Compliance Recap

March 2019

March was a busy month in the employee benefits world.

The Department of Justice (DOJ) announced that it will not defend the Patient Protection and Affordable Care Act (ACA) in the court case challenging the ACA's constitutionality. The Internal Revenue Service (IRS) updated two Q&As regarding ACA reporting for 2018.

The Department of Health and Human Services (HHS) published its 2020 Actuarial Value Methodology and 2020 AV Calculator. HHS also released a bulletin that allows grandmothered plans to be extended through 2020. A U.S. District Court vacated the bona fide associations and working owner provisions contained in the Department of Labor's association health plans final rule.

The Department of Labor (DOL) released two information letters. One information letter clarifies when an authorized representative may receive claim-related notices on behalf of an ERISA plan participant. The other information letter addresses whether employees may delay taking FMLA leave and whether the statutory 12-week period may be extended.

The IRS updated its Publication 969 for taxpayers to use in preparing 2018 returns. The IRS also announced tax relief for individuals and businesses affected by recent storms in Alabama, Nebraska, and Iowa.

UBA Updates

UBA released one new advisor: 2019 Compliance Calendar

UBA updated or revised existing guidance:

- Flow Chart of Key Wellness Program Regulations
- Option for Some to Renew Policies that Do Not Fully Meet ACA Standards
- DOL Issues Final Regulations Regarding Association Health Plans

Status of Court Case Challenging ACA Constitutionality

As background, in February 2018, twenty states filed a lawsuit asking the U.S. District Court for the Northern District of Texas (Court) to strike down the Patient Protection and Affordable Care Act (ACA) entirely. The lawsuit came after the U.S. Congress passed the Tax Cuts and Jobs Act in December 2017 that reduced the individual mandate penalty to $0, starting in 2019.

On December 14, 2018, the Court issued a declaratory order that the individual mandate is unconstitutional and that the rest of the ACA is unconstitutional. The Court granted a stay of its December 2018 order, which prohibits the order from taking effect while it is being appealed in the Fifth Circuit Court of Appeals (appeals court).

On March 25, 2019, the DOJ submitted a letter to the appeals court clerk stating the Court's ruling should be affirmed and that the entire ACA should be struck down as unconstitutional. The DOJ intends to file an appellate brief to defend the Court's ruling.

IRS Updates Q&As on ACA Reporting

On March 26, 2019, the Internal Revenue Service (IRS) updated the Extended Due Dates and Transitional Relief section of the Questions and Answers on Information Reporting by Health Coverage Providers (Section 6055) to include two additional Q&As at Q29 and Q30. Q29 addresses the extended 2019 due date, provided under IRS Notice 2018-94, for furnishing Forms 1095-B to individuals. Q30 states that Notice 2018-94 did not affect the penalty amounts for failing to furnish and file Forms 1094 and 1095.

The IRS updated the Extended Due Dates and Transition Relief for 2015 and 2016 Reporting section of the Questions and Answers on Reporting of Offers of Health Coverage by Employers (Section 6056) to include an additional Q&A at Q35. Q35 addresses the extended 2019 due date provided under IRS Notice 2018-94 for furnishing Forms 1095-C to individuals.

HHS Publishes Final 2020 Actuarial Value Calculator and Methodology

On March 19, 2019, The Department of Health and Human Services (HHS) published the Final 2020 Actuarial Value (AV) Calculator Methodology. The Final 2020 AV Calculator Methodology also contains the 2020 AV Calculator. HHS issues this guidance annually to help issuers of non-grandfathered health insurance plans, offered in the individual and small group markets, to determine the levels of coverage of their plans (for example, AV of 60 percent for bronze level, AV of 70 percent for silver level, AV of 80 percent for gold level, and AV of 90 percent for platinum level).

A few changes were made to the 2020 AV Calculator compared to the 2019 AV Calculator. For the 2020 AV Calculator, HHS added a one-year projection factor of 6.1 percent for medical costs and 9.8 percent for drugs costs to the calculator claims data. Also, the AV Calculator estimate for the annual limit on cost-sharing has been increased to $8,250 for 2020. Finally, HHS removed the column labeled "Number of Enrollees" in its AV Calculator to limit user confusion.

HHS Releases Bulletin that Extends Grandmothered Plans Through 2020

As background, in the fall of 2013, the Department of Health and Human Services (HHS) announced a transitional relief program that allowed state insurance departments to permit early renewal at the end of 2013 of individual and small group policies that do not meet the "market reform" requirements of the

Patient Protection and Affordable Care Act (ACA) and for the policies to remain in force until their new renewal date in late 2014.

Since 2013, HHS has re-extended transitional relief each year. Most recently, on March 25, 2019, HHS released a Bulletin in which it re-extended its transitional relief policy to permit renewals with a termination date no later than December 31, 2020, provided that all such coverage comes into compliance with the specified requirements by January 1, 2021.

Read more about the transitional relief.

