McGohan Brabender

JUNE 2018 COMPLIANCE UPDATE

FORM 5500 FILINGS

ERISA imposes all kinds of reporting and disclosure obligations. One of the most important ones is the obligation to file Forms 5500. The filing requirement applies to welfare benefit plans that have at least 100 participants (i.e. employees) in them as of the first day of the plan year. A welfare benefit plan with more than 100 participants (i.e. employees) enrolled on the first day of the plan can be subject to the filing requirement if the plan is considered "funded" under ERISA. The forms are due seven months after the close of the plan year. This means the forms for plans maintained on the 2017 calendar year will be due July 31, 2018. Employers can request an automatic 2½-month extension to file the forms by submitting Form 5558 before the original due date. The penalty for filing the forms late can be over $2,000 per day! Therefore, it is imperative that all forms be filed on time. The Form 5500 filing requirement is not new, but I wanted to remind you that the deadline for calendar-year plans is fast approaching.

PCORI FEE COMING DUE

The Patient-Centered Outcomes Research or PCORI is due July 31, 2018. The fee, which is part of the Affordable Care Act (aka Obamacare), is assessed against all group health plans. If you are sponsoring a fully insured health plan, the carrier is responsible for reporting and paying the fee although most carriers build the fee into the premiums. However, if you are sponsoring a self-funded health plan (including a Health Reimbursement Account or HRA) then you have to report and pay the fee.

Paying the PCORI fee in 2018

Reporting PCORI fee on Form 720

The fee is reported on IRS Form 720 and is paid with IRS Form 720V. The fee is relatively small (i.e. $2.39 per life; special rules apply to HRAs) and it goes away with plan years beginning after October 1, 2019.

NEW PAID FMLA TAX CREDIT

The Family and Medical Leave Act has been around for some time. The FMLA requires larger employers to offer certain employees unpaid leave under certain circumstances. However, the new twist is that employer can get a tax credit for **paid** FMLA. To qualify for the credit, an employer must have a written policy that provides at least two weeks of paid family and medical leave (prorated for part-time employees). Credit is only provided for a qualifying leave for lower paid individuals who have been employed with the company for at least one year and earn a certain amount.

IRS guidance on tax credit for paid FMLA

Frequently Asked Questions about paid FMLA tax credit

The benefit to employers of paid FMLA

The government has started issuing guidance on the new tax credit. Again, the credit only applies if the employer has adopted a written policy that pays certain employees during FMLA.

NOTIFICATION TIMEFRAMES

ERISA imposes various disclosure requirements on the plan administrator. Those requirements are subject to various timeframes. In other words, it makes little sense to impose various disclosure requirements on the plan administrator without listing the time periods in which the notices have to be sent.

Notifying participants of a plan change

Basically, there are three separate deadlines, and which timeframe applies depends on the particular notice and time of the year. Note that the timeframes are the "drop dead dates." You should not wait until the last minute to distribute the notices. The sooner the better when it comes to distributing the notices.

TAKE A PROACTIVE APPROACH TO ENROLLMENT

No one looks forward to the annual open enrollment season. It is a very busy time for HR personnel and the employees do not look forward to the process.

Employers can be held responsible for eligibility

However, it is critical for both the employer and employees that everyone pay attention to the details when it comes to this time of the year. There are a number of court cases involving people who were not properly enrolled and these cases could have been avoided if everyone paid attention to the details.

IRS BACKTRACKS ON 2018 HSA CONTRIBUTION LIMITS

The IRS has reinstated the maximum HSA family contribution limit for 2018. Earlier this year the IRS reduced the 2018 maximum HSA contribution amount for those having family coverage under an HDHP by $50. That is, the IRS had previously announced the maximum HSA contributions for those with family coverage under an HDHP was $6,900 and then the IRS reduced the amount to $6,850. This created an administrative nightmare for those who already contributed the maximum amount.

IRS announces HSA relief

IRS provides relief for HSA family limit

Thankfully the IRS took a practical approach and reinstated the maximum annual HSA contributions for those with family coverage under an HDHP to $6,900. Otherwise, everyone would have had to jump through all the administrative hoops of withdrawing the excess amount (i.e. the $50) from the HSA.

VOLUNTARY SEVERANCE PLANS

According to recent reports unemployment is at historic lows and employers are scrambling to find quality workers. However, some employers are trying to thin the ranks. One way to do that is to offer employees a voluntary severance program.

Voluntary severance plan can backfire

If the program is structured properly it can protect the employer from litigation down the road. However, it has to be drafted properly so that there are no misunderstandings on anyone's part.

COBRA AND OTHER STUFF

This article talks about COBRA and a couple of other benefit topics and is worth the read. COBRA has been around for a long time and, although COBRA is less important because of the health care exchanges or marketplaces, COBRA is not going away.

COBRA coverage in M&A transactions

COBRA mistakes are never easy to fix so it is important to make sure that you handle it properly from the get-go rather than trying to correct mistakes down the road.

NEW DISABILITY CLAIM PROCEDURES EFFECTIVE APRIL 1ST

We have reported on this in previous newsletters. The Department of Labor issued new procedures for disability claims.

DOL's final rule on disability claims takes effect

The new rules apply to any benefit that is contingent upon a finding of disability. Obviously the new rules apply to disability plans. But they also can apply to a retirement plan that pays benefits if the participant is considered disabled.

DISCRIMINATION RULES

Among the most misunderstood employee benefit provisions are the discrimination rules applicable to self-funded health plans. The Affordable Care Act imposed discrimination rules on all health plans. However, the rules have been postponed with respect to fully insured health plans. That is, self-funded health plans have been subject to discrimination rules under the Internal Revenue Code for some time and continue to be subject to those rules. Fully insured health plans currently are not subject to any discrimination rules under the Internal Revenue Code.

