

## Benefits Counselor – May 2023

### President Biden Ends COVID-19 National Emergency

On April 10, 2023, President Biden signed a resolution to end the COVID-19 national emergency (National Emergency) a month earlier than originally planned. Although the signing immediately ended the National Emergency, the resolution did not terminate the public health emergency (PHE).

As discussed in our [May 2020](#) and [February 2023](#) Benefits Counselors, the National Emergency sets forth the tolling of deadlines, known as the "Outbreak Period," for purposes of COBRA, HIPAA special enrollment, claims submission, claim appeals and independent third-party review of denied claims. The Outbreak Period concludes on the earlier of one year following the date the deadline was originally tolled, or 60 days following the end of the National Emergency (e.g., June 9, 2023), or such other date announced by the U.S. Department of Labor (DOL) in future guidance.

The DOL has informally stated that despite the statutory end of the National Emergency, to avoid potential confusion and changes to administrative processes already in progress, the Outbreak Period may not end until July 10, 2023, which would have been the end had the National Emergency ended May 11, 2023, as originally intended. The DOL is expected to issue future guidance formalizing the Outbreak Period end date.

### HEALTH PLAN DEVELOPMENTS

#### OCR Issues HIPAA Privacy Proposed Rule Specific to Reproductive Health Care

In response to the U.S. Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, which concluded that the Constitution does not prohibit states from regulating or banning abortion (see our [July 2022 Benefits Counselor](#)), the U.S. Department of Health and Human Services (HHS) Office of Civil Rights (OCR) has proposed regulations to modify the HIPAA privacy rule to prohibit certain uses and disclosures of information about reproductive health care.

Specifically, the proposed regulations would prohibit the use or disclosure of protected health information (PHI) by a regulated entity for a criminal, civil or administrative investigation into or proceeding against a person in connection with seeking, obtaining, providing or facilitating reproductive health care, where

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the health care is lawful under the circumstances in which it is provided. Currently, HIPAA permits, but does not require, the disclosure of PHI in like situations. The proposal would also prohibit the identification of any person for the purpose of initiating such investigations or proceedings. Reproductive health care would be interpreted broadly to include prenatal care, abortion, miscarriage management, infertility treatment, contraception use and treatment for reproductive related conditions such as ovarian cancer.

To implement the prohibition, the proposed regulations would require a regulated entity, when it receives a request for PHI potentially related to reproductive health care, to obtain a signed attestation that the use or disclosure is not for a prohibited purpose. While the OCR is undertaking this rulemaking, the current HIPAA privacy rule remains in place.

### **Departments Issue FAQs Addressing ACA Preventive Health Services Mandate After Braidwood**

In our [April 2023 Benefits Counselor](#), we detailed how the U.S. District Court for the Northern District of Texas held that portions of the Affordable Care Act's (ACA) preventive services coverage mandate are unconstitutional. In *Braidwood Mgmt., Inc. v. Becerra*, Judge Reed O'Connor vacated actions taken to enforce or implement the preventive care coverage requirements related to the U.S. Preventive Services Task Force's (USPSTF) recommendations made on or after March 23, 2010. On April 13, 2023, the DOL, HHS and the Treasury Department (Departments) published a new set of frequently asked questions (FAQs), [FAQ Part 59](#), addressing the impact of the *Braidwood* decision on the requirement to cover USPSTF preventive care services. The Departments also strongly encouraged plans and insurers to continue to cover preventive services at issue without cost sharing.

The FAQs confirm that the USPSTF recommendations in effect on March 23, 2010, and the Health Resources and Services Administration (HRSA) and Advisory Committee on Immunization Practices (ACIP) recommendations remain in place. As such, non-grandfathered plans must continue covering those recommendations without cost share when provided in-network, even to the extent the HRSA or ACIP recommendations overlap with post-March 23, 2010 USPSTF recommendations. The Departments noted that they intend to issue further guidance identifying what USPSTF-recommended services must be covered. Further, high-deductible plans may continue covering USPSTF-recommended preventive care services prior to the application of the deductible until further guidance is issued.

### **Supreme Court Allows Mifepristone Access as It Considers Cases**

On April 21, 2023, the U.S. Supreme Court stayed a federal district court order that suspended the U.S. Food and Drug Administration's (FDA) approval of the drug mifepristone, which is used as part of a two drug regimen to induce abortion. Accordingly, mifepristone will remain available subject to current FDA guidelines while the appeal of the federal district court's decision proceeds through the judicial system.

On April 7, 2023, the U.S. District Court for the Northern District of Texas held that: (1) the FDA's 2000 approval process for mifepristone had been flawed; (2) the FDA's recent elimination of the in person dispensing requirement for mifepristone ignored safety risks; and (3) the FDA's approval of sending mifepristone by mail violated the Comstock Act, an 1873 statute that prohibits mailing items intended to cause unlawful abortion. As a result, the district court ordered that mifepristone be removed from the marketplace pending the disposition of the case on the merits. That same day, the U.S. District Court for the Eastern District of Washington issued an order prohibiting the FDA from pulling access to mifepristone in the District of Columbia and 17 states that sought continued access to mifepristone.

