

Catching Up With Health Care Reform

PCORI Fees, Nondiscriminatory Wellness Programs and Other New Guidance

Norbert F. Kugele
nkugele@wnj.com
616.752.2186

April A. Goff
agoff@wnj.com
616.752.2154

Overview

- Employer Responsibility enforcement delayed!
- Filing PCORI Fees by July 31
- Notice to Employees of the Health Insurance Marketplace
- Updated SBC requirements



Overview

- Coverage of individuals participating in clinical trials
- Preventive services--updated regulations on religious organization exemption
- Final regulations on nondiscriminatory wellness programs
- Supreme Court's DOMA ruling



EMPLOYER RESPONSIBILITY

IRS Announces Delay!

- Play or pay penalties delayed for another year
 - Enforcement will not begin until 1/1/15
 - During 2014:
 - No penalties for failure to offer coverage to at least 95% of full-time workers
 - No penalties for individuals who obtain subsidized coverage through Exchange
 - Reporting of health plan coverage information also delayed

Implications

- Have another year to figure out the hard issues:
 - Measurement periods
 - Additional classes to be covered
 - Who are common law employees
- Other reforms are still going forward!

90-Day Maximum Waiting Period

- 90-Day maximum waiting period for group health plan still in effect for plan years beginning in 2014
 - Calendar year plans – January 1, 2014
- First of the month following 90 days is too long
- Cumulative service requirements
- Variable-hour employee exception
- Multi-employer plan participants



PCORI FEES

Filing deadline

- Plan years ending between October 1, 2012 and December 31, 2012
 - First filing due by July 31, 2013
 - Last filing due July 31, 2019
- All other plans:
 - First filing due by July 31, 2014
 - Last filing due July 31, 2020

Which Benefits?

- Applies to “specified health insurance policies”
 - Health insurance plans
 - HMO coverage
 - self-insured group health plans
 - Many health reimbursement arrangements
- Includes:
 - Retiree coverage
 - COBRA coverage

Which Benefits?

- Does NOT apply to:
 - Stand-alone vision and dental plans
 - Most health FSA accounts
 - Exceptions:
 - Employer contributes more than \$500 above employee's contribution.
 - Health FSA offered to a broader group of employees than health plan coverage
 - Limited purpose HRAs
 - Non-coordinated benefits
 - Specified disease or illness
 - Hospital/fixed indemnity coverage

Which Benefits?

- Does NOT apply to:
 - Most employee assistance, disease management and wellness programs
 - Expatriate-only plans
 - Stop-loss coverage/indemnity reinsurance policy
 - Medicare/Medicaid/CHIP/TRICARE
 - Medicare/TRICARE supplemental coverage
 - Federally-recognized Indian Health Services
 - Programs under the Indian Health Care Improvement Act

PCORI Fee amount

- 1st year: \$1 per covered life
- Years 2 - 7: \$2* per covered life

*Fee amount may be adjusted for inflation



Who Pays for Insured Benefits

- Tax Code Section 4375 imposes the fee upon the insurer
- Expect insurer to pass costs on to plan sponsor

Who Pays for Self-Insured Benefits

- Tax Code section 4376 imposes fee upon plan sponsor:
 - Single-employer plan: employer who maintains the plan
 - Plan established by employee organization: the employee organization
 - Employer-sponsored plan with multiple participating employer: does the plan clearly identify plan sponsor?
- No set-off for payments made by insurers



Counting Lives (self-insured plans)

- Average number of lives covered by the plan during the plan year
 - Employee
 - Spouses
 - Other dependents

Counting Lives (self-insured plans)

- Actual count method
 - Add up number of lives covered each day of plan year.
 - Divide by number of days in the year.

Counting Lives (self-insured plans)

- Snapshot method
 - Count only on certain days:
 - Count number of lives on the similar days (or multiple days) of each quarter.
 - Divide by number of count days.
 - Counting options:
 - Actual number of lives
 - Factor method:
 - Number of participants with single-only coverage
 - Number of participants with other coverage multiplied by 2.35

Counting Lives (self-insured plans)

- Form 5500 method
 - Formula based on number of participants reported on the plan year's 5500.
 - If plan only provides single coverage: add total participant counts at beginning and end of year and divide by 2.
 - If plan offers single and family coverage options: add total participant counts at beginning and end of year (without dividing by 2).
 - **Can only use if file 5500 by July 31**

Counting Lives (self-insured plans)

- Special counting rules:
 - Do not have to pay for an employee who only has fully-insured coverage
 - Can aggregate self-insured plans with same plan year
 - For those who have only HRA (and Health FSA) coverage: need only count participants

Counting Lives (self-insured plans)

- Transition rule on counting:
 - Applies to plan years ending between October 1, 2012 and July 9, 2013
 - May use any reasonable method to count the average number of lives covered for the plan year

Paying the PCORI Fees

- Use IRS Form 720 (as updated April 2013)
 - <http://www.irs.gov/pub/irs-pdf/f720.pdf>
 - Only have to file in July if have no other excise taxes or fees that require quarterly filing.



