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POSTED:

Feb 18, 2022

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HEALTH AND WELFARE PLAN DEVELOPMENTS

New Coverage Requirements for At-Home COVID-19 Tests

Effective January 15, 2022, the Biden Administration extended the provisions of the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) by requiring health plans and insurers to cover the cost of over-the-counter (OTC) COVID-19 tests. Plans must cover OTC COVID-19 tests without imposing cost sharing, prior authorization or other medical management requirements, such as the need for a prescription. Plans may provide coverage for OTC COVID-19 tests directly at the point of sale or may require participants to submit claims for reimbursement. The Administration also detailed several other requirements:

- Plans may limit the number of OTC tests covered individuals may purchase. However, plans must cover/reimburse at least eight tests per 30-day period (or per calendar month). The limit is applied on a per covered individual basis (e.g., a family of three is entitled to 24 covered tests per month). However, plans may not set limits on the number of covered tests if they are ordered by a health care provider.
- If certain requirements are met, plans may limit the amount paid for OTC COVID-19 tests obtained from non-network pharmacies and retailers, to no less than the actual price or $12 per test (including shipping costs and sales tax). To qualify, plans must make direct coverage of tests available at the point of sale and direct-to-consumer shipping programs. Subsequent guidance issued by the Administration clarified that plans have flexibility in how they structure their point-of-sale and direct-to-consumer shipping programs. Furthermore, plans will not be disqualified if supply shortages prevent full implementation of their direct-to-consumer shipping programs.
- Plans are not required to cover OTC COVID-19 tests that are processed by a laboratory or health care provider, unless such tests were ordered by an attending health care provider.
- Plans may take reasonable measures to prevent, detect and address suspected fraud and abuse. Plans may require individuals to attest that they are purchasing the OTC tests for personal use, not for employment purposes, and will not offer the tests for resale. Furthermore, plans may limit coverage to purchases from authorized retailers and may also require reasonable

documentation of proof of purchase with claims for reimbursement.
- Finally, the Administration clarified if a plan or insurer covers the cost of OTC COVID-19 tests, purchasers cannot receive additional reimbursement through their health flexible spending arrangements (health FSAs), health reimbursement arrangements (HRAs) or health savings accounts (HSAs).

Updated ACA Preventive Care Guidance

In the same set of FAQs as the OTC COVID-19 tests, the Administration also updated certain preventative services coverage requirements. First, the guidance states that plans must cover a follow-up colonoscopy conducted after a positive non-invasive stool-based screening test (e.g., Cologuard) or direct visualization test (e.g., sigmoidoscopy, CT colonography). This requirement is effective for plan years beginning on and after May 31, 2022. The Administration also reminded plans that they must provide coverage for the full-range of FDA- approved birth control methods, and must provide coverage for the type of FDA-approved birth control recommended by the individual's provider. This additional guidance comes after the Administration has received numerous complaints regarding plan failures to properly cover birth control. Plans should take this opportunity to review their internal processes and procedures to ensure all FDA approved contraceptives are covered without cost sharing requirements in accordance with the Administration's guidance.

DOL, HHS, and IRS Report to Congress on Mental Health Parity

In January 2022, the U.S. Departments of Labor (DOL), Health and Human Services (HHS) and the Treasury (IRS) (collectively, the Departments), reported to Congress on industry compliance with the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), as amended by the Consolidated Appropriations Act of 2021 (CAA). In this year's report, the Departments described how plans, insurers and service providers have performed and documented the CAA's new comparative analysis requirement for nonquantitative treatment limitations (NQTLs).

In short, the Departments found that many plans have struggled to fulfill their new obligations. The Departments reported that after reviewing more than 150 comparative analyses, each one was insufficient. The Departments described several common issues, such as (1) failing to begin preparing comparative analyses until requested by the DOL to do so; (2) failing to provide comparative analyses in a proper format; and (3) failing to indicate how plans handled specific benefits from a MHPAEA perspective.

Ultimately, the Departments reported that in 2021, the DOL sent:

- 156 letters requesting comparative analyses from plans and insurers regarding 216 separate NQTLs;
- 80 insufficiency letters; and
- 30 initial determination letters finding that 48 NQTLs violated the MHPAEA.

Concluding their report, the Departments emphasized that MHPAEA enforcement will continue to be a top priority moving forward. However, the Departments also acknowledged that in light of the widespread compliance issues, additional regulations may be required to clarify the MHPAEA's protections for individuals and the obligations it imposes on plans and insurers. That additional guidance should come as welcome relief to many plans and administrators who have struggled to prepare comparative analyses in line with the Departments' expectations.

