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Recent EEOC Activity Addresses Employer Wellness Programs and ICHRAs

Wellness Program Incentives

On January 7, 2021, the Equal Employment Opportunity Commission (EEOC) issued Proposed Rules addressing permissible wellness program incentives under the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act of 2008 (GINA) (Proposed Wellness Rules). Employers who sponsor (or have contemplated sponsoring) wellness programs that offer incentives to participate have long been awaiting EEOC's guidance to better understand the limits that will apply to the incentives.

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EBSA Clarifies Deadline Extension Relief

The Employee Benefit Security Administration (EBSA) recently issued Disaster Relief Notice 2021-01 (Notice 2021-01) to clarify how long certain COVID-19-related relief will last. Notice 2021-01 provides that deadline relief will end as of the earlier of (a) one year after the date the relief outlined in earlier guidance applied to a plan, participant, beneficiary, plan sponsor, plan fiduciary or plan service provider, or (b) 60 days after the end of the National Emergency that started March 1, 2020.

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DOL Issues 2021 Adjusted Penalty Amounts

The Federal Civil Penalties Inflation Act of 2015 requires the Department of Labor (DOL) to adjust certain penalty amounts by January 15 of each year to ensure that they continue to have a meaningful deterrent effect and be a useful enforcement mechanism. The civil monetary penalties apply to a wide range of benefit-related violations. The 2021 adjustments are effective for penalties assessed after January 15, 2021.

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Sweeping COVID-19 Relief Law Will Cover COBRA Premiums for Many

The American Rescue Plan Act of 2021 (ARPA), signed into law on March 11, 2021, contains provisions that will ensure that certain COBRA qualified beneficiaries will be able to continue group health coverage without paying the premiums for it. Specifically, for periods of coverage beginning on or after April 1, 2021 and ending September 30, 2021, ARPA allows so-called "assistance eligible individuals" to be deemed to have paid COBRA premiums in full. Employers will be able to claim employment tax credits to offset the amounts (including applicable administrative fees) of these unpaid COBRA premiums.

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Recent EEOC Activity Addresses Employer Wellness Programs and ICHRAs

However, the Biden Administration's January 20, 2021, regulatory freeze memorandum forced the agency to withdraw the Proposed Wellness Rules on February 12, 2021. Employers are now left with little concrete guidance to navigate implementing and administering wellness programs, including incentives for COVID-19 vaccines.

The EEOC had issued the Proposed Wellness Rules to update its position regarding the maximum level of incentives employers may offer under wellness programs without violating the ADA. The Proposed Wellness Rules became necessary after a 2018 federal court decision invalidated EEOC's 2016 final wellness rules that permitted employers to offer an incentive or penalty up to 30% of the cost of self-only coverage for an employee to disclose ADA-protected information under a wellness program. The 2016 rules also permitted employers to offer a wellness incentive or penalty up to 30% of the cost of self-only coverage for disclosure of a spouse's manifestation of diseases or disorders.

The Proposed Wellness Rules would have prohibited employers from offering employees any wellness incentives above a *de minimis* amount, though certain health-contingent programs under a group health plan could follow 2013 HIPAA regulations that permitted incentives of up to 30% of the cost of coverage (50% for tobacco use prevention or reduction). The EEOC listed examples of *de minimis* incentives that included water bottles and gift cards of nominal value. However, the agency offered no additional examples or definitions of what qualified as a *de minimis* incentive.

So, questions remain for employers who wish to implement or continue wellness programs that include incentives. Employers could possibly choose to offer no wellness incentives, offer only *de minimis* incentives like those in the Proposed Wellness Rules, offer incentives under 2013 HIPAA rules, or offer incentives less than the amounts permitted under the EEOC's final 2016 rules. The EEOC states on its website that it is considering next steps for new proposed wellness rules but offers no timeline for when it might issue new proposed rules.