Due to the two conflicting court decisions, the U.S. Department of Justice, on behalf of the FDA, sought emergency relief from the U.S. Court of Appeals for the Fifth Circuit and then the U.S. Supreme Court. Because the U.S. Supreme Court stayed the Texas District Court's decision in its entirety, the FDA's current rules governing access to mifepristone will remain in place until a final decision is reached on the merits. For the time being, plan sponsors may continue to cover mifepristone. However, plan sponsors should be prepared for rapid changes in the legal landscape.

## **RETIREMENT PLAN DEVELOPMENTS**

### **DOL Issues FAQs on Notice Requirements for Plans that Received SFA Funds**

On April 25, 2023, the Employee Benefits Security Administration (EBSA) of the DOL published [a bulletin](#) addressing the annual funding notice requirements for multiemployer pension plans receiving Special Financial Assistance (SFA). The bulletin provides responses to FAQs and explains that, pending further guidance, the EBSA will treat compliance with the bulletin as constituting a reasonable, good faith interpretation of the annual funding notice disclosure requirements. The DOL also expects that plans will consider the bulletin's guidance even if a plan has already prepared and begun to furnish their annual funding notices for its

2022 plan year.

### **DOL Agrees to Rulemaking on Adequate Consideration Exemption for ESOPs**

The DOL has committed to moving forward with public notice and comment rulemaking to establish a clear definition regarding the "adequate consideration" requirement for employee stock ownership plan (ESOP) acquisitions. While ESOP transactions are inherently prohibited transactions in violation of ERISA, they are permitted as long as they meet the adequate consideration exemption.

For an ESOP transaction to meet the adequate consideration exemption, an ESOP must not pay more than fair market value of the shares, as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary of Labor. Before this commitment, the DOL had neither provided nor agreed to provide formal regulations or guidance for the valuation process. Even though new regulations could be years from now, valuation regulations will have a profound impact on the creation and ongoing viability of ESOPs.

## **GENERAL DEVELOPMENTS**

### **Fourth Circuit Finds Company Did Not Properly Eliminate ERISA Severance Plan**

In *Messer v. Bristol Compressors International*, the U.S. Court of Appeals for the Fourth Circuit vacated a district court's grant of partial summary judgment when it found that a board resolution was insufficient to terminate an ERISA governed severance plan contained in the company's employee handbook.

Bristol Compressors International (BCI) was implementing a plant closing. BCI's employee handbook contained an ERISA governed severance plan that could only be modified or amended in writing by BCI's Human Resources department. BCI's Board of Directors signed a unanimous written consent document that approved eliminating the severance plan in the employee handbook. However, no further action was taken to effectuate the elimination of the severance plan. Specifically, the human resources department was not asked by management to implement changes to the employee handbook to eliminate the severance plan. BCI then began to lay off employees as it prepared to close its manufacturing facility. Faced with a plant closing and no severance plan, a group of former BCI employees brought the underlying lawsuit.

Ultimately, the Fourth Circuit noted that the employee handbook (1) gave BCI the



power to alter or eliminate employee handbook provisions; and (2) provided the procedure for amending the employee handbook in writing by the human resources department. In short, because BCI did not follow the employee handbook's procedures for terminating the severance plan, the Fourth Circuit held that the district court erred in finding that the BCI was entitled to summary judgment on the issue of whether the severance plan was eliminated. This decision serves as a reminder of the importance of procedural compliance with governing provisions, especially when ERISA benefits are being modified, changed or eliminated.

## **UPCOMING COMPLIANCE DEADLINES AND REMINDERS**

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 schedules and attachments. Thus, for plan years ending December 31, 2022, the Form 5500 filing deadline is July 31, 2023. Plan administrators can apply for a deadline extension until October 15, 2023, by filing Form 5558 by July 31, 2023.

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 2022, the deadline is July 29, 2023.

### **Retirement Plan Compliance Deadlines and Reminders**

Annual Funding Notice. Defined benefit plans with 100 or fewer participants generally must provide the annual funding notice to required recipients by the Form 5500 filing deadline, including filing extensions.

Form 8955 SSA. Like Form 5500, Form 8955 SSA (Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits) is due seven months after the end of a plan year (July 31, 2023, for calendar year plans). A plan administrator can receive the same extension for the Form 8955 SSA as is available for Form 5500 by filing Form 5558 on or before July 31, 2023. Plan administrators must also provide the individual statements to those separated participants identified on Form 8955 SSA prior to the Form 8955 SSA filing deadline.

### **Health Plan Compliance Deadlines and Reminders**

RxDC Reporting. Health plans must file reports on prescription drug and health care spending for the 2022 calendar year by June 1, 2023.



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 by July 31, 2023.

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Reinhart's [Employee Benefits Practice](#) is one of the largest and most tenured in the country:

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