

Welcome!



Pearson Partners International, Inc.



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Health and Welfare Compliance Issues

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Presents

***HEALTH AND WELFARE
COMPLAINTS ISSUES***

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Overview of Discussion Items

- Cafeteria plan amendments
- Medicare creditable coverage reporting
- Conforming with state tax legislation
- Welfare plan compliance reporting
- Wellness incentives
- Health care reform coming attractions
- HIPAA privacy and security enforcement

Cafeteria Plan Amendments

- Reimbursement of over the counter drugs (except insulin) from health spending account
- June 30, 2011 amendment date
- No OTC purchases with debit cards after January 16, 2011

Medicare Creditable Coverage

- Annual notice of creditable coverage
- Must provide before annual Medicare Part D enrollment
- Changes this year to October 15th through December 7th
- Sample notices at:
<http://www.cms.gov/CreditableCoverage/Model%20Notice%20Letters.asp#TopOfPage>

Conforming State Tax Legislation

- Patient Protection and Affordable Care Act (“**PPACA**”) definition of dependent child (i.e., any child under age 26)
- Internal Revenue Code (“**IRC**”) amended to permit coverage to be provided tax-free
- Not all states follow the IRC
- Employers who operate in multiple states should review law with payroll department

Welfare Plan Compliance Reporting

- Excise tax on plan sponsor of \$100 per day, per participant, per violation
- Applies to numerous health plan requirements, including health care reform
- Requires self-reporting on corporate excise tax return

Health Plan Requirements Subject to Tax

- COBRA
- HIPAA portability and nondiscrimination
- Mental Health Parity and Addiction Equity
- GINA (genetic nondiscrimination)
- Newborns Act
- Michelle's Law
- Pediatric Vaccines

Excise Tax Return Obligation

- September 2009 – return filing regulation was finalized
- January 2010 – IRS issued Form 8928
- March 2010 – health care reform requirements also made subject to IRC section 4980 excise taxes
- Signals new significance to excise tax and renewed enforcement efforts

Meet Form 8928

- Any employer or plan liable for tax for following violations must file:
 - COBRA
 - pre-existing conditions, creditable coverage, special enrollment
 - Nondiscrimination
 - newborns and mother's health protection
 - mental health parity
 - MSA and HSA comparable contributions
- Penalty structure depends on reasonable cause, willful neglect and timely correction
- How the IRS will interpret is unclear

Best Practices for Tax Reporting

- Communicate with tax preparers
- Adopt procedures to avoid errors
 - list compliance areas
 - identify "owner" of compliance areas
 - verify expertise in compliance areas
 - clearly address in vendor contracts
 - allocate liability for excise tax
- Adopt procedures to catch and correct errors
 - 30 day correction window
 - Periodically self audit
 - Periodically require reporting by vendors

Best Practices to Minimize Violations

- Reconsider significance of plans and SPDs
- Document new compliance procedures
 - Identify compliance areas
 - Identify owner of compliance areas
 - Adopt breach log
- Plan for new laws
 - Preliminary analysis
 - Ownership, timelines and ticklers

Wellness Programs

- Increasingly popular cost-control measures to:
 - Improve participant health outcomes
 - Steer participants toward appropriate treatment and
 - Lower claims
- **Examples**
 - Smoking cessation programs
 - Programs that seek reduced cholesterol or weight loss
 - Health risk assessments
- May require participation or that certain goals be met

Current State of Play

- Health care reform encourages use of wellness programs, but such programs still must comply with differing requirements under:
 - Health Insurance Portability and Accountability Act (“**HIPAA**”)
 - Genetic Information Nondiscrimination Act (“**GINA**”)
 - Americans with Disabilities Act (“**ADA**”)

Wellness Programs: HIPAA

- HIPAA generally prohibits discrimination with respect to a health factor
- HIPAA excepts "bona fide wellness programs"
 - May provide up to a 20% discount off the employee's premium cost for participation or success in "health promotion" or "disease prevention" programs (up to 30% or 50% under health care reform)
 - May be structured as incentive or penalty
 - For example, a higher premium for smokers who do not attend a smoking cessation class
- There must be a reasonable alternative for employees who are not medically capable of satisfying the requirements to earn the discount