COVID-19 Vaccine Incentives

Now that COVID-19 vaccine distribution is ramping up, many employers are seeking to incentivize their employees to get inoculated. Some employers have provided or considered incentives ranging from cash to gifts to paid time off. In response to the mass rollout of COVID-19 vaccines, a large group of businesses and associations requested that the EEOC provide guidance on employers offering wellness incentives to workers to encourage getting a COVID-19 vaccine without violating the ADA and other laws. To date, the EEOC has issued no specific guidance, so employers who wish to offer anything more than a *de minimis* incentive like a nominal gift card should seek counsel to ensure the incentive will not be deemed coercive and violate the ADA.

Also, employers considering providing a COVID-19 vaccine incentive must remember that some employees may not be able to receive a vaccine due to religious beliefs or medical conditions. Thus, employers who offer incentives for the COVID-19 vaccine are still required to make reasonable accommodations for employees who are unable to earn the vaccine incentive, such as providing alternative training or resources related to COVID-19 safety.

ICHRAs and the ADEA

The EEOC recently issued a Commission Opinion Letter addressing whether employers may offer employees an Individual Coverage Health Reimbursement Arrangement (ICHRA) funded by defined employer contributions for the purchase of an age-rated individual major medical health insurance policy without violating the Age Discrimination in Employment Act (ADEA). The EEOC considered the following two scenarios.

(1) An employer provides a $300 per month defined contribution to an ICHRA for each employee. For a 55-year-old employee, the $300 may cover a much smaller portion of health insurance premium costs than it would for a 22-year-old employee because current law allows age rating of individual major medical health insurance policies following a specified age curve that allows variation in premium costs based on age.

(2) An employer provides a specified percentage, 30% per month, contribution of premium costs to an ICHRA for all employees. If the cost of an individual major medical health insurance policy for a 55-year-old is $1,000, then a 30% contribution toward the employee's ICHRA is $300. The cost of the same policy for a 22-year-old is $250, so the 30% contribution is $75.

Background

An ICHRA is a type of health reimbursement arrangement (HRA) created by regulations issued by the Department of the Treasury, Department of Labor, and Department of Health and Human Services. Employers could begin offering ICHRAs to employees beginning on January 1, 2020. ICHRAs differ from traditional HRAs because ICHRAs must be integrated with individual health insurance coverage, as opposed to group health plan coverage.

Under the ADEA, older employees cannot be required, as a condition of employment, to make greater contributions for fringe benefits than younger employees. However, older workers may be required, as a condition of participating in a *voluntary* employee benefit plan, to make greater contributions than younger employees, but only if they are not required to contribute a greater portion of the total premium costs than younger employees where the employee and employer contribute to the benefit.

First Scenario

In considering the first scenario, the EEOC explained that it first had to determine whether an ICHRA qualifies as an "employee benefit plan" covered by the ADEA. The EEOC noted that it needed to weigh both the ICHRA as well as the underlying individual health insurance policy.

The EEOC determined that an ICHRA funded entirely by the employer is not subject to the ADEA restrictions on contributory plans. Moreover, because the employer makes the same contribution to all employees, it does not result in lesser compensation to older employees.

The EEOC further determined that, if an employer has no control over the individual insurance policies that employees purchase with ICHRA funds, and the employer plays no role in making the policies available to employees who purchase the coverage from independent third parties with no employer involvement in their selection, the underlying individual insurance policies are not ADEA-covered employee benefit plans. Thus, no ADEA violation occurs despite older employees paying a larger share of the policy cost relative to what they would pay if they were younger, or relative to the share that younger ICHRA participants pay.

Second Scenario

The EEOC found that the second scenario also does not violate the ADEA. Under the percentage contribution design, older employees would effectively be getting a greater level of compensation. The EEOC explained that providing larger amounts to older workers based on their age does not violate the ADEA. Thus, employers can increase their contributions to older employees' ICHRAs to offset age-based increases to their health plan costs without violating the ADEA.

The EEOC also generally noted that ICHRA regulations prohibit employers from decreasing the maximum available dollar amount as a participant ages, so compliant ICHRAs will not violate the ADEA's prohibition against providing decreased compensation on the basis of age.

