TOP EMPLOYEE BENEFIT ISSUES IN RETIREMENT AND WELFARE PLANS FOR PLAN SPONSORS

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TOP EMPLOYEE BENEFIT ISSUES FOR 2024 - 2025

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ACA Affordability Percentage

In Revenue Procedure 2023-29, the IRS announced the new Affordable Care Act (ACA) affordability percentage of 8.39% for 2024 employer health care plans. This percentage has decreased by the greatest annual amount since its inception. This could make some health plans fail to meet an affordability safe harbor and expose employers to IRC Section 4980H(b) penalties.

ACA Affordability Percentage

An affordability percentage, indexed annually, applies to determine if an employer's self-only coverage meets the ACA's affordability requirements. In 2025, the indexing adjustment for plan years beginning on or after January 1, 2025, results in an affordability percentage of 9.02% (Rev. Proc. 2024-35). As a result, the affordability calculation may result in a higher allowable premium.

This is where the COBRA Ryde(r)s away

- In *Thompson v. Ryder System, Inc.* the United States District Court for the Southern District of Florida denied Ryder's motion to dismiss a class action complaint regarding COBRA enrollment notices sent to thousands of departed employees
- Per the Judge, a notice that "merely points the plan participant to an unhelpful website and phone number" does not satisfy the requirements of federal law.

This is where the COBRA Ryde(r)s away

- Ryder's enrollment notice "lists a phone number and website to assist prospective enrollees with the process; but, as plaintiff describes, the phone number is simply a 'catch-all' general H.R. phone number to enroll in COBRA, operated by a third party [under the guise of] the Ryder benefits department."
- The Court determined that the enrollment notice did not meet the requirements of 29 C.F.R. 2590.606-(b)(4)(v) of an "adequate explanation of the plan's procedures for electing continuation coverage."

Transparency Act

- Cost comparison tool: For plan years beginning in 2023, health plans and issuers were required to make an internet-based price comparison tool available for 500 shoppable items, services and drugs. For plan years beginning in 2024, the internet-based price comparison tool must be expanded to cover all covered items, services and drugs.

Transparency Act

- Machine-readable files: Non-grandfathered health plans and issuers must publicly post three MRFs regarding in-network provider rates, out-of-network allowed amounts and billed charges, and prescription drug rates and prices. Federal agencies have ended an enforcement delay for posting the prescription drug file. Future guidance will specify a timeline for complying with this requirement.

Transparency Act

- Prescription drug reporting: Health plans and issuers must report information about prescription drugs and health care spending to the federal government annually. This reporting process is referred to as the "prescription drug data collections" (or "RxDC report"). The annual deadline is June 1, which means that the RxDC report is due by June 1, 2024, covering data for 2023. However, because June 1, 2024, is a Saturday, this deadline may be extended to the next business day, which is June 3, 2024.

Transparency Act

- Gag clause attestation: Health plans and issuers must annually submit an attestation of compliance with the federal prohibition on gag clauses. The gag clause attestation is due by Dec. 31 of each year.

Welfare Plan Litigation

The Third Circuit's recent decision upholding MetLife's escape from a lawsuit accusing the company of pocketing $65 million in pharmacy rebates instead of using the funds to lower employee healthcare costs hands additional authority over to employers facing a new wave of class action litigation over excessive health fees. Knudson v. Metlife Group, Inc., WL 4282967

CCA & Welfare Plan Litigation

The Consolidated Appropriations Act of 2021 expanded ERISA's compensation disclosure regime to encompass welfare plan service providers. Brokers and consultants providing services to group health plans subject to ERISA must disclose if they reasonably expect to receive at least $1,000 in direct or indirect compensation for their services. These disclosures must also include a description of the services, a statement regarding whether the service provider is a plan fiduciary, and a description of all compensation the service provider expects to receive in exchange for its services.

CCA & Welfare Plan Litigation

As disclosures become public, the plaintiffs' bar has initiated excessive fee claims, a common lawsuit in the retirement plan sphere, but now brought against health plan fiduciaries.

See Lewandowski v. Johnson and Johnson. On February 5, 2024, a Johnson & Johnson employee filed a proposed class action lawsuit claiming that workers were overcharged for prescription drug benefits due to a lack of monitoring by plan fiduciaries.

CCA & Welfare Plan Litigation

Plan sponsors should comply with the new fee disclosure rules and monitor their welfare plans with the same eye towards reviewing fees as has been prudent to retirement plan fees.

