



UBA
Compliance Advisor

What every HR leader should know about compliance



Compliance Recap

July 2020

July was a busy month in the employee benefits world.

The U.S. Supreme Court (Supreme Court) upheld the religious exemption and moral exemption final rules to the Patient Protection and Affordable Care Act (ACA) contraceptive mandate. The Internal Revenue Service (IRS) released the indexed 2021 ACA affordability percentage.

The President signed a law extending the Paycheck Protection Program (PPP) application deadline. The IRS released draft ACA reporting forms for 2020. The Department of Health and Human Services (HHS), the Department of Labor (DOL), and the Department of the Treasury (Treasury) (collectively, the Departments) released proposed rules on grandfathered health plans.

A U.S. court of appeals upheld the short-term limited duration insurance (STLDI) final rule. HHS published a revised confidentiality of substance use disorder patient records final rule. The IRS issued a private letter ruling on health reimbursement arrangement (HRA) and profit-sharing plan contributions. The IRS also issued an information letter on submitting claims for dependent care assistance plan (DCAP) reimbursement.

The DOL published new Family and Medical Leave Act (FMLA) forms and released requests for information on Paid Leave and FMLA. The President issued four executive orders on drug pricing.

UBA Updates

UBA released a new advisor: [Proposed Rules on Grandfathered Group Health Plan Coverage](#)

UBA updated, refreshed, or revised existing guidance:

- [The Coronavirus Aid, Relief, and Economic Security Act Paycheck Protection Program](#)
- [Contraception Mandate Rolled Back for Employers](#)
- [Frequently Asked Questions about the Exchange \(Marketplace\) Notice](#)
- [Frequently Asked Questions about the Patient-Centered Outcomes/Comparative Effectiveness \(PCORI\) Fee](#)
- [The Play-or-Pay Penalty and Counting Employees under the ACA](#)
- [Health Savings Accounts: What You Need to Know](#)



Supreme Court Upholds Religious Exemption and Moral Exemption to the ACA Contraceptive Mandate

On July 8, 2020, the Supreme Court [reversed](#) the 3rd Circuit decision and held that the Departments had the authority to issue the final regulations and ordered the nationwide preliminary injunction to be dissolved.

As background, the ACA requires that non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage provide coverage of certain specified preventive services, including contraceptive services, without cost sharing. The Departments released two final rules on November 7, 2018, regarding contraceptive coverage exemptions based on [religious beliefs](#) and [moral beliefs](#). These rules finalize the Departments' interim final rules that were published on October 13, 2017.

On January 13, 2019, the U.S. District Court for the Northern District of California (California Court) granted a [preliminary injunction](#) that prohibits the final rules' implementation and enforcement against the 13 plaintiff states. On January 14, 2019, the U.S. District Court for the Eastern District of Pennsylvania (Pennsylvania Court) granted a nationwide [preliminary injunction](#) that prohibits the implementation of the two final rules. On June 5, 2019, the U.S. District Court for the Northern District of Texas (Texas Court) issued a [permanent injunction](#) against the ACA's contraception mandate. The California Court and Pennsylvania Court preliminary injunctions were affirmed by the [U.S. Court of Appeals for the 9th Circuit](#) and the [U.S. Court of Appeals for the 3rd Circuit](#) respectively.

The plaintiff and the federal government asked the Supreme Court to hear an appeal of the 3rd Circuit decision. On January 17, 2020, the Supreme Court [granted](#) review of the 3rd Circuit decision and consolidated this case with a [similar case](#) decided by the 3rd Circuit, affirming a nationwide preliminary injunction prohibiting implementation of the two final rules.

[Read more](#) about the contraceptive coverage exemptions court cases and final rules.

IRS Releases the Indexed 2021 Affordability Percentage

The IRS [released](#) the indexed affordability percentage of 9.83% for plan years beginning in 2021. An employer uses the affordability percentage to determine whether it has offered affordable coverage under the ACA's employer shared responsibility provisions to avoid Penalty B.

[Read more](#) about the affordability percentage.

PPP Application Deadline Extended

On July 4, 2020, the President signed a [law](#) extending the PPP application deadline allowing businesses to apply for the loan until August 8, 2020

As background, the PPP was established under the Coronavirus Aid, Relief and Economic Security Act (CARES Act) in order to provide small employers with an incentive to keep workers on their payroll during the COVID-19 crisis. Under the PPP, which is an extension of the Small Business Administration (SBA) Section 7(a) loan program, qualifying small businesses are eligible to borrow up to \$10 million, in order to maintain their workforce during the covered period for the loan. All or a portion of the loan may be



forgiven if the borrower follows the SBA guidelines. The Treasury has issued FAQs and the application form on its [website](#). Information on the program is also available on the [SBA website](#).

[Read more](#) about the PPP.

