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Compliance *focus*

Introduction

The final quarter of 2020 was perhaps the most “normal” with respect to all issues compliance- and benefits-related. We saw the typical updates of federal limits for various benefits/fees and some additional guidance around various Covid-19 related benefits issues. One surprise was perhaps the Covid-19 relief bill signed by President Trump just last week, which provided additional relief for Section 125 health flexible spending arrangements and Section 129 dependent care assistance programs. You can read more about these changes, along with other significant regulatory news, below.

The “Outbreak Period” Continues...Hassles with COBRA, HIPAA and ERISA Claim Suspensions

Many of us assumed that the National Emergency would not end on April 30th, 2020 as the agency guidance suggested in its examples, however, we all hoped it would be over by now. As the National Emergency continues, more employers find themselves having to deal with late COBRA elections and payments, enrollment requests well beyond the typical 30-day window, and a seemingly never-ending run-out period for HRAs and health FSAs.

As a quick reminder, last April the agencies issued a joint final rule extending time frames for COBRA elections and payments, HIPAA special enrollment notices, and ERISA claim submissions. The rule indicated that all applicable deadlines were suspended beginning March 1st, 2020 until 60 days after the end of the National Emergency (i.e. the “Outbreak Period”). President Trump has not declared the National Emergency over, and Congress hasn’t taken any such action either, so the Outbreak Period continues without any definite end in sight. Over a short period of time, the Outbreak Period certainly provided some additional protection and flexibility for employees while having only a minor impact on employers and plan administration. However, as the Outbreak Period drags on, the burden for employers has increased.

COBRA

The biggest struggle and risk to employers is likely the extended COBRA election and payment deadlines.

- Employees who experienced a qualifying event triggering a COBRA continuation right as of March 1st, 2020 or later have the option to elect COBRA up to 60 days after the end of the Outbreak Period since their 60-day election period will not begin to toll until the Outbreak Period ends. Such an individual would then also have an additional 45 days beyond electing COBRA to make full payment. It may be difficult for individuals to delay electing COBRA for many months and then have enough cash to make premium payments for all such months at once, but if that does occur, will the carrier or stop-loss vendor allow the coverage to be reinstated retroactively? Will the COBRA administrator handle this appropriately?
- For those who elected COBRA prior to or during the Outbreak Period, payment deadlines are also extended. For example, any payments missed during the Outbreak Period would still be timely up to 30 days after the end of the Outbreak Period because the 30-day grace period will not begin to toll until the Outbreak Period ends. During the Outbreak Period, the employer and carrier have a few options for handling nonpayment:
 - Continue to pay the premium on behalf of the COBRA participant and then terminate retroactively if full payment is not made after the Outbreak Period;
 - Continue to pay the premium on behalf of the COBRA participant, but suspend claims payments until payment is made; or terminate coverage retroactively if full payment is not made after the Outbreak Period; or
 - Terminate coverage and then reinstate retroactively (including reprocessing any applicable claims) if full payment is made after the Outbreak Period.

The employer must carefully coordinate this decision with the carrier (or stop-loss vendor) to ensure the carrier will provide coverage, suspend claims, or terminate/reinstate retroactively. In addition, the employer should really make this decision uniformly for all COBRA participants and ensure the COBRA administrator will handle administration accordingly. Unless the COBRA participant confirms a desire to discontinue coverage (beyond just failing to pay), the employer must ensure there is a way to provide the coverage if the individual eventually makes payment.

HIPAA Special Enrollments

Many employers have struggled over the last couple months with HIPAA special enrollment requests as well. Employees who request mid-year enrollment due to a loss of coverage, acquisition of a dependent due to marriage or birth/adoption, or becoming newly eligible for a Medicaid/CHIP subsidy are generally required to request enrollment within 30 or 60 days of the event depending upon which event occurred. This 30-day (or 60-day) notification period is suspended during the Outbreak Period, meaning an event could occur now and enrollment could be requested up until 30 (or 60) days following the end of the Outbreak Period. NOTE: The extension applies to the notice timeframe, but does not change the requirements for the effective date. Upon receiving a request for enrollment, the plan is in compliance so long as coverage is made effective no later than 1st of the month following receipt of the notice, unless the triggering event was a birth or adoption, in which case the plan must make coverage effective retroactively back to the date of birth or adoption.

For example, if an employee got married in September 2020, a HIPAA special enrollment right is triggered for the employee, spouse and any newly acquired dependents (e.g. stepchildren).

Typically notice of the event would be required within 30 days of the marriage for any such individuals to exercise their special enrollment right. However, if the employee requested enrollment for the spouse in December 2020, the plan would be in compliance so long as coverage for the spouse was made effective no later than January 1st, 2021.