Gender and Family Planning Issues in Benefits

The Supreme Court's decision in *Bostock v. Clayton County, Ga.* (40 S. Ct. 1731 (2020)), ACA Section 1557, the Mental Health Parity and Addiction Equity Act (MHPAEA), or state laws necessitate benefit changes for LGBTQ employees and their family members.

Gender and Family Planning Issues in Benefits

However, the decision to provide coverage also comes with potential risks. If a group health plan provides any level of coverage for medically necessary gender-affirming care, the Mental Health Parity Act would require the plan to cover gender dysphoria mental health treatment "in parity" with medical/surgical benefits.

In addition to federal concerns, an increasing number of states are enacting strict restrictions prohibiting providers from performing and employer-sponsored health plans from covering medical procedures aimed at addressing gender dysphoria. These new state-level restrictions may come with criminal penalties, further complicating plan sponsor reliance or general ERISA preemption protections.

Gender and Family Planning Issues in Benefits

Case law, federal requirements, and state laws combine here to make coverage or exclusion of gender-related treatment and services an evolving issue. There have been two recent relevant decisions: a decision from the Fourth Circuit Court of Appeals, Kadel v. Folwell, 100 F.4th 122 (4th Cir. 2024), which held certain gender-affirming care exclusions violated the Equal Protection Clause, and an Eleventh Circuit Court of Appeals decision, Lange v. Houston Cnt., GA., 101 F.4th 793 (11th Cir. 2024), which held that a health insurance provider could be liable under Title VII of the Civil Rights Act of 1964 for denying gender-affirming care coverage.

Gender and Family Planning Issues in Benefits

Disputes over such coverage – some brought by plan participants, others by governmental enforcement agencies – and findings of employer liability are becoming increasingly common in this area. While it may be possible (and legal) for employers to design a welfare plan that satisfies a plan sponsor's coverage goals for gender dysphoria treatments, in any decision poses the risk of exposure to costly lawsuits under either federal antidiscrimination laws or state laws seeking to restrict access to these procedures. We recommend closely cooperating with counsel to review the relevant state and federal landscape.

Gender and Family Planning Issues in Benefits

For many employers, mere compliance with the law is no longer sufficient to meet diversity, equity and inclusion (DEI) goals.

Family planning benefits can be an important part of DEI efforts, but employers should consider relevant compliance issues. Tax issues, ACA mandates and state laws need to be reviewed when designing/administering abortion, adoption, fertility and surrogacy benefit programs.

Mental Health Parity

Ensure the plan sponsor/administrator/fiduciary prepares a comparative analysis of nonquantitative treatment limitations (NQTLs) required by the 2021 CAA. Employers sponsoring fully insured plans should discuss and obtain this analysis from their insurers.

Mental Health Parity

Self-insured plan sponsors are responsible for full compliance.

Prepare a written memo to document your NQTL comparative analysis. Include assistance with NQTL comparative analyses in any future requests for proposals from vendors.

New Mental Health Parity Rules

On July 25, the U.S. Departments of Labor, Treasury, and Health and Human Services released much anticipated guidance under the Mental Health Parity and Addiction Equity Act.

The guidance includes a tri-agency proposed rule and DOL Technical Release 2023-01P, both of which are intended to clarify existing MHPAEA requirements and to assist group health plans and issuers in compliance.

What Guidance Did We Receive

The departments issued a proposed rule that would amend existing 2013 regulations and also add some new regulations.

The amendments also provide considerable new details regarding the evaluation of nonquantitative treatment limitations by providing a framework to evaluate NQTLs that is similar to the way quantitative treatment limitations are evaluated.

What Guidance Did We Receive

The new regulations address the requirement under the 2021 Consolidated Appropriations Act for plans to perform and document an analysis on NQTLs imposed by the plan on mental health and substance use disorder benefits, as compared to medical and surgical benefits.

What Guidance Did We Receive

The departments are charged with auditing plans' NQTL comparative analyses under the 2021 Consolidated Appropriations Act and, to date, have found them lacking.

Review Plan Design for Red Flags

Much of the new guidance focuses on a plan's evidentiary standards, factors and processes, all of which require a behind-the-curtain analysis of a plan's administrative and operational processes.