Wellness Programs: GINA

- GINA generally prohibits the collection of genetic information for purposes of underwriting
 - Genetic information includes family history
 - Impacts health risk assessments (HRAs)
- EEOC regulations except genetic information requested through a "voluntary wellness program":
 - Participating employees must give prior, voluntary, knowing authorization on form that understandably describes:
 - the type of genetic information that will be obtained
 - how it will be used, and
 - restrictions on further disclosure

Wellness Programs: GINA

- Can offer a financial incentive (not to exceed HIPAA limit) to complete an HRA that includes questions seeking genetic information if:
 - Clear that such questions are optional and
 - Incentive will be provided regardless of whether the questions are answered
- Alternatively, can provide two HRA forms:
 - One that requests non-genetic information in return for an incentive (not to exceed HIPAA limit)
 - warn employees and/or health care providers not to provide genetic information
 - "safe harbor" language is available
 - Another that requests genetic information with no incentive (and that is completely voluntary)

Wellness Programs: ADA

- ADA prohibits health- and disability-based questions unless they are voluntary or "job-related and consistent with business necessity"
- Generally, HRAs will not meet the job-related standard
- As a result, to comply with ADA:
 - HRAs must be voluntary, or
 - Meet a safe harbor exception for:
 - administering "bona fide benefit plans" that includes features of underwriting and classifying risk with respect to the plan

Wellness Programs: ADA & Seff v. Broward

- Recent Florida US district court case, *Seff v. Broward County*, offers hope to employers
 - County charged plan participants extra \$20 per pay period if they did not complete HRA and biometric screenings for risk factors
 - Plaintiff, a former County employee who incurred the \$20 charge, filed a class action complaint alleging a ADA violation by requiring employees to undergo a medical examination and making medical inquiries of its employees
 - The County argued its actions were covered by the ADA's "bona fide benefit plan" safe harbor

Wellness Programs: ADA & Seff v. Broward

- District court agreed with the County that the HRA fell under the ADA's "bona fide benefit plan" exception for:
 - terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are:
 - based on or not inconsistent with State law" and
 - not "used as a subterfuge to evade the purposes of [the ADA]"

Wellness Programs: ADA & Seff v Broward

- Key points of the case:
 - The wellness program was part of the County's group health plan
 - The Court noted "There is also a strong argument that the program is a bona fide benefits plan independent of the County's group health plan as it offers benefits, namely, disease coaching and medication cost waivers for certain participants"
 - The HRA was used for underwriting, classifying, and administering risks related to the ultimate goal for the County to maintain or lower its participant's premiums
 - Since the safe harbor applies, the Court did not need to address whether the HRA program was voluntary

Wellness Programs: ADA & Seff v. Broward

- Where are we now?
 - EEOC may appeal
 - One district court, but not much else out there
 - Design consideration - whether to position wellness programs to be consistent with the facts of the case:
 - as part of medical plan (or maybe stand-alone?)
 - used for underwriting

Health Care Reform: Coming Attractions

2012

- Uniform Explanation of Coverage (4 pages)
- Report to HHS and participants on improving quality of care
- Medicare Part D enrollment moved to October 15
- W-2 reporting

2013

- \$2,500 FSA cap
- Written notice to participants regarding exchanges
- Tax exclusion of Part D subsidy eliminated

2014

- Provide affordable essential coverage or pay free rider penalty
- No waiting period beyond 90 days
- No pre-existing condition limitation for any age
- Reporting to HHS and participants on minimum essential coverage
- *Vouchers eliminated*

Being Grandfathered – Still Worth it?

- Pros

- Avoid expanded claims and appeals procedures
- Avoid external review
- Avoid free preventive care benefits
- Exclude adult children with other coverage

- Cons

- Rising costs
- Extreme limits on plan financial changes
- Status not sustainable long-term
- Accidental non-compliance subject to excise tax

Health Care Reform: Internal Appeals

- **Now:**
 - Rescission = claim denial subject to appeal
 - Provide coverage during appeal -- even when clearly ineligible
 - New evidence or rationale for denial ASAP to claimant
 - Will TPA comply?
 - Opportunity to present testimony
 - Hearing?