Nondiscrimination test for self-insured plans

The rules impose an affirmative obligation on employers to test their self-funded health plans each year and to report the discriminatory amount, if any, on the employees' Form W-2s. It is worth noting this has not been a high enforcement area for the government but that is no reason to ignore the rules. As a rule of thumb, if plan benefits are the same for everyone and everyone in the same coverage category (e.g. single coverage vs family coverage) pays the same amount for the coverage, then the self-funded health plan will be considered non-discriminatory. Issues come up when there are different waiting periods or the higher paid employees pay less than the lower paid employees for the same coverage. Therefore, the best course is to establish a uniform waiting period for all employees and require all employees within the same coverage tier pay the same amount.

TRUMP ADMINISTRATION TAKES ANOTHER HIT AT OBAMACARE

In an unusual but not totally unprecedented move, the Trump administration has ordered the Department of Justice to not defend parts of the Affordable Care Act. The Trump administration is saying that since Congress has repealed the individual mandate under Obamacare then the statute's protection for those with pre-existing conditions and the community rating rules are invalid.

Administration declines to defend ACA

Several states filed a lawsuit in Texas saying the Affordable Care Act is unconstitutional. The Executive branch is charged with enforcing the laws of the land. However, the Department of Justice under Trump administration filed papers in court saying it will not defend the lawsuit. This is very unusual but not unheard of. The Obama administration did not defend the Defense in Marriage Act, which the U.S. Supreme Court later struck down. The fact the Department of Justice will not defend the Affordable Care Act does not mean the statute is invalid. Seventeen states have decided to step into the lawsuit and defend the law. So the matter is far from over, but it does add another layer of uncertainty to the law.

WHERE DOES THE MONEY GO?

Do you ever wonder where your health care dollars go? The following breaks out where the money is spent.

Prescription costs take biggest chunk of health care dollars

It probably does not come as a big surprise but the largest chuck of the health care dollars goes towards drugs.

SPECIALTY DRUGS

No one can argue that the medical professional hasn't made tremendous strides in improving people's lives. However, those improvements have come at a cost and nowhere is that more evident than in the cost of specialty drugs.

Specialty Drug Cost Control

The average annual cost for specialty drugs from chronic conditions in 2015 was $52,000, and that number continues to rise. This article talks about ways to help control (but not eliminate) those costs.

NEW BENEFIT FRONTIER – STUDENT LOAN REPAYMENT

The cost of higher education has skyrocketed over the past 10 years and young people are burdened with huge student loans. Some employers are offering programs to help younger employees pay off that debt.

Incentivizing Student Loan Repayment Benefits

The Internal Revenue Code offers some, but limited, tax advantageous options for employees to help pay off those loans. Perhaps Congress and the current administration will amend the law to give employers more options to help employees reduce their student loans.

AFFORDABILITY JUST GOT MORE EXPENSIVE

The Affordable Care Act requires large employers to offer full-time employees quality/affordable coverage or pay a penalty if that employee receives a premium subsidy under a health care exchange or marketplace. The IRS just released the percentage of the employee's income to be used to determine if the cost of single coverage is considered "affordable" for this purpose. That is, if the coverage is considered affordable the employer will not be subject to the employer mandate penalty.

"Affordability" increases to 9.86 percent

For the 2019 calendar year the employee's share of the premium for self-only coverage will be considered affordable if it is no more than 9.86 percent of the employee's household income. For this year the percentage is 9.56 of the employee's household income.

THAT UNWELCOME KNOCK ON THE DOOR – DOL AUDIT

No one wants to answer the door and see a Department of Labor auditor asking to review various documents. As a practical matter, it usually is not a knock on the door. It is more likely a letter in the mailbox saying the plan is going to be audited.

DOL Audit checklist of requested documents

This article talks about the various documents the government will want to review. Our experience has been that the government auditors are very reasonable and the audits go smoothly. In the context of a fully insured health plan, the carrier has most of the materials and, in the case of a self-funded health plan, the TPA is able to assist with the audit. No one wants to go through an audit, but it happens and you will get through it.

TO PAY OR NOT TO PAY – PLAN ASSETS

The previous article talks government audits. One of the things the government looks at is whether the plan assets are used for the exclusive benefit of the participants. That is, ERISA says that all plan assets have to be used to benefit the plan participants.

What expenses can we pay from plan assets?

Stated another way, the plan assets cannot be used to pay expenses that really are the employer's obligations. That sounds simple enough but some expenses fall into a gray area. This article talks about some common situations that come up in this area.

HSAs AND MEDICARE

The rule is pretty simple. If you are enrolled in Medicare, you can no longer make or receive HSA contributions.

HSAs and Medicare: Like oil and water

Usin HSA to pay for Medicare premiums

In practice, the application of the rule is complicated because there are several different parts to Medicare, and when a person is actually enrolled in Medicare can vary. These articles talk about the interplay between Medicare and HSAs.

2019 LIMITS RELEASED

There are a number of provisions in the Internal Revenue Code that allow for adjustments due to inflation. The following article lists the 2019 limits for HSAs and HDHPs.

2019 HSA contribution limits

Another limit that is adjusted annually is the maximum out-of-pocket applicable to essential health benefits under the Affordable Care Act. This article lists those amounts for 2019.

2019 out-of-pocket limits

As a practical matter, the insurance companies and TPAs know these limits and should modify your health plan to comply with the rules.