BUCK

US

FYI® In-Depth
For Your Information®

Celebrating 40 years of FYI®

2019 Planning for Health and Welfare Benefit Plan Operations

Volume 41

Issue 99

December 13, 2018

Authors
Julia Zuckerman, JD
Richard Stover, FSA, MAAA

As 2018 comes to a close, it's time to consider health and welfare compliance issues for 2019. We have resources that can help you stay on top of deadlines. The calendar below presents a schedule of activities that address important upcoming deadlines and our Reporting and Disclosure Guide will help you identify and address other activities that are event-based and participant-specific. Below we highlight some issues you'll want to consider in the coming year.

Affordable Care Act compliance

The Tax Cuts and Jobs Act enacted at the end of 2017 nullified the Affordable Care Act (ACA) individual mandate penalty beginning on January 1, 2019. However, it did not impact the existing ACA employer shared responsibility assessments or reporting requirements. (See our December 20, 2017 *Legislate*.) Additionally, although Congress in early 2018 again delayed the 40 percent excise tax on "high cost" healthcare plans, aka the Cadillac tax, it remains slated to go into effect in 2022. (See our January 23, 2018 *FYI Alert.*) It is not clear when the IRS will release additional guidance on this tax

In the meantime, continue to comply with all rules currently in place. Below we highlight a few. You should also prepare to revisit your employee benefits strategies in response to guidance on the Cadillac tax.

Employer reporting and shared responsibility enforcement. Beginning in 2015, employers with at least 50 full-time employees were required to offer minimum essential coverage that is "affordable" and meets minimum value standards to full-time employees and their dependents, or potentially pay certain nondeductible assessments. The IRS imposed employer reporting obligations to enforce these requirements and to administer the low-income subsidies provided to eligible individuals who purchase coverage in the ACA marketplace. The IRS has issued draft forms and instructions for 2018 reporting.

(See our July 16, 2018 *For Your Information.*) The deadline for furnishing the forms to employees is January 31, 2019 — and although in each of the past three years the IRS has extended the January 31 due date for furnishing the forms to individuals, no extension has been provided yet for 2018 reporting. The deadline for filing the forms with the IRS is April 1, 2019, if filing electronically. With these deadlines in mind, employers should be prepared to submit the reporting by gathering information and coordinating service provider support needed for this filing.

In late 2017, IRS started sending assessment notices in connection with an employer's failure to offer minimum essential coverage to at least 70 percent of its full-time employees and their dependents in 2015 using Letter 226-J — the so-called (a) penalty. IRS also issued Form 14764, the ESRP Response, and Form 14765, the Employee PTC Listing. Together, these forms are the vehicles for employers to respond to a Letter 226-J. (See our March 21, 2018 *For Your Information.*) The IRS later began sending 226-J letters for assessments relating to coverage offered to full-time employees in 2015 that is "unaffordable" or fails to provide minimum value — the so-called (b) penalty. (See our July 16, 2018 *For Your Information*.) Employers should ensure processes are in place to make shared responsibility assessment payments, as necessary. The IRS is now in the process of sending assessment notices for 2016.

PCORI fee. Plan sponsors of self-insured group health plans with a calendar plan year will pay the Patient-Centered Outcomes Research Institute (PCORI) fee for the last time in 2019. Non-calendar year plans that end before October 1 will pay the fee for the last time in 2020. The fee, which helps to fund patient-centered outcomes research, applies to plan years ending after September 30, 2012, and before October 1, 2019, and is based on the average number of lives covered under the plan. The fee used to calculate the payment amount for plan years that end on or after October 1, 2018, and before October 1, 2019 (including 2018 calendar year plans), is $2.45 per covered life. (See our November 28, 2018 *For Your Information*.) Plan sponsors must pay the PCORI fee by July 31 of the calendar year immediately following the last day of that plan year.

Health and welfare plan nondiscrimination testing

Certain employer-provided benefits are eligible for tax exclusions under the Internal Revenue Code. Each exclusion comes with an important condition — it generally must be for the benefit of "rank and file employees." Thus, for executives and other highly paid individuals to take advantage of the exclusion, an employer must be able to demonstrate that the benefit satisfies applicable nondiscrimination tests. Although the various tests include common elements, they can differ significantly. Employers should review the various nondiscrimination tests applicable to health and welfare plans (which include provisions related

Nondiscrimination testing details

Our November 8, 2017 *FYI In-Depth* includes an overview of the health and welfare nondiscrimination testing. We also have publications that cover each of the testing requirements in more detail:

- Dependent care account plans (See our January 2, 2018 *FYI In-Depth*)
- Cafeteria plans (See our February 20, 2018 *FYI In-Depth*)
- Self-insured health plans (See our May 3, 2018 *FYI In-Depth*)
- Group term life insurance (See our September 10, 2018 *FYI In-Depth*)

to self-funded group health plans, health FSAs, dependent care assistance programs, life insurance, and cafeteria plans) to ensure that their benefit plans are in compliance. Modeling nondiscrimination tests at the beginning of the plan year can provide important information for year-end compliance. (See our May 3, 2018 *FYI In-Depth* for an overview of nondiscrimination testing of self-insured health benefits and our November 8, 2017 *FYI In-Depth* for an overview of health and welfare nondiscrimination testing generally.)

