UBA ComplianceCenter

Acadia BENEFITS INC.

Compliance Recap

April 2015

Regulatory agencies were quiet during the month of April. The most significant guidance came from a variety of federal agencies that issued various documents regarding wellness programs. In addition to a Proposed Rule (discussed below) issued by the Equal Opportunity Employment Commission (EEOC) to align wellness program requirements with Title I of the Americans with Disabilities Act (ADA), other agencies released documents on the same topic. The Department of Health and Human Services (HHS) Office of Civil Rights (which enforces HIPAA privacy rules) released an FAQ on wellness programs and HIPAA privacy and security. Additionally, HHS and the Department of Labor (DOL) issued an FAQ on wellness programs. Finally, HHS released an FAQ on the relationship between insurance reforms under the Patient Protection and Affordable Care Act (PPACA) and wellness programs.

A recent audit report from the Treasury Inspector General indicated that the IRS will likely increase its enforcement of entities that are noncompliant in regard to paying the Patient-Centered Outcomes Research Institute (PCORI) fee.

UBA published information and guidance on penalties under PPACA, focusing on excise tax penalties and penalties that large employers must pay if they do not meet their employer-shared responsibility/play or pay obligations.

Read more about potential employer penalties under PPACA.

In February the Department of Labor issued an updated definition of "spouse" under the Family and Medical Leave Act (FMLA) to make compliance easier, and defined "spouse" as a husband or wife, which refers to a person "with whom an individual entered into marriage as defined or recognized by state law." The governing state law is that of the celebration state or where the marriage took place. This definition was set to go into effect on March 27, 2015. A federal judge in Texas has issued a temporary injunction blocking the ruling from going into effect after the attorneys general in several states that do not recognize same-sex marriage challenged it. The final outcome of the injunction remains to be seen, and might be affected by an anticipated Supreme Court ruling in one of the same-sex marriage cases pending before it. **Medicare Part D 2016 Defined Standard Set**

The Centers for Medicare & Medicaid Services (CMS) set the 2016 parameters for the defined standard Medicare Part D prescription drug benefit. Most group health plan sponsors offering prescription drug coverage to Part D eligible individuals must disclose to Part D eligible individuals and to CMS whether the plan coverage is creditable or non-creditable. To be creditable, the actuarial value must equal or exceed the actuarial value of standard Medicare Part D coverage under CMS. Practically speaking, a group health plan must offer coverage that is at least as good as standard Part D coverage to be determined creditable. For 2016, the standard deductible is set at $360, the initial coverage limit is $3,310, and the out-of-pocket threshold is $4,850. For further benefit parameters and more, read the full announcement from CMS.

Further Information on DOL's Definition of "Spouse" Under FMLA

As previously reported, in February the Department of Labor (DOL) issued an updated definition of "spouse" under the Family and Medical Leave Act (FMLA) to make compliance easier, and defined "spouse" as a husband or wife, which refers to a person "with whom an individual entered into marriage as defined or recognized by state law." The governing state law is that of the celebration state, or where the marriage took place. This definition was set to go into effect across the United States on March 27, 2015. A federal judge in Texas has issued a temporary injunction blocking the ruling from going into effect after the attorneys general in several states that do not recognize same-sex marriage challenged it. The final outcome of the injunction remains to be seen, and might be affected by an anticipated Supreme Court ruling in one of the same-sex marriage cases pending before it. Although it was originally thought that until litigation concluded employers in all states should apply the old rule, in April the DOL made it clear that **the new rule applies in all states except those involved in litigation, which are Texas, Arkansas, Louisiana, and Nebraska**.

EEOC Proposed Rule

On April 20, 2015, a Proposed Rule to amend regulations and provide guidance on implementing Title I of the Americans with Disabilities Act (ADA) as it relates to employer wellness programs was published by the EEOC. To accompany the Proposed Rule, the EEOC also released a Fact Sheet for Small Businesses and an FAQ for the general public.

Title I of the ADA applies to employers with 15 or more employees, prohibits discrimination against people with disabilities, and requires equal opportunity in promotion and benefits, among other things. Under the Proposed Rule, wellness programs that are part of or are provided by a group health plan or by a health insurance issuer (carrier) offering group health insurance in conjunction with a group health plan are required to provide a notice and describe the use of incentives. In the Proposed Rule, "group health plan" refers to both insured and self-insured group health plans. All of the other proposed changes relate to "health programs," which include wellness programs regardless of whether they are offered as part of or outside of a group health plan or group health insurance coverage. The term "incentives" includes financial and in-kind incentives for participation, such as awards of time off, prizes, or other items of value.

Read more about the EEOC's Proposed Rule on wellness programs.

Vanpooling Benefits

The IRS issued an information letter regarding one of the pieces of criteria used in determining whether a vanpooling benefit is a qualified transportation plan benefit. The IRS did not provide a definitive answer on the matter as a whole, but indicated that the question of who "operates" a vanpool should focus on control - who drives the van, who determines the route, and who determines the pick-up and drop off. Employees receiving transit passes to pay for vanpool rides do not necessarily indicate that a vanpool is private or public transit-operated. Determining who operates a vanpool will help an employer determine whether the related 80/50 rule applies or whether cash reimbursements are available.

Question of the Month

Q. How is PPACA's "IRS Form W-2 safe harbor" regarding affordability calculated?

A. Under PPACA, coverage is considered affordable if it costs less than 9.5 percent of an employee's household income. Because employers are often unaware of an employee's household income, there are three safe harbors that an employer can use to determine affordability. One is the "IRS Form W-2 safe harbor," and under it coverage is affordable if the employee's contribution for self-only coverage is less than 9.5 percent of his W-2 (Box 1) income for the current year. Box 1 reports taxable income and might be artificially low for an individual with high 401(k), 403(b) or Section 125 deferrals, or who takes unpaid leave. There are no adjustments to account for this.

Employers using the W-2 safe harbor may not change an employee's contribution level (dollar amount or percentage) during the calendar year, or the plan year for non-calendar year plans.

If the employee is only offered coverage for part of a year, an adjustment to W-2 income is made by multiplying the IRS Form W-2 wages by a fraction equal to the number of calendar months for which coverage was offered over the number of calendar months in the employee's period of employment during the calendar year. (If coverage is offered for at least one day during the calendar month, or the employee is employed for at least one day during the calendar month, the entire calendar month is counted in determining the applicable fraction.)

The W-2 safe harbor is considered the most flexible, but it is calculated at the end of the year, which does not give an employer the ability to make necessary adjustments. It has shortcomings for employees with significant pre-tax deductions or who take unpaid leave.

Employers may use different safe harbors for different employee groups, so long as the employee groups are based on reasonable classifications such as hourly or salaried employees, geographic location, and job category.

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