Recent Health Plan Developments

Much Ado About the New COBRA Notice Proposed Regulations and Forms

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Recently much has been published about the new proposed COBRA notice regulations from the U.S. Department of Labor ("DoL"). In fact, the DoL's proposed regulations most significant change is to permit the DoL to provide updated COBRA model notices via the DoL website instead of using the formal regulatory process with proposed and final regulations. The updated notices include some of the previous updates related to the option of obtaining coverage on the exchanges or health insurance market places created by the Affordable Care Act or ACA. While the proposed regulation is not final, the DoL stated that until the regulation is final, it will consider the use of the model notices it published on its website to be in good faith compliance with the COBRA notice requirements even though use of the model notices is not required. If an employer is going to use the model notices, it should carefully review the notices and customize the model notices to fit the employer's group health plan's requirements. It is important to remember that the notices are drafted by the DoL and they are charged with protecting employees, not employers.

Historically the model notices have often spoken in terms of when the COBRA coverage begins and the minimum durations of the election and coverage periods and the model notices have not always addressed the end of the election periods, and where there is a gap in providing a limitation on the duration of a period, courts have found the periods to continue beyond what the employer had expected. The new model notices mention the availability of the marketplace and the potential tax credits that an individual may be eligible for if coverage is purchased through the marketplace, but it does not talk about the recent guidance from CMS on the interaction of the marketplace coverage availability with COBRA coverage and employers may want to consider whether they want to address this in their notice or refer their COBRA eligible employees or dependents to this guidance as they assess their decision on electing COBRA.

COBRA and Eligibility For Health Insurance Coverage on the Marketplace

If you are considering electing COBRA and switching to coverage on the health insurance marketplace at a later date, you should read this. The Center for Medicare and Medicaid Services ("CMS") issued a memo regarding how the federal and state insurance marketplaces should operate special enrollment periods permitting persons to elect into coverage on the insurance marketplace other than during the annual enrollment in the fall of each year. The guidance indicates that an individual is eligible to enroll in coverage on the marketplace outside of the annual enrollment period in the fall of each year at two special enrollment periods with respect to a person eligible for COBRA continuation coverage. The individual may enroll under one of these special enrollment periods when they are first eligible for COBRA coverage or when they have exhausted all of their COBRA coverage. This means that an individual cannot elect into COBRA and drop it before using all of the COBRA coverage (18, 29 or 36 months as applicable based upon the qualifying event) and go for the greener pasture of the marketplace. Many individuals are probably unaware of these restrictions on when they can enroll in coverage on the insurance marketplace. The CMS memo does not state how long the special enrollment periods related to eligibility for COBRA and exhaustion of COBRA coverage last. I doubt that many employer COBRA notices include this information, so employers may want to consider whether they want to refer the individuals eligible for COBRA coverage to some resource that better explains the availability rules on the insurance marketplace coverage or if they want to include some additional statement in the COBRA notices since it does refer to coverage available on the insurance marketplace and this coverage choice is subject to limitations and may vary based on whether the coverage is available from the federal marketplace or on one of the state marketplaces.

Because HHS and CMS feared that many individuals did not understand that they could not elect in and out of marketplace coverage on a whim, there is a special open enrollment period on the federal marketplace from May 2, 2014 to July 1, 2014, but there is no indication that this will be extended or offered again.

Updated CHIP Notice is Available on the DoL Website

As you prepare your annual notices for the open enrollment periods, remember the annual CHIP notice that must be

provided regarding premium assistance for coverage for children under Medicaid and CHIP and the various state Medicaid/CHIP resources which employees may access. The notice is available on the DoL's website.

Affordable Care Act Guidance

The DoL issued another set of frequently asked questions on the ACA – Part XIX. These also address the COBRA notices. The FAQs address use of with a flat fee reimbursement for certain costs and whether the plan may treat providers who will not accept the flat fee as full reimbursement as out of network. As long as the plan uses a reasonable method to ensure adequate access to the health care providers it can use the reference pricing amount acceptance or flat fee acceptance as the determination of whether the provider is in-network.

The coverage for preventive care for smoking cessation for non-grandfathered group health plans is to be done pursuant to reasonable medical management using evidence-based clinical practice guidelines. The FAQs now further define the coverage without cost sharing that will be treated as reasonable good faith compliance with the required coverage of preventive smoking cessation:

1. Screening for tobacco use; and
2. For those who use tobacco products, at least two tobacco cessation attempts per year. Coverage of a tobacco cessation attempt includes coverage of the following without prior authorization being required: (a) four tobacco cessation counseling sessions of at least 10 minutes each; and (b) all FDA approved tobacco cessation medications (including both prescription and over-the-counter medications) for a 90 day treatment regimen when prescribed by a health care provider without any prior authorization from the plan.