Wellness programs

Employer-provided wellness programs continue to be the subject of attention. After finding that EEOC's final ADA and GINA regulations — which permit an incentive of up to 30 percent of the cost of self-only coverage — are arbitrary and capricious, a federal court ordered the regulations be vacated as of January 1, 2019.

It is not clear when EEOC will either revise the current regulations or issue new regulations — but the agency has said informally that it will not act on this prior to the January 1, 2019 deadline. Without EEOC regulations in effect, employers will face uncertainty about whether a wellness program that asks for medical information (e.g., biometric screenings and health risk assessments) and/or that inquires about a spouse's medical conditions (e.g., spousal health risk assessments) would be considered voluntary. Accordingly, employers should review their wellness program designs to determine comfort level and any associated risk (e.g., employee morale) with incentive limits. Some may reset and take a more conservative approach; others might stay the course or provide more aggressive designs. (See our February 13, 2018 *For Your Information*)

Additionally, the DOL has brought recent lawsuits claiming that employer wellness programs violate HIPAA requirements. Specifically, the DOL sued a large retail employer in 2017 and a large children's products manufacturer in 2018, alleging that the tobacco surcharge imposed as part of each company's respective wellness program violated the HIPAA nondiscrimination rules. In 2018, the DOL sued a cleaning products company on the grounds that its wellness program, which offered premium discounts in exchange for participants achieving certain health outcomes, failed to provide a reasonable alternative standard as required under HIPAA; the employer settled that case only a few days after the DOL filed the complaint, agreeing to pay $59,189 to participants who paid higher premiums for not enrolling in the wellness program or not achieving certain outcomes. While these cases do not have an immediate impact on employer wellness programs overall, they signal that legal action involving those programs is likely to continue. In some cases, the benefits might outweigh any legal risk, but employers should take the time to reassess their wellness programs for compliance or otherwise be aware of areas of exposure. (See our October 31, 2017 *For Your Information*.)

Mental health parity

The Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) requires group health plans that offer mental health and substance use disorder benefits to cover those benefits on terms that are no more restrictive than those for medical and surgical benefits.

MHPAEA enforcement. Earlier this year, DOL, IRS and HHS (the departments) issued guidance that clarifies how MHPAEA rules apply to nonquantitative benefit limitations, such as pre-authorization and medical management techniques — with specific examples of parity standards in the context of experimental or investigative treatment limitations, formulary design, and provider networks. The departments also issued a revised disclosure template to help participants and beneficiaries request information on limitations that may affect their mental health and substance use disorder benefits, as well as a self-compliance tool plan sponsors can use to review coverage terms and policies and to monitor those of vendors. (See our May 14, 2018 *FYI In-Depth.*)

Consider a compliance review

Did you know that the most common way the DOL identifies health and welfare plans for scrutiny, and possible litigation and/or referral to other agencies like the IRS, is through participant and beneficiary complaints?

A compliance review coupled with careful consideration of any risk exposure could minimize the chance of participants and beneficiaries contacting the DOL in the first place and help you address any issues that could be raised upon audit. This will ultimately save you time, money, and aggravation should the DOL come knocking.

The departments appear focused both on compliance assistance as well as enforcement. Using DOL's self-compliance tool as a guide, now is a good time to work with advisors in evaluating parity compliance — paying close attention to areas like exclusions for experimental or investigative treatments, formulary design, step-therapy protocols or fail-first policies, network access, provider lists, and reimbursement rules. Plans should also reach out to vendors, such as those providing MH/SUD or prescription drug carve-out benefits, to confirm compliance with parity rules. They should also ensure processes are in place to respond in short order to disclosure requests.

Autism coverage and wilderness therapy benefits. In recent years, there has been increased demand for coverage of autism treatment benefits in employer group health plans — and a corresponding uptick in litigation by participants seeking coverage for these benefits. There has also been an increase in litigation concerning coverage for wilderness therapy programs. Employer group health plans should be aware of these trends, as well as of compliance concerns with coverage gaps. In particular, they should consider plan terms relating to autism treatment coverage and any limitations placed on those benefits in light of potential legal risk, as well as the financial and clinical impact of autism-related coverage. (See our January 12, 2018 *FYI In-Depth*.)