Review Plan Service Contracts For Self-Funded Plans

In the preamble to the proposed rule, the departments recognize that, in practice, employers rely on the issuer of a fully insured plan, or on the third-party administrator of a self-insured plan, to administer their plans in compliance with MHPAEA regulations, including the requirements to perform an NQTL comparative analysis.

Confirm NQTL Comparative Analysis has Been Performing and Request a Copy

The requirement under the 2021 Consolidated Appropriations Act to perform and document an NQTL comparative analysis has been in effect since Feb. 10, 2021. Plans are required to submit their NQTL comparative analysis to the relevant department upon request by the secretary.

Ask Questions About Your Plan's Network Composition

Finally, much of the new guidance draws attention to the issue of network composition and its impact t participants in accessing mental health and substance use disorder benefits.

Ask Questions About Your Plan's Network Composition

Issues around network composition include looking at the methods for determining reimbursement rates and credentialing standards, as well as procedures for ensuring the network includes an adequate number of each category of provider and facility to provide services under the plan.

Final Rule – Mental Health Parity

The DOL, HHS, and Treasury (the "Departments") have released final rules under the Mental Health Parity and Addiction Equity Act (MHPAEA), focusing on non-quantitative treatment limitations (NQTLs) and the comparative analysis requirement established under the CAA, 2021. The final rules amend existing MHPAEA regulations to incorporate new and revised definitions of key terms and to specify the steps that plans (or insurers) must take to comply with MHPAEA. They also include provisions codifying minimum standards for NQTL comparative analyses and applying MHPAEA requirements to individual health insurance arrangements.

Final Rule – Mental Health Parity

Comparative Analysis Requirement. Plans must perform and document NQTL comparative analyses and submit them to a requesting agency within ten business days of the request. The analysis must: (1) describe the NQTL; (2) identify and define the factors and evidentiary standards used to design or apply the NQTL; (3) describe how factors are used in the design or application of the NQTL; (4) evaluate whether processes, strategies, evidentiary standards, or other factors are comparable to, and applied to more stringently than, those with respect to medical/surgical benefits, as written and as applied; and (5) address findings and conclusions regarding comparability and relative stringency. Plans must also prepare and make available to the agencies, upon request, a written list of all NQTLs imposed under the plan. An exhaustive list of NQTLs is not included as requested by commenters; rather, plans must analyze any NQTL that limits the scope or duration of treatment. The agencies intend to provide additional examples in a future update to the MHPAEA Self-Compliance Tool.

Final Rule – Mental Health Parity

Fiduciary Certification. For plans subject to ERISA, one or more named fiduciaries must review and understand any NQTL comparative analysis prepared by or on behalf of the plan, and must certify that the fiduciary prudently selected qualified service providers to perform and document the analysis and that the fiduciaries have satisfied their duty to monitor those service providers. The final rules omit a proposed requirement to certify that the comparative analysis complies with regulatory content requirements.

Final Rule – Mental Health Parity

Applicability Date. The final rules generally apply to group health plans for plan years beginning on or after January 1, 2025. However, several provisions – including those implementing the meaningful benefits standard, the prohibition on discriminatory factors and evidentiary standards, required use of outcomes data, and certain related comparative analysis requirements – will not apply until plan years beginning on or after January 1, 2026.

In the meantime, plans must continue to comply with existing requirements, including the CAA, 2021 amendments to MHPAEA.

Notice 2024-75

Expanded list of preventive care benefits. The IRS' second notice expands the list of preventive care benefits that can be provided by an HDHP without charging a deductible. The expanded list includes:

- Over-the-counter oral contraceptives (including emergency contraceptives) and
- Male condoms

Notice 2024-75

The notice also clarifies that:

(1) All types of breast cancer screening for individuals who have not been diagnosed with breast cancer are treated as preventive care,

(2) Continuous glucose monitors for individuals diagnosed with diabetes are generally treated as preventive care, and

- The safe harbor for providing certain insulin products without a deductible applies whether the insulin product is prescribed to treat an individual diagnosed with diabetes or prescribed for the purpose of preventing the exacerbation of diabetes or the development of a secondary condition.

Notice 2024-75

Generally, an HDHP may provide preventive care benefits without a deductible, or with a deductible below the minimum annual deductible otherwise required to qualify as a HDHP. To be a preventive care benefit, the benefit must be determined to be preventative care in guidance issued by the IRS.