ACA Transition Relief on Summary of Benefits and Coverage Requirements- The FAQs also extended a number of the transition relief items applicable to the required annual preparation and issuance of the summary of benefits and coverage. The DoL indicated that they still want to continue working with employers toward compliance. Summaries of Benefits and Coverage are still required to be issued annually.

Corporate Transactions and the Shared Responsibility Penalty- Employers will be subject to the shared responsibility penalty tax in 2015 for failing to offer coverage, or when employees go to the insurance marketplaces to obtain coverage and obtain a tax credit or subsidy and the employer's coverage either is not affordable or does not provide minimum value should carefully consider the shared responsibility penalty and related records when such entities engage in corporate transactions. While we have not seen any published guidance on the topic, the final regulations do provide some analytical frameworks for determining when a resulting entity might be treated as an Applicable Large Employer subject to the employer shared responsibility penalty tax. The employers subject to this tax will generally be determined based generally on their employment in the preceding calendar year, or 2014 for 2015. Companies engaged in corporate transactions need to be particularly mindful because early indications are that the Internal Revenue Service (the "Service") is initially considering the rules on how the shared responsibility penalty tax applies to new entities to determine whether the entity surviving following a corporate transaction will be subject to the shared responsibility penalty tax. Some of these rules determine whether a new entity is subject to the shared responsibility tax based on whether the new entity expects to employ more than 50 full time employees in its initial year and this could mean that the combination of two businesses into a new entity which when combined, would make the new entity immediately an Applicable Large Employer with 50 or more full time employees subject to the shared responsibility penalty, even if neither of the predecessor entities were subject to the employer shared responsibility tax at inception.

Following the initial indicators on applying the shared responsibility tax to corporate transactions will have implications when employees are added to an existing entity that is already subject to the shared responsibility penalty as well because a corporate transaction adding a group of new employees to an existing employer, which is subject to the tax, would make those new employees immediately part of the calculation of the penalty tax for that entity without any transition period for post transaction administrative time to add the new employees. The phrase "successor employer" has also been heard which reminds us of the proposed COBRA regulations from many years ago which sought to impose COBRA liability on "successor employers" without definition. Moving a group of employees to a joint venture outside of the controlled group would also presumably fall under the new entity analysis and provide an incentive for joint ventures with small groups of employees, to the extent practical in the business environment.

This means that there will be a new consideration in structuring corporate transactions, new entities and in bringing the new employees from an acquisition on the employer's system with respect to obtaining records regarding employment status and potentially coverage provided, depending upon how the related reporting of coverage provided and offered rules may or may not be modified. Watch for the issuance of guidance on how the shared responsibility penalty and the related reporting requirements will address the many various forms of corporate transactions. It is our understanding that guidance on the application of the shared responsibility penalty tax to mergers and acquisitions is under active consideration.

Litigation Concerns Related to the Affordable Care Act

For employers considering how to structure their work force in 2014 in anticipation of the 2015 effective date of the shared responsibility penalty tax, remember that ERISA also applies. The first case to look at whether an employer retaliated against an employee to prevent him from obtaining benefits is in the very early stages of litigation, but it did survive a motion to dismiss and will move forward toward the next stages, potentially a motion for summary judgment or a trial. The employee had been a part-timer with good reviews, but with medical issues and who had not had health insurance coverage. A full time position opened up that would have included health coverage and he applied for it and interviewed for it, but was not given it. He sued under ERISA section 510 that he was denied the position to keep him from becoming eligible for health benefits among other claims. The ERISA section 510 claim is moving on to the next stage in the litigation. If there is another opinion on this case, we will be watching for it. This is probably of just the beginning of the litigation that the ACA will generate.

HIPAA Privacy and Security Reminder

This is just a gentle reminder that all of the business associate agreements and all of the agreements with subcontractors of business associates to your group health plans need to be updated for the final regulations issued last year by September 22, 2014. Compliance is important as the U.S. Department of Health and Human Services continues to audit and to investigate complaints it receives. It recently assessed a $4.8 million dollar sanction against two health care providers whose security was insufficient when an individual found his deceased partner's health information on the internet. Apparently the health information of 6,800 individuals was accessible on the internet through a couple of search engines. Security in operation is critical.

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