HRA and Health FSA Claims

While the agencies' joint rule doesn't specifically address health FSA or HRA claims, it is generally accepted that because claims for reimbursement under a health FSA or HRA are considered "ERISA claims" they are therefore subject to the extended deadlines during the Outbreak Period. For a health FSA or HRA, rather than submission within a date tied to when each expense was incurred, claims are generally required to be submitted within a certain time frame following the end of the plan year (i.e. a run-out period). If a 2019 plan year's run-out period extended beyond March 1st, 2020, it appears that the employer would have to allow claims incurred during the 2019 plan year to be submitted for reimbursement through the end of the Outbreak Period + any time that was remaining in the run-out period as of March 1st, 2020. As time passes, it becomes less likely that plan participants are still holding onto claims for reimbursement from a 2019 plan year that ended early in 2020. However, employers with plan years that ended in the second half of 2020 should keep this requirement in mind as their normal run-out periods end and the Outbreak Period continues.

In Other News...

Recap of 4th Quarter Issue Briefs and Alerts

2020 Employer Reporting – Slight Extension & Transition Relief

IRS Notice 2020-76 once again extends the due date to March 2nd, 2021 for providing Form 1095s to individuals and is allowing Form 1095-Bs to be made available upon request rather than requiring individual delivery. The IRS also granted one final year of penalty relief for good faith reporting errors.

More here: <https://benefitcomply.com/2020-employer-reporting-slight-extension-transition-relief/>

IRS Announces 2021 Health FSA & Qualified Transportation Limits

In Revenue Procedure 2020-45, the IRS sets forth a variety of 2021 adjusted tax limits. Among other things, the notice indicates that employee contribution limits toward health flexible spending arrangements (FSAs) and qualified transportation fringe benefits are unchanged for 2021. The limit on annual employee contributions toward health FSAs for 2021 is \$2,750, with the ability to carryover up to \$550. (And note that the recently-passed Covid-19 relief legislation mentioned below temporarily increases the carryover to an unlimited amount.) The limit on monthly contributions toward qualified transportation and parking benefits for 2021 remains at \$270.

More here: <https://benefitcomply.com/irs-announces-2021-health-fsa-qualified-transportation-limits/>

Schedules A & C: A Closer Look

Schedules A & C are attached to Form 5500 and used to report insurance and service provider information, respectively. In this issue brief, we briefly discuss the basics of each schedule, clear up some common misconceptions surrounding the schedules, and provide a few tips for Form 5500 preparers. Finally, we preview proposed 5500 reporting changes.

More here: <https://benefitcomply.com/schedules-a-c-a-closer-look/>

BENEFITS NEWS HIGHLIGHTS

- On October 19, the IRS published [Rev. Proc. 2020-43](#) setting forth the maximum contribution amount for excepted benefit health reimbursement arrangements for plan years beginning after December 31, 2020, and before January 1, 2022. The indexed amount remains \$1,800.
- On October 29, the Departments of Health and Human Services, Treasury, and Labor released a [final price transparency rule](#) (along with an accompanying [fact sheet](#)) that requires non-grandfathered group health plans and health insurance issuers offering non-grandfathered coverage in the individual and group markets to provide cost-sharing information to enrollees and disclose certain pricing information for in-network and out-of-network providers and for prescription drugs.
- On November 10, the United States Supreme Court heard oral arguments regarding the constitutionality of the Affordable Care Act's individual mandate, and whether that provision is severable from the rest of the law. Health Affairs' Katie Keith provides a summary of these arguments [here](#). A decision is expected next spring at the earliest, or before the end of the current term (summer 2021) at the latest.
- On December 9, the IRS and Treasury [finalized](#) regulations implementing provisions in the 2017 Tax Cut and Jobs Act that eliminated the employer deduction for expenses related to qualified transportation and commuting fringe benefits.
- On December 10, HHS issued [proposed rules](#) that would change the requirements for group health plans with respect to uses and disclosures of PHI. The proposed rule would also modify the required content of the HIPAA Notice of Privacy Practices. Comments on the proposed rule are due by mid-February.
- In mid-December, OCR released a [summary of its findings](#) from the HIPAA compliance audits it conducted in 2016-2017. Among the findings was that, while covered entities and business associates complied with notification requirements after a breach occurred, most entities failed to conduct appropriate security risk analyses and implement necessary safeguards to adequately protect their PHI in the first place.

