IslerDare PC

Employee Benefits Update *February 28, 2023*

Roundup of Recent Developments Impacting Health and Welfare Plans

WELCOME TO JESSICA KUESTER!

IslerDare is pleased to welcome the newest member of the Employee Benefits and Executive Compensation Group: **Jessica E. Kuester**. Jessica joins us with over 13 years of experience representing clients on a broad range of issues. She spent the last 8 years at Ogletree Deakins, where she advised employers on all manner of benefit compliance issues, including retirement plans, group health plans, welfare plans, and severance plans. Before joining Ogletree Deakins, Jessica was an employee benefits associate at Venable LLP. She earned her J.D., magna cum laude, from Syracuse University College of Law.

IMPORTANT DATES

February 28:

- File ACA information reporting returns (if filing on paper)

March 1:

- File Medicare Part D disclosure with CMS

March 2:

- Provide ACA information reporting forms to participants

March 31:

- File ACA information reporting returns (if filing electronically)
- File Retiree Drug Subsidy reconciliations with CMS for 2021 plan year (calendar year plans)
- Submit ACA information returns if employer operates in CA, RI, or NJ

EXECUTIVE SUMMARY

This Employee Benefits Update summarizes the following developments impacting group health plans:

- The White House announced that the COVID-19 public health emergency and national emergency will end on May 11, 2023, which impacts group health plan benefits and operations;
- Certain decisions of arbitrators engaged in the Independent Dispute Resolution process under the No Surprises Act have been put on hold; and
- Proposed rules related to mandated coverage of contraceptives would eliminate the exemption allowing employers with moral objections to avoid providing coverage.

End of the COVID-19 Public Health Emergency and National Emergency

With the nation emerging from the COVID-19 pandemic, the White House has announced the impending end of the public health emergency and the national emergency. Absent further guidance, both of these emergency periods will end on May 11, 2023, which will affect employer-sponsored group health plans in a number of ways.

The end of the public health emergency means the end of certain COVID-19 coverage mandates for health plans sponsored by employers. Those mandates require health plans to cover up to eight over-the-counter COVID-19 tests per participant per month, up to $12 per test, and to cover COVID-19 testing and related services (including out-of-network), all without cost-sharing. When the public health emergency ends on May 11, 2023, plans will no longer be mandated to cover these items without cost-sharing, subject to other applicable requirements (e.g., preventive care mandates under the Affordable Care Act).

The end of the national emergency affects several deadlines for group health plans. In May 2020, the Department of Labor and the Internal Revenue Service issued guidance extending certain deadlines for employer-sponsored plans for as long as the national emergency is in effect, plus 60 days (referred to as the "outbreak period"). However, each deadline can only be extended for a maximum of one year, or until the end of the outbreak period, whichever comes first. The deadlines affected by the extension are:

- The 30-day or 60-day HIPAA special enrollment periods
- The 60-day election period for qualified beneficiaries to elect COBRA coverage
- The due date for each monthly COBRA payment
- The deadline for individuals to notify the plan administrator of a COBRA qualifying event
- The deadline for individuals to file a claim for benefits
- The deadline for claimants to file an appeal of a claim denial
- The deadline for claimants to file a request for external review of a claim
- The deadline for claimants to perfect a request for external review

Because these extensions are tied to the outbreak period, which lasts for 60 days after the end of the national emergency, all extensions will end on July 10, 2023. The White House announcement contained little detail about how these extensions will end, leaving many questions unanswered. For example, during the outbreak period, each monthly COBRA premium was delayed for up to one year. As of July 10, 2023, it is unclear whether all delayed COBRA premiums will become due immediately (following any grace period, if applicable), or whether all COBRA payments delayed prior to that date will keep their one-year extension. We are monitoring the agencies for additional guidance.

✓ ***Action Steps for Employers:*** While guidance hopefully will spell out the details for resuming normal deadlines, employers should be prepared to move quickly in case that guidance is delayed. Employers should confirm that enrollment vendors, COBRA vendors, and claim and appeal administrators are ready for these upcoming changes and that employees are informed of these changes to the extent appropriate. In addition, employers should consider, subject to other applicable requirements, whether to implement cost-sharing for COVID-19-related services and tests, either immediately or at the end of the plan year, and coordinate any design change that they want to make to COVID-19-related services and tests with their insurance carrier or third-party administrator.

Arbitration Decisions Under the No Surprises Act

The No Surprises Act was passed to reduce surprise medical billing for group health plan participants. A surprise medical bill occurs when a participant visits an in-network facility and unknowingly receives care from an out-of-network provider, or when a participant visits an emergency room and receives care from an out-of-network provider. The No Surprises Act requires health plans and medical providers to go through an arbitration process when the parties disagree about the reimbursement rate for the out-of-network medical providers. CMS published rules outlining the arbitration process, but that arbitration process has been challenged multiple times.

Most recently, on February 6, 2023, a Texas judge ruled that the arbitration provisions set forth by CMS go against the intent of the No Surprises Act. Specifically, the court found that the arbitration process is unfairly biased in favor of health plans and insurers, to the detriment of providers.

Notably for group health plans, CMS has requested all arbitrators to hold their decisions with respect to items and services furnished on or after October 25, 2022, until additional guidance is issued. Further, arbitrators are asked to recall any decisions issued on or after February 6, 2023, with respect to items and services furnished on or after October 25, 2022. Arbitrators can continue to render payment decisions with respect to items and services furnished before October 25, 2022.

- ✓ ***Action Steps for Employers:*** In light of CMS's directive to hold all arbitration decisions with respect to items and services furnished on or after October 25, 2022, employers should confirm that any claims going through the arbitration process are properly held in abeyance until CMS issues additional guidance.

Proposed Reduced Exemptions to Contraceptive Coverage

Under the Affordable Care Act, employer-sponsored group health plans must cover contraceptive services and devices without cost-sharing. Since the implementation of this coverage mandate, various employers have sought exemptions on religious and moral grounds. In 2018, a final rule allowed a group health plan to avoid covering contraceptives if the coverage went against the employer's religious beliefs or moral convictions.

On January 30, 2023, the Departments of Health and Human Services, Labor, and Treasury issued a proposed rule that would eliminate the moral conviction exemption. That is, employers with a moral objection to contraceptive coverage would no longer be excused from providing that coverage. Notably, even though an exemption for moral objection would be eliminated, employers with a religious objection to providing contraceptive coverage would still be excused from providing such coverage. Individuals enrolled in objecting plans would have the ability to obtain contraceptive services at no cost directly from a willing provider or facility that furnishes contraceptive services through a new pathway referred to as an "individual contraceptive arrangement." The individual contraceptive arrangement would not require any involvement on the part of an objecting entity.

- ✓ ***Action Steps for Employers:*** This rule is only proposed, with comments due by April 3, 2023. Employers who do not provide coverage for contraceptives should review the proposed rule and consider whether to provide comments on the proposal.

Additional Information

For additional information about these health and welfare plan topics, or any other employee benefits matter, please contact any member of our Employee Benefits and Executive Compensation Group listed below.

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