IRS Releases Draft ACA Reporting Forms for 2020

The IRS released draft [1094-B](#), [1095-B](#), [1094-C](#), and [1095-C](#) forms. The draft 1094-B and 1094-C forms do not contain any substantive changes from the 2019 1094-B and 1094-C forms. Under the instructions section of the draft 1095-B form, an additional code “G” has been added, which would apply on line 8 to designate enrollment in an individual coverage health reimbursement arrangement (ICHRA).

The draft 1095-C form, under Part II, adds a data field for “employee’s age on January 1.” Also, under Part II, a line 17 has been added for “ZIP code,” which is the ZIP code used for determining affordability of an ICHRA or an employee’s primary residence ZIP code. The instructions for Part II add eight additional codes to reflect offers of ICHRA coverage. The instructions for Part II line 15 add information on how the required employee contribution is calculated to determine affordability of ICHRA coverage.

The IRS has not yet released the separate instructions for these ACA reporting forms.

The Departments Release Proposed Rules on Grandfathered Health Plans

In response to the President’s Executive Order 13765 “Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal” issued on January 20, 2017, the Departments issued [proposed rules](#) for grandfathered health plans that would make changes to certain types of cost-sharing requirements without causing a loss of grandfathered status. The DOL also released a [press release](#) and [frequently asked questions](#) regarding the proposed rules. The proposed rules only address the requirements for grandfathered group health plans and grandfathered group health insurance coverage and would not apply to grandfathered individual health insurance coverage.

Public comments on the proposed rules are due by August 14, 2020. The proposed rules would apply to grandfathered group health plans and grandfathered group health insurance coverage beginning 30 days after the publication of any final rules.

[Read more](#) about the proposed rules.

U.S. Court of Appeals Upholds Short-Term Limited Duration Insurance Final Rule

As background, on August 1, 2018, the Departments released a [final rule](#) that amended the definition of short-term, limited-duration insurance (STLDI). HHS also released a [fact sheet](#) on the final rule. The final rule allows consumers to purchase STLDI policies that are less than 12 months in length and may be renewed for up to 36 months.

On July 18, 2019, the U.S. District Court for the District of Columbia (District Court) [upheld](#) the STLDI final rule. The court found that the final rule did not exceed the regulatory authority that Congress delegated to the Departments to define STLDI as a category of insurance that is exempt from individual insurance regulations. The ruling was appealed.



On July 17, 2020, the U.S. Court of Appeals for the District of Columbia (Court of Appeals) [upheld](#) the STLDI final rule. The Court of Appeals found that the final rule defining the duration of STLDI up to 364 days and exempting STLDI from the individual insurance regulations did not exceed the regulatory authority that Congress delegated to the Departments.

[Read more](#) about the STLDI final rule.

HHS Published a Revised Confidentiality of SUD Patient Records Final Rule

HHS published a revised Confidentiality of SUD Patient Records [final rule](#). The final rule outlines confidentiality protections for patient records created by federally assisted substance use disorder treatment programs (SUD records). The CARES Act contained modifications to the SUD confidentiality laws that expanded the circumstances under which SUD records may be used and disclosed in accordance with the HIPAA rules regarding treatment, payment, and health care operations. HHS noted in the revised final rule that several of the provisions in the revised final rule will serve as interim transitional standards until regulations confirming to the CARES Act are released.

Under the final rules, if a patient consents to disclosure of SUD records for payment or health care operations, the recipient, such as a group health plan, may further disclose the information for payment or health care operations (which include care coordination and case management) to its contractors, subcontracts, and legal representatives without additional consent. The revised final rules contain a list of examples of activities that HHS considers to be payment and health care operation activities. The disclosure must be limited to the information necessary to carry out the purpose of the disclosure.

The revised final rules also provide that health plans may obtain SUD information without patient consent to periodically conduct audits or evaluations for purposes such as identifying agency or health plan actions or policy changes aimed at improving care and outcomes for patients (for example, provider education, recommending or requiring improved health care approaches); targeting limited resources more effectively to better care for patients; adjusting specific insurance components to facilitate adequate coverage and payment; and reviews of appropriateness of medical care, medical necessity, and utilization of services.

[Read more](#) about the SUD confidentiality provisions under the CARES Act.

IRS Issues Private Letter Ruling on HRA and Profit-Sharing Plan Contributions

The IRS issued a [private letter ruling](#) in response to an inquiry regarding allocating employer contributions between a funded HRA and a qualified profit-sharing plan. A union requested the ruling on their proposed amendments to the HRA plan and profit-sharing plan that would create an employer contribution, part of which would be contributed to the HRA and the remaining portion would be allocated between the HRA and the profit-sharing plan according to the employee's election before the beginning of the plan year. If an employee did not make an election, a default uniform fixed contribution would be allocated to the profit-sharing plan and the remaining portion would be allocated to the HRA. The union inquired as to whether the proposed amendments would 1) cause the profit-sharing plan to be treated as offering a cash or deferred arrangement under IRC Section 401(k) and 2) affect the exclusion of the contributions and reimbursements under the HRA from gross income under IRC Sections 105(b) and 106.