Updated PCORI Fees Released

In Notice 2020-84, the IRS provided the adjusted PCORI fee of \$2.66 for plan years ending in October 2020 through September 2021. Employers who sponsored self-funded group medical plans are required to report and pay the ACA Patient-Centered Outcomes Research Institute (PCORI) fees annually. In the spending bill passed late in 2019, the PCORI fee (which was set to expire) was extended another 10 years.

More here: <https://benefitcomply.com/updated-pcori-fees-released/>

Group Health Plan Coverage of COVID-19 Immunizations

Non-grandfathered group health plans must prepare to provide coverage for COVID-19 immunizations with no cost-sharing. Coverage with no cost-sharing must be available for both in-network and out-of-network providers within 15 days of such immunizations being recommended by the United States Preventive Services Task Force (USPSTF) or the Advisory Committee on Immunization Practices (ACIP). Grandfathered group health plans are encouraged, but not required, to provide this coverage as well.

More here: <https://benefitcomply.com/group-health-plan-coverage-of-covid-19-immunizations/>

Health & Welfare Benefit Nondiscrimination Rules

Employers are generally permitted to structure plans with different eligibility, benefits, and contributions between classes of employees so long as the employer does not discriminate against a protected class (e.g., age, disability, race, religion, or sex) or based on health status. However, to offer benefits on a tax-favored basis, plans must be structured in accordance with benefit nondiscrimination rules. Benefit nondiscrimination rules restrict the ability to favor highly compensated individuals or key employees on a tax-favored basis. Benefit nondiscrimination rules are enforced by the IRS. Failure to comply with benefit nondiscrimination rules risks the highly compensated and key employees being taxed on benefits received under the discriminatory plan.

More here: <https://benefitcomply.com/health-welfare-benefit-nondiscrimination-rules/>

Can Employers Require COVID-19 Vaccinations?

As COVID-19 vaccines become available, many employers will have a strong case for requiring employee vaccinations, so long as their vaccination policies have certain exceptions, are job-related, and are consistent with business necessity, legal experts say...

Important Note: This alert provided by Guardian HR Compliance, a Benefit Comply service. For more information on employer HR compliance support please visit <https://benefitcomply.com/hr-support/>

More here: <https://benefitcomply.com/can-employers-require-covid-19-vaccinations/>

Significant Benefits Issues in New COVID-19 Relief Legislation

The recently passed COVID-19 relief legislation contains some important benefits-related provisions. We have drafted two different compliance alerts outlining key provisions. The first provides a high-level

overview of the most important benefits provisions in the legislation, including new flexibility regarding Section 125 and 129 reimbursements and elections. The second is a more detailed dive into the 125 and 129 changes.

More here: <https://benefitcomply.com/significant-benefits-issues-in-new-covid-19-relief-legislation/>

And here: <https://benefitcomply.com/additional-sections-125-and-129-flexibility-included-in-covid-19-relief-legislation/>

Quarterly Q&A

Question: Do employers need to be concerned about compliance with provisions in final Health Plan Transparency in Coverage Rule and reporting requirements in the new Covid-19 relief bill (i.e., the Consolidated Appropriations Act, 2021)?

Answer:

Transparency in Coverage Final Rule

The Transparency in Coverage rule, issued in response to President Trump's Executive Order aimed at increasing transparency in the health industry, was issued in late October and takes effect in early January 2021.

Although provisions in the regulations apply to "group health plans," it seems likely that many of the requirements will be handled by the carriers and TPAs, rather than by employers. Here are a few thoughts and observations up front:

- This is going to be a hard-fought battle. We expect the insurance and health care industries to push back hard on this one. There will also be lawsuits. There is likely a good chance that the regulations will significantly change in some ways before they are actually rolled out.
- Employers will probably end up being involved in distributing whatever information is required to their plan participants, but most of the hard work will fall on the backs of the insurance carriers and the TPA/Networks. Employers generally have no access to the actual payment arrangements that exist between the payer and providers. So the detailed cost data that is supposed to be provided to the participant will have to come from the carrier or TPA.
- We anticipate a whole cottage industry of cost data vendors will pop up to take advantage of the cost data files that are supposed to be released (initially on 500 procedures).

Employers should watch this, but there is very little that can be done by employers at this point other than communicate with carriers and administrators regarding their approach to the new rules as they further develop.

Consolidated Appropriations Act, 2021

This legislation also includes significant new health plan reporting requirements regarding prescription and other health plan cost information. These requirements go into effect beginning in 2022. Plans will be required to report certain information as described in [our issue brief](#). As we note there, employer plan sponsors will be responsible to ensure that required reporting is completed for their plans, but again, much of the information required will need to be provided by carriers and plan administration vendors. We expect significant regulatory guidance on this reporting requirement to be released during 2021, which will help employers better understand exactly what needs to be reported.