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employee benefits lawflash

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Group Health Plans: Year-End Action Items and Upcoming Changes

Group health plan sponsors turn their attention to completing 2013 tasks, implementing upcoming 2014 changes, preparing for the ACA Shared Responsibility requirement in 2015, and documenting recent extensive plan changes.

As 2013 comes to an end, extensive health plan changes to comply with requirements of the Patient Protection and Affordable Care Act (ACA) are imminent for 2014, and the ACA Shared Responsibility requirements of 2015 draw closer. This LawFlash reminds employers of 2013 and 2014 items for group health plan sponsors, outlines the Shared Responsibility requirements for 2015, and addresses long-delayed plan documentation requirements.

2013 Reminders and Opportunities

W-2 Reporting. Employers that filed at least 250 Forms W-2 in 2012 must report the aggregate value of health coverage on the 2013 Forms W-2 provided to employees in January 2014. Employers must determine which benefits are subject to reporting and how to calculate the value of those benefits on their payroll systems, how to handle midyear coverage changes, and how to treat former employees and retirees. The Form W-2 reporting requirement is unchanged from 2012.[1]

SBC. By now, employers with calendar-year plans should have distributed their SBCs as part of the open enrollment process for 2014. Employers should make further plans to distribute SBCs to new participants and upon request. Employers must also provide revised SBCs 60 days in advance of a midyear change that modifies, in a favorable or unfavorable way, the terms of their current SBCs. SBC requirements are unchanged from 2013, except for two new questions.

Comparative Effectiveness Research Fee. This annual fee jumps to $2 per covered life for the year beginning in 2013 and will increase each year thereafter based on a standard tied to National Health Expenditures until it expires in 2019.

FSA Limit. Annual salary reduction contributions to a healthcare FSA provided under a cafeteria plan are now limited to $2,500 (indexed). Employers should prepare to amend their cafeteria plans to reflect this limit by the end of 2014.

COBRA Notices. While the 2013 Exchange Notice requirement has come and gone (except for new employees), employers should remember to revise their COBRA notices to reflect the DOL's model Exchange language.

DOMA Decision. As a result of the U.S. Supreme Court's June 2013 groundbreaking decision in *United States v. Windsor*, employers should have already determined what, if any, changes they will make to the design and operation of their health and welfare benefits to address same-sex marriages. Employers should have also determined how they will handle the 2013 reporting and disclosure of any prior imputed income amounts associated with health benefits for same-sex married couples, pre-tax premium changes and special enrollment

1. For more information on the Form W-2 reporting requirement, see our January 12, 2012 LawFlash, "Updated Guidance on Form W-2 Reporting of Healthcare Coverage," available http://www.morganlewis.com/pubs/EB_LF_UpdatedGuidanceFormW-2Reporting_12jan12.

rights for same-sex married employees, and assistance with refund requests of prior years as well as how they will capture demographic information associated with same-sex marriages.

Health FSA $500 Carryover Opportunity. Welcome, but highly complicated, guidance in IRS Notice 2013-71 creates a second (and alternative) exception to the long-standing "use it or lose it" rule for health FSAs. Employers have the option to allow health FSA participants to carry over up to $500 into future plan years while still permitting participants to salary defer the full $2,500 for the future year. This opportunity cannot be used in conjunction with the existing grace period exception, and the guidance does not address how (or whether) the carryover works in conjunction with an existing or future health FSA linked to a high-deductible plan. As a result of the significant open issues related to the opportunity, employers should carefully examine whether there are too many risks associated with the opportunity to confidently move ahead with the carryover at this time.

HIPAA Business Associate Agreements and Security Policies. Final HIPAA Omnibus Regulations required group health plans to update their HIPAA Privacy and Security Policies and Procedures, their Notices of Privacy Practice, and Business Associate Agreements by September 23, 2013. A transition rule permits those Business Associate Agreements already in place prior to the issuance of the HIPAA Omnibus Regulations to be updated for compliance by the date the underlying services contract is renegotiated or by September 23, 2014, whichever occurs first. With increased scrutiny by HHS and increased sanctions for noncompliance, it is important for a group health plan to review all aspects of its HIPAA compliance, including ensuring that it has completed its workforce training.

2014 Highlights

Assessment of Grandfathered Plan Status. Plan sponsors of grandfathered plans must assess whether 2014 plan design changes will impact their plans' grandfathered status. For example, grandfathered plan status is lost if **any** increase is made to the percentage of cost sharing borne by a participant or if a co-pay increases by more than $5 (plus the cost of medical inflation). These increases would be from the amounts in place when the ACA was enacted in 2010, not from the prior year.[2] If grandfathered plan status is lost, significant changes may be required to comply with all applicable healthcare reform provisions. As a reminder, grandfathered health plans must disclose their grandfathered statuses in any plan material describing the benefits.

