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June 2015 Newsletter

Employee Benefit Plan Select Issues

Guidance Issued Regarding Wellness Program Compliance: The Americans with Disabilities Act (ADA) (enforced by the Equal Employment Opportunity Commission (EEOC)), prohibits employers from discriminating against employees on the basis of disability or making disability-related inquiries unless job-related. However, certain inquiries are permissible if made pursuant to a "voluntary" wellness program, but the employee benefits community has long wondered how the term "voluntary" would be interpreted by the EEOC. This concern over what would constitute a voluntary wellness program has become particularly poignant lately as the EEOC has begun enforcement measures against various employers on this very issue.

The EEOC recently broke its reticence on the matter. The proposed, non-binding regulations clarify that compliance with the ACA-modified HIPAA nondiscrimination regulations governing wellness programs does not equal compliance with the ADA. For example, the proposed regulations place an incentive cap of 30% of total cost of employee-only coverage whether the plan is merely participatory or is health-contingent. This is contrary to the HIPAA regulations, since these impose no cap on incentives for participatory-only programs. Further, the HIPAA regulations allow up to a 50% incentive if the wellness program includes a smoking cessation program. The EEOC would allow the increased incentive in this circumstance only if the employer uses the "honor system" without making further inquiries or medical examinations regarding smoking and smoking cessation.

In addition to the above, the EEOC's proposed regulations also expound upon notice, confidentiality, and reasonable design requirements with which an employer would need to comply.

While the proposed regulations are not binding, the EEOC has indicated that employers may rely upon them until final regulations are issued. Therefore, employers sponsoring wellness programs should carefully analyze such programs in light of the EEOC's guidance to determine whether they comply with the EEOC's interpretation of the ADA.

Note that the proposed regulations do not address how the EEOC would apply the Genetic Information Nondiscrimination Act (GINA) to wellness programs that allow family participation. There is some concern that collecting medical information from various family members (ex. pursuant to a health risk assessment) would violate GINA even if each health risk assessment did not ask about family medical history. The EEOC has indicated it intends to offer guidance on this issue in the future.

It Is Now Easier to Correct Plan Errors: The IRS recently issued two new revenue procedures which, in some cases, simplify and reduce the fee for correcting certain errors that occur with respect to retirement plans. For example, correcting certain errors relating to Plan loans could have cost as much as $12,500 before and can now be corrected with a compliance fee ranging from $300 to $3,000. The new guidance makes other changes as well, including providing additional options for correcting plan overpayments. Finally, the IRS reduced the required contribution in the event participants are not given the opportunity to participate in the plan, reducing what some practitioners referred to as a windfall for participants and a hindrance to correction for the plan sponsor.

Participant Fee Disclosure: The Department of Labor recently issued a final regulation on participant level fee disclosure that provides some additional flexibility with regard to the timing of disclosure. Remember that while the plan sponsor is responsible for the participant level fee disclosure, TPAs often provide assistance in this regard, and upon request, will provide documentation to assist you in meeting your obligations.

Hardship Withdrawals: The IRS recently published an article that, in addition to reaffirming that plan sponsors (not the contracted TPAs) are ultimately responsible for maintaining documentation regarding hardship distributions and loans made from qualified retirement plans, indicates that the IRS may no longer accept electronic self-certification as sufficient documentation to support the nature of a hardship. This article also indicated documentation should be retained verifying that the distributed funds were used to address the hardship. These provisions regarding self-certification and verification measures are contrary to past informal guidance offered by the IRS and indicate a potential shift interpretation. While the IRS article does not have the force of law, plan sponsors will want to take note of this development and consider implementing more stringent documentation requirements than a self-certification on those participants seeking hardship withdraws.

Limits on Cost Sharing under the Affordable Care Act: The ACA places a limitation on what cost sharing any non-grandfathered group health plans (including self-insured) may impose on its participants annually. For 2015, those limitations are $6,600 for self-only coverage and $13,200 for other coverage. HHS, DOL, and IRS recently issued guidance that clarifies that the self-only limitation applies to each individual covered by a plan, embedded within the limitation placed on other coverage. In other words, if an individual is part of a family plan, as soon as that individual exceeds the limitation for self-only coverage, any additional costs incurred by that individual for the plan year cannot be subject to cost sharing, even if the overall annual limitation for the family plan has not been satisfied. This interpretation comes as a surprise to many insurance providers and plan sponsors, so the same guidance indicates this rule will only apply to plan and policy years that begin in or after 2016.

Misc. Updates: (1) PCORI fees are due by July 31st using IRS Form 720. These fees apply to issuers of health insurance, including employers who sponsor self-insured health plans. **(2)** The government issued final regulations regarding the Summary of Benefits and Coverage, which apply for plan years beginning on or after January 1, 2017.

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