NOTICE OF HEALTH INSURANCE MARKETPLACE

Notice Requirements

- Employers subject to Fair Labor Standards Act must issue notice
- Notice must be provided to ALL employees, whether part-time or full-time even if not eligible for benefits
- Current employees must receive notice by October 1, 2013
 - New hires after that date: within 14 days of start date

Notice Requirements

- Notice must be available free of charge
- May distribute in paper form or electronically if certain criteria are met
- Two model notices available
 - Employer offers coverage
 - Employer does not offer coverage
- Updated model COBRA notice



UPDATED SBC REQUIREMENTS

Changes to SBC Template

- Updated template to address:
 - Minimum essential coverage
 - Minimum value
 - <http://www.dol.gov/ebsa/pdf/CorrectedSampleCompletedSBC2.pdf>
- For use in second year
 - Plan years beginning on or after January 1, 2014
- If too late to implement:
 - Put the information in a cover letter

Updating Information in SBC

- Phase-out of annual limits
 - “Is there an overall annual limit on what the plan pays?”
 - Answer must now be “no”
 - Why this Matters information must now correspond to the “no” answer.
- No new coverage examples



COVERAGE FOR CLINICAL TRIALS

Coverage for Clinical Trials

- Often carved out from group health plan coverage
- Must cover the routine patient costs associated with approved clinical trials
 - Requirement for non-grandfathered group health plans beginning January 1, 2014
 - Grandfathered group health plans exempt



HEALTH REIMBURSEMENT ARRANGEMENTS AFTER 2013

Health Reimbursement Arrangements

- Design:
 - No employee contributions permitted
 - Contributions may be carried over if plan design permits
- Concern: annual dollar limitations prohibited beginning in 2014
- Stand-alone vs. Integrated HRAs
 - Stand-alone HRAs no longer permitted
 - Integrated HRAs may be permitted if underlying group health plan complies

Health Reimbursement Arrangements

- HRAs and individual market coverage (including Exchange coverage)
- Spend down of HRA balances
- Retiree-only HRAs



CLARIFICATION REGARDING PREVENTIVE CARE RELIGIOUS EXEMPTION

Preventive Care - Contraceptives

- Religious Exemption Final Regulations issued July 2, 2013
- Apply plan years beginning on or after January 1, 2014
- “Religious Employers” and “Eligible Organizations” do not have to comply with mandate
 - Self-Certification; no for-profit organizations

Preventive Care

- Insured vs. Self-funded group health plans
- Notice of availability of separate payments
 - Eligible organization does not fund or administer contraceptive benefits, but will provide separate payments for contraceptive services at no cost
 - Model language available



WELLNESS PROGRAMS

Background

- HIPAA nondiscrimination rules:
 - Prohibit discrimination on basis of health factors
 - Eligibility
 - Benefits
 - Generally cannot require individual to pay more to participate based on health factors
- Exception: HIPAA-compliant wellness program

What's New

- Increase maximum rewards
 - From 20% to 30% of cost of coverage
 - Up to 50% if also address tobacco use
- Clarify/change rules under 2006 regulations:
 - Reasonable alternative requirements
 - When medical verification may be required
 - Notice of reasonable alternatives

Types of Wellness Programs

- Participatory Programs
 - Obtains rewards by simply participating (no need to meet standards)
- Health-Contingent Programs
 - Activity-only wellness programs
 - Outcome-based wellness programs

Participatory Programs

- Does not condition reward on satisfying a standard that is based on a health factor
- Rewards available on a uniform basis to all plan participants
- Examples:
 - Reimburse fitness center costs
 - Reward for completing HRA
 - Reimbursing fees for smoking cessation program (whether quit or not)

Health-Contingent Programs

- Basic requirements:
 - Opportunity to qualify for reward at least once a year
 - Reward limits:
 - 30% of cost of coverage
 - Additional 20% (to 50%) in connection with program designed to prevent or reduce tobacco use

Health Contingent Programs

- Basic Requirements (cont.)
 - Reasonable Design
 - Reasonable chance of promoting health/preventing disease
 - Not overly burdensome
 - Not a subterfuge for discrimination based on a health factor
 - Not highly suspect in method