What This Means for Employers

Employers may offer ICHRAs where the employer contributes either a uniform dollar amount or uniform premium percentage to each employee. These designs will not violate the ADEA.

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EBSA Clarifies Deadline Extension Relief

Background

In 2020, shortly after the President declared a National Emergency due to the COVID-19 outbreak, EBSA issued Disaster Relief Notice 2020-01 (Notice 2020-01). Additionally, the Department of Labor (DOL), the Department of the Treasury, and the Internal Revenue Service issued the Notice of Extension of Certain Timeframes for Employee

Benefits Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak (Joint Notice). The Joint Notice and Notice 2020-01 (Notices) applied ERISA Section 518 to allow employee benefit plans, plan participants and beneficiaries, employers and other plan sponsors, plan fiduciaries, and other service providers to disregard a period of up to one year (beginning March 1, 2020) in determining the date by which certain required or permitted actions must occur.

The Notices stated that the relief would continue during a period that started March 1, 2020, and would end 60 days after the officially announced end of the COVID-19 National Emergency or another date announced in future guidance (Outbreak Period). As previously noted, however, the maximum duration of the deadline relief is one year under ERISA Section 518. Since the National Emergency recently extended beyond March 1, 2021, practitioners and other interested parties were left to wonder whether relief under the Notices would extend beyond February 28, 2021.

Relief Provided

The Notices provided relief to plans that acted in good faith, including using alternate electronic means, to disclose the following items as soon as administratively practicable:

- Plan document
- Summary Plan Description (SPD)
- Summary of Benefits and Coverage (SBC)
- Summary of Material Modification (SMM)
- Summary of Material Reduction (SMR)
- Summary Annual Report (SAR)
- COBRA general and election notices
- Marketplace notice
- CHIP notice
- HIPAA special enrollment rights notice
- Grandfathered status notification
- Newborns' and Mothers' Health Protection Act description
- Michelle's Law notice
- Women's Health and Cancer Rights Act notification

The Notices also allowed participants and beneficiaries relief from deadlines to:

- Request HIPAA special enrollment
- Elect COBRA coverage
- Pay COBRA premiums
- Notify plan administrator of certain qualifying events or disability determinations
- File a claim for plan benefits
- Appeal an adverse benefit determination
- Request an external review, or file information to perfect a request for external review, of an adverse benefit determination

Notice 2021-01

Notice 2021-01 announces that individuals and plans with deadlines and timeframes subject to relief provided by the Notices will be able to disregard a period that ends on the earlier of (a) the date that is one year from the date they were first eligible for relief, or (b) 60 days after the announced end of the National Emergency (the end of the Outbreak Period). Thus, deadline relief will last for a maximum period of one year.

Notice 2021-01 explains the maximum relief period as follows:

- If a qualified beneficiary would have been required to make a COBRA election by March 1, 2020, the Joint Notice delays that requirement until February 28, 2021, which is the earlier of one year from March 1, 2020, or the end of the Outbreak Period (which remains ongoing). Similarly, if a qualified beneficiary would have been required to make a COBRA election by March 1, 2021, the Joint Notice delays that election requirement until the earlier of one year from that date (March 1, 2022) or the end of the Outbreak Period.

- Likewise, if a plan would have been required to furnish a notice or disclosure by March 1, 2020, the relief under the Notices would end with respect to that notice or disclosure on February 28, 2021. The responsible plan fiduciary would be required to ensure that the notice or disclosure was furnished on or before March 1, 2021.

There is some confusion as to why February 28 is deemed to be one year in the first example, while March 1 is the deadline in the second example, but

Notice 2021-01 specifically states that any permissible delay should not exceed one year. Thus, employer plan sponsors should ensure that they disregard no more than 365 days when complying with applicable notice, disclosure and deadline requirements.

