UBA
Compliance Advisor

What every HR leader should know about compliance

Compliance Recap

December 2020

6-Minute Read

December was a busy month in the employee benefits world.

President Trump signed the Consolidated Appropriations Act, 2021, which includes the No Surprises Act and other group health plan provisions. The Centers for Disease Control Advisory Committee on Immunization Practices (ACIP) issued two interim recommendations for COVID-19 vaccines.

The Department of Health and Humans Services (HHS) released a final rule on grandfathered health plans. The Department of Labor (DOL) and Internal Revenue Service (IRS) released advance information copies of the 2020 Form 5500 Annual Return / Report (including Form 5500-SF and Form 5500-EZ) and related instructions.

DOL released a final rule on proxy voting and shareholders rights under the Employee Retirement Income Security Act of 1974 (ERISA). The HHS Office for Civil Rights (OCR) issued guidance on Health Insurance Portability and Protection Act of 1996 (HIPAA) covered entities disclosing protected health information for public health purposes due to COVID-19 and released a proposed rule modifying the HIPAA Privacy Rule.

The U.S. Supreme Court issued a ruling on the *Rutledge v. Pharmaceutical Care Management Association* ERISA preemption case. The Equal Employment Opportunity Commission (EEOC) issued guidance on making COVID-19 vaccines mandatory for employees. The IRS released a final rule on qualified transportation fringe benefits. HHS released a final rule on its policies for issuing, modifying, withdrawing, applying guidance, and making guidance available to the public**.**

UBA Updates

UBA released new advisors:

- Blue Cross Blue Shield Association Tentative $2.67 Billion Antitrust Settlement
- Final Rules on Grandfathered Group Health Plan Coverage
- Frequently Asked Questions about Grandfathered Plans
- Mandatory Coverage of COVID-19 Vaccines under Group Health Plans
- Congress Passes the No Surprises Act as Part of the Consolidated Appropriations Act, 2021 Part 1: President Trump Signs Act into Law
- Consolidated Appropriations Act, 2021 Part 2: Broker and Consultant Compensation Transparency, Prohibition on Gag Clauses
- Consolidated Appropriations Act, 2021 Part 3: Temporary Health FSA and DCAP Relief

President Trump Signs the Consolidated Appropriations Act, 2021

On December 27, 2020, President Trump signed the Consolidated Appropriations Act, 2021 (Appropriations Act). The Appropriations Act contains appropriation bills for the federal government and an economic aid package to assist business in light of COVID-19. The Appropriations Act also contains several provisions affecting group health plans including a new law prohibiting certain surprise medical billing, disclosure obligations for service providers (including health plan brokers), a prohibition on group health plans entering into contracts with certain gag clauses, and relief for health flexible spending arrangements and dependent care flexible spending arrangements in light of COVID-19.

The Appropriations Act contains additional provisions regarding benefits for employees and relief for employers such as extended pandemic unemployment, extension of the Paycheck Protection Program, extension of the payroll tax credit for emergency paid sick leave and expanded family and medical leave, employee retention and rehiring tax credit, deferred payroll tax, student loan repayments from employers, and shuttered venue operator grants.

Read more about the provisions affecting group health plans in our Advisors "Congress Passes the No Surprises Act as Part of the Consolidated Appropriations Act, 2021 Part 1: President Trump Signs Act into Law," "Consolidated Appropriations Act, 2021 Part 2: Broker and Consultant Compensation Transparency, Prohibition on Gag Clauses," and "Consolidated Appropriations Act, 2021 Part 3: Temporary Health FSA and DCAP Relief."

ACIP Recommends Use of the Pfizer and Moderna Vaccines for the Prevention of COVID-19

On December 11, 2020, the Food and Drug Administration (FDA) issued an Emergency Use Authorization for the Pfizer-BioNTech COVID-19 vaccine (Pfizer vaccine). The following day, December 12, 2020, the Centers for Disease Control Advisory Committee on Immunization

Practices (ACIP) issued an interim recommendation for use of the Pfizer vaccine in persons age 16 years or older for the prevention of COVID-19.

