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Benefits Counselor - July 2020

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HEALTH AND WELFARE PLAN DEVELOPMENTS

ACA Section 1557 Nondiscrimination and *Bostock v. Clayton County*

On June 12, 2020, the Department of Health and Human Services (HHS) issued a final rule under Affordable Care Act (ACA) section 1557 generally eliminating the protections for sex discrimination based on gender identity and termination of pregnancy. On June 15, 2020, the U.S. Supreme Court (SCOTUS) issued its decision in *Bostock v. Clayton County* holding that discrimination based on sexual orientation or gender identity is sex discrimination under Title VII.

Background

Section 1557 prohibits covered health programs from discriminating on the basis of race, color, national origin, sex, age or disability. The regulations implementing section 1557 were originally issued in July 2016 (the 2016 Rule) and provided that sex discrimination included pregnancy and gender identity. However, also in 2016, the U.S. District Court for the Northern District of Texas in *Franciscan Alliance Inc. et al. v. Burwell*, issued a nationwide preliminary injunction blocking enforcement of the prohibition of discrimination on the basis of gender identity and termination of pregnancy as sex discrimination. In 2019, the District Court issued a final judgment vacating these provisions.

Final Section 1557 Regulations

Among other items, the final rule:

- Repeals the 2016 Rule's broadened definition of "on the basis of sex" that included discrimination based on gender identity or termination of a pregnancy.
- Eliminates the requirement that covered entities distribute nondiscrimination notices and "taglines" translation notices in at least 15 languages in all "significant communications."
- Narrows the scope of entities subject to the regulations. The 2016 Rule interpreted section 1557 as applying to all of an entity's operations, even if the entity is not principally engaged in health care. Under the final rule, section 1557 applies to entities principally engaged in health care and to the health care activities of other entities only to the extent those *activities* receive funding from HHS.

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While the final rule does not include a definition of "on the basis of sex," HHS indicated it will enforce the definition consistent with plain meaning of the civil rights statutes that gave rise to section 1557 (*i.e.*, Title IX of the Civil Rights Act of 1964).

The *Bostock* Decision

Three days after the final rule was released, SCOTUS held that gender identity falls within Title VII of the Civil Rights Act of 1964 and its prohibition against discrimination on the basis of sex. *Bostock* does not invalidate the final rule, as section 1557's prohibition of sex discrimination stems from Title IX rather than Title VII. However, the *Bostock* decision may make it more difficult to defend gender identity exclusion.

IRS Proposed Regulation Would Treat Certain Medical Care Arrangement Payments as Deductible

On June 8, 2020, the Internal Revenue Service (IRS) issued proposed regulations that would allow a deduction for payments for direct primary care arrangements and health care sharing ministry memberships under section 213 of the Internal Revenue Code (the Code). The proposed regulations define a direct primary care arrangement as a contract between an individual and a primary care physician or physicians who agree to provide medical care for a fixed fee without billing a third party. The proposed regulations further clarify that expenditures for a direct primary care arrangement will be eligible medical expenses under section 213 regardless of whether they are for medical care or medical insurance. The proposed regulations also provide that payments made for certain programs, such as membership in health maintenance organizations and coverage under certain government-sponsored health care programs, are amounts paid for medical insurance under Code section 213(d)(1)(D).

The IRS will accept comments on the proposed rule until August 10, 2020.

Departments Issue Additional Guidance on FFCRA, CARES Act, and COVID-19 Health Coverage

On June 23, 2020, the Departments of Labor (DOL), HHS, and Treasury (collectively, the Departments), issued FAQs regarding the Families First Coronavirus Response Act (FFCRA), the Coronavirus Aid, Relief, Economic Security Act (CARES Act) and other health plan coverage issues related to COVID 19. This set of FAQs builds on guidance previously issued by the Departments regarding FFCRA and CARES Act compliance. Highlights include:

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- How plan sponsors can determine which COVID 19 tests must be covered under FFCRA.
- Clarifying that COVID 19 testing for "surveillance or employment" purposes is not covered under FFCRA and that testing to screen for general workplace health and safety (such as employee "return to work" programs), for public health surveillance, or for any other purpose not primarily intended for individualized diagnosis or treatment of COVID 19 or another health condition is beyond the scope of FFCRA.
- Plans must cover at home COVID 19 testing when ordered by an attending health care provider who has determined that the test is medically appropriate and that the test otherwise meets the criteria under the FFCRA. The FAQs also clarify who is an attending health care provider.
- Plans generally must cover a facility fee without imposing cost sharing requirements if one is charged for a visit that results in an order for or administration of a COVID 19 diagnostic test.
- The requirement to provide coverage without cost sharing under FFCRA in conjunction with the process for setting reimbursement rates for COVID 19 tests under the CARES Act should generally prohibit balance billing for COVID 19 tests.
- There is no limit on the number of tests that must be covered without cost sharing, provided an attending healthcare provider determines the tests to be medically appropriate.

