Compliance

In this issue

Introduction

Employer Mandate Collection Efforts for 2018

Many employers have recently received a Letter 226J from the IRS proposing that an employer shared responsibility payment (ESRP) is owed for the 2018 calendar year, which means the IRS has wrapped up most collections for 2017 and is now focusing on 2018.

Upon receipt of a Letter 226J, the employer has 30 days to either make payment or appeal the proposed ESRP (unless an extension is requested). Since many of the proposed assessments are the result of a misunderstanding of the offer of coverage requirements and/or employer reporting mistakes, most employers have the option to appeal, arguing that coverage was actually offered in accordance with §4980H requirements. We have worked on appeals for several hundred employers at this point, in all cases successfully appealing any proposed ESRP that was not reflective of the coverage actually offered by the employer. In other words, submitting an adequate explanation and supporting documentation to the IRS should result in a dismissal of the proposed ESRP. We strongly recommend that employers get assistance before agreeing to pay any proposed assessment. In many cases, even when there weren't any significant reporting errors, there is room to argue that the assessment should be reduced (e.g., because of over-reporting full-time employee counts or confusion as to how to apply the affordability safe harbors).

One of the biggest mistakes that we continue to run into is a failure to indicate on the Form 1094-C that minimum essential coverage (MEC) was offered to at least 95% (or all but 5, if greater) of full-time employees and their dependents for each month. If an employer failed to mark "Yes" in Part III, column (a) of the Form 1094-C for all 12 months and at least one full-time employee enrolled in subsidized coverage through a public Exchange, the IRS will assess a penalty under §4980H(a).

To appeal a proposed ESRP under §4980H, we suggest submitting the following:

- A letter/explanation disputing all or part of the assessment;
- A completed Form 14764, with signature, indicating disagreement with the assessment and that no payment is being sent in; and

- Revised coding on Form 14765 for employees listed, including supporting documentation, if applicable.

We have updated our summary of §4980H requirements and penalties with 2021 numbers, which you can find here: https://benefitcomply.com/affordability-considerations/

An IRS FAQ page specific to Letter 226J may be found here – https://www.irs.gov/individuals/understanding-your-letter-226-j

An IRS FAQ page specific to Employer Shared Responsibility Provisions may be found here – https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act

In Other News...

Recap of 1st Quarter Issue Briefs and Alerts

EEOC Proposed Wellness Rules Addressing Permitted Incentive Limits

The EEOC released long-awaited proposed rules addressing what type of incentive can be offered for participation in a wellness program without violating the Americans with Disabilities Act (ADA) or the Genetic Information Nondiscrimination Act (GINA). The rules propose that most wellness programs subject to the ADA or GINA are permitted to offer only a de minimis incentive, stating that "allowing too high of an incentive would make employees feel coerced to disclose protected medical information to receive a reward or avoid a penalty," but there is an exception allowing health-contingent programs that are part of a group health plan to instead follow HIPAA wellness program incentive limits. NOTE: these rules were subsequently pulled from publication in the Federal Register and placed on hold pending further review by the Biden Administration.

More here: https://benefitcomply.com/eeoc-proposed-wellness-rules-addressing-permitted-incentive-limits/

HHS Issues Proposed Modifications to HIPAA Privacy Rule

On December 10, 2020, HHS of Health and Human Services (HHS) released a pre-publication version of a proposed rule (the "proposed rule") that would modify the HIPAA Privacy Rule to better support care coordination and case management. The proposed rule builds upon public input solicited by HHS in 2018 as part of its "Regulatory Sprint to Coordinated Care."

More here: https://benefitcomply.com/hhs-issues-proposed-modifications-to-the-hipaa-privacy-rule/

Enforcement Efforts for Mental Health Parity – New Comparative Analysis

Recent legislation prioritizes enforcement efforts for existing rules that require parity for group health plan coverage of mental health and substance use disorder benefits. Group health plans that provide coverage for mental health or

BENEFITS NEWS HIGHLIGHTS

- On January 5, President Trump signed into law H.R. 7898, which amends HITECH to give businesses credit for certain security practices. Specifically, the legislation requires the Department of Health and Human Services (HHS) to consider whether covered entities and business associates have implemented recognized security practices (e.g., the National Institute of Standards and Technology Act (NIST) Security Framework) for purposes of HIPAA compliance. Having done so may result in reduced or more favorable penalties; audit resolutions; and mitigation of remedies. Epstein, Becker, and Green provides a helpful summary of the legislation here.

