Compliance Alert

12/11/24 Alert 2024-04

Employee Benefits Compliance

Compliance Year End Top 5 Issues and Action Items

Introduction

With 2024 coming to an end, it is worth reflecting on this year's group health plan compliance developments. Although not included in the Top 5 list below, Mental Health Parity Compliance and Final Rules on Non-Quantitative Treatment Limits will remain a challenge for group health plan sponsors. (See Alert 2024-03) We also expect developments with the excepted benefit status of fixed dollar indemnity plans and plan sponsors should work with carrier partners to ensure compliant distribution of the new hospital and other fixed indemnity plan notice required under Final Rules released earlier this year. (See Alert 2024-01) Our Compliance Top 5 list below otherwise addresses current and pressing topics as we close out 2024. We will continue to monitor these and other issues in 2025.

Election Results Create Regulatory Uncertainty

President Elect Trump returns to the White House in January 2025, and Republicans have a majority in both the House and Senate. The general consensus among stakeholders is that a full repeal of the Affordable Care Act (ACA) is not a priority of the new Administration. That does not mean, however, that all ACA provisions will remain unchanged. The new Administration can, and likely will, make changes to pending regulations under a "regulatory freeze." This could affect the proposed expansion of ACA mandated preventive care to cover certain over the counter birth control items without a prescription. Newer, final regulations could potentially be challenged under a lesser known law called the Congressional Review Act (CRA), which provides a fairly complex process by which Congress can roll back certain final regulations issued under the prior Administration. The new administration could also seek to expand non-ACA plans and insurance options, including relaxing rules around short-term, limited duration health insurance and association health plans, as well as a focus on individual coverage HRAs (ICHRAs). Other related issues, such as the availability of ACA-related individual market subsidies and/or Medicaid expansion roll backs, may also have an indirect impact on group health plans. For more information listen to our podcast, A Trump Second Term: Possible Group Health Plan Implications, available on Spreaker, SoundCloud and iTunes.

Telehealth Flexibility for HSA Compatible HDHPs Ends Absent Year End Legislative Extension

The Consolidated Appropriations Act of 2023 (CAA of 2023) included a two-year extension of COVID-era telehealth flexibility for Health Savings Account (HSA) compatible High Deductible Health Plans (HDHPs). Under the extended relief, HDHPs were allowed to provide telehealth services below the plan's required minimum deductible for plan years beginning before January 1, 2025, without causing participants to lose HSA eligibility. This means that calendar year and non-calendar year plans beginning in 2025 can no longer extend this flexibility absent new legislation. While we have heard significant interest in extending this flexibility, legislation has not yet been passed with mere days left before the extension expires. We will continue to monitor this very fluid area of law and report on any legislation related to telehealth flexibility for HSA compatible HDHPs. For more information, see our COVID Relief Chart at a Glance.

Confirm Tobacco Cessation Programs Comply with HIPAA's Required Reasonable Alternative Standard and the Full Reward Rule

Over the past year, more than a dozen large employers have faced litigation challenging a very common wellness program design that requires tobacco users to pay more for health coverage than non-tobacco users (a tobacco use surcharge or tobacco-free incentive). The litigation alleges that the plans did not offer a compliant reasonable alternative standard (or waiver) as required by HIPAA. Most of the targeted employers did allow employees to complete a tobacco cessation program as a reasonable alternative standard, but then only eliminated the tobacco surcharge on a moving forward basis. This is a violation of the "full reward" rule, which requires participants who complete a reasonable alternative standard to earn the complete full reward that would have been available if they had met the initial standard. That includes providing additional premium discounts (or other payout) for any months for which the surcharge was applied as opposed to removing the surcharge on a going forward basis. For a detailed discussion of tobacco cessation programs under HIPAA and the full reward rule see 101 Wellness Plan Compliance Obligations.

HIPAA Final Rule Requires Policy Updates

On April 22, 2024, the Department of Health and Human Services (HHS) released a Final Rule amending the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule to Support Reproductive Health Care Privacy. The Final Rule prohibits Covered Entities (including group health plans) from disclosing Protected Health Information (PHI) sought for the purposes of criminal, civil, or administrative investigations or proceedings related to seeking, obtaining, providing, or facilitating reproductive health care that is otherwise lawful. Generally, insurance

carriers will be responsible for compliance on behalf of fully insured medical plans. Self-funded plans will need to amend their existing HIPAA Policies and Procedures to reflect this change, train any employees with access to PHI, and potentially update BAAs by December 22, 2024. An amended Notice of Privacy Practices is also required by February 16, 2026. For a detailed discussion see Alert 2024-02 or our Compliance Insights Transitioning to a Self-Funded Plan and A HIPAA Foundation for Employer-Plan Sponsors.

Gag Clause Attestation Due December 31

Effective December 27, 2020, the Consolidated Appropriations Act of 2021 (CAA) prohibited group health plans from entering into an agreement with a health care provider, network or association of providers, third-party administrator (TPA), or other service provider that would directly or indirectly restrict the plan from providing provider-specific cost or quality of care information, electronic access to de-identified claims and encounter information, or sharing such information with business associates in accordance with HIPAA standards (referred to as "gag clauses"). The CAA requires group health plans to make a formal attestation of compliance by December 31. While guidance confirmed that insurance carriers, Pharmacy Benefit Managers (PBMs), and TPAs can submit a single attestation on behalf of their clients, several of these vendors partners have indicated they will not make blanket attestations. That means many employer plan sponsors will need to submit this attestation in reliance on assurances from their TPAs and insurance carriers that their agreements comply with the gag clause prohibition. The Departments have created a website for submitting attestations. For more information on this process see our Gag Clause Attestation Completion Tips Guide.