- **Permitted delay to 2012:**
 - diagnosis, treatment and denial codes with meaning for each
 - a "discussion" of the Plan's final decision on appeal
 - compliance of EOBs?
 - urgent care - 24 rather than 72 hours
- **Failures are subject to excise tax**

Health Care Reform: External Review

- **External review must be offered by NGF plans:**
 - on exhaustion of most internal appeals
 - in urgent cases, and
 - upon any failure to comply with claims procedures
- **Not your 2010 external review system**
 - requirements are extensive and detailed
- **Plan must contract with 3+ independent review organizations**
 - Requires specific details
 - IRO availability may be limited
 - Contracting through TPA is permitted - Caution!
- **IRO decision on external review is de novo (there is no deference to the decision by the plan fiduciary)**
- **Failures are subject to excise tax**

Financial Changes Causing Loss of GFP Status

- Measured forever against plan on March 23, 2010:
 - Any increase in percentage cost-sharing (co-insurance)
 - Increase in fixed cost-sharing other than a co-payment (deductible or out-of-pocket) by more than an inflation limit
 - Increase in fixed co-payment by more than a dollar or inflation limit
 - Decrease in employer contribution rate by more than 5%
 - based on cost of coverage (total COBRA cost)
 - based on a formula (such as hours worked) towards the cost of any tier of coverage for any class of similarly situated individuals
 - evaluate premium increases for each plan option and each tier

Example of GFP Loss due to Premium Change

Facts

- On March 23, 2010, a Plan's PPO individual COBRA rate was 1000
- For 2010, the employer contributed 850 for each individual active employee, or 85%
- On March 23, 2010 the Plan's PPO family COBRA rate was 2000
- For 2010, the employer contributed 1000 for each active family, or 50%
- For 2011, the COBRA rates remain the same
- The employer reduces its contribution for individual actives to 750 (75%)
- The employer increases its contribution for family actives to 1500 (75%)

Insured Health Plan Discrimination

- Prior to PPACA, no nondiscrimination rules applicable to insured group health plans
- PPACA Section 2716 adds a Section 105(h)-type requirement for NGF insured plans
 - Section 2716 is to be interpreted "similar to the rules" for nondiscriminatory eligibility and benefits under Section 105(h)
 - "Highly compensated individual" has the meaning in Section 105(h)
- Effective January 1, 2011 (for calendar year plan)
- IRS Notice 2011-1 delays compliance due to lack of guidance
- When guidance is issued, there will be time for employers to respond and react to the new rule

Penalty for Discriminatory Plan

- Section 4980D excise tax on employer (not HCI) of \$100 per day for each day of noncompliance for each affected participant
 - Potentially each non-HCI employee under the plan
 - Excise tax capped annually if noncompliance is due to reasonable cause and not willful neglect

Exemption

- Technically, retiree-only plans fall under the HIPAA "small plan exception"
 - Fewer than 2 "current employees" covered under the plan on first day of the plan year
 - Exempt from all of PPACA per preamble to grandfathered plan interim final regulations
- Currently, must truly be separate plan - separate documentation, experience rating and Form 5500
 - Commentators have asked for more flexibility

HIPAA Privacy and Security Compliance

- Background

▪ Privacy Rule

- limits the use and disclosure of PHI by covered entities like group health plans

▪ Security Rule

- requires covered entities to
 - ensure confidentiality, integrity, and availability of ePHI,
 - protect against reasonably anticipated threats
 - protect against reasonably anticipated impermissible uses and disclosures
 - ensure workforce compliance

HITECH Expanded HIPAA Privacy and Security

- Requirements

- Update Business Associate Agreements
- Address breaches of unsecured PHI
 - Breach log
 - Notifications (personal, news outlets, HHS)
 - New procedures
 - New training

- Enforcement

- Significantly increases civil monetary penalties
- Permits enforcement by state attorneys general
- Provides for criminal prosecution of individuals or employees for unauthorized access of PHI

Increased Penalties

- Before HITECH

- Single Violation: Up to \$100
- Multiple Violations of the Same Requirement: \$25,000/year

- After HITECH

- Single Violation: \$100 - \$50,000 plus (based on the type of violation)
- Multiple Violations of the Same Requirement: Up to \$1,500,000 (based on the type of violation)

- **Penalties may be waived if the violation was not due to willful neglect and was corrected within 30 days**

QUESTIONS???

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