Notice Form Relief

Notice 2020-01 also stated that plans and fiduciaries would not be deemed to have violated applicable notice and disclosure rules if they acted in good faith to furnish any required notice, disclosure or document as soon as administratively practicable under the circumstances. Good faith acts include using electronic alternative means of communicating with plan participants and beneficiaries who the plan administrator reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites. Notice 2021-01 states that notices and disclosures properly furnished without relying on the relief in Notice 2020-01 do not need to be refurnished. Moreover, if a plan can demonstrate that a participant or beneficiary received a notice or disclosure, the plan does not need to refurnish it even if initially furnished by relying on Notice 2020-01 relief.

Ongoing Enforcement

The DOL notes that the ongoing COVID-19 pandemic might cause problems for plan participants and beneficiaries who no longer have the relief provided by the Notices due to the one-year limit on that relief. The DOL suggests that plan sponsors and fiduciaries should make reasonable accommodations to prevent any loss or delay in payment of benefits in such cases and should take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes.

For example, the DOL states that where a plan administrator or other responsible plan fiduciary knows, or should reasonably know, that the end of the relief period for an individual action will cause a participant or beneficiary to lose protections, benefits, or rights under a plan, the administrator or other fiduciary should consider affirmatively sending a notice regarding the end of the relief period. Also, Notice 2021-01 provides that plan fiduciaries and sponsors might need to reissue or amend disclosures issued prior to or during the pandemic if such disclosures failed to provide accurate information regarding the time in which participants and beneficiaries were required to act.

Further, ERISA group health plans should consider ways to ensure that participants and beneficiaries who are losing coverage under their group health plans are made aware of other coverage options that may be available to them, including telling them that they could obtain coverage through a Marketplace special enrollment period that under Executive Order continues through May 15, 2021.

The DOL acknowledges that there may be instances when full and timely compliance with ERISA's disclosure and claims processing requirements by plans and service providers may not be possible, including when pandemic-related disruptions to a plan's principal place of business makes compliance with pre-established timeframes for certain claims' decisions or disclosures impossible. In the case of fiduciaries that have acted in good faith and with reasonable diligence under the circumstances, the DOL states that it will emphasize compliance assistance, including grace periods and other relief, when enforcing ERISA's requirements.

Conclusion

The Agencies continue to monitor the effects of the COVID-19 outbreak as they relate to employee benefit plans. The Agencies have said that they understand that continued relief may be needed to preserve and protect private-sector employee benefit plans and have announced that they intend to continue to engage with interested parties on whether and, if so, how to better target relief to focus on areas in which participants and beneficiaries continue to need relief and as plans continue to move toward a normal compliance status as we move closer to the end of the Outbreak Period.

Plans and plan sponsors should continue to watch for additional agency guidance. In the meantime, they should be careful to properly apply relief provided under the Notices according to the maximum period outlined in Notice 2021-01.

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DOL Issues 2021 Adjusted Penalty Amounts

Group Health Plan Penalties

	2021 Penalty	Change
Form 5500 maximum penalty for failing to file a Form 5500	$2,259 per day that the filing is late	Up from $2,233 per day
Summary of Benefits Coverage (SBC) maximum penalty for failing to provide SBC	$1,190 per failure	Up from $1,176 per failure
Violations of Genetic Information Nondiscrimination Act (GINA) such as establishing eligibility rules based on genetic information or requesting genetic information for underwriting purposes	$120 per participant per day	Up from $119 per participant per day
Failures relating to disclosures relating to the availability of Medicaid or children's health insurance program (CHIP) assistance	$120 per participant per day	Up from $119 per participant per day
Failure to furnish plan-related information requested by the DOL, which are required under ERISA to be provided to the DOL upon request.	Up to $161 per day, but not to exceed $1,613 per request	Up from $159 per day, but not to exceed $1,594 per request

