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, and Carolyn Smith 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 and Carolyn Smith are senior 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.

GRACE PERIODS, CARRYOVERS, AND CAFETERIA PLAN HEALTH COVERAGE ELECTION CHANGES

On May 12, 2020 the United States Department of Treasury and the Internal Revenue Service ("IRS") issued Notices 2020-29 and 2020-33.

https://www.irs.gov/pub/irs-drop/n-20-29.pdf
https://www.irs.gov/pub/irs-drop/n-20-33.pdf

These Notices are in response to the ongoing COVID-19 pandemic and provide flexibility for cafeteria plan participants with respect to certain mid-year plan elections as well as increasing the carryover limit for health flexible spending accounts ("Health FSAs"). Also included in this guidance are some helpful clarifications concerning high deductible health plans (HDHPs) and coverage of both COVID-19 testing and telemedicine.

The permitted plan design/election changes contained in these Notices are all optional and employers may adopt none, some or all of these changes.

Notice 2020-29

Mid-Year Elections

Even before the IRS issued Notice 2020-29 a number of insurers were allowing a COVID-19 "special enrollment" and making that special enrollment available for the self-insured clients as well. COVID-19, of course, is not an enumerated event that would allow a mid-year change in elections for a cafeteria plan and there were questions raised about whether such a special open enrollment could be offered on a pre-tax basis. In Notice 2020-29 the IRS specifically permitted a special open enrollment only for 2020 and with certain conditions.

The first condition is that election changes were limited to "employer-sponsored heath coverage," Health FSAs, and depended care assistance programs/spending accounts (DCAPs). The IRS did not further define "employer-sponsored health coverage" and the aim was undoubtedly focused on group medical coverage but that reference likely includes other health coverage such as dental and vision coverage as well. With respect to employer-sponsored health coverage the following elections are permitted.

- Prospectively enroll employee or family member in employer sponsored health coverage;
- Prospectively change to another health plan option of the same employer;
- Prospectively revoke coverage but only if the employee provides an attestation that he/she is or will be enrolled in other comprehensive health coverage (e.g., individual health insurance coverage, Medicare, etc.) not sponsored by the employer.

With respect to revoking coverage, the IRS has provided sample attestation language. The IRS also stated that an employer may rely on the written attestation unless the employer has actual knowledge that the employee is not, or will not be, enrolled in other comprehensive health coverage.

Again, these changes are permissive, and consideration should be given to how various election options or combinations will affect claims. Indeed, the IRS specifically noted that an employer may want to limit elections to prohibit adverse selection and provided the examples of an employee switching from self-only coverage to family coverage, or from a low option plan covering in-network expenses only to a high option plan covering expenses in or out of network.

For Health FSAs and DCAPs an employer may permit employees to revoke an election, make a new election, or decrease or increase an existing

FSA election on a prospective basis. Employers will undoubtedly want to prohibit Health FSA election changes that would reduce an election below what has already been paid by the Health FSA, and appropriate limiting language may be required. Changes can only be prospective so an employee cannot retroactively reject coverage and request a refund.

The "consistency rules" that ordinarily apply to cafeteria plan mid-year elections do not apply here and changes to the coverages listed above can be made for any reason as long as permitted by the employer. The employee does not need to establish that he or she was in any manner adversely affected by COVID-19.

If an employer decides to permit any of these mid-year election changes a plan amendment must be adopted by December 31, 2021.

Extension of Grace Period/Plan Years Ending in 2020

Ordinarily cafeteria plans function under the "use it or lose it" forfeiture rules. Thus, as a general rule, amounts remaining in a Health FSA or a DCAP at the end of a plan year must be forfeited. There are two exceptions to this rule. The first is a grace period that may apply to Health FSAs and DCAPs and allows amounts from a prior year to be used for expenses incurred up through two months and fifteen days (2 ½ months) into the succeeding year. The second exception is a permitted "carryover" of a specified amount from one plan year to the next and is only applicable to Health FSAs. Also, a Health FSA cannot generally have both a carryover and a grace period except as noted below.

Notice 2020-29 provides a permissive extension of coverage, until December 31, 2020 for a grace period ending in 2020 or for a non-calendar plan year ending in 2020. For example, a 2019 calendar year plan with a grace period ending on March 15, 2020 may extend that grace period until December 31, 2020. As another example, a cafeteria plan with a plan year ending on June 30, 2020 may allow employees to use any remaining Health FSA or DCAP amounts at the end of the plan year for expenses incurred from July 1, 2020 to December 31, 2020 without regard to whether the Health FSA or DCAP has a grace period and even if the Health FSA has a carryover. These extensions would have no applicability for a 2019 calendar year Health FSA that did not have a grace period.

