ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES: PRACTICAL Q & A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, and Dan Taylor provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley Gillihan, Steven Mindy, Carolyn Smith and Dan Taylor are members of the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

While, once again, wholesale repeal/replace gave way to more modest ACA changes, there were a number of significant legislative and regulatory changes that occurred in 2018 which set the stage for 2019 to be an extremely pivotal year for health benefits. This advisory highlights many of the up-coming deadlines and key changes.

LEGISLATIVE UPDATE:

RECAP OF 2018 EMPLOYEE BENEFIT PROVISIONS

The Tax Cuts and Jobs Act (TCJA) contains the most sweeping changes to federal tax laws in decades. Enacted at the tail end of 2017, most of the provisions are first effective starting in 2018. In order to help pay for reduced rates and other tax relief, the law also cuts back on and repeals some prior popular tax credits and deductions, including several in the benefits space. Key changes made by the TCJA with respect to employee benefits include the following:

- **A new tax credit is available for employers who provide qualifying employees with paid family and medical leave.** The new credit is currently available only for 2018 and 2019. The IRS recently provided guidance on the credit in Notice 2018-71.

- **Qualified transportation benefits are no longer deductible by the employer.** Starting in 2018, employers may no longer take a deduction for qualified transportation benefits, i.e., transit passes, parking, and transportation to and from work in a commuter highway vehicle, unless the transportation is necessary to ensure the safety of the employee. According to the IRS (see Notice 2018-99), this deduction denial applies regardless of whether the employer pays the expenses directly, reimburses the employee through a qualified reimbursement arrangement, or the expenses are paid through a pre-tax compensation reduction arrangement. Qualified transportation expenses remain excludable from the employee's income and wages. *Non-profit employers must pay UBIT with respect to qualified transportation benefits.*

- **The exclusion for qualified bicycle commuting reimbursement is suspended.** Such reimbursements are taxable to the employee starting in 2018 and through 2025.

- **Tax benefits for qualified moving expenses are suspended.** Prior to the TCJA, qualified moving expenses paid or reimbursed by an employer were excludable from employees' income and wages. In addition, individuals were entitled to an above-the-line deduction for any unreimbursed qualified moving expenses. Both of these tax benefits are suspended starting in 2018 through 2025. The suspension does not apply with respect to active duty members of the Armed Forces. The employer's deduction for moving expenses is not affected by the suspension.

In addition to these changes, TCJA includes a variety of other provisions that reduce tax benefits for certain common "fringe benefit" arrangements, including changes to the tax rules for meals and entertainment and significant changes to the deductibility of certain executive compensation. Employers should work with counsel to ensure compliance with these requirements.

The Bipartisan Budget Act relaxes rules for hardship distributions from 401(k) plans. The main purpose of the Bipartisan Budget Act (BBA), enacted in February 2018, was to provide funding for the federal government. A few employee benefit plan changes went along for the ride, including relaxation of rules relating to hardship distributions from 401(k) plans and similar arrangements.

Under the BBA, qualified non-elective contributions (QNECs), qualified matching contributions (QMACs) and earnings on QNECs, QMACs, and 401(k) elective contributions may be distributed on account of hardship. A participant is not required to take out a loan before taking a hardship distribution. Both of these changes apply to plan years beginning after Dec. 31, 2018.

The BBA also directed the IRS to revise regulations relating to hardship distributions to eliminate the requirement under the IRS safe harbor that a participant cannot make 401(k) contributions for 6 months following a hardship distribution. In November, the IRS published proposed regulations making that change, as well as a variety of other changes to the hardship distribution rules.

REGULATORY UPDATE

DOL Fiduciary Rule Invalidated: The DOL's far-reaching investment fiduciary rule would have imposed significant new disclosure and approval burdens on entities that receive investment-related compensation from covered plans, including HSAs. The Fifth Circuit declared the DOL rule invalid, and the DOL quickly issued a non-enforcement bulletin. See DOL EBSA Field Assistance Bulletin 2018-2 (May, 2018). Entities that might be considered brokers under SEC rules may be impacted by a similar regulatory regime proposed by the SEC.

The President's Executive Order on Health: Two final rules and one proposed rule were issued in 2018 in response to the President's October 2017 Executive Order on Promoting Health Care Choice and Competition.

- ***Association Health Plans (AHPs):*** A final rule published Jan. 5, 2018 makes it easier for otherwise unrelated employers to group together to form a single large group health plan, thus avoiding certain ACA rules applicable to small group insured plans. AHPs can also be of interest to large employers, e.g., franchisors offering a health plan to franchisees. However, barriers still exist in many states.

- ***Short-Term Limited Duration Insurance (STLDI):*** A final rule published Aug. 3, 2018, allows STLDI to have a total coverage period (including any insurer approved renewals) of up to 36 months. Combined with the repeal of the so-called "individual mandate" under the ACA, and (perhaps) the ability to fund such coverage through an HRA starting in 2020, STLDI coverage may increase in popularity. Some states, however, impose stricter limits on STLDI (e.g., limit such coverage to 12 months or less.