Retirement Plans

	2021 Penalty	Change
Failure to provide required ERISA § 514(e) preemption notice for plans with automatic contribution arrangements	$1,788 per day	Up from $1,767 per day
Failure to provide blackout notices (required in advance of certain periods during which participants may not change their investments or take loans or distributions) or notices of diversification rights	$143 per day	Up from $141 per day
Failure to comply with ERISA § 209(b) recordkeeping and reporting requirements	$31 per employee	No change
Failure to furnish plan-related information requested by the DOL, which are required under ERISA to be provided to the DOL upon request.	Up to $161 per day, but not to exceed $1,613 per request	Up from $159 per day, but not to exceed $1,594 per request

Multiple Employer Welfare Arrangements (MEWAs)

	2021 Penalty	Change
Failure to meet applicable filing requirements, which include annual Form M-1 filings and filings upon origination	$1,644 per day	Up from $1,625

Next Steps for Employers

Because the Department of Labor is required to adjust penalty amounts each year to account for inflation, the cost of compliance errors continues to rise. The DOL has discretion to impose lower penalties in some instances, so not all violations will result in the maximum permitted penalty. However, penalties still can be severe, so employers should become familiar with the increased penalty amounts and review their plan administrative policies and procedures to redouble their efforts to ensure compliance with ERISA requirements.

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Sweeping COVID-19 Relief Law Will Cover COBRA Premiums for Many

Who is Eligible?

Assistance eligible individuals include qualified beneficiaries who, due to a reduction in hours or involuntary employment termination, become eligible for or already have effective COBRA continuation coverage during the period that begins April 1, 2021, and ends September 30, 2021. Since assistance eligible individuals include those already receiving continuation coverage as of April 1, 2021, certain qualified beneficiaries whose COBRA coverage started as long ago as November 2019 could qualify for ARPA premium assistance.

Terminations Must Be Voluntary

The law precludes any qualified beneficiary whose termination of employment was voluntary from being assistance eligible. However, the standard an employer should use to determine voluntariness is unclear. Moreover, it could be difficult for an employer to know (particularly for past terminations as far back as 2019) whether a termination was voluntary or not. We expect further guidance from the U.S. Department of Labor (DOL) to clarify these questions. Future guidance likely also will address whether employers will need to provide a notice to all qualified beneficiaries and later determine whether they voluntarily terminated, or predetermine which terminations were voluntary and send notices only to individuals they identify as having been involuntarily terminated.

Extended Qualified Beneficiaries

Additionally, ARPA provides for COBRA premium assistance for qualified beneficiaries who were eligible to elect COBRA continuation coverage due to involuntary termination or reduction in hours but who had not yet elected as of April 1, 2021, or who had elected such coverage but discontinued it prior to April 1, 2021 (Extended Qualified Beneficiary or EQB). EQBs essentially get a second chance to elect COBRA during a new 60-day election window provided under ARPA.

Special Extended Election Period

EQBs must elect COBRA during a period that begins on April 1, 2021, and ends 60 days after the plan administrator provides a newly required notice alerting them that they qualify for COBRA premium assistance under ARPA. The law requires the DOL to issue model notices for this use by no later than April 10, 2021, and plan administrators must furnish the notices to EQBs by no later than May 31, 2021.

EQB Coverage Period

EQB coverage will begin with the first period of coverage that begins on or after April 1, 2021, and will not extend beyond what would have been the maximum applicable COBRA continuation period had an EQB timely elected COBRA continuation coverage or not discontinued such coverage. In other words, ARPA's COBRA provisions will not serve to extend a qualified beneficiary's maximum COBRA period determined according to his or her original qualifying event.

Model Notices

In addition to specific EQB notices, ARPA generally requires plan administrators to notify qualified beneficiaries who become eligible for COBRA between April 1, 2021, and September 30, 2021, that COBRA premium assistance is available by either amending existing COBRA qualifying event notices or including with them a separate written notice that:

- describes any forms necessary for establishing COBRA premium assistance eligibility.

- provides the name, address, and telephone information for the plan administrator or other individual maintaining relevant information regarding COBRA premium assistance.
- explains the extended election period available to EQBs.
- notifies qualified beneficiaries that they must tell the group health plan if they become eligible for other group health coverage or Medicare or be subject to a $250 penalty (higher if intentional).
- prominently describes the right to subsidized coverage as well as any conditions on receiving subsidized coverage.