(Notice 2024-71, Notice 2024-75, 2024-44 IRB)

ACA Preventive Care

In March 2023, the U.S. District Court for the Northern District of Texas struck down a key component of the ACA's preventive care mandate as unconstitutional. American Council of Life Insurers et al. v. U.S. Department of Labor et al., case number 4:24-cv-00482.

ACA considers birth control to be considered preventive care unless employer has religious objection.

On appeal

HIPAA

Key Biden-Harris Administration Advancements of HIPAA:

- HIPAA Privacy Rule To Support Reproductive Health Care Privacy Final Rule, Fact Sheet, Social Media Tool Kit, - PDF and Video
- Confidentiality of Substance Use Disorder Patient Records Final Rule, Fact Sheet, and Webinar
- The HIPAA Security Rule Risk Analysis Requirement Video
- How the HIPAA Security Rule Can Help Defend Against Cyber-Attacks Video
- Guidance on Telehealth Privacy and Security Tips for Patients

HIPAA

- Guidance on Educating Patients about Privacy and Security Risks to Protected Health Information when Using Remote Communication Technologies for Telehealth
- HIPAA Recognized Security Practices Video
- Protecting the Privacy and Security of Your Health Information When Using Your Personal Cell Phone or Tablet Guidance
- HIPAA Privacy Rule and Disclosure of Information Relating to Reproductive Health Care Guidance

HIPAA

- HIPAA and Audio-Only Telehealth Guidance
- HIPAA and Disclosures of Protected Health Information for Extreme Risk Protection Orders
- HIPAA, COVID-19 Vaccinations and the Workplace Guidance
- 55 Completed HIPAA Enforcement Actions by OCR, including ransomware, hacking, phishing, protected health information (PHI) on unsecured servers, media access to PHI, improper disposal of PHI, malicious insiders, and patients access to their health information

Qualified Retirement Plans

New IRS Pre-Examination Retirement Compliance Program

- Normal EPCRS (Employee Plans Compliance Resolution System) – Rev. Proc. 2021-30
  - SCP – Self-correction
  - VCP – Voluntary Correction with IRS approval
  - Audit CAP – Correction on Audit

New IRS Pre-Examination Retirement Compliance Program

- New Pilot Program
  - 90-Day Notice
  - Provides opportunity to address compliance issues and disclose during 90-day window
- How is this different?
  - SCP/VCP treatment vs. Audit CAP
  - Cap on penalties
- Secure 2.0

Amendments to EPCRS

- Notice 2023-43 provides interim guidance while the official Rev. Proc. 2021-30 is updated.
- Expands eligibility for Self-Correction methods to additional failures (*e.g.*, certain demographic failures) previously only eligible for correction with IRS assistance.

Notice 2024-77

The IRS has issued guidance, in question-and-answer format, on how changes made by the Secure Act 2.0 to the correction of inadvertent benefit overpayments impacts the Employee Plan Compliance Resolution System (EPCRS). (Notice 2024-77, 2024-44 IRB)

2024 ERISA Fiduciary Duty Litigation

Best Practices for Fiduciaries

- Fiduciary Best Practices
  - Obtain ERISA counsel with experience advising plan fiduciaries
  - Establish a Plan Investment Committee
  - Train Committee members

2024 ERISA Fiduciary Duty Litigation

- Fiduciary Training
  - As fiduciaries, committee members should be adequately and continuously trained to understand and implement their fiduciary duties under ERISA
  - Understanding how to execute duties with the care, skill and diligence of a prudent person
  - Understanding how to make decisions in the sole interest of participants and beneficiaries for the exclusive purpose of providing benefits and defraying reasonable expenses
  - Understanding “prohibited transactions” under ERISA and the Internal Revenue Code

2024 ERISA Fiduciary Duty Litigation

- Select an Investment Advisor
  - Selecting an investment advisor shall be done with prudence
  - Several vendors must be considered before selecting an investment advisor
  - Each vendor's expertise, experience and fees should be evaluated
  - The investment advisor should have no conflict of interests and is independent of the Plan or other service providers

2024 ERISA Fiduciary Duty Litigation

- Create and Investment Policy Statement
  - Identifies the Plan fiduciaries and defines their duties and responsibilities
  - Describes the Plan's objectives and investment goals, objectives how the Plan's Committee is selecting investments that are monitored and evaluated
  - The investment policy statement should be an outline for guidance only
  - The investment policy statement should be reviewed annually.