- ***Health Reimbursement Arrangements (HRAs):*** A proposed rule published Oct. 29, 2018, would expand the ability of employers of all sizes to use HRAs by creating two new types of HRAs. Under the proposal, if certain requirements are satisfied, an employer may establish an HRA that helps to pay for the employee's premiums for individual market coverage (other than excepted benefit or short-term coverage) and other unreimbursed medical expenses. These premium reimbursement HRAs are considered MEC for purposes of the ACA employer penalties. Among other requirements, an employer must not offer a traditional group health plan and a premium reimbursement HRA to the same class of employees. The second type of new HRA, the excepted benefit HRA, must satisfy four requirements (similar to requirements that apply to excepted benefit FSAs): (1) the maximum annual contribution is $1,800 (indexed, and without regard to any carryovers); (2) the employee must also be offered traditional health insurance from the same employer (but the employee does not have to enroll in that coverage); (3) the employee cannot also be offered a premium reimbursement HRA; and (4) the terms and conditions must be the same for all "similarly situated" classes of employees. The proposed rules are expected to be finalized in the early part of 2019.

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MAKING A LIST AND CHECKING IT TWICE:

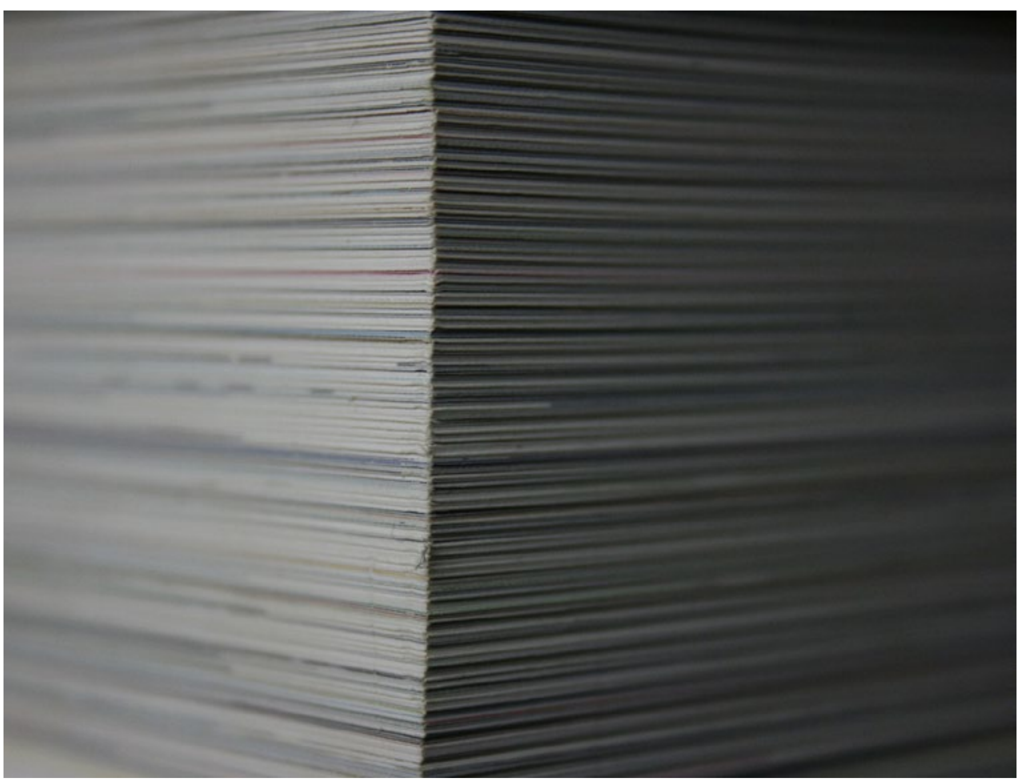
UPCOMING DEADLINES AND EFFECTIVE DATES

Health Coverage Reporting Deadlines for 2018 Minimum Essential Health Coverage (MEC)

The Affordable Care Act (ACA) requires employers, insurers, and certain other providers of minimum essential coverage (MEC) to provide health coverage information to individuals and the IRS. Applicable large employers (generally, those with 50 or more full-time employee equivalents as defined under the employer penalty provisions in Code section 4980H), are required to provide individuals with information on health insurance offers and coverage using Form 1095-C (Employer-Provided Health Insurance Offer and Coverage).

Forms 1095-C must also be sent to the IRS with Form 1094-C. Other providers of MEC, including self-funded non-ALEs) are required to provide information to individuals using IRS Form 1095-B (Health Coverage). Forms 1095-B must also be sent to the IRS along with Form 1094-B. These Forms are provided on a retrospective basis, i.e., health offers and coverage for 2018 are reported in 2019.

The IRS recently announced the deadlines for providing the 2018 Forms, including an extended due date for furnishing the Forms to individuals. There is no extension of the time for filing with the IRS. The IRS also has provided some penalty relief for good faith compliance. The filing deadlines are below.