CMS Details No Surprises Act Independent Dispute Resolution Process

On January 1, 2022, the Centers for Medicare and Medicaid Services (CMS) published an informative guide for plans, insurers and providers titled *Federal Independent Dispute Resolution (IDR) Process – Guidance for Disputing Parties*. As the name suggests, the publication summarizes each stage of the Federal IDR Process, which was established by the No Surprises Act to assist parties in resolving disputes regarding the applicable out-of-network rate for certain services. The publication provides helpful tips and reminders for each stage of the IDR process from the initial payment or claim denial, through the open negotiation period, and concluding with the IDR entity's final determination. As a reminder, the No Surprises Act's balance billing protections and the requirement to negotiate/use the IDR process takes effect for plan years beginning on or after January 1, 2022.

RETIREMENT PLAN DEVELOPMENTS

Supreme Court Rules on Excessive Fee Disputes

On January 24, 2022, the U.S. Supreme Court issued an opinion in *Hughes v Northwestern University*, another in a long line of excessive fee cases. The dispute in *Hughes* began when current and former employees of Northwestern University claimed that the school's defined contribution plan featured too many investment options and included several options with unreasonable fees. Affirming the lower court's dismissal of the complaint, the Seventh Circuit Court of Appeals held that Northwestern did not breach its fiduciary duties as a matter of law. The Seventh Circuit's analysis emphasized that the underperforming investments were included alongside a range of investment options, including some with low fees,

thereby allowing participants to choose which investments to select.

In a unanimous decision however, the Supreme Court disagreed. Writing for the Court, Justice Sonia Sotomayor took aim at the Seventh Circuit's exclusive focus on Northwestern's range of investment options. While acknowledging that assembling a range of investment options is an important component of the duty of prudence, the Court reiterated that fiduciaries have an obligation to independently monitor each investment offered by the plan. The Court further remarked that if "fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty."

Notably, the Court did not describe the specific analysis plan fiduciaries must undertake to satisfy their duty of prudence. Instead, the Court asked the Seventh Circuit to reconsider the employees' claims under a context-specific inquiry that takes into account the specific rationale behind each of the plan's investment choices at the time the choice was made.

The Supreme Court's decision further emphasizes that plan fiduciaries must evaluate each investment option on an individual basis. The decision will also make it harder for plan fiduciaries to stop excessive fee suits at the motion to dismiss stage. In the weeks following the Supreme Court's decision, two district courts, one in Wisconsin and another in Georgia, relied heavily on the Court's analysis to deny defendant plans' motions to dismiss similar excessive fee lawsuits. Both courts noted that further discovery is necessary to determine whether each plans' fiduciaries prudently evaluated their available investment options. However, the decision may also make it more difficult to certify a plan-wide class, considering the investment specific inquiry. Each member of a proposed class would seemingly have to be invested in the challenged investment option.

IRS Updates Retirement Payment Withholding Procedure

On January 4, 2022, the IRS released a new payment withholding procedure that will impact the election process for tax withholding on retirement distributions. In a change from previous years, the IRS revised Form W-4P, *Withholding Certificate for Pension or Annuity Payments*, to apply solely to requests for withholding on periodic pension or annuity payments. Requests for withholding on nonperiodic payments and eligible rollover distributions have been shifted to a newly released Form W 4R, *Withholding Certificate for Nonperiodic Payments and Eligible Rollover Distributions*. As a result of that shift, taxpayers will have the ability to elect federal income tax withholding for nonperiodic payments at a rate of less than 10

percent.

If a taxpayer receiving nonperiodic payments fails to file the Form W-4R, withholding will default to the 10 percent level. If a taxpayer receiving periodic distributions fails to make an election, the default has changed to "single with no adjustments," which may increase the amount of tax withheld from previous years. These changes will be required for the 2023 tax year, but the IRS encourages individuals to switch to the new methodology beginning in 2022.

IRS Clarifies Definition of "Substantially Equal Periodic Payments"

Last month, the IRS released Notice 2022-06, which clarifies the definition of "substantially equal periodic payments" for the purposes of Internal Revenue Code (the Code) section 72. That section provides for an additional 10 percent tax on early withdrawals from a qualified individual account retirement plan, unless the withdrawals are part of substantially equal periodic payments. Previously in Revenue Ruling 2002-62, the IRS provided three methods for determining whether a series of periodic payments is substantially equal: (1) the required minimum distribution method; (2) the fixed amortization method; and (3) the fixed annuitization method.