District Court Vacates Portions of the Association Health Plans Final Rule

As background, on June 19, 2018, the U.S. Department of Labor (DOL) issued a Final Rule that broadened the definition of "employer" and the provisions under which an employer group or association may be treated as an "employer" sponsor of a single multiple-employer employee welfare benefit plan and group health plan under Title I of the Employee Retirement Income Security Act (ERISA).

On March 28, 2019, the U.S. District Court for the District of Columbia (Court) found that the DOL's final rule exceeded the statutory authority delegated by Congress under ERISA and that the final rule unlawfully expands ERISA's scope. In particular, the Court found the final rule's provisions – defining "employer" to include associations of disparate employers and expanding membership in these associations to include working owners without employees – are unlawful and must be set aside.

The Court's order vacates the specific provisions of the DOL's final rule regarding "bona fide group or association of employers," "commonality of interest," and "dual treatment of working owners as employers and employees." The Court order sends the final rule back to the DOL to consider how the final rule's severability provision affects the final rule's remaining portions.

Although the DOL issued Questions and Answers after the Court's decision, the DOL has not indicated how it will proceed. The DOL could revise its final rule or could appeal the decision and request that the Court stay its decision pending the appeal. Employers in association health plans should keep apprised of future developments in this case.

Read more about the court decision.

DOL Releases Information Letter on ERISA Claim-Related Notices to Representatives

The Department of Labor (DOL) recently released an information letter (Letter) that clarifies an authorized representative's ability to receive notices regarding claims under ERISA. The Letter notes that a plan may communicate with both the individual and the individual's authorized representative. However, for purposes of the claims procedures rules, when a person clearly designates an authorized representative to act and receive notices on the person's behalf with respect to a claim, the plan should direct all information and notifications to the authorized representative, unless the person indicates otherwise.

DOL Releases Opinion Letter on When an Employee Must Take FMLA Leave

On March 14, 2019, the Department of Labor (DOL) released Opinion Letter FMLA2019-1-A (Letter) to address whether an employer may delay designating paid leave as Family and Medical Leave Act (FMLA) leave or permit employees to extend FMLA leave beyond the 12-week period (26 weeks for military or caregiver leave) provided under the FMLA.

The Letter states that once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may delay designating the FMLA-qualifying leave as FMLA leave. The employer may not delay designating leave as FMLA-qualifying leave even if the employee would prefer that the employer delay the designation. Further, an employer may not designate more than 12 weeks of leave as FMLA leave. If an employee substitutes paid leave for unpaid FMLA, the paid leave counts toward the 12-week FMLA period and does not extend such period.

IRS Releases Publication 969 Health Savings Accounts and Other Tax-Favored Health Plans

The Internal Revenue Service (IRS) updated its Publication 969 for taxpayers to use in preparing 2018 returns. The publication explains Health Savings Accounts (HSAs), Medical Savings Accounts (Archer MSAs and Medicare Advantage MSAs), Health Flexible Spending Arrangements (FSAs), and Health Reimbursement Arrangements (HRAs).

Tax Relief for Victims of Storms in Alabama, Nebraska, and Iowa

The Internal Revenue Service (IRS) recently announced that individuals who reside or have businesses in certain counties of Alabama, Nebraska, and Iowa may qualify for tax relief, including postponed deadlines, because of the President's declaration that a major disaster occurred in these states due to severe storms. The IRS automatically identifies taxpayers located in the covered disaster area and applies automatic filing and payment relief. But affected taxpayers who reside or have a business located outside the covered disaster area must call the IRS disaster hotline at 866-562-5227 to request this tax relief.

The Department of Labor (DOL) released a Fact Sheet that recognizes that the recent natural disasters may impede efforts to comply with ERISA for the next few months. The Fact Sheet provides guidance on relief that is available for certain ERISA requirements for employee benefit plans. The DOL also released an FAQ directed toward participants and beneficiaries of employee benefit plans that have been impacted by the recent natural disasters. The FAQ addresses health benefit questions and retirement benefit questions.

Question of the Month

Q. How does a person who is 65 years old or older maintain HSA eligibility and continue working? Also, when the person plans to retire, what should the person do about HSA contributions to avoid IRS penalties?

A. To maintain health savings account (HSA) eligibility, an individual who is working and age 65 or older must:

- Not apply for or waive Medicare Part A, and
- Not apply for Medicare Part B, and
- Waive or delay Social Security benefits.

For example, if a person delays Social Security benefits and delays Medicare Part A and B, retires at the end of April at an age over 65, and applies for Social Security benefits and Medicare on May 1, 2019, then the general rule is that the person's Social Security entitlement and Medicare Part A coverage will be retroactive for six months, but no earlier than the person's first month of eligibility. In this example, if the person retired and applied for Medicare at age 67, then Medicare benefits would be retroactively effective as of November 2018.

IRS regulations state that a person can't contribute to an HSA when the person has Medicare, so a person would need to stop contributing six months in advance of applying for Social Security benefits and Medicare. If a person contributes to an HSA after Medicare coverage begins, then the person may be subject to IRS penalties.

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