February 28, 2019: Deadline for filing Forms 1094-B, 1095-B, 1094-C and 1095-C with the IRS for Forms that are not filed electronically.

March 4, 2019: Deadline for providing Forms 1095-B and 1095-C to individuals (this is an extension of the original due date of Jan. 31, 2019).

April 1, 2019: Deadline for filing Forms 1094-B, 1095-B, 1094-C and 1095-C with the IRS for electronic filing. In general, persons who file 250 or more information returns a year are required to use electronic filing.

For more information see IRS Notice 2018-94.

PCORI Fee: The Patient-Centered Outcomes Research Institute (PCORI) fee is imposed under the ACA for plan years ending on or after Oct. 1, 2012 and before Oct. 1, 2019. (These dates follow the fiscal year of the federal government, which ends on Sept. 30 of each calendar year.) The fee is paid once each year, and is due on the July 31 following the end of the plan year.

Thus, for example, for a calendar year plan year, the fee for 2018 is due on July 31, 2019. The fee is imposed on specified health insurance and is payable

by the employer or other plan sponsor of a self-funded plan (including HRAs) and by the insurer with respect to fully-insured coverage. The fee is based on the average number of lives covered under the plan.

Special rules apply for health reimbursement arrangements (HRAs) required to report. For plan years ending on or after Oct. 1, 2018 and before Oct. 1, 2019 (e.g., in the case of the 2018 plan year for calendar year plans), the fee is $2.45 per participant. More information can be found on the IRS PCORI Fee website.

Repeal of the ACA Individual Mandate: Starting January 1, 2019, individuals who do not have qualifying health coverage will no longer face a tax penalty. The IRS is studying whether the related reporting requirements for self-funded employers, insurers, and others providing MEC should be changed for 2019 and future years. As we go to press, a federal district court in Texas has concluded that repeal of the individual mandate has caused the entire ACA to be unconstitutional. This decision will undoubtedly be appealed – with (likely) several rounds of further analysis to come throughout 2019. Texas v. U.S., No.18-167 (N.D. Tex. Dec.14, 2018)].

"Cadillac Plan" Tax Delay: The so-called "Cadillac Plan" tax is a 40% excise tax on the cost of employer sponsored health coverage that exceeds specified dollar thresholds. The tax was originally scheduled to go into effect in 2018, but has been delayed several times, most recently by legislation enacted in January 2018. The tax is scheduled to go into effect in 2022, unless it is further delayed by Congress.

EEOC wellness plan rules: In 2017 the EEOC issued comprehensive rules governing wellness program compliance under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). These rules added a number of new compliance obligations, and established somewhat of a safe harbor (30%) for the value of wellness program incentives. In AARP v EEOC, the incentive safe harbor portion of these rules has been set aside. For 2019, employers with wellness programs that include incentives should review the impact of this decision on their programs.

On the retirement side: The Department of Labor took the first formal step in fulfilling the directives of the President's August 2018 Executive Order on retirement plans and issued proposed rules on multiple employer plans (MEPs). Similar to the goals of the AHP rules, the proposed MEP rules would clarify the circumstances under which an employer group or association or a professional employer organization (PEO) may sponsor a workplace retirement plan. The rules are expected to be finalized in early 2019.

The President also directed the DOL and IRS to make retirement plan notices more understandable and useful for plan participants, while also reducing the costs on employers. Finally, the IRS was directed to review the life expectancy and distribution tables currently used for determining required distributions from tax-qualified plans. The objective is to bring the tables up to date so that retirement funds can be drawn out more slowly, rather than forcing larger distributions earlier on. So, stay tuned, there will be more to come on retirement plans.

FOR QUICK REFERENCE: 2019 COST-OF-LIVING ADJUSTMENTS FOR POPULAR BENEFITS

BENEFIT	2018	2019
HSA contribution max (including employee and employer contributions)	$3,450 ($6,900 family)	$3,500 ($7,000 family)
HSA additional catch-up contributions	$1,000 (this is not indexed)	Same
HDHP annual deductible minimum	$1,350 ($2,700 family)	Same
Limit on HDHP OOP expenses	$6,650 ($13,300 family)	$6,750 ($13,500 family)
Health FSA salary reduction max	$2,650	$2,700
QSEHRA max reimbursement	$5,050 ($10, 250 family)	$5,150 ($10,450 family)
Transit and parking benefits	$260	$265
401(k) employee elective deferral max	$18,500 (Catch-up contributions $6,000)	$19,000 (Catch-up limit unchanged)
Highly compensated employee	$120,000 (applies for 2019 plan year under look-back rule)	$125,000 (applies for 2020 plan year under look-back rule)

IS THERE MORE TO COME?

As this goes to press, the year isn't quite done. Federal agencies are still at work and Congress has started a lame duck session, so it's possible that we will see more changes in 2018. Also, as we go to press, the federal district court in Texas has found the ACA unconstitutional. 2019 will undoubtedly prove once again to be an exciting year. Key late breaking December developments will be covered in the New Year! ■