Health Plan Design Changes. 2014 brings about the most extensive set of changes triggered by the ACA. As a consequence, employers should address the following, among other items:

- Eliminating preexisting condition restrictions
- Removing or modifying annual or lifetime limits on any essential health benefits (for self-insured plans, this occurs after establishing a state benchmark plan for purposes of determining essential health benefits)
- Establishing a maximum waiting period of 90 days
- Limiting out-of-pocket (OOP) maximums to $6,350 for individual coverage and $12,700 for family coverage (and working toward integrating, for 2015, expenses incurred for pharmacy benefit managers or other separate programs administered by unrelated vendors into a single OOP limit)

Wellness Programs. The IRS, DOL, and HHS released joint final regulations implementing the expanded wellness rules adopted by the ACA. These rules contain mostly good news for employers with wellness programs but are unfavorable to employers with outcome-specific health condition–based programs, such as smoking penalties. The final rules allow employers to offer outcome-based wellness programs that include incentives of up to 30% of the cost of coverage (and up to 50% of the cost of coverage if the wellness program contains a smoking cessation element).

2. For more information on these changes and other plan changes having a negative impact on grandfathered plan status, see our June 21, 2010 LawFlash, "Interim Final Rules Released on Group Health Plan Grandfather Status Under Healthcare Reform Law," available at http://www.morganlewis.com/pubs/WashGRPP_HealthPlanGrandfatherStatus_LF_21jun10.pdf.

HRA/Health FSA Restrictions. Due to the 2014 ACA prohibition on annual or lifetime dollar limits, employers must examine, and likely redesign, their HRAs to be certain that they are properly integrated with a health plan (and, as a result, are not subject to ACA market reforms). IRS Notice 2013-54 and DOL Technical Release 2013-03 address these integration concerns and essentially outlaw stand-alone HRAs in all situations except when they are offered through a retiree-only plan. This guidance also addresses the following:

- How to structure health FSAs to avoid ACA market reforms, including the prohibition on annual dollar limits
- The cafeteria plan prohibition on purchasing Exchange coverage on a pre-tax basis
- When employee assistance programs are able to avoid ACA complications
- How HRA contributions are counted for purposes of determining a plan's value or affordability

Transitional Reinsurance Program. HHS issued a new proposed rule on benefit and payment parameters for 2014. Part of the proposed rule includes additional details regarding the transitional reinsurance program—a program to help stabilize premiums for Exchange coverage in 2014 to 2016. Funding for the program comes from contributions from insured and self-insured health plans. The fee is calculated on a per capita basis and is expected to be approximately $63 per year per person. The amount will now be split into two components, and a narrow range of self-insured/self-administered plans are exempt from the fee.

Mental Health Parity Final Rules. Starting for plan years beginning July 1, 2015, final mental health parity rules (which are not significantly different than earlier proposed rules) become effective. Among the changes from the 2009 guidance are the following:

- Clarification that intermediate levels of care (e.g., intensive outpatient, residential, etc.) are subject to the same parity requirements as more traditional inpatient and outpatient care
- Additional guidance on the types of nonquantitative treatment limitations plans may and may not apply
- The need to provide specific information where "medical necessity" determinations are involved
- Further information on filing for a cost exemption if the changes the plan makes to comply with the final rule raise costs by at least 2% in the first year
- Clarification that state consumer protection laws are not preempted

2015 Shared Responsibility Requirement

While employers welcomed the one-year delay in the Shared Responsibility requirement, the requirement is fast approaching and employers should already be fully engaged with counting hours, determining which employees will be treated as full time under the ACA, and evaluating whether health coverage will be affordable starting January 1, 2015. The most significant tasks are summarized below.

Full-Time Employees. The IRS's proposed regulations from early 2013 outline a number of safe harbors related to determining when employees are treated as full-time employees for purposes of the employer Shared Responsibility requirement found in Internal Revenue Code section 4980H and applicable to all large employers on and after January 1, 2015. While the guidance is expected to be readdressed soon in the form of final regulations, employers should already be actively planning and measuring which employees will be part-time, full-time, or new variable-hour or seasonal employees at the start of the 2015 plan year.

Transition Rules. It is uncertain which, if any, of the significant transition rules associated with the early 2013 guidance will be available for the 2015 Shared Responsibility requirements. As such, employers with non-calendar plan years

- may need to comply starting January 1, 2015;
- may not be able to disregard short-term employment expectations (and, as such, may have to offer health coverage to short-term full-time employees); and

- may not be able to have a measurement period in 2014 of less than 12 months if they want to utilize a stability period of 12 months beginning in 2015.

Reporting Requirements. The delay in issuing proposed rules associated with the ACA Shared Responsibility reporting requirements under Internal Revenue Code sections 6055 and 6056 led to the one-year delay in the Shared Responsibility rules. Now that proposed rules are available, employers should carefully monitor these requirements and be certain that they or their vendors will be able to satisfy the reporting requirements at the start of 2016.

Plan Documentation Requirements

Since the 2010 passage of the ACA, employers have witnessed what often feels like a lifetime of plan design changes. Fortunately, regulators have consistently allowed employers to delay amending their health and cafeteria plan documents to address these changes—but 2014 brings the end of these permissive provisions.

Absent any announcements of further permissible delays, employers should expect to spend a fair amount of time and effort in capturing, documenting, and adopting these far-reaching changes before the end of 2014.

Such steps will likely result in the complete amendment and restatement of such plans, along with ensuring that employee communication materials—such as summary plan descriptions, summary material modifications, claims and appeal procedures, SBCs, and open enrollment materials—have kept pace with these changes.

Contacts

Morgan Lewis can help plan sponsors implement changes for 2014, prepare for the Shared Responsibility changes on the horizon for 2015, and revise plan documents and communication materials. If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

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