual orientation or gender identity.
More here: https://benefitcomply.com/supreme-court-ruling-title-vii-nondiscrimination-rules/

How Employers Should Handle MLR Rebates

Employers who sponsor a fully-insured group health plan may soon be receiving a Medical Loss Ratio (MLR) rebate from their insurers. Self-insured medical benefit plans are not subject to these requirements. For employers who need a refresher on exactly how to handle the rebates, we've provided some background on the MLR rebate and have also answered several common questions.

More here: https://benefitcomply.com/how-employers-should-handle-mlr-rebates-4/

Dependent Care Assistance Programs (DCAPs): Basics

Section 129 of the tax code permits employees to exclude up to $5,000 from gross income to pay for dependent care expenses. These arrangements, required to be established by a written document, are referred to as Dependent Care Assistance Programs (DCAPs). In many ways they function similarly to health flexible spending accounts (FSAs), so they are frequently referred to as "dependent care flex accounts." In this issue brief, we will discuss the various rules to be aware of when implementing and administering a DCAP.

More here: https://benefitcomply.com/dependent-care-assistance-programs-dcaps-basics/

- On July 23, the Department of Health and Human Services (HHS) extended the COVID-19 public health emergency for an additional 90 days (i.e., until October 23, 2020). The public health emergency was originally declared by HHS in late January 2020 and first renewed in April. For more information on the implications of this emergency, and the difference between it and President Trump's National Emergency, see our blog post here.

- On July 27, HHS issued a press release regarding a $1 million payment by a health care provider for a privacy breach stemming from the theft of an unencrypted laptop that contained the protected health information (PHI) of over 20K patients. The Office of Civil Rights (OCR) investigated the incident and concluded that the provider had failed to encrypt ePHI on laptops even after determining that it was reasonable and appropriate to do so. In addition, the provider had failed to implement device/media controls and execute a business associate agreement with a vendor. In addition to the fine, the provider is required to comply with a corrective action plan.

- On July 29, the Treasury Department and IRS issued temporary and proposed regulations addressing the reconciliation of advance payments of refundable employment tax credits provided under the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), including the process for recapturing excess payments when necessary.

- In its Summer Cybersecurity Newsletter, the Office of Civil Rights (OCR) highlights the importance of developing and maintaining an IT asset inventory to help monitor its environment, ensure software is up to date, and effectively guard against malicious intrusion. OCR also notes that maintenance of an asset inventory also helps organizations comply with the Security Rule's requirement to "implement policies and procedures that govern the receipt and removal of hardware and electronic medial that contain ePHI into and out of a facility, and the movement of these items within the facility."

California Releases Draft Employer Reporting Instructions

California has recently released draft reporting instructions to assist employers and other entities who are subject to reporting requirements under California's individual mandate. These forms help clarify exactly who is subject to California's reporting requirements; what content must be filed with the state and on what forms; the due date for such information; and other issues related to filing requirements.

More here: https://benefitcomply.com/compliance-alert-california-releases-draft-employer-reporting-instructions/

Life Insurance – Imputing Income

Life insurance policies (both group term life and supplemental life policies) are commonly offered by employers, but such policies cannot always be provided on a tax-favored basis like group health plan coverage. Employers offering life insurance to employees and their family members need to understand the taxation rules to impute additional taxable compensation where appropriate. The taxation of such benefits will depend upon whose life is insured, the benefit amount, the cost of coverage, and the handling of premium payments.

More here: https://benefitcomply.com/life-insurance-imputing-income/

- On July 23, the Department of Health and Human Services (HHS) extended the COVID-19 public health emergency for an additional 90 days (i.e., until October 23, 2020). The public health emergency was originally declared by HHS in late January 2020 and first renewed in April. For more information on the implications of this emergency, and the difference between it and President Trump's National Emergency, see our blog post here.

- On September 3, Nelson Mullins Riley & Scarborough LLP issued an article describing the ways in which the Covid-19 pandemic may make a telemedicine benefit a more attractive offering for employers. Specifically, the article notes that remote work, the increased need for wellness programs, and relaxed regulatory enforcement with respect to telemedicine programs make the offering more valuable during this pandemic.

- On September 4, Katie Keith reported in Health Affairs on a new preliminary injunction issued by the U.S. District Court for the District of Columbia against portions a recent OCR final rule. The final rule eliminated certain protections under Section 1557 of the Affordable Care Act (ACA) against discrimination based on gender identity or sexual orientation. This new preliminary injunction not only prevents HHS from enforcing the rule as it relates to sex discrimination; it also prevents HHS from enforcing a separate provision that allows health care providers to claim a religious exemption from Section 1557.