Health Contingent Programs

- Basic Requirements (cont.)
 - Uniform availability/reasonable alternative
 - Full reward available to all
 - Second alternative may be required
 - can waive requirement for individuals.
 - Must allow for cycle of failure and renewed effort
 - Appeal and external review process applies

Activity Only Programs

- Special rules:
 - Must provide a reasonable alternative to the required activity when:
 - Unreasonably difficult to satisfy because of medical condition
 - Medically inadvisable to attempt to satisfy the requirement.
 - Can seek clarification from individual's physician, if reasonable under the circumstances

Outcome-Based Programs

- Special Rules:
 - Anyone who does not meet target biometrics must be offered a reasonable alternative
 - Cannot require verification that meeting the target is unreasonably difficult before offering alternative
 - Must give adequate time to meet alternative
 - May have to provide an alternative to the alternative
 - Individual can seek his or her physician's input on second alternative

Health Contingent Programs

- Basic Requirements (cont.)
 - notice to individuals that a reasonable alternative is available
 - Must appear in ALL plan materials describing the terms of the program
 - Outcome-based programs: also include with disclosure that individual did not meet initial standards
 - Must include:
 - Contact information
 - Statement that personal physician's recommendations will be accommodated.

Effective Date

- Plan years beginning on and after January 1, 2014
 - Applies to grandfathered plans
- May still get more guidance
 - Verification of medical limitations
 - Rescission in connection with false statements about tobacco use

Other Laws Also Apply!

- Wellness programs also subject to:
 - HIPAA privacy requirements
 - Genetic Information Nondiscrimination Act requirements
 - Americans with Disabilities Act



SUPREME COURT'S DOMA RULING



United States vs. Windsor

- Challenged Section 3 of DOMA
- Lawsuit over \$350,000 in estate taxes
- Argued violated Equal Protection Clause of Fifth Amendment

Supreme Court's Decision

- 5-4 Decision; Section 3 of DOMA Unconstitutional
- Left intact Section 2 of DOMA
 - Allows states to refuse to recognize same-sex marriages performed under the laws of another state
- Impacts over 1,000 federal laws and regulations that utilize definition of spouse

Employee Benefit Plans Implications

- Federal benefits and protections afforded to opposite-sex legally married couples must be extended to same-sex couples
- More questions than answers at this point

Federal Tax Implications

- Withholding: employees who reside in states that recognize same-sex marriage may need a new W-4
- Refund?

Immigration Implications

- Same-sex foreign nationals married in their home country deemed married for immigration purposes
 - Can join highly skilled professional as dependent rather than requiring separate visa
 - Sponsorship visa can extend to spouse

Retirement Plans

- Employers with pensions and 401(k) plans would be required to recognize same-sex spouse for purposes of:
 - Qualified Joint and Survivor Annuities (QJSA) and
 - Qualified Preretirement Survivor Annuities (QPSA)
 - Qualified Domestic Relations Orders (QDROs)
 - Minimum Required Distributions
 - Hardship Withdrawals

Welfare Plans – Known Impact*

- Federal income tax treatment of health coverage for same-sex spouse changes
 - No more imputed income for spouse and spouse's children
 - Refund of imputed income?
- COBRA continuation coverage required for same-sex spouses
- HIPAA special enrollment rights
- FMLA required to take care of same-sex spouse
- Health Care FSAs, HRAs, HSAs

Welfare Plan: Self-Funded or Insured?

- ERISA Preemption: self-funded welfare benefit plans NOT required to extend benefits to same-sex spouses
 - Federal law does not require spousal benefit coverage
 - State law mandates do not apply to a self-funded welfare benefit plan
- Legal risk is not via ERISA but through discrimination claims

Welfare Plans – Unknown Impact

- Are same-sex spouses required to be covered?
 - Same sex marriage currently legal in: California, Connecticut, Delaware, the District of Columbia, Iowa, Maine, Maryland, Massachusetts, Minnesota (effective August 1, 2013), New Hampshire, New York, Rhode Island (effective August 1, 2013), Vermont and Washington
- What about civil unions and domestic partnerships?

Next Steps

- Do you have employees in states where same-sex marriage is legal?
- Determine company position – can you effectively administer benefits differently in different states?
- Further guidance expected
- Employee communication strategy

Questions?

April A. Goff

Warner Norcross & Judd LLP

agoff@wnj.com

616.752.2154

Norbert F. Kugele

Warner Norcross & Judd LLP

nkugele@wnj.com

616.752.2186