2024 ERISA Fiduciary Duty Litigation

- Document Meetings and Actions
  - Minutes of committee meetings Should be kept
  - All deliberations and decisions should be documented to demonstrated that Plan fiduciaries followed prudent procedures
- Plan fiduciaries should act independently
- Recent DOL audits related to ESG investing

Evaluation Fees

Fees are at the core of fiduciary litigation

Different models for record-keeping fees	• **Revenue Sharing** • **Per participant on a per capita basis ($50 per year)** • **Per participant on a pro rata basis (50 bps per year)**
Fees for other service providers	• Trustee • Custodian
Investment management fees	Expense ratios
Types of Investments	• Stable value • QDIAs
Lower cost investment options	• Lower-cost share classes • Collective trusts • Separate accounts
Usage fees	• Plan loans • Hardship withdrawals • QDROS

SECURE 2.0

Plan Amendments

- Secure 2.0 Amendments must be done before the end of the play year beginning after 1/1/2026. See Notice 2024-3
- Secure 1.0 amendments now tie to Secure 2.0 timing
- CARES & Relief Acts are end of 2025 plan year

Mandatory Plan Amendments

- Long-term part-time worker eligibility for plan years beginning after 12/31/2024. Need to start tracking eligibility now to be ready for 2025 –see next slide
- Higher catch-up contribution limits for tax years beginning after 12/31/2024. Impact on next point?

Notice 2024-73

The IRS has issued guidance addressing long-term, part-time employees in 403(b) retirement plans under the SECURE 2.0 Act, which applies to 403(b) plans beginning in 2025. The IRS also announced a delayed applicability date for related final 401(k) regulation. (IR 2024-257, 10/3/2024; Notice 2024-73, 2024-43 IRB)

Mandatory Plan Amendments

- Roth-only catch-up contributions for high earners for tax years beginning after 12/31/2023 – Notice 2023-62 extends to 2/31/25
- Increase in age for required minimum distributions ("RMDs") for distributions after 12/31/2022 for participants attaining age 72 after that date

Mandatory Plan Amendments

- No pre-death RMDs for Roth accounts for tax years beginning after 12/31/2023
- If you are doing a qualified birth or adoption distribution, need to amend for distributions after 12/29/2022. I doubt you did this

Optional Plan Amendments

- Matching student loan payments for plan years beginning after 12/31/2023
- Option for Roth employer match and nonelective contributions for contributions made after 12/29/2022
- Pension-linked emergency savings accounts for plan years beginning after 12/31/2023

Optional Plan Amendments

- Increase involuntary cash-out limit (5k to 7k) for distributions after 12/31/2023
- Disaster relief for disasters after 1/26/2021
- Reliance on employee certification for hardship distributions for plan years beginning after 12/29/2022

Optional Plan Amendments

- Penalty-free withdrawals for emergency expenses for distributions after 12/31/2023
  - Notice 2024-55
- Penalty-free withdrawals in the event of domestic abuse for distributions after 12/31/2023
  - Notice 2024-55
- Penalty-free withdrawals for terminal illness for distributions after 12/29/2022

Non-Plan Amendment Items to Consider

- Small financial incentives for participation
- Simplified disclosures for unenrolled DC plan participants
- Recovery of overpayments
- Retirement Savings Lost and Found – will need to start providing information to DOL/Treasury for plan years beginning after 12/31/2023

New Fiduciary Rule

Remainder of DOL Fiduciary Regs Blocked in Texas.

A Texas federal judge froze the remainder of a package of regulations from the U.S. Department of Labor expanding the definition of a fiduciary under the Employee Retirement Income Security Act, after a judge blocked most of the policy in an adjacent district.

Final Regulations – RMDs

Recently finalized Treasury regulations on employee retirement account distributions address when and to whom the new distribution rules apply, and provide detailed IRS interpretation regarding distributions starting during an employee's lifetime as well as the determination of designated beneficiaries.

Reg. §1.401(a)(9)-0 through -9, as finalized July 19, 2024 (preamble and final regs at 89 Fed. Reg. 58,886), generally incorporated what the IRS had proposed on Feb. 24, 2022 (87 Fed. Reg. 10,504) in implementing changes from the Setting Every Community Up for Retirement Enhancement (SECURE) Act 1.0 (2019) (Div.) of Pub. L. No. 116-94) and, to an extent, SECURE Act 2.0 (2022) (Div. T of Pub. L. No. 117-328).

QUESTIONS?

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