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Biggest Benefits Policy Developments In 2018: Midyear Report

By **Emily Brill**

Law360 (July 3, 2018, 6:15 PM EDT) -- So far this year, the U.S. Department of Labor has clarified how companies can include socially conscious investments in 401(k) plan lineups, test whether health care plans comply with mental health parity laws and ensure retirement advisers aren't placing the company in legal hot water.

Here's a look back at the major benefits policy developments for the first half of 2018.

Socially Conscious Investing

In April, the Trump administration's labor department released its first piece of guidance on socially conscious investing, a practice officially known as investing based on environmental, social or governmental, or ESG, factors.

The field assistance bulletin urged plan fiduciaries to tamp down any enthusiasm they might have developed for socially conscious investing in the Obama era, attorneys say.

"While [the guidance] did not, as a technical matter, repeal what was issued during the Obama administration, it definitely changed the focus of the analysis in a way that most people read as making it harder for [Employee Retirement Income Security Act] fiduciaries to integrate ESG factors into their investment decision-making," said Julie Stapel, a partner at Morgan Lewis & Bockius LLP.

April's field assistance bulletin modified existing guidance allowing plan administrators to consider ESG criteria — factors such as a company's environmental impact or diversity policies — when assessing an investment's feasibility, because ESG factors "may have a direct relationship" to the investment's financial value.

The Trump-era guidance scolded administrators who "too readily" assume ESG criteria give companies an economic boost, telling them to focus on "financial factors that have a material effect on the return and risk of an investment" when making decisions for a plan.

Administrators have more leeway to include socially conscious investment options in benefit plans when crafting 401(k) plans, the guidance said. Attorneys who advise ERISA fiduciaries said they consider this part of the guidance the most helpful.

“The calculation is different when you’re adding an ESG investment and there’s a non-ESG investment already available on the platform,” said Amy Null, a partner at WilmerHale. “I thought that statement was particularly helpful, and it hadn’t been said before.”

Mental Health Parity Guidance

Buried in the massive 21st Century Cures Act of 2016 was a section directing the DOL, the U.S. Treasury Department and the U.S. Department of Health and Human Services to help companies boost their compliance with mental health parity laws.

The agencies issued several pieces of guidance this year with that goal in mind — among them, a Mental Health Parity and Addiction Equity Act self-compliance tool, a disclosure template and a proposed set of frequently asked questions about interpreting the MHPAEA.

The tool helps companies determine whether limits on their plans’ mental health benefits mirror limits on medical and surgical benefits, as the MHPAEA requires. It also answers other questions employers might have about how to comply with the MHPAEA, which attorneys say is simple in theory but complicated in practice.

James Gelfand, senior vice president of health policy for the ERISA Industry Committee, said the tool has brought some necessary clarity into a space where “there’s a lot that hasn’t been defined.”

“There’s a lot of information in that tool, and as you go down each question, there’s lots of information that we’ve never had before,” Gelfand said. “It’s literally appearing in this self-compliance tool for the first time.”

The tool appeared on the DOL’s website on April 23 alongside the frequently asked questions and disclosure template, which plan participants can use to request information about a plan’s non-quantitative treatment limitations, or NQTLs. If a plan’s mental health NQTLs aren’t sufficiently comparable to its medical and surgical NQTLs, that plan is out of compliance with the MHPAEA.

“The Department of Labor has it as an enforcement priority to ensure there is compliance with the MHPAEA,” said Michelle Capezza, a member of Epstein Becker Green. “Plan sponsors are going to have to meet those disclosure obligations … so they’ll want to make sure they have a process in place to respond to any [request for information].”

Fiduciary Rule Nonenforcement Policy

One of the biggest developments in the benefits regulation sphere this year came from the courts, when the Fifth Circuit shot down the DOL’s 2016 fiduciary rule in March but failed to issue a mandate formalizing the rule’s dissolution until June.

The DOL entered the fray in May, as confusion roiled at financial services companies about whether the rule still applied. In a field assistance bulletin, the DOL said it wouldn’t penalize companies for continuing to rely on the rule. That nonenforcement policy, issued May 7, was still in effect as of July 3.

Null said she considers the policy important for the broker-dealer world, which was greatly impacted by the fiduciary rule, which had conferred fiduciary status onto one-time retirement investment advisers such as broker-dealers unless they signed a contract agreeing to act in the client’s best interest.

“The industry kind of moved to fiduciary compliance and then structured a way for their products to work relying on a number of exemptions," Null said. "When the fiduciary rule was repealed, all the exemptions were repealed, and you're left in this limbo stage between two rules, but needing the exemption because that's how you designed your product."

The DOL's fiduciary rule nonenforcement policy allows broker-dealers to continue relying on those exemptions, including the so-called "best-interest exemption." Null said this gives broker-dealers "time to reanalyze where they're going in the wake of the fiduciary rule repeal."

The policy softened the potentially seismic impact the repeal could have had on the financial services industry, which had been significantly shaken up by the fiduciary rule, attorneys said.

"The financial industry saw this [rule] as changing their whole business model," Capezza said.

Association Health Plan Rule

The DOL rounded out the first half of 2018 with a blockbuster new rule that Congress estimates will impact four million Americans by 2023.

The rule loosened the requirements for small businesses and the self-employed to band together and form health plans, known as association health plans.

The businesses and individuals first form a group, known as an employer association, and then purchase health insurance for their members through that group.

The rule gave small businesses and individuals, through these associations, access to the large-group insurance market, which is exempt from certain Affordable Care Act requirements.

The rule caused a small uproar upon its release, sharply divided along political lines.

Republicans cheered the bill, saying it will give small businesses and individuals access to cheaper health insurance.

Democrats railed against the bill, saying it will weaken the ACA marketplace and lead to millions enrolling in inadequate health care plans. The New York and Massachusetts attorneys general vowed to sue over the rule, which they said would shrink "critical consumer health protections."

Capezza said the association health plan rule appears to be part of a move to respond to the needs of a changing workforce. She placed another recent development in the benefits space — states creating auto-individual retirement account programs — in that category as well.

"I think a lot of these mechanisms which are emerging … are trying to lay a framework for people to be able to obtain health insurance and access to retirement savings programs regardless of whether they had a traditional employer," Capezza said.

--Editing by Pamela Wilkinson and Alanna Weissman.