On December 18, 2020, the FDA issued an Emergency Use Authorization for the Moderna COVID-19 (mRNA-1273) vaccine (Moderna vaccine). The following day, December 19, 2020, ACIP issued an interim recommendation for use of the Moderna vaccine in persons age 18 or older for the prevention of COVID-19.

Accordingly, under the CARES Act, non-grandfathered individual and group health plans must cover the Pfizer vaccine as preventive care no later than January 1, 2021 (based on the December 12, 2020, recommendation from ACIP), and the Moderna vaccine as preventive care no later than January 8, 2021 (based on the December 19, 2020, recommendation from ACIP).

Read more about the coverage requirement.

HHS Releases Final Rule on Grandfathered Group Health Plans

In response to the President's Executive Order 13765 "Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal" issued on January 20, 2017, the Department of Health and Human Services (HHS), Department of Labor (DOL), and the Department of the Treasury (Treasury) (collectively, the Departments), issued final rules for grandfathered health plans that make changes to certain types of cost-sharing requirements without causing a loss of grandfathered status. The DOL also released a press release regarding the final rules. The final rules only address the requirements for grandfathered group health plans and grandfathered group health insurance coverage and do not apply to grandfathered individual health insurance coverage. Also, the final rules do not provide an opportunity for a plan or coverage that has lost grandfathered status to regain that status.

The final rules take effect on January 14, 2021, but will not become applicable until June 15, 2021. This means that employers cannot rely on these final rules until June 15, 2021.

Read more about the final rules in our Advisors "Final Rules on Grandfathered Group Health Plan Coverage" and "Frequently Asked Questions about Grandfathered Plans."

DOL and IRS Release Advance Copies of Form 5500 for 2020

The DOL and IRS released advance information copies of the 2020 Form 5500 Annual Return / Report (including Form 5500-SF and Form 5500-EZ) and related instructions along with a press release. Changes to the instructions and forms that affect welfare benefit plans are highlighted below.

The instructions were updated to reflect the $2,233 per day maximum civil penalty amount for penalties assessed after January 15, 2020, for violations occurring after November 2, 2015. For large funded welfare plans that must submit Schedule H as part of their filing, the instructions for Part III line 3 were updated to reflect independent qualified public accountant report

requirements and line 3b and its instructions were updated to permit filers to indicate more accurately whether there have been any permissible limitations on the scope of the audit. Line 5c on Schedules H and I was revised to make clear that if the plan was covered by the Pension Benefit Guarantee Corporation (PBGC) at any time during the plan year, filers should check the "Yes" box.

Advance copies of the 2020 Form 5500 series are for informational purposes only and cannot be used to file a 2020 Form 5500.

DOL Releases Final Rule on Proxy Voting and Shareholders Rights

The DOL released a final rule regarding fiduciary duties regarding proxy voting and shareholder rights under ERISA. The final rule details the obligations of ERISA plan fiduciaries when making decisions on exercising shareholder rights, including proxy voting, in order to meet the duties of prudence and loyalty under ERISA. The final rule provides that plan fiduciaries must: evaluate material facts that form the basis for any particular proxy vote or other exercise of shareholder rights; maintain records on proxy voting activities and other exercises of shareholder rights; and exercise prudence and diligence in the selection and monitoring of persons, if any, selected to advise or assist with shareholder rights, such as providing research and analysis, recommend-dations regarding proxy votes, administrative services with voting proxies, and recordkeeping and reporting services. The final rule also details safe harbor policies that plan fiduciaries may adopt with respect to decisions on whether to vote proxies.

OCR Issues guidance on HIPAA Covered Entities Disclosing PHI for Public Health Purposes Due to COVID-19

The OCR issued guidance noting that the HIPAA privacy rule permits covered entities (or their business associates) to disclose protected health information (PHI) to a health information exchange (HIE) for the purposes of reporting the PHI to a public health authority (PHA) without an individual's authorization when:

- The disclosure is required by law.
- An HIE is a business associate of the covered entity (or of another business associate) that wishes to provide PHI to a PHA for public health purposes.
- An HIE is acting under a grant of authority or contract with a PHA for a public health activity.