Remember, however, that enrollment in a general Health FSA will make an employee ineligible for health savings account (HSA) contributions for the entire period of coverage. In our examples above for a calendar year plan with a grace period ending March 15, an employee (if enrolled in a HDHP and otherwise eligible) would ordinarily become HSA eligible as of April 1. An employee in a cafeteria plan without a grace period with a plan year ending June 30 would (again if otherwise eligible) become HSA eligible on July 1. If the Notice 2020-19 extensions are adopted the employee would, however, be HSA ineligible until at least January 1, 2021.

Although beyond the scope of this article, HSA eligibility has a concept known as the "full contribution rule" which allows an employee who meets certain other conditions to make a full year's HSA contribution if he or she is otherwise HSA eligible as of December 1 of that year. Because of this rule, employers who are considering

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extending eligibility may only want to do so through November 30, 2020 to preserve the possible use of the full contribution rule.

As with mid-year elections, if an employer wants to extend coverage for a grace period or non-calendar plan year an amendment is required by December 31, 2021.

COVID-19 Testing, Telemedicine and HDHPs

Notice 2020-15 was one of the IRS' earliest pieces of guidance on the COVID-19 pandemic and provided that an HDHP could provide medical care services related to testing for and treatment of COVID-19 with reduced or no cost sharing prior to the satisfaction of the applicable minimum HSA compatible HDHP deductible. Congress followed with the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) which generally expanded coverage for testing and provided that telemedicine could be provided with reduced or no cost sharing prior to the satisfaction of the applicable minimum HSA compatible HDHP deductible. With respect to telemedicine those provisions were effective March 21, 2020 and only for plan years beginning on or before December 31, 2021.

Notice 2020-29 clarifies the prior guidance and legislation in several ways.

- As to testing, relief is provided for expenses incurred on or after January 1, 2020 and include "the panel of diagnostic testing for influenza A & B, norovirus and other coronaviruses, and respiratory syncytial virus (RSV) and any items or services required to be covered with zero cost sharing …" pursuant to the FFCRA and CARES Act.
- As to telemedicine relief is provided retroactive to January 1, 2020.

Notice 2020-33

As mentioned above, one exception to the "use it or lose it" rule for Health FSAs (but not DCAPs) is a permitted limited carryover from year to year. Since the inception of the carryover in 2013, that carryover amount had been limited to $500. Notice 2020-33 increases the carryover amount to $550 for plan years beginning on or after January 1, 2020. This will mean that the first time the increased carryover amount could be used is for a 2020 calendar year plan to be used in calendar year 2021. The carryover amount for a 2019 plan year remains at $500.

Notice 2020-33 also provides for future indexing of the carryover amount set at 20% of the maximum Health FSA contribution. The maximum contribution for a Health FSA for a plan year beginning in 2020 is $2,750 resulting in the maximum carryover amount of $550. If that maximum Health FSA contribution would, for example, increase to $3,000 for plan years beginning in 2021 the maximum carryover amount 2021 to be used in the next plan year would increase to $600.

Employers desiring to increase the maximum Health FSA carryover amount for the 2020 plan year to be used in the 2021 plan year must adopt an amendment by December 31, 2021 to be retroactive to the beginning of the 2020 plan year.

Conclusion

Again, the plan design/election changes set forth in Notices 2020-29 and 2020-31 are permissive. They provide an opportunity for employees to change their elections in light of changed circumstances related to COVID-19 (although employees need not establish that they were affected by COVID-19 at all). That said, there are procedural steps that an employer will need to take including conducting the new "open enrollment" and amending plan documents. As to conducting the enrollment, communication will be key Although there are extended deadlines for plan amendments communication to employees should be sent out as soon as practicable letting them know what is (and what is not) permitted and the deadlines for making any new or revised election changes.

Implementation of these changes will also require close coordination with any Health FSA/DCAP third party administrator. Coordination will also be crucial with any insurance carrier (including a stop loss carrier). Just because the IRS is permitting the change under a cafeteria plan does not mean the carrier must allow the change. The concern of changes enhancing adverse selection may be of particular concern with the carriers. Finally, most of these changes are only temporary and apply for just the 2020 plan year. ■