The statute is unclear as to whether the DOL will provide model language to include in general notices to all qualified beneficiaries, but we expect further guidance to clarify this point.

Premium Assistance Period

Assistance eligible individuals, including EQBs, will cease to be eligible for ARPA's COBRA premium assistance for any month of coverage beginning on or after the earlier of the date they become eligible for either other group health coverage or Medicare. COBRA premium assistance also will end as of the earlier of the date following the date the applicable maximum COBRA continuation coverage period expires or, in the case of an EQB, the date following the date that the period of COBRA coverage that would have been required had the COBRA election been made by, or had not been discontinued before, April 1, 2021.

ARPA requires plan administrators to notify affected qualified beneficiaries before ARPA premium assistance expires except in cases where an individual becomes eligible for other group health coverage or Medicare. The notice must clearly state when COBRA premium assistance will expire, as well as inform the qualified beneficiary that he or she still may be eligible for group health coverage without premium assistance under either COBRA or another group health plan.

Plan administrators must provide this notice no sooner than 45 days before, and no later than 15 days before, premium assistance will expire. The DOL will issue model notices by no later than April 25.

Premium Assistance Tax Credits

Employers will be able to claim a dollar-for-dollar Medicare tax credit for any applicable COBRA premium assistance provided under ARPA. The amount of available tax credit will equal the COBRA premiums not paid by an employer's qualifying assistance eligible individuals. The Treasury Department will provide further guidance and details, including necessary forms and instructions, regarding tax credit offsets.

COBRA Premium Refunds

ARPA requires that plan sponsors refund COBRA premiums paid by assistance eligible individuals for periods of coverage beginning on or after April 1, 2021, and ending September 30, 2021. Plan sponsors must issue refunds by no later than 60 days after the date on which qualified beneficiaries paid COBRA premiums for coverage during the premium assistance period. Employers will be able to claim ARPA tax credits to offset these COBRA premium refunds.

Permissible Coverage Election Changes

ARPA also permits, but does not require, a plan sponsor to allow qualified beneficiaries to switch their group health plan election to a different employer-sponsored plan if:

- the premium cost for that plan is not higher than for the plan in which the qualified beneficiary is enrolled.
- the plan sponsor offers the plan to similarly situated active employees.
- the coverage is not just excepted benefits, a qualified small employer health reimbursement arrangement (QSEHRA) or a health flexible spending arrangement (HFSA).

Interplay with Prior COVID-19 COBRA Relief

In April 2020, the agencies that enforce COBRA issued a Notice that allowed plan administrators and qualified beneficiaries to ignore a period known as the Outbreak Period (March 1, 2020, through 60 days after the officially declared end to the National Emergency originally declared last March by the President) for purposes of standard COBRA notice, election and premium payment deadlines. Recent

guidance clarified that the maximum period during which the Notice's COBRA relief could apply will be the earlier of one year from the first day that a plan or individual became eligible for the relief, or the end of the Outbreak Period.

The relief provided under the Notice likely expands the number of assistance eligible individuals who can get ARPA COBRA premium relief, since many might still be in an extended election period for coverage that would include periods between April 1, 2021, and September 30, 2021. Presumably these individuals would be able to elect retroactive COBRA coverage for periods prior to April 1, 2021, though prior coverage periods would not qualify for premium assistance.

ARPA sets several new definite COBRA election and notice deadlines that will apply to EQBs and plans. It is unlikely that prior Notice guidance extending COBRA deadlines will also act to extend any new deadlines imposed by ARPA.

Conclusion

We expect future DOL and IRS guidance to provide greater detail regarding premium assistance eligibility, newly required notices, claiming available tax credits, determining employment termination voluntariness and the interplay between prior COBRA deadline extension guidance and ARPA's COBRA assistance provisions. We will continue to monitor this issue and provide relevant updates as needed.

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