The guidance also provides that a covered entity may rely on a PHA's request, when the request is reasonable based on the circumstances, to disclose a summary record to a PHA or HIE as being the minimum necessary PHI needed by the PHA to accomplish the public health purpose of the disclosure. Furthermore, a covered entity may disclose PHI to a PHA through an HIE without receiving a direct request from the PHA if the covered entity knows that the PHA is using the HIE to collect such information, or that the HIE is acting on behalf of the PHA.

The guidance also describes that an HIE may provide PHI it has received as a business associate of a covered entity to a PHA for public health purposes without first obtaining permission from the covered entity during the COVID-19 public health emergency. However, a covered entity is required to provide notice to individuals that it discloses PHI to a PHA for public health purposes (this would be contained in the covered entity's Notice of Privacy Practices).

For purposes of this guidance, an HIE is an organization that enables the sharing of electronic PHI among more than two unaffiliated entities for treatment, payment, or health care operations. An HIE may provide other services, such as public health reporting to PHAs for public health purposes. Public health purposes include activities such as preventing or controlling disease, injury, or disability; conducting public health surveillance, investigations, and interventions; etc. (public health activities are listed at 45 CFR §164.512).

OCR Releases Proposed Rule Modifying the HIPAA Privacy Rule

The Office for Civil Rights (OCR) under the Department of Health and Human Services (HHS) (collectively, the Departments) issued a proposed rule modifying the Privacy Rule under the Health Insurance Portability and Accountability Act (HIPAA) to support HHS' Regulatory Sprint to Coordinated Care initiative.

If finalized, this rule would take effect 60 days after any final rule is published in the Federal Register. Covered entities and their business associates would have until the compliance date (180 days from the effective date of any finalized changes under the rule) to establish and implement policies and practices to achieve compliance with any new or modified standards in accordance with this rule.

Read more about the proposed modifications in our At-A-Glance Advisor and Compliance Advisor regarding the Proposed Rule Amending the HIPAA Privacy Rule.

The Supreme Court Rules on ERISA Preemption Case

In October, the U.S. Supreme Court heard oral arguments in the *Rutledge v. Pharmaceutical Care Management Association* case. The case addresses the issue of whether an Arkansas state law regulating pharmacy benefit managers' (PBM) drug reimbursement rates is preempted by ERISA. Under ERISA, state laws that are either impermissibly connected to ERISA or reference ERISA plans are preempted, meaning ERISA plans will not be required to comply with the state laws. While the case only addresses the Arkansas state law, many states have enacted laws similar to the Arkansas law.

The Arkansas state law prohibits PBMs from reimbursing pharmacies at a rate less than what it costs pharmacies to purchase drugs from a wholesaler. The Arkansas law also includes an appeal procedure under which pharmacies can challenge PBM reimbursements that are less than what the pharmacy paid to acquire the drug and allows pharmacies to refuse to provide a

prescription to an individual if the PBM's reimbursement rate for the drug is less than what the pharmacy paid to acquire the drug from a wholesaler.

On December 10, 2020, the Supreme Court held that ERISA does not preempt the Arkansas law. The Supreme Court held that the law does not have an impermissible connection with an ERISA plan and that the law does not refer to ERISA. Holding that the law does not have an impermissible connection with an ERISA plan, the Supreme Court relied on prior case law that state rate regulations that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage are not preempted by ERISA. Holding that the law does not refer to ERISA, the Supreme Court relied on prior case law that a state law does not refer to ERISA if it does not act immediately and exclusively upon ERISA plans and an ERISA plan is not essential to the law's operation.