- On January 7, HHS announced that it would be extending the Covid-19 National Public Emergency for an additional 90 days, effective January 21, 2021.

- On January 14, the Department of Labor issued its annual inflationary adjustments to the civil monetary penalties that apply for certain ERISA violations.

- Also on January 14, the Treasury Department issued final ICHRA rules, which did not differ substantively from the proposed rules issued in 2019 (see Benefit Comply's summary of the proposed rules here).

- In mid-January, the Department of Health and Human Services (HHS) updated the federal mainland poverty level (FPL), setting it at $12,880 for 2021 (up from $12,760 in 2020). Applicable Large Employers who are relying on the FPL affordability safe harbor may use the FPL in effect 6 months before the start of the plan year.
- On January 19, the Centers for Medicare and Medicaid Services (CMS) issued a bulletin extending its nonenforcement policy (in place since 2013) for certain non-grandfathered individual and small group market plans that do not comply with specified market reforms (so-called "grandmothered plans"). The extended non-enforcement allows states to permit insurers to renew "grandmothered" policies that begin on or before October 1, 2022. It also requires that such coverage come into compliance with the applicable requirements by January 1, 2023.

substance use disorder benefits and are therefore subject to mental health parity rules will soon be required to prepare a comparative analysis and have it available upon request. The carrier will handle this responsibility on behalf of fully-insured group health plans, but employers offering a self-funded group health plan should coordinate with their third-party administrator (TPA) to determine compliance responsibilities for this new requirement.

More here: https://benefitcomply.com/enforcement-efforts-for-mental-health-parity-new-comparative-analysis/

IRS Guidance on COVID-Related Cafeteria Plan Flexibility

In mid-February, the IRS released guidance further clarifying items in the recently passed Consolidated Appropriations Act of 2021 (CAA) permitting flexibility for health flexible spending arrangements (FSAs), dependent care account plans (DCAPs) and cafeteria plan election change rules. None of these changes are required. Employers have the option to implement some or all of the changes, or employers could choose not to change their plans at all. For employers who are willing to allow some additional flexibility, IRS Notice 2021-15 provides further details on exactly what is permitted and how it may impact things such as annual contribution limits, HSA-eligibility, COBRA continuation, and nondiscrimination rules. The notice also added some additional election change flexibility around health coverage similar to what was available in 2020 under Notice 2020-29.

More here: https://benefitcomply.com/irs-guidance-on-covid-related-cafeteria-plan-flexibility/

New DOL Outbreak Period and Extended Time Frames Guidance

The Department of Labor (DOL) has issued new guidance regarding notice and disclosure timeframe relief for employee benefit plans and plan participants due to COVID-19. EBSA Disaster Relief Notice 2021-01 (The Joint Notice) clarifies that the deadline for extended timeframes, such as a COBRA election, are based on each participant's individual circumstances, rather than on a fixed period applicable to all notices and disclosures. This interpretation will create significant administrative challenges for plan sponsors and administrators.

More here: https://benefitcomply.com/new-dol-outbreak-period-and-extended-time-frames-guidance/

BENEFITS NEWS HIGHLIGHTS

- The IRS has released an updated version of Publication 502, which sets forth expenses that are considered "medical expenses" under Code § 213(d) and that may be eligible for reimbursement under a health FSA, HSA, HRA, or covered on a tax-favored basis under a group health plan.

- HHS has finalized portions of its proposed Notice of Benefits and Payments Parameters for 2022 to address standards for individual coverage HRAs (ICHRAs) and qualified small employer health reimbursement arrangements (QSEHRAs). Under the final rules, individual market insurers will be required to: 1) accept payments of premiums that are received directly from an ICHRA or QSEHRA that are made on behalf of an enrollee covered by the ICHRA or QSEHRA; and 2) accept payments made directly by enrollees in connection with an ICHRA or QSEHRA. Issuers must accept such payments as long as they are made using one of the acceptable monthly premium payment methods under existing exchange standards.