Superseding previous guidance, Notice 2022-06 retained the three methods with some minor clarifications. Among other changes, the Notice included:

- Updated life expectancy tables to reflect guidance published in 2020;
- A new maximum interest rate floor of 5 percent; and
- For the fixed amortization and fixed annuitization methods, a safe harbor allowing plans to calculate an account balance on any date within the period that begins on December 31 of the year prior to the date of the first distribution and ends on the date of the first distribution.

The provisions included in Notice 2022-06 must be used for any series of periodic payments commencing on or after January 1, 2023, but may be used for any series commencing in 2022. Plans that feature substantially equal periodic payments should be prepared to implement these changes prior to the January 2023 deadline.

PBGC Civil Monetary Penalty Increases

The Pension Benefit Guarantee Corporation (PBGC) published final regulations increasing the maximum civil penalties for failures to provide certain notices or other material information under ERISA sections 4071 and 4302.

The maximum penalties under ERISA section 4071 are increased from $2,259 per day to $2,400 per day. ERISA section 4071 penalties apply if a plan fails to provide a notice or other information required under subtitles A, B, C or D of Title IV of ERISA, or ERISA sections 303(k)(4) or 306(g)(4). Among other things, these include annual reports; plan termination insurance coverage and plan termination provisions; employer liability (other than multiemployer plan withdrawal liability); payment of the variable rate portion of PBGC's premium; the financial condition of contributing sponsors of certain underfunded, single employer plans; and notices regarding the nonpayment of contributions.

The maximum penalties under ERISA section 4302 are increased from $301 per day to $320 per day. ERISA section 4302 penalties apply to multiemployer plans that fail to provide certain notices regarding withdrawal liability.

GENERAL DEVELOPMENTS

DOL Updates Penalties for 2022

The DOL has adjusted the civil monetary penalties that may be assessed for various benefit related violations, effective for penalties assessed after January 15, 2022. The Inflation Adjustment Act of 2015 requires an annual adjustment of civil penalty levels for inflation.

Some of the notable increases include:

- **Form 5500.** The penalty for a plan administrator's failure to file an annual report for the plan has been increased to $2,400 per day, up from $2,259.
- **Certain Retirement Plan Disclosures**. The penalty for various retirement plan disclosure failures, including a multiemployer plan's failure to provide notice upon request of potential withdrawal liability, the failure to provide a notice of a funding based limit on benefits or benefit accruals and the failure of plans with automatic contribution arrangements to provide the required notice to participants has been increased to $1,899 per day, up from $1,788.
- **Blackout Notices**. The penalty for failing to provide blackout notices or notices of diversification rights increased to $152 per day, up from $143.
- **Improper Distribution**. The penalty on a plan fiduciary who makes an improper distribution has been increased to $18,500 per improper distribution, up from $17,416.
- **GINA Violations and CHIP Notice**. Penalties for violations of the GINA and failures relating to disclosures regarding the availability of Medicaid and Children's Health Insurance Program (CHIP) have increased to $127 per

employee per day, up from $120.
- The maximum penalty for failing to provide a summary of benefits and coverage (SBC) increased to $1,264 per failure, up from $1,190.

UPCOMING COMPLIANCE DEADLINES AND REMINDERS

Health Plan Compliance Deadlines and Reminders

Form M 1: Association health plans and other multiple employer welfare arrangements (MEWAs) that provide health coverage must file their annual Form M 1 with the DOL by March 1, 2022.

Medicare Part D Creditable Coverage Disclosure: Calendar year plans providing prescription drug coverage must provide the annual creditable coverage disclosure to CMS by March 1, 2022 (or, for fiscal year plans, 60 days after the beginning of the plan year).

HIPAA Breach Reporting: Plans must file their annual breach reports with the Office for Civil Rights (OCR) by March 2, 2022. The annual breach report is for breaches involving fewer than 500 individuals that occurred during the preceding year. Breaches involving 500 or more individuals must be reported no later than 60 calendar days from the date of the breach's discovery.

ACA Reporting Information

Furnish Forms 1095-B and 1095-C to Participants: Subject to limited exception, plan sponsors of self funded health plans and Applicable Large Employers (ALEs) must distribute Forms 1095 B and 1095 C to participants by March 2, 2022.

File Forms with IRS: Plan sponsors and ALEs must file the transmittal Forms 1094 B and 1094 C with their corresponding Forms 1095 with the IRS by February 28, 2022, or March 31, 2022, if e filing.

Retirement Plan Compliance Deadlines and Reminders

Form 1099 R: Plan sponsors must file the Form 1099-R with the IRS by February 28, 2022, or March 31, 2022, if e filing.