Benefits BULLETIN

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Baldwin Krystyn Sherman Partners

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Preparing for 2016 Open Enrollment

With open enrollment beginning soon for many organizations, it is important for employers to be aware of the legal changes affecting health plans for 2016.

To remain in compliance, employers should review and update their health plans as needed and communicate plan changes to employees in an easy-to-understand manner.

Employers should consider the following steps as they evaluate their health plans for 2016 (Note: Many rules apply only to non-grandfathered plans, so reviewing grandfathered status may be the first step):

- Ensure that the plan's out-of-pocket maximum (OOP maximum) does not exceed the Affordable Care Act's (ACA) limits for the 2016 plan year ($6,850 for self-only coverage and $13,700 for family coverage).
- Embed an individual OOP maximum in family coverage, if necessary.
- Ensure that the OOP maximum for an HDHP does not exceed $6,550 for self-only coverage and $13,100 for family coverage.
- Ensure that the plan complies with ACA insurance market rules, including eliminating pre-existing condition exclusions and providing coverage for clinical trial participants and a comprehensive benefits package.
- Monitor IRS guidance on whether the health flexible spending account (FSA) limit will remain at $2,550 or increase for 2016.

Applicable large employers should review their measurement methods for determining full-time status for the purposes of offering health coverage, and they should test 2016 health plans for affordability and minimum value to avoid ACA employer penalties.

To inform employees of any plan adjustments, employers should communicate with them early on, and often. Using a variety of formats, such as in-person meetings and written materials, can help employees select a plan that will best meet their needs for the coming year.

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Section 6055 and 6056 Reporting Recap

There have been a number of recent updates regarding the ACA's Section 6055 and 6056 reporting requirements. The major developments are outlined below:

Sept. 17, 2015: The IRS released final 2015 versions of Forms 1094-B, 1095-B, 1094-C and 1095-C, along with related instructions, that employers will use to report under Sections 6055 and 6056. The final instructions include extensions of time to file and a process to obtain an electronic reporting waiver, as well as important clarifications on the reporting of HRA coverage.

Aug. 18, 2015: The IRS finalized Publication 5165, *Guide for Electronically Filing ACA Information Returns for Software Developers and Transmitters*. Any employer that files at least 250 Section 6055 or 6056 returns must file electronically (or obtain a waiver). However, these employers can file the first 250 returns on paper, if they so choose.

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Section 6055 and 6056 Reporting (cont.)

Reporting entities that file fewer than 250 returns during a calendar year may still file via paper. Electronic filing will be done through the ACA Information Returns (AIR) program, which is slated to become available on Oct. 22, 2015.

June 29, 2015: The Trade Preferences Extension Act of 2015 was signed into law, which increased penalties for employers that fail to comply with Section 6055 and 6056 reporting. The adjusted penalty amounts for 2016 are outlined below:

- The general penalty amount increased from $100 to $250 for each return, up to an annual maximum of $3 million per calendar year (previously $1.5 million). The annual maximum for small employers (those with up to $5 million in annual gross receipts) rose from $500,000 to $1 million.
- Penalties for violations corrected within 30 days increased from $30 to $50, up to an annual maximum of $500,000 per calendar year (up from $250,000). The annual maximum for small employers increased from $75,000 to $175,000.
- Penalties for violations corrected by Aug. 1 increased from $60 to $100, up to an annual maximum of $1.5 million per calendar year (previously $500,000). The annual maximum for small employers increased from $200,000 to $500,000.
- Minimum penalties for violations due to intentional disregard rose from $250 to $500 for each return, with no annual maximum.

Temporary relief from penalties may be available if employers can show they made good faith efforts to comply with the reporting requirements. Employers should review their information returns and individual statements to promote reporting accuracy.

DOL Proposes Expanding Overtime Protections

On June 3, 2015, the U.S. Department of Labor (DOL) released a proposed rule to modify the “white collar exemptions” provided by the Fair Labor Standards Act. As proposed, the change would have a far-reaching impact, since it would expand the number of employees who qualify for overtime pay based on salary exemption requirements.

To qualify for the white collar exemption, an employee must satisfy a variety of tests, including a duties test, a salary basis test and a salary level test. Currently, under the salary level test, only white collar workers making less than $23,660 a year are automatically eligible for overtime pay. Under the proposed rule, the salary threshold would increase to a projected $50,440 per year in 2016 and would be updated automatically each year in order to keep up with rising costs. The DOL has not yet proposed any changes to the duties test, which requires that an employee’s duties conform to executive, administrative or professional duties, as defined by law.

If enacted, it is projected that the rule would allow 6 million more white collar workers to be eligible for overtime compensation. As proposed, this rule could result in significant costs for employers, such as increased salaries or paying overtime wages to previously exempt employees.

In addition, employers would need to re-examine employees’ exemption statuses, review and revise overtime policies, notify employees of changes and adjust payroll systems. Employers may also incur additional managerial costs because they might need to spend more time tracking when employees clock in and out.

The DOL, on the other hand, projects that the higher salary level requirements could actually simplify the process of employee classification because employers would not be required to perform a duties test for employees making less than $50,440 per year, which, in

turn, could result in fewer lawsuits and lower legal costs for employers.

The DOL invited the general public to comment on the new rule from June 3 to Sept. 4, 2015, during which it received more than 200,000 comments. The comment period is now closed and a final rule could be issued within the next few months. In the meantime, employers may wish to review exempt classifications for current employees and determine which employees may be affected if the rule is ultimately implemented as proposed.

Reviewing Expansions to Transgender Health Care

On Sept. 8, 2015, the Department of Health and Human Services issued a proposed rule, *Nondiscrimination in Health Programs and Activities* (Section 1557), that aims to improve health equity for transgender individuals. The rule states that individuals cannot be denied health coverage due to their race, color, national origin, sex, age, or disability—making it the first piece of legislation to bar discrimination based on sex in health care.

Specifically, the proposal states:

- Health care cannot be denied based on sex, including gender identity.
- Treatment must be consistent with gender identity, including access to facilities.
- Care cannot be limited or denied because an individual seeking care identifies as belonging to another gender (for example, a transgender man cannot be denied treatment for breast cancer if treatment is medically necessary).

The extent to which gender transition services, such as gender reassignment surgery or hormonal treatments, must be covered by health plans remains unclear. A comment period for this proposal is open until Nov. 9, 2015; therefore, it is possible that additional clarification will be provided in the final rule.

In the meantime, in addition to complying with legal requirements regarding health care coverage, employers should consider creating a more positive environment for transgender employees in general. To aid in this process, employers may wish to establish a policy for handling gender transitions that addresses how to best protect employee privacy and that establishes methods for communicating gender transitions to co-workers. Employers should communicate with transitioning employees on any issues that may arise, such as which names and pronouns are preferred during transition.

Employers should also consider providing transgender employees with access to gender-neutral restrooms. It is important, though, that transgender workers are not required to use these facilities–they should only be offered to them as an option. By fostering an atmosphere of inclusion, employers can minimize gender discrimination lawsuits and allow transgender workers to be happier and more engaged in their work.