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

As 2011 closes, plan sponsors of group health plans turn their attention to continued viability of grandfathered plan status, identifying insured plans that may be discriminatory, compliance with new claims and appeals rules, and W-2 reporting of the value of health coverage in 2012.

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The end of the 2011 plan year brings about another opportunity to review group health plan compliance with Patient Protection and Affordable Care Act (PPACA) requirements. This LawFlash describes year-end action items for group health plan sponsors and previews upcoming changes for 2013. This list is not exhaustive, but it is intended to serve as a reminder of items that plan sponsors should review and consider before the end of the year.

Annual Assessment of Grandfathered Plan Status. Plan sponsors of grandfathered plans must assess whether 2012 plan design changes will impact the 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 (from the co-pay in place when healthcare reform was enacted, not from the prior year). These and other plan changes having a negative impact on grandfathered plan status are discussed in 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. If grandfathered plan status is lost, significant plan changes may be required to comply with nongrandfathered plan healthcare reform provisions.

Claims and Appeals Rules. Plan sponsors of nongrandfathered plans must continue to implement the new claims and appeals rules with their insurers or providers and confirm that the insurers or providers have compliant notices and processes in place. Plan documents should be reviewed to confirm that fiduciary liability for claims and appeals decisions is accurately described and delegated.

Notice Requirements – All new content requirements for claim-related notices become effective January 1, 2012. Claim-related notices must contain the following:

- Information sufficient to identify the claim
- The denial code and its corresponding meaning

- A statement notifying a claimant of the opportunity to request the diagnosis and treatment codes and their corresponding meanings
- A description of the standard on which the denial was based
- A description of the available internal and external appeal procedures available
- Availability of and contact information for assistance with the appeal from the office of health insurance consumer assistance
- A non-English notice of the availability of non-English telephonic assistance where plan participants reside in a county where 10% or more of its population are literate only in the same non-English language

External Review – Currently, all nongrandfathered plans must provide an external review opportunity for reviews of claim denials involving medical judgments or rescissions. Self-insured plans must offer a standard external review opportunity through a process administered by the Office of Personnel Management or by contracting with at least two accredited independent review organizations by January 1, 2012 and three such organizations by July 1, 2012. Insured plans and non-ERISA plans may rely on state external review procedures that comply with certain consumer protection standards. If the state external review process does not satisfy the standards, the insured plans or non-ERISA plans may also follow the external review process as self-insured plans.

W-2 Reporting. Employers that filed at least 250 Forms W-2 in 2011 must report the aggregate value of health coverage on the annual 2012 Form W-2 provided to employees in January 2013. Employers should determine which benefits are subject to the reporting and how to calculate and accumulate the value on their payroll system, how to handle midyear coverage changes, and how to treat former employees and retirees. The Form W-2 reporting requirement is discussed in detail in our July 7, 2011 LawFlash, "New Guidance Related to Form W-2 Reporting Requirements," available at http://www.morganlewis.com/pubs/EBLF_NewGuidanceRelatedToFormW2ReportingReqs_7july2011.pdf.

Summary of Benefits and Coverage (SBC). In late November, plan sponsors received some welcome news—a delay in implementation of the new SBC effective date. The Department of Labor (DOL) stated in an FAQ that until final regulations are issued, plan sponsors are not required to comply with the SBC requirement. The DOL further stated that when final regulations are issued, they will include an effective date that provides ample time for plan sponsors to comply. Prior to the release of the FAQ, a four-page (doubled-sided) SBC was required to be sent to *new* health plan participants beginning on March 23, 2012 and to *all* participants during the plans' next annual enrollment period. Non-calendar-year plans with annual enrollment in April, May, or June would have struggled to meet the original SBC effective date. Sponsors of self-insured plans will have a more active role in preparation of the SBC, while sponsors of insured plans may rely on the insurer. All plan sponsors will need to work with their insurers or providers to approve the content and determine how and when the SBCs will be distributed. SBC content requirements and associated noncompliance penalties are discussed in our August 26, 2011 LawFlash, "New Summary of Benefits and Coverage Required for Health Plans in 2012," available at http://www.morganlewis.com/pubs/EB_LF_SummaryOfBenefitsAndCoverage2012_26aug11.pdf.

Nondiscrimination Rules. Healthcare reform added and subsequently delayed implementation of a new nondiscrimination standard for insured group health plans. The nondiscrimination rule is similar to the Section 105(h) nondiscrimination rule already applicable to self-insured plans. Although the effective

date is currently unknown, plan sponsors of potentially discriminatory insured health plans that benefit only highly paid executives should identify possible discrimination concerns and possible solutions.

New Comparative Effectiveness Fee. Beginning with plan years ending after September 30, 2012, plan sponsors will be subject to an annual fee of $1 per covered life to fund a federal program on comparative effectiveness research. The fee will increase to $2 per covered life for plan years ending after/on September 30, 2013 and will end in 2019. Plan sponsors should be aware of this new benefit plan cost and include it during budget planning discussions.

FSA Limit. Beginning with the January 1, 2013 tax year, annual salary reduction contributions to a health flexible spending account (FSA) provided under a cafeteria plan will be limited to $2,500. Plans that currently permit health FSA salary reductions in excess of $2,500 must adopt a plan amendment and communicate this reduction before 2013. Transitioning to the new limit will be challenging for non-calendar-year plans and may require some advance planning during 2012. The limit is based on tax year, not plan year. Non-calendar-year plan sponsors may want to impose the new limit during enrollment for the plan year beginning in 2012 in order to simplify compliance.

Morgan Lewis can help plan sponsors implement changes for 2012 and prepare for changes on the horizon for 2013. Please contact one of the following Morgan Lewis attorneys for more information:

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