Compliance Recap

September 2019

September was a busy month in the employee benefits world.

The U.S. Senate confirmed Eugene Scalia as the new Secretary of the Department of Labor (DOL).

The Internal Revenue Service (IRS) published proposed rules regarding affordability safe harbors and Section 105(h) nondiscrimination rules as applied to individual coverage health reimbursement arrangements (ICHRAs). The IRS also announced that the health insurance providers fee will resume for 2020. The IRS released an information letter regarding transition relief and whether employer shared responsibility penalties may be waived under the Patient Protection and Affordable Care Act.

The DOL, Department of Health and Human Services (HHS), and Treasury (collectively, the "Departments") released final FAQs on mental health parity.

The DOL issued an opinion letter regarding delaying Family and Medical Leave Act (FMLA) leave. The DOL also issued an opinion letter regarding whether employer contributions to health savings accounts (HSAs) are earnings subject to wage garnishment under the Consumer Credit Protection Act (CCPA).

UBA Updates

UBA released one new advisor: FAQs, Model Disclosure, Fact Sheet on Mental Health Substance Abuse Disorder Parity

UBA updated or revised existing guidance:

- PCORI, TRF, and HIP Fee Highlights
- Update on Tri-Agency Final Rules on Health Reimbursement Arrangements

IRS Publishes Proposed Rules on Affordability Safe Harbors and Nondiscrimination for ICHRAs

The Internal Revenue Service (IRS) published proposed rules clarifying how the employer shared responsibility provisions and Section 105(h) nondiscrimination rules apply to health reimbursement arrangements (HRAs) and other account-based group health plans that are integrated with individual health insurance coverage or Medicare.

Public comments on the IRS' proposed rules are due by December 30, 2019. Because employers may want to offer individual coverage HRAs beginning on January 1, 2020, before the IRS publishes its final regulations, the IRS provides a time period within which employers may rely on the proposed regulations.

Read more about the proposed rules.

IRS Announces Health Insurance Providers Fee to Resume in 2020

As background, the Patient Protection and Affordable Care Act (ACA) imposes a fee on each covered entity (for example, health insurers or a non-fully insured MEWA) engaged in the business of providing health insurance for United States health risks. There was a moratorium on the fee for 2017 and there is a suspension on the fee for 2019. Under IRS Notice 2019-50, absent legislative action, the fee will resume for 2020. According to an estimate by the American Academy of Actuaries, the fee will increase premiums by one to three percent in 2020.

Read more about the health insurance providers fee.

IRS Releases Information Letter on Employer Shared Responsibility Penalties under the ACA

The Internal Revenue Services (IRS) released an information letter responding to an inquiry of whether employer shared responsibility penalties (ESRPs) may be waived or reduced based on hardship or other factors and whether the IRS will extend the transition relief for employers with fewer than 100 employees.

The letter notes that the law does not provide for waiver of ESRPs. While the IRS provided several forms of transition relief in 2015 and 2016, no transition relief is available for 2017 and future years. Although the January 20, 2017, executive order Minimizing the Economic Burden of the ACA Pending Repeal directs federal agencies to exercise authority and discretion to waive, defer, and grant exemptions from the ACA provisions, the ACA's legislative provisions are still in force until Congress changes them.

DOL, HHS, and Treasury Releases Final FAQs on Mental Health / Substance Use Disorder Parity

The U.S. Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury (collectively, the "Departments") released final FAQs About Mental Health and Substance Use Disorder Parity Implementation and the 21st Century Cures Act Part 39. The Departments respond to FAQs as part of implementing the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), as amended by the Patient Protection and Affordable Care Act (ACA) and the 21st Century Cures Act (Cures Act). The FAQs contain a model disclosure form that employees can use to request information from their group health plan or individual market plan regarding treatment limitations that may affect access to mental health or substance use disorder (MH/SUD) benefits.

The DOL also released an enforcement fact sheet summarizing the DOL's closed investigations and public inquiries regarding mental health and substance use disorder during the 2018 fiscal year.

Read more about the FAQs, model disclosure form, and the enforcement fact sheet.

DOL Issues Opinion Letter on Delaying FMLA Leave

The Department of Labor (DOL) issued an opinion letter in response to an inquiry of whether an employer may delay designating paid leave as Family and Medical Leave Act (FMLA) leave if the delay complies with a collective bargaining agreement (CBA). The employer is a government public agency subject to CBAs that allow or require employees to delay taking unpaid leave until after the CBA-protected accrued paid leave is exhausted. The CBA-protected leave is treated as continuous employment and does not affect an employee's seniority status under state civil service rules.

The Department of Labor (DOL) concluded that, under the FMLA, once an employer has enough information to determine that an employee's leave request qualifies as FMLA leave, the employer must designate the leave as FMLA. The employer may not delay designating paid leave as FMLA leave when leave is requested for an FMLA qualifying reason. The FMLA leave would run concurrently with the CBA-protected leave. Because an employee's entitlement to benefits (not including health benefits) during a period of FMLA leave is determined by the employer's policy for providing benefits during other forms of leave, the employee must accrue seniority the same as the employee would if the employee only took CBA-protected leave.