Relaxed agency rules for disaster victims

Recent hurricanes Florence and Michael have Maria devastated parts of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia. Additionally, wildfires have destroyed large swaths of structures in California. The DOL has released announcements acknowledging health plan administrative delays that participants, beneficiaries, and plan administrators may face when a disaster strikes. The DOL suggested that plan fiduciaries make reasonable accommodations to prevent the loss of benefits and minimize loss of coverage for individuals affected by a hurricane or other natural disaster. It also said that its approach to enforcement "will be marked by an emphasis on compliance assistance and include grace periods and

other relief where appropriate" in these situations. (See our December 11, 2018 *For Your Information.*)

Proposed expansion of employers' HRA options

Following last year's White House directive to expand employers' ability to offer HRAs to their employees and allow HRAs to be used in conjunction with non-group coverage, DOL, HHS, and Treasury recently proposed conditions under which an HRA can satisfy the ACA's market reforms through integration with individual coverage, and issued guidance addressing the application of the employer mandate and nondiscrimination requirements on these HRAs. They also set forth rules for an excepted benefit HRA option that would not be integrated with individual coverage. Final rules are expected to apply for plan years beginning on or after January 1, 2020, so now is a good time for employers to start considering whether these new possibilities could be attractive options. (See our *FYI In-Depth* from December 10, 2018.)

Out-of-pocket maximums

The 2019 annual ACA out-of-pocket (OOP) maximums on essential health benefits for non-grandfathered group health plans are $7,900 for self-only coverage and $15,800 for coverage other than self-only. Plan sponsors can still allocate a plan's OOP limit among different coverage categories so long as the combined amounts don't exceed the annual OOP limit. (See our May 18, 2018 *For Your Information*.)

2019 benefit limits

The IRS has issued the 2019 limits for qualified transportation fringe benefits, adoption assistance programs, health flexible spending arrangements and long-term care premiums. (See our November 15, 2018 *FYI Alert* and September 20, 2018 *For Your Information.*) The 2019 HSA annual contribution limits and the OOP amounts for self-only and family coverage all increased over the 2018 limits. (See our May 14, 2018 *For Your Information.*) Plan sponsors should review and consider whether to update their plan documents to reflect these limits.

In closing

Planning ahead to identify tasks and set compliance goals for 2019 is an important first step for assuring smooth operations during the year. In addition to the significant items noted above, plan sponsors may want to perform an annual "checkup" (i.e., an audit/review of operational practices and fiduciary responsibilities) to address plan compliance and design considerations. Plan sponsors may conduct their own review or contract with an independent party. Regardless of who performs the review, identifying problems and initiating corrections in advance of any official governmental audit is certainly the preferred course of action.

We have published companion pieces to this *FYI In-Depth* that cover year-end planning:

2019 Planning for ERISA Single-Employer Defined Benefit Plan Operations

2019 Planning for ERISA Single-Employer Defined Contribution Plan Operations

2019 Planning for ERISA Multiemployer Defined Benefit Plan Operations

2019 Planning for Governmental Retirement Plan Operations

Calendar of health and welfare benefit plan compliance tasks[1]

Action Item	Due Date
January	
Reporting of value of health coverage on Form W-2	January 31, 2019*
February	
File ACA information reporting returns with IRS (for paper filing)	February 28, 2019*
March	
DOL Form M-1 (for MEWAs)	March 1, 2019*
Disclosure of creditable/noncreditable status of prescription drug coverage to CMS	March 1, 2019
Provide ACA information reporting returns to individuals	March 4, 2019
Last day for flexible spending accounts with 2½ month grace periods	March 15, 2019
April	
File ACA information reporting returns with IRS (for electronic filing)	April 1, 2019*
May	
Form 990 or Form 8868 if requesting extension	May 15, 2019
July	
Summary of Material Modifications for prior year amendments	July 29, 2019
Form 720 filing and payment of PCORI fee	July 31, 2019*
Form 5500 or file Form 5558 to request an extension	July 31, 2019
August	
Form 990 (if on extension) or Form 8868 if requesting additional extension	August 15, 2019
September	
Summary Annual Report (if no extension)	September 30, 2019

[1] Assumes calendar plan and sponsor tax year. Does not account for weekends, extended due dates other than for Forms 5500 and 990, short plan years, or new plans. The “weekend rule,” which extends due dates falling on weekends to the following Monday, generally applies to filing deadlines and certain other acts under tax rules.

October	
Provide notice of creditable/noncreditable prescription drug coverage to participants	October 14, 2019*****
Form 5500 filed if on extension	October 15, 2019
November	
Form 990 (if additional 3-month extension)	November 15, 2019
December	
Summary Annual Report (if on extension)	December 15, 2019
Deadline for correcting DCAP discrimination test failures	December 31, 2019

**Date does not vary regardless of plan year.*

Produced by the Knowledge Resource Center

The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive.