

February 19, 2013

## *BENEFITS UPDATE*

### AGENCIES ISSUE NEW AFFORDABLE CARE ACT FAQs, POSTPONE EMPLOYER NOTICE OF HEALTH CARE EXCHANGES

On January 24, 2013, the United States Departments of Labor and Health and Human Services and the Internal Revenue Service jointly issued a new set (Part XI) of Frequently Asked Questions relating to the Patient Protection and Affordable Care Act. [These FAQs](#) address six topics, four of which we summarize in this Alert:

- The postponement of employers' required notice about state health care exchanges;
- The effect of the ACA on health reimbursement arrangements;
- The effect of the ACA on fixed-indemnity health plans; and
- The payment by health plans of the Patient-Centered Outcomes Research (PCOR) fee.

#### *Postponement of Employers' Required Notice of Health Care Exchanges*

The ACA required employers to give employees a written notice by March 1, 2013 (and to new employees when hired) describing the new state health care exchanges mandated by the ACA and the possible availability of a federal subsidy for coverage from the exchange for some employees in lieu of any available employer-sponsored health plan coverage.

However, this notice requirement is postponed indefinitely (perhaps until late summer/fall 2013). The postponement may be due to many states' delay (not Oregon's) in establishing an exchange, which delay might require postponement of other aspects of the ACA (though there has been no official suggestion of such a broader delay). The DOL may provide a model notice or other guidance facilitating employers' compliance with this notice requirement.

#### *Effect of the ACA on Health Reimbursement Arrangements*

The ACA requires health plans to phase out annual benefit limits, with no such limits permitted by the 2014 plan year. HRAs that cover employees who are not covered under a comprehensive health plan of the employer (that is, HRAs that are not "integrated" with such a health plan) are likely to impose impermissible annual benefit limits. The Q&As addressed this issue as follows:

- HRAs cannot be integrated with coverage provided through individual, as opposed to group, health insurance.
- Even if an employer has a comprehensive health plan, an employee covered by an HRA but not the comprehensive health plan is not treated as having integrated coverage.
- HRAs may permit participants to draw down unused balances after 2013, even if the HRA may not accept new contributions after 2013 because of the no-annual-limit rule.

### ACA Exemption for Certain Fixed Indemnity Insurance

Some employers provide (or permit their employees to buy) supplemental insurance. “Fixed indemnity” policies are exempt from certain ACA mandates if they are all of the following:

- Separate from other health insurance policies;
- Not coordinated with exclusions or benefits under the employer’s group health plan; and
- Providing a fixed dollar amount per day of hospitalization or illness, without regard to the expenses incurred, the services performed or the drug prescribed.

For example, a policy providing \$100/day of hospitalization could be exempt; if that policy also provided only \$50 for outpatient doctor visits, it would not be an exempt fixed indemnity policy.

### Payment of PCOR Fees by Health Plans

The PCOR fee is imposed on sponsors of self-insured health plans for plan years ending after September 30, 2012 and before October 1, 2019. (The fee is \$1 per participant for plan years ending between October 1, 2012 and September 30, 2013.) The specific question was whether a multiemployer plan may pay the fee with plan assets.

Due to the peculiar nature of multiemployer plans (the fact that the board of trustees generally has no assets other than plan assets), the Q&A concludes that the PCOR fee may be paid with plan assets. But in other ERISA plans (meaning plans that are neither governmental plans nor church plans and that cover one or more employees and not just retirees or independent contractors), it probably would be a “prohibited transaction” to pay the fee with the plan’s, as opposed to the plan sponsor’s, assets.

### Coping with the ACA Generally

The agencies are issuing new guidance on the ACA’s requirements frequently as we approach the major changes scheduled to take effect in 2014. In light of those changes, we encourage employers to watch for new developments, using the DOL website, among other sources, and speak with their advisors about the possible effects of these new rules:

- The “play-or-pay” penalties;
- The rules that prohibit discrimination in favor of “highly compensated individuals” with respect to features such as entry dates, employee contributions, benefit levels or subsidized COBRA coverage; and
- Plan mandates, such as those prohibiting limits on annual benefits and preexisting conditions and capping eligibility-waiting periods.

We regularly speak with clients, individually and in group presentations, about the ACA and would be happy to help employers address these issues. Please feel free to contact us any time with any questions about these matters or any other labor, employment, or benefits issues.

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