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.

"VOLUNTARY" BENEFITS FACE DIFFERENT COMPLIANCE BURDENS THAN TRADITIONAL GROUP HEALTH PLAN COVERAGE

Unlike group health coverage, which is almost always an ERISA covered benefit, employers may have a choice as to whether certain other "voluntary" benefits made available at the worksite should be treated as an employer sponsored ERISA plan or as a non-ERISA voluntary supplemental plan.

Many employers make supplemental benefits such as vision, dental, accident, disability, supplemental life, and health indemnity coverage available as a voluntary benefit to their employees. These benefits are commonly referred to by benefits advisors, insurers, and brokers as "voluntary supplemental" benefits to distinguish them from employer sponsored coverage such as primary group health coverage.

The term "voluntary" benefits also has a specific meaning under ERISA. If the requirements under ERISA for a voluntary plan are met, then the arrangement may not be subject to ERISA. Employers need to understand the parameters of this important exception to avoid inadvertently creating an ERISA covered plan.

This article discusses what it means for a plan to be voluntary under ERISA and provides a high level overview of related issues compared to providing benefits through a more formal employer sponsored program. This article is limited to supplemental products, which are also known as "excepted benefits" because they are excepted from Affordable Care Act mandates. Different issues arise with other products, including individual market primary medical plans.

WHAT IS A VOLUNTARY PLAN UNDER ERISA?

Most health and welfare type benefits offered by employers to employees through the worksite could, depending on the circumstances, be considered to be employee benefit plans subject to ERISA.

However, there is a safe harbor exception from ERISA for certain voluntary plans where the employer merely payroll deducts the coverage but does not otherwise fund, endorse, or sponsor the program.

Benefits such as vision, supplemental life, dental, accident, health indemnity and disability coverage can qualify for an ERISA exemption under this safe harbor. The key element in determining whether a plan is voluntary under ERISA is the level of involvement of the employer.

WHAT ARE THE ELEMENTS OF THE ERISA SAFE HARBOR?

The ERISA voluntary plan safe harbor has four parts, all of which must be satisfied:

- No contributions are made by the employer.
  - Any employer contributions will take the plan out of the safe harbor.
  - Pre-tax salary reduction contributions through a cafeteria plan also may take the arrangement out of the safe harbor, although there is somewhat mixed guidance on this issue.
- Participation in the program is completely voluntary for employees.
  - This means that the employee has complete discretion whether or not to purchase the policy.

- The employer does not endorse the program or the insurance coverage.
    - This is the element where most of the issues usually arise and is very dependent on the particular facts and circumstances.
- The employer cannot receive any consideration in connection with the program, other than reimbursement of actual reasonable expenses (and excluding any profit) for administrative services actually rendered in connection with payroll deductions.

WHAT TYPES OF EMPLOYER ACTIONS ARE AND ARE NOT PROHIBITED ENDORSEMENT?

Whether an employer has taken action that crosses the line to create an ERISA plan due to endorsement is very dependent on the facts and circumstances.

One action that, by itself, is not considered prohibited endorsement, may take the arrangement out of the safe harbor when looked at together with other actions and the arrangement as a whole.

There are many federal court cases reviewing these issues under a multitude of fact scenarios.

The following are some common employer actions that are generally permitted under the voluntary plan safe harbor:

- ✓ Permitting the insurer to publicize the program, such as through worksite presentations, including to come to the workplace to sign up employees for coverage directly with the insurer
- ✓ Paying premiums collected to the insurer
- ✓ Keeping business cards of the insurance agents on hand for employees, notifying employees about the availability of the arrangement and directing them to the insurer for more information
- ✓ Collecting premiums by payroll deduction

The following are common employer actions that individually (or in the aggregate) increase the risk that a plan will fall out of the safe harbor and into ERISA:

- ✓ Signing a group contract with the insurer
- ✓ Selecting the insurer, negotiating the plan with the insurer or designing the plan (an arrangement is more likely to come within the safe harbor if an insurance company or agent first approaches the employer, rather than if the employer seeks out the insurer)
- ✓ Describing the plan as subject to ERISA or including the plan in an ERISA Summary Plan Description
- ✓ Assisting employees with claims
- ✓ Encouraging employees to sign up for the coverage and/or referring to the coverage as part of the employer's benefit package.

WHAT IF THE PLAN I THOUGHT WAS A "VOLUNTARY" PLAN IS SUBJECT TO ERISA?

It is important to keep in mind that employers may choose to offer supplemental products through an ERISA covered group plan, and many do. Also, employers that offer group health plan coverage or their employees, are already dealing with ERISA.

In such cases employers might choose to bundle the supplemental coverage with the group health coverage under a single wrap-around plan – as opposed to treating the benefit as a separate stand-alone plan.

At its most basic level, ERISA has a variety of compliance requirements. For example, ERISA requires that the plan must be administered in accordance with a written plan document and that employees must be provided a Summary Plan Description describing the plan (which may often consist of the insurance certificate with some additional ERISA-required language).

ERISA also imposes annual (Form 5500) reporting requirements on most plans. There is a very important exception from ERISA reporting for fully insured plans with fewer than 100 participants. The employer or other plan administrator may be subject to certain fiduciary rules when handling ERISA covered contributions. Depending on the benefits offered, other requirements may apply, such as HIPAA privacy or even COBRA if the coverage is health coverage.

CONCLUSION

Many employers already have ERISA covered plans and choose to offer supplemental benefits on a group plan basis. The determination of whether a plan meets the voluntary plan safe harbor under ERISA depends on all the details of the arrangement.

The bottom line for employers who want to have a high level of certainty that their plan is not subject to ERISA is to limit their involvement to actions that clearly fall within the safe harbor, and to structure payroll deductions so that insurance premiums are paid on an after-tax basis.

Employers should consult with their own advisers to determine whether their arrangement is subject to ERISA and what compliance requirements may arise.