- On January 28, the Biden administration issued an Executive Order indicating that it would be opening a special enrollment period (SEP) for individuals in the Health Insurance Marketplace (federal exchange) from February 15, 2021 – May 15, 2021 (now further extended to August 15, 2021). Individuals who are uninsured and those who are currently covered by a Marketplace plan and wish to change coverage are eligible to enroll. Individuals covered by COBRA will also be able to drop COBRA and enroll.

Significant Employee Benefit Changes Contained in the American Rescue Plan Act (ARPA)

Congress passed the $1.9 trillion COVID relief bill, the American Rescue Plan Act of 2021 (ARPA). The bill includes significant employee benefits related provisions including a federal subsidy that will cover 100% of the cost of COBRA continuation coverage for up to 6 months for individuals who have had an involuntary termination of employment or reduction in hours. The bill also includes an increase in the amount an employee can elect to contribute tax-free to a §129 Dependent Care Assistance Program (DCAP).

More here: https://benefitcomply.com/significant-employee-benefit-changes-contained-in-the-american-rescue-plan-act-arpa/

OCR Releases Report of Second Phase HIPAA Audit Findings

Late last year, the Office for Civil Rights (OCR) released its findings from the series of HIPAA privacy and security audits it conducted of approximately 200 covered entities and business associates in 2016 and 2017. OCR is the division of the Department of Health and Human Services (HHS) responsible for overseeing and enforcing compliance with HIPAA's requirements. The purpose of the report is to describe OCR's findings and recommend assistance for covered entities and business associates in areas where deficiencies were common.

More here: https://benefitcomply.com/ocr-releases-report-of-second-phase-hipaa-audit-findings/

BENEFITS NEWS HIGHLIGHTS

- On February 26, the DOL, Internal Revenue Service (IRS), and Department of Health and Human Services (HHS) issued a new set of **FAQs** regarding the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) for group health plans. This FAQ further clarifies requirement to cover COVID-related diagnostic testing and vaccinations with no cost-sharing.
- Thomson Reuters provides **a summary** of a recent district court finding that a health plan's exclusion for Applied Behavioral Analysis (ABA) therapy for autism violated the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) because it imposed a separate treatment limit that applied only to a mental health condition and it excluded coverage for a primary treatment for autism without a comparable exclusion for medical benefits.
- In March, the IRS released Notice 2021-21, which among other things extends the HSA contribution deadline for 2020 contributions until May 17, 2021.

Quarterly Q&A

Question: If a person is out on an FMLA leave of absence and then fails to return to work after FMLA is exhausted (but is not fired), is that person eligible for COBRA?

Answer: Under the current statute, all "reductions of hours" make an individual eligible for the COBRA subsidy, so this would qualify someone for the subsidy. There is no requirement that the reduction of hours is involuntary for subsidy eligibility.

A leave of absence is generally considered a reduction of hours for COBRA purposes (assuming the individual loses eligibility for active coverage). Therefore, a leave of absence that results in loss of active coverage would make an individual eligible for the COBRA subsidy.

If an employer has a full-time requirement to be eligible for benefits and a person goes on leave and exhausts their FMLA protection (or their leave was never covered by the FMLA), they will likely not be considered eligible for benefits since they won't be working full-time hours. The Americans with Disabilities Act (ADA) does not provide benefit protection. (One exception to this general rule applies when the employer utilizes the look-back measurement method and the employee has qualified for a stability period during the most recent measurement period.)

Essentially, once a person exhausts their FMLA protection, they have experienced the COBRA qualifying event "reduction of hours." Therefore, unless the employer has a policy in their plan document or SPD extending benefit eligibility when a person goes out on unprotected leave, the individual's active coverage should be terminated and they should be offered COBRA. This is important for several reasons, including:

1. The carrier/stop-loss vendor could refuse to cover the individual's claims if they are left as active employees, and the employer would be responsible for covering those claims; and
2. If the employer does not offer COBRA in compliance with the COBRA regulations, they could subject to fines.

What happens if an employee informs their employer that they will not be returning from an FMLA leave of absence? In this case, an employer is permitted to terminate that employee's employment, which generally would not result in COBRA subsidy eligibility. However, we do not have guidance regarding what is considered a voluntary termination versus an involuntary termination for COBRA subsidy eligibility purposes, so the matter is far from settled. Unless further guidance is provided indicating otherwise, it is likely that termination of employment will be considered involuntary unless an employee affirmatively quits.