Proposed Updates to MHPAEA Self-Compliance Tool

The Departments recently released proposed updates to the Mental Health Parity and Addiction Equity Act (MHPAEA) self compliance tool. The self compliance tool is intended to assist plan sponsors in complying with MHPAEA and its implementing regulations, particularly MHPAEA rules regarding financial requirements and treatment limitations. The proposed 2020 update would:

- Incorporate relevant guidance issued since the last self-compliance tool was last updated in 2018;
- Add and revise examples related to MHPAEA compliance, including explanations of how MHPAEA violations can be corrected;
- Provide additional examples of "warning signs," which may serve as red flags for impermissible treatment limitations; and
- Add a new section providing best practices for establishing an internal compliance strategy, which includes examples of the types of records that a plan should be prepared to provide in the event of a DOL investigation.

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Public comments on the changes to the self compliance tool are due by July 24, 2020.

RETIREMENT PLAN DEVELOPMENTS

IRS Releases Additional Guidance Regarding Implementation of CARES Act and SECURE Act Provisions

On June 19, 2020, the IRS released Notice 2020 50 with new guidance regarding coronavirus distributions and participant loan relief provided under the CARES Act. Section 2022 of the CARES Act allows sponsors of qualified retirement plans to permit qualified individuals to take penalty free coronavirus related distributions of up to $100,000 and to provide special treatment for plan loans made to qualified individuals.

Among other items, Notice 2020 50 expands the group eligible for the coronavirus related distribution and plan loan relief and provides clarifying guidance on the administration and reporting of coronavirus-related distributions. Notice 2020 50 also provides plans a safe harbor method for implementing the suspension of participant loan repayments.

The IRS also issued Notice 2020 51 clarifying the administration of the automatic required minimum distribution (RMD) waiver under the CARES Act, permitting individuals that received an RMD payment in 2020 to rollover the distribution, and extending the rollover deadline.

For a detailed summary of this guidance, please see our June 29 article.

IRS Provides COVID-19 Relief and Other Guidance on Suspensions of Contributions to Safe Harbor Plans

The IRS issued Notice 2020-52 temporarily loosening the conditions for a plan to reduce or suspend safe harbor matching or nonelective contributions mid-year and extending the supplemental notice deadline for mid-year suspension of safe harbor nonelective contributions.

- **Relief from Restrictions on Mid-year Reductions or Suspensions of Safe Harbor Contributions**. Notice 2020-52 provides that if a plan amendment that reduces or suspends safe harbor contributions is adopted between March 31, 2020 and August 31, 2020, a plan will not be treated as failing to satisfy the requirements that the plan: (1) is operating at an economic loss for the plan year; or (2) has included a statement in the safe harbor notice reserving the right to reduce or suspend the safe harbor contributions.

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- **Relief from Supplemental Notice Timing Requirements**. If a plan amendment reducing or suspending safe harbor nonelective contributions is adopted between March 13, 2020 and August 31, 2020, the plan will not be treated as failing to meet the safe harbor notice requirements solely because a supplemental notice is not provided on a timely basis, provided that (1) the notice is provided to eligible employees no later than August 31, 2020; and (2) the plan amendment is adopted no later than the effective date of the reduction or suspension.

The IRS notes that this relief does not apply with respect to the timing of supplemental notices for a mid-year reduction or suspension of safe harbor matching contributions.

DOL Issues Proposed Regulation on ESG Investing

On June 23, 2020, the DOL issued a proposed rule to clarify fiduciary duties under the Employee Retirement Income Security Act (ERISA) when using environmental, social and governance (ESG) factors in investment strategies. The proposed rule is generally consistent with the DOL's long-established position regarding ESG investments. (See our alert for information on the evolution of DOL guidance regarding ESG investing.) Importantly, the proposed rule does not prohibit fiduciaries from considering ESG-related factors and generally permits fiduciaries to consider pecuniary ESG factors (*e.g.*, a company's improper waste disposal or dysfunctional improper governance). Additionally, the proposal permits fiduciaries to consider collateral ESG factors when deciding between two economically indistinguishable investment options. However, in light of the DOL's skepticism regarding the frequency at which such scenario would occur, fiduciaries should exercise caution when considering any non-pecuniary factors.

Further, the proposed rule contains a new provision describing the requirements for the selection of investment alternatives for defined contribution plans that purport to pursue ESG objectives. The proposal codifies the DOL's position articulated in Field Assistance Bulletin (FAB) 2018-01 providing that fiduciaries could select ESG-themed investments only if:

- The selection is based exclusively on objective risk-return criteria used to select and monitor all of the plan's investment options;
- The fiduciary documents the selection and monitoring of the investment; and
- The ESG investment is not included as a qualified default investment alternative (QDIA) (or as a component of a QDIA); the proposal specifically prohibits selecting an ESG-themed investment as a QDIA.

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Public comments regarding the proposal are due no later than July 30, 2020.

DOL Announces New Proposed Fiduciary Rule

On June 29, 2020, the DOL announced a new proposal to regulate investment advice fiduciaries under ERISA. The DOL's 2016 fiduciary rule and the exemptions that accompanied that rule were vacated by the U.S. Court of Appeals for the Fifth Circuit in 2018. This latest proposal is intended to replace the 2016 fiduciary rule.

The new fiduciary rule includes a technical amendment to reinstate the text of the 1975 investment advice regulation, including the five-part test for determining whether a person renders investment advice under ERISA. The DOL issued this portion of the proposal as a final rule, effective immediately. The DOL indicated there was good cause for making the amendment effective immediately because it simply implements the court order that already vacated the 2016 fiduciary rule and reinstates the prior versions.

The DOL has also proposed a new prohibited transaction class exemption for investment advice fiduciaries, which is based on the temporary enforcement policy announced in FAB 2018-02. The exemption, which is available to registered investment advisers, broker-dealers, insurance companies, banks and their employees who are investment professionals, would require that fiduciary investment advice be provided in accordance with the impartial conduct standards, which include the following components:

- A best interest standard, under which fiduciaries must provide advice in the best interest of retirement investors in accordance with the duties of prudence and loyalty;
- A reasonable compensation standard, which provides that investment advice fiduciaries must charge only reasonable compensation for providing advice pursuant to the overarching rules under ERISA and the Code; and
- A requirement that the fiduciary make no materially misleading statements about recommended investment transactions and other relevant matters.

The DOL will accept public comments on the proposed prohibited transaction class exemption during the 30-day period following its publication in the Federal Registrar.

UPCOMING COMPLIANCE DEADLINES AND REMINDERS

2019 Form 5500 for Calendar Year Plans. Plan administrators generally have seven months after the end of a plan year to file a Form 5500, including applicable

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schedules and attachments. For plan years ending December 31, 2019, the Form 5500 filing deadline is July 31, 2020. However, by filing Form 5558 by July 31, 2020, plan administrators can request a deadline extension to October 15, 2020.

SMM for Calendar Year Plans. Plan administrators generally have 210 days after the end of a plan year to provide a Summary of Material Modifications (SMM) of a plan change. Thus, for a plan change adopted in 2019, the deadline to provide the SMM to participants is July 29, 2020. However, as explained in our May Benefits Counselor , the deadline for providing the SMM is tolled during the COVID-19 Outbreak Period, provided the plan administrator acts in good faith and provides the SMM as soon as administratively feasible.

Health Plan Compliance Deadlines and Reminders

PCORI Fee. Plan sponsors of self funded plans must report and pay the annual Patient Centered Outcomes Research Institute (PCORI) fee by filing IRS Form 720. Plans with plan years that end between October 1, 2019 and December 31, 2019, will need to pay the fee by July 31, 2020. For plan years that end on or after October 1, 2019, and before October 1, 2020, the fee is $2.54 per covered life.

Retirement Plan Compliance Deadlines and Reminders

Annual Funding Notice. Calendar year defined benefit plans with 100 or fewer participants (*i.e.*, small plans) must provide an annual funding notice to required recipients by the earlier of the Form 5500 due date or the date of the Form 5500 filing, including extensions. However, as with the deadline for distributing SMMs, the deadline for providing the annual funding notice is tolled during the COVID-19 Outbreak Period.

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