EEOC Issues Guidance on Employers Requiring Employees to Receive COVID-19 Vaccines

The EEOC issued guidance regarding whether employers can require employees to receive COVID-19 vaccines under federal law. The guidance provides that, generally, employers may require employees to receive the COVID-19 vaccine, subject to certain legally protected exceptions for disability and sincerely held religious beliefs. Employers should review this guidance and consult with its attorney regarding any applicable state laws before requiring employees to receive the COVID-19 vaccine.

IRS Releases Final Rule on Qualified Transportation Fringe Benefits

IRS released a final rule implementing the changes to the Internal Revenue Code that were enacted under the Tax Cuts and Jobs Act that removed the employer deduction for qualified transportation fringe benefits provided to an employee for amounts paid or incurred after December 31, 2017. The rule provides guidance to determine what qualified transportation benefit expenses are no longer deductible and what exception may allow certain qualified transportation benefit expenses to be deductible for employers.

HHS Releases Final Rule on Promoting Regulatory Openness Through Good Guidance

HHS released a final rule on Good Guidance Practices and press release. The Good Guidance Practices rule communicates HHS' policies for issuing, modifying, withdrawing, applying guidance, making guidance available to the public, notice-and-comment procedures for significant guidance, and responding to petitions from the public about guidance. Documents not made available to the public, published regulations, and documents directed to particular persons, such as advisory opinions (unless the document is made available to the public), are excluded from the definition of guidance.

Under the Good Guidance Practices rule, unless a law otherwise permits or the guidance is incorporated into a contract, cooperative agreement, or grant, guidance itself cannot impose binding requirements. For guidance to be binding, it must go through notice-and-comment procedures. The rule sets forth special requirements for guidance that is determined to be "significant guidance" by the Office of Management and Budget's Office of Information and Regulatory Affairs.

The Good Guidance Practice rule applies to guidance issued, modified, or withdrawn after January 6, 2021. After this date, guidance documents that are not posted in the HHS Guidance Search page are no longer in effect. However, guidance documents not posted to the HHS Guidance Search page may still be helpful, for historical context, when complying with legally binding DOL rules and regulations. HHS will post quarterly lists regarding guidance documents issued, modified, or withdrawn in the immediately preceding quarter.

Question of the Month

Q: What can employers do to assist employees with unused health flexible spending arrangements (health FSAs) and unused dependent care flexible spending arrangements (DCAPs) in light of the COVID-19 pandemic?

A: Beyond implementing a $550 (indexed) carryover or a two-and-a-half-month grace period for a health FSA or a grace period for a DCAP, the recently enacted Consolidated Appropriations Act, 2021 (Appropriations Act) provides additional options for an employer to implement. Employers may amend their health FSAs and DCAPs, to take advantage of the flexibility offered by the Appropriations Act, no later than the last day of the first calendar year beginning after the end of the plan year in which the change took effect.

The Appropriations Act provides that health FSAs and DCAPs may permit participants to carry over any unused contributions remaining from the 2020 plan year to the plan year ending in 2021. Additionally, health FSAs and DCAPs may permit participants to carry over any unused contributions remaining in the health FSA or DCAP from the 2021 plan year to the plan year ending in 2022.

The Appropriations Act also permits health FSAs and DCAPs to extend the grace period for participants to use remaining balances for a plan year ending in 2020 or 2021, until 12 months after the end of the plan year. Additionally, health FSAs may permit participants who cease to participate during calendar year 2020 or 2021 to continue to use the remaining contributions for reimbursements through the end of the plan year (including any grace period) in which the participation ceased.

The Appropriations Act also provides that DCAPs may extend the maximum age for dependents from 12 to 13 for eligible dependents who turned 13 (that is, aged out of eligibility) during the last plan year with an open enrollment period ending on or before January 31, 2020.

Participants are therefore permitted to use unused balances for qualifying reimbursements for expenses incurred on behalf dependents who aged out during the pandemic.

Finally, the Appropriations Act permits health FSAs and DCAPs to allow participants to prospectively change existing elections for 2021 at any time during the 2021 plan year without a change in status.

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