DOL Issues Opinion Letter on CCPA Wage Garnishment Regarding HSAs

The Department of Labor (DOL) issued an opinion letter responding to an inquiry of whether employer contributions to employee health savings accounts (HSAs) constitute earnings for wage garnishment purposes under the Consumer Credit Protection Act (CCPA).

The DOL concluded that employer contributions to HSAs are not earnings under the CCPA for wage garnishment purposes because the contributions do not compensate an employee directly for the amount or value of an employee's services, are not included in an employee's take-home pay, and can only be used to reimburse qualified medical expenses without being subject to taxes and penalties.

Question of the Month

Q. We recently received a medical loss ratio (MLR) rebate. How should the money be distributed?

A. If the plan document states how a rebate should be used, then the plan administrator should follow the plan document's terms.

If the plan document is silent on how the rebate should be distributed, then the following general principles apply.

How should the rebate be divided?

Assuming both the employer and employees contribute to the cost of coverage, the rebate should be divided between the employer and the employees, based on the employer's and employees' relative share. Employers may divide the rebate in any reasonable manner – for example, the rebate could be divided evenly among the employees who receive it, or it may be divided based on the employee's contribution for the level of coverage elected.

Employers are not required to precisely determine each employee's share of the rebate, and so do not need to perform special calculations for employees who only participated for part of the year, moved between tiers, etc.

Using the example that the rebates are based on premiums paid to the carrier for calendar year 2018, the employer may pay the rebate only to employees who participated in the plan in 2018 and are still participating, only to current participants (even though the rebate relates to 2018), or to those who participated in 2018, regardless whether they are currently participating.

Insurers must send a notice to all employees who participated in the plan in 2018 stating that a rebate has been issued to the employer, so employers who choose to limit rebate payments to those who are currently participating should be prepared to explain why the rebate is only being paid to current participants. This might include the fact that since the rebate would be taxable income, the amount involved does not justify the administrative cost to locate former participants and issue a check.

Are former plan participants entitled to a share of the rebate?

Whether former participants should be included in any rebate allocations depends on the type of plan involved. For ERISA plans, there is no requirement that former participants be included or excluded. However, the Department of Labor's (DOL) Technical Release, in discussing fiduciary decisions regarding distribution of rebates, states that if a fiduciary determines that the cost of including former participants in a rebate distribution approximates the amount of the rebate, the fiduciary may properly decide to allocate the rebate only to current participants. This means that plan fiduciaries should consider whether to include former participants and should make a prudent decision based on all of the facts and circumstances.

For non-federal governmental plans, the interim final regulations specifically require any portion of a rebate that is based on former participants' contributions to be aggregated and used for the benefit of current participants.

For nongovernmental, non-ERISA plans, the interim final regulations provide that if the rebate is paid to the policyholder (which is only permissible if the policyholder has given the insurer written assurance that meets the requirements of the regulations), the policyholder must allocate the rebate to current participants only, in the same way as a non-federal governmental plan. If the rebate is paid directly to participants by the insurer (because the policyholder has declined to provide a written assurance), the insurer must distribute the rebate equally among those who were participants during the MLR reporting year on which the rebate is based.

How may the employer use the rebate?

The employer may pay the rebate in cash, use it for a premium holiday, or use it for benefit enhancements. The rebate must be applied or distributed within 90 days after it is received.

A cash rebate is taxable income to the employee if it was paid with pre-tax dollars.

A premium holiday should be completed within 90 days after the rebate is received (or the rebate needs to be deposited into a trust).

Benefit enhancements include reduced copays or deductibles (which may not be practical due to the timing requirements) or wellness-type benefits that the employer would not have offered without the rebate, such as free flu shots, a health fair, a lunch and learn on nutrition or stress reduction, or a nurse line.

How should the rebate be provided?

The employer should consider the practical aspects of providing a rebate in a particular form.

Generally, the larger the amount that would be due to an individual, the more effort the employer should make to directly benefit the person (either through a cash rebate or premium holiday). While benefit enhancements are permissible, a large rebate should be used to provide a direct benefit enhancement, such as a reduced co-pay, and not for a general benefit, such as flu shots.

The agencies have not provided any details as to what amount is so small that it does not need to be returned to the employee. (Insurers are not required to issue a rebate check to individuals if the amount is less than $5.00.) A cash rebate is taxable income if the premium was paid with pre-tax dollars, so issuing a check that is very small after taxes should not be necessary. If an employer knows it costs $2.00 to issue a check, issuing a rebate check for $1.00 should not be necessary. However, an employer cannot simply keep the rebate if it determines that cash refunds are not practical – it will need to use the employee share of the rebate to provide a benefit enhancement or premium reduction.

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