The IRS concluded that the amendments would not create a cash or deferred arrangement under IRC Section 401(k) because the arrangement would not allow an employee to choose to receive the contributions in cash or some other taxable benefit. The IRS further concluded that the amendments would not affect the exclusion of the contributions and reimbursements under the HRA from gross income because the HRA complies with the IRS requirements for HRAs under Rev. Rul. 2002-41 and Notice 2002-45, including the requirements that contributions are paid solely by participating employers and not pursuant to salary reductions, that HRA funds may only be used for qualified medical expenses, and that HRA funds may not be used to provide other taxable or nontaxable benefits.

IRS Issues Information Letter on Submitting Claims for DCAP Reimbursement

The IRS issued an [information letter](#) responding to a DCAP participant's inquiry regarding whether IRS regulations contain a hardship exemption if a participant submits claims late under the terms of the DCAP. In the information letter, the IRS states that it does not have authority, based on hardship or other reasons, to change the plan sponsor's deadline for submitting claims after the plan year ends. The IRS does not specify deadlines for submitting claims for DCAP reimbursement. A plan is permitted to include a run-out period after the end of the plan year during which a participant can submit a claim for reimbursement and can provide a deadline for submitting a claim for reimbursement. The plan sponsor has sole discretion to determine the time for submitting claims after the end of the plan year. The IRS notes that the plan document should specify the time frame for submitting claims after the end of the plan year.

DOL Publishes New FMLA Forms

The DOL published the following new FMLA forms and published [Q&As](#) regarding the new forms. An employer may use the new forms, but is not required to use the forms in order to comply with FMLA. An employer may continue to use the prior versions of the forms.

- [Eligibility Notice, Rights and Responsibilities Notice, form WH-381](#)
- [Designation Notice, form WH-382](#)
- [Employee's Serious Health Condition, form WH-380-E](#)
- [Family Member's Serious Health Condition, form WH-380-F](#)
- [Qualifying Exigency, form WH-384](#)
- [Military Caregiver Leave of a Current Servicemember, form WH-385](#)
- [Military Caregiver Leave of a Veteran, form WH-385-V](#)

DOL Releases RFIs on Paid Leave and FMLA

The DOL released a [Request for Information](#) (RFI) seeking information from the public regarding paid leave (family and medical leave to care for a family members health, or for one's own health). The DOL is seeking information regarding the effectiveness of current state and employer provided paid leave programs, and how access or lack of access to paid leave programs impacts workers and their families. Written comments must be submitted on or before September 14, 2020.

The DOL also released an [RFI](#) seeking information from the public regarding the current FMLA regulations (not including the expanded FMLA provided under the FFCRA). The DOL is seeking information regarding what employees would like to see changed in the FMLA regulations to better



effectuate the rights and obligations under FMLA. Also, the DOL is seeking information regarding what employers would like to see changed in the FMLA regulations to better effectuate the rights and obligations under FMLA. Written comments must be submitted on or before September 15, 2020.

President Issues Executive Orders on Drug Pricing

President Trump issued four executive orders aimed at lowering drug prices. HHS released a [press release](#) announcing the executive orders. The [Executive Order on Access to Affordable Life-saving Medications](#) directs HHS to increase access to insulin and epinephrine for low income individuals by conditioning federal grants to Federally Qualified Health Centers (FQHCs) upon the FQHC discounting the price of such products. The [Executive Order on Increasing Drug Importation to Lower Prices for American Patients](#) directs HHS to allow the importation of certain drugs from other countries, authorizing the reimportation of insulin products, and finalizing the proposed rule on the importation of prescription drugs from Canada. The [Executive Order on Lowering Prices for Patients by Eliminating Kickbacks to Middlemen](#) directs HHS to finalize a proposed rule amending a regulatory safe harbor under the federal anti-kickback statute regarding drug price discounts offered by drug manufactures and creating two new safe harbors. The fourth executive order directs HHS to take action to ensure that the Medicare program pays no more for the most costly Medicare Part B drugs than any economically comparable country. The fourth executive order has been postponed in order to give pharmaceutical manufacturers time to come up with an alternative pricing plan.

Question of the Month

Q. How long must a group health plan provide coverage without cost sharing for in vitro diagnostic tests for detection of SARS-CoV-2 or the diagnosis of COVID-19 and the administration of such tests under the FFCRA, as amended by the CARES Act?

A. As of March 18, 2020, and until the end of the public health emergency as declared by HHS, group health plans must provide coverage without cost sharing for in vitro diagnostic tests for detection of SARS-CoV-2 or the diagnosis of COVID-19 and the administration of such tests under the FFCRA, as amended by the CARES Act. Currently, the public health emergency is set to expire on October 23, 2020. However, HHS has twice extended the end date of the public health emergency. Employers should stay apprised of any further extensions.

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