Catching Up With Health Care Reform

PCORI Fees, Nondiscriminatory Wellness Programs and Other New Guidance

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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)
  - 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

- 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 by "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?

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