- On September 9, the Internal Revenue Service (IRS) issued Notice 2020-66, clarifying that Medicaid coverage of Covid-19 testing and diagnostic services under the Families First Act is not considered minimum essential coverage (MEC) and therefore will not interfere with premium tax credit eligibility.

- In August, a New York District Court vacated four (4) provisions of the Department of Labor's (DOL's) final rule regarding the Families First Coronavirus Relief Act (FFCRA). In response, the DOL recently issued revisions and clarifications to its rule. Littler provides a summary of the revised rule's key provisions here.

Quarterly Q&A

Question: What are the different rules with respect to annual contribution limits for health flexible spending accounts (HFSAs), dependent care assistance plans (DCAPs), and health savings accounts (HSAs) when an employee joins the employer's plan mid-plan year?

Answer: Different contribution rules apply depending on the plan/account in question. More detail is provided below.

HFSAs

When an employee joins a HFSA mid-plan year, they may elect to make up to the full annual contribution limit ($2,750 for 2020). This is true even if the individual previously contributed to a HFSA under another employer's plan during the same plan year, since the annual contribution limits apply on a per-plan basis.

Example: Denise is hired by Employer A on May 6. Employer A offers a HFSA that runs on a calendar year. Denise elects to contribute $2,750 to the HFSA. Denise's coverage takes effect June 1. Since Denise is permitted to make a full annual election for her HFA even though she has joined mid plan year, she will be able to make contributions of $392.85/month to her HFSA for each of her 7 months of coverage. (And remember that because of the "uniform contribution rule," Denise's full annual contribution election amount will be available for reimbursement of claims beginning on June 1, even though Denise has not yet contributed that amount to her HFSA.)

NOTE: If the employer offers a short plan year for all participants (e.g. due to changing plan years or an acquisition), the employer is required to pro-rate the annual contribution limit accordingly.

HSAs

HSA contribution maximums are determined on a calendar year basis and are generally calculated on a monthly basis for each month that an individual has qualified HDHP coverage in place. (An individual is considered to have HDHP coverage for any month in which the HDHP was in effect as of the first of the month.) So if an individual has HDHP coverage in place for 5 months of the calendar year and is HSA-eligible for those 5 months, they may establish to an HSA and contribute 1/12 of the annual statutory maximum for their applicable tier of coverage for each of those five months.

Example: Jose is hired by Employer B on June 13, 2020. He enrolls in single coverage under an HSA-compatible HDHP and coverage takes effect August 1. Jose remains enrolled in the HDHP for the remainder of the calendar year. He may contribute 1/12 of $3,550 (for 2020) for each of the 5 months of coverage.

The monthly contribution rule applies unless an individual wishes to take advantage of what is known as the "full contribution," or "last month," rule. This rule permits somebody who is HSA-eligible as of December 1 of a given calendar year to make a full year's contribution to their HSA for their applicable tier of HDHP coverage ($3,550 for single and $7,100 for family in 2020), even if they were not HSA eligible for the entire year. This is true if the individual commits to remaining HSA-eligible for all of December and the entire *following* calendar year (this is known as the 13-month "testing period").

Example: In the scenario above, instead of making pro-rated monthly contributions to his HSA for August – December, Jose could elect to make a full contribution of $3,550 for the calendar year as long as he commits to remaining HSA-eligible for the remainder of December 2020 and all of 2021.

DCAPs

DCAP contributions apply on a calendar year basis, and apply per family, rather than per plan. Therefore, an individual who enrolls in a DCAP midyear may be able to make the full allowable contribution as long contributions are not made to another employer's DCAP for the same calendar year (e.g., as long as a spouse isn't also contributing to an employer's DCAP, or as long as the individual wasn't previously contributing to another employer's DCAP during the calendar year).
The maximum calendar year contribution for a DCAP for a household (i.e., both individuals and spouses who are married and filing jointly) is $5,000. Therefore, if spouses work at separate employers, they may only contribute a *combined* total of $5,000 to their respective DCAPs per calendar year.

Example 1: Andrea switches jobs midyear. Under her previous employer, she had participated in a DCAP and had contributed a total of $2,400 to the plan. She joins her new employer's DCAP and may contribute an additional $2,600 to the DCAP for the remainder of the calendar year.

Example 2: Same facts as Example 1, except that Andrea had not contributed to a DCAP with her previous employer. Andrea may elect the full $5,000 to contribute to her DCAP with her new employer for the remainder of the calendar year.

Example 3: Same facts as Example 2, except that Andrea's spouse (with whom she files jointly) also participates in a DCAP and has contributed $3,000 to that DCAP for the calendar year. When Andrea joins her new employer's DCAP, she may contribute up to $2,000 for the calendar year assuming her spouse does not contribute any additional amounts to their DCAP.