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INSURANCE BRIEF

INSIDE THIS ISSUE:

Health Care Reform Updates

It's hard to believe that a year ago we were still unsure whether a health care reform bill would be passed. Since the passage of the Patient Protections and Affordable Care Act (PPACA) on March 23, 2010, there have been many updates. There is guidance yet to come and as 2011 promises to be an exciting year in Congress I am sure you will be hearing a lot from us on this topic. Below are some of the recent items in the headlines.

Fully Insured Discrimination Testing Delayed. As announced in a December 22nd memo by ERISA attorney Alfred B. Fowler, the IRS has delayed enforcement of the fully insured plan nondiscrimination provision. Once guidance is issued the agencies expect the effective date to be delayed to allow time to implement changes.

Repeal of Health Care Reform. The Republicans in the House plan to vote on January 12th to repeal PPACA. The bill is expected to pass easily. However, with Democrats controlling the Senate it is not expected to pass there. This exercise is seen as merely a fulfillment of campaign promises to try to repeal PPACA. As long as Obama is President there is no realistic chance of success as the Senate lacks the votes to override a veto.

Individual Mandate in the Courts. Meanwhile, the threat to PPACA from the courts is slowly progressing. The first ruling finding the individual mandate unconstitutional was made by a Virginia judge on December 13, 2010. There are now two rulings supporting the mandate and one against. The request to expedite the process by skipping immediately to the Supreme Court was denied.

The docket for the 2010-11 U.S. Supreme Court session is already full and it seems unlikely that the case will make its way through the appeals process in time to be heard even in the 2011-12 session. If the Supreme Court were to strike down the individual mandate it is being debated whether this would result in the complete unraveling of PPACA. More likely is that Congress would be forced to "fix" the bill.

DOL releases new FAQs. The Department of Labor (DOL), Health and Human Services (HHS) and the IRS jointly issued another set of FAQs on a range of topics including health care reform. Among the Q&A is "when do employers have to comply with the new automatic enrollment requirements?" Previously it was believed this would go into effect in 2012. However, the DOL answered that it will not be until after certain rulemaking is completed by 2014.

Q4 addresses the 60-day prior notice for material modifications to a plan or coverage. The timing of this provision depends on when carriers are required to provide a summary of benefits and coverage explanation. The Departments have to first establish the standards for the carriers. The carriers then have 24 months to begin providing the summary.

To see the complete FAQ go to http://www.dol.gov/ebsa/faqs/faq-aca5.html.

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HSA Contributions for Non-tax Dependents

With the start of a new tax year and the implementation of the dependents to age 26 provision we felt it would be a good idea to review the contribution rules for Health Savings Accounts (HSA) for your non-tax dependents. These include adult children as well as domestic partners.

The following are comments provided by IRS and Treasury officials during a Joint Committee on Employee Benefits of the American Bar Association in May 2010.

> 3. § 223 – Contributions to Health Savings Account
>
> An employee elects family coverage for himself and his domestic partner under a high deductible health care plan (HDHP) for a calendar year. The domestic partner is not the employee's dependent. The fair market value of the health coverage for the domestic partner is imputed as income to the employee.
>
> Question A: What amount can the employee contribute to a health savings account (HSA) during the year such coverage is elected, disregarding any "catch-up contribution" that may be available to the employee?
>
> Question B: Does the special rule for married individuals that limits the contribution amount that a husband and wife can make to an HSA apply to the employee and his domestic partner?
>
> Question C: What amount can the employee's domestic partner contribute to an HSA during the year such coverage is elected, disregarding any "catch-up contribution" that may be available to the employee's domestic partner?
>
> Proposed Response A: Since the employee has elected family coverage defined in Section 223(c)(4) of the Code as "any coverage other than self-only coverage" and Notice 2004-50 confirms that family HDHP coverage is HDHP coverage for one HSA-eligible individual and at least one other individual (whether or not the other individual is an HSA-eligible individual), the employee is treated as having family HDHP coverage and is eligible for contributions up to the HSA contribution limit for family HDHP coverage.
>
> Proposed Response B: No. The HSA contribution limits imposed on married individuals do not apply to domestic partners. The Defense of Marriage Act provides that domestic partners will not, for federal tax purposes, be considered each other's "spouse." 1 U.S.C. § 7. Thus, the employee and his domestic partner are not subject to the contribution limits imposed on married individuals.
>
> Proposed Response C: The employee's domestic partner is eligible to contribute up to the HSA contribution limit for family HDHP coverage for the same reason that the employee is eligible to contribute up to the HSA contribution limit for family HDHP coverage.
>
> IRS Response A: The Service representative agrees with the proposed response.
>
> IRS Response B: The Service representative agrees with the proposed response.
>
> IRS Response C: The Service representative agrees with the proposed response.

Although the scenario above specifically addresses domestic partners, the same logic can be followed for adult children. If filing separate tax returns from their parents then they have the full family maximum available, assuming they are otherwise HSA eligible.

Didn’t Distribute Your CHIP Notice?

Did you distribute the CHIP Notice prior to your renewal? If not, then read on for advice from the EBIA on what you should do now.

QUESTION: We just heard we're required to send something called a CHIP notice. If we didn't include this in our group health plan's annual enrollment materials, what should we do now?

ANSWER: You should send the notice as soon as possible. The Children’s Health Insurance Program Reauthorization Act of 2009 extended the Children's Health Insurance Program (CHIP). Under the new Act, states may choose to subsidize the cost of enrolling eligible children and their families in employer-provided group health plans, and employer plans are required to provide certain special enrollment rights related to such coverage. Employers are also required to provide an annual, written notice to employees about the potential opportunities for premium assistance through this program.

The notice requirement applies to employers that offer any group health plan coverage (other than a plan that provides only HIPAA excepted benefits) to employees who reside in a state that offers a CHIP subsidy program, which most states do. The notice must be provided to all employees who reside in a state that offers such a program, even those who are not eligible to enroll in the plan.

The notice must inform employees of the potential premium assistance opportunities currently available for coverage under the employer’s plan, and it must contain contact information for the state program. The DOL has posted a CHIP model notice on its website at www.dol.gov/ebsa/chipmodelnotice.doc. The model notice includes contact information for all 40 states that currently offer a CHIP subsidy program. By listing all of the state information in one notice, an employer can send the same notice to all employees rather than creating a customized notice for each state.

For calendar year plans, the first annual notice must be provided by January 1, 2011. (For non-calendar year plans, the first notice was required to be provided by the later of (1) the first day of the first plan year beginning after February 4, 2010; or (2) May 1, 2010.) An employer that misses the deadline is subject to a civil penalty of up to $100 per employee per day that the notice is late.

Many employers chose to provide the initial notice in their annual enrollment materials. However, enrollment materials typically are provided only to eligible employees and the distribution group may be greater for the CHIP notice because it must be provided to all employees who reside in an affected state. An employer can address this by expanding the group that gets the enrollment materials (and CHIP notice) or by sending a stand-alone CHIP notice to the non-eligible employees.

An employer that has not yet provided a CHIP notice to all affected employees should do so now. The notice may be provided in paper form or electronically in accordance with the DOL's rules for electronic disclosure.

Note: The DOL’s rules for electronic disclosure are quite restrictive, including requiring getting consent from the recipient to send it electronically. Therefore, it is our recommendation that employers do a paper distribution.

Please contact your SML Account Team if you have any questions.