



## Managing Plan Communication During a Time of Legislative Uncertainty

By Corrie Cripps

For many employer-sponsored group health plans, this is open enrollment season. This normally busy time of year, coupled with the general public's uncertainty about potential health care policy changes, has produced a more stressful environment than usual.

### What's happening at the federal level

While the congressional efforts to repeal and replace the Affordable Care Act (ACA) in 2017 have failed, the Trump administration is now taking executive and regulatory action to modify various aspects of the ACA. In addition, other guidance that may affect group health plans in 2018 is still pending. The following is a summary of the recent regulatory actions that will affect self-insured plans in 2018.

## Accommodation/exemption from the ACA's contraceptive mandate

On October 6, 2017, the Department of Labor (DOL) issued interim final rules (effective immediately) on religious and moral exemptions and accommodations to the ACA's contraceptive mandate.<sup>1,2</sup>

These interim final rules allow a much broader group of employers and insurers to exempt themselves from covering contraceptives such as birth control pills on religious or moral grounds. While the interim final regulations do maintain the existing accommodations process, the process is now optional. In other words, employers could choose not to request an accommodation, or choose to revoke their current accommodation and instead claim exemption status. The key difference in an accommodation versus an exemption essentially impacts the third party administrator (TPA). Under the exemption, the TPA would no longer be responsible for providing the contraceptive coverage. The rules outline the process if an employer now chooses to revoke its current accommodation (which includes notifying the TPA and plan participants).

## DOJ memo on gender identity/orientation

In a memorandum issued on October 4, 2017, to agency heads and US attorneys, Attorney General Jeff Sessions issued guidance to agency heads and US attorneys concluding that transgender individuals are not automatically protected

from discrimination under Title VII of the Civil Rights Act of 1964.<sup>3</sup>

It is important to note that the Department of Justice's (DOJ) recent guidance conflicts with the Equal Employment Opportunity Commission's (EEOC), an independent commission, stance that transgender employees are protected under Title VII.

The December 31, 2016, U.S. District Court injunction (applicable nationwide) on certain parts of the ACA Section 1557—the prohibitions against discrimination on the basis of gender identity and termination of pregnancy—is still in effect.<sup>4</sup> The DOJ's recent guidance does not specifically address ACA Section 1557. The U.S. Department of Health and Human Services (HHS) is expected to issue a new proposed rule on ACA Section 1557, which will likely include a religious exemption.

## Disability claims and appeals rules may be delayed until April 1, 2018

Last December the Employee Benefits Security Administration at the DOL issued a final rule on disability benefit plans claims procedures changes, which are slated to become effective on January 1, 2018.<sup>5</sup> There is now a proposed rule to move the compliance date to April 1, 2018 for these regulations.<sup>6</sup>



These regulations are applicable to all Employee Retirement Income Security Act (ERISA) plans that offer disability benefits. The regulations generally align procedures for disability claims with those for group health plans under the ACA.

### **HIPAA administrative simplification rules**


On October 4, 2017, HHS withdrew the January 2, 2014 proposed rule that would have required a controlling health plan (CHP) to submit information certifying compliance with certain Health Insurance Portability and Accountability Act (HIPAA) electronic transaction operating rules and standards.<sup>7</sup>

The withdrawal of this proposed rule does not remove the requirements for covered entities to comply with any of those regulations codified at 45 CFR parts 160 and 162. The other HIPAA Administration Simplification requirement to obtain and use Health Plan Identifiers (HPIDs) has been delayed since October 2014, with no new guidance issued.<sup>8</sup>

### **ACA emergency room regulations**

The American College of Emergency Physicians (ACEP) filed suit in May 2016 against the Departments of Health and Human Services, Labor and the Treasury (the Departments) regarding the ACA regulation for emergency services, applicable to non-grandfathered plans. Specifically, ACEP is concerned with the part of the rule that sets forth how much insurers/ plans are required to pay out-of-network physicians for emergency health care services.

On August 31, 2017, a federal court ruled that the Departments acted arbitrarily and capriciously in adopting final regulations under the patient protections provisions for emergency services.<sup>9</sup> The court stated that the Departments did not "seriously respond" to the transparency and manipulation concerns raised in comments by providers and advocacy groups to the interim final rules. The court's ruling does not invalidate the final regulations; instead the ruling sends the regulations back to the Departments and requires them to respond to ACEP's concerns and proposals in a substantive manner.



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## EEOC wellness regulation review

On August 22, 2017, the U.S. District Court for the District of Columbia concluded that the U.S. Equal Employment Opportunity Commission's (EEOC) interpretation of a "voluntary" wellness program in its regulations is arbitrary and capricious, and has sent the regulations back to the EEOC for reconsideration.<sup>10</sup>

In *AARP v. EEOC*, the AARP filed a lawsuit against the EEOC regarding its wellness program rules, which state that employers can cap incentives to participate in the wellness programs at 30% of an employee's health insurance costs. The AARP argued that these incentives are so high that they are not truly "voluntary", which means that older plan participants would have to incur financial penalties if they chose not to participate or divulge sensitive medical information in cases where the incentive requirement is that a health risk assessment be completed.

The court ruled in AARP's favor, determining that the EEOC did not justify its conclusion that the 30% incentive level is a reasonable interpretation of voluntariness. However, instead of vacating the regulations the court remanded them to the EEOC for reconsideration.

The EEOC has stated in its status report to the Court that it will need until August 2018 to reconsider its regulations on employer wellness programs and expects to issue a new final rule by October 2019.<sup>11</sup> AARP is expected to respond to the EEOC's status report and argue that revised regulations should be issued sooner.

## Executive order on health care

On October 12, 2017, the President issued an executive order on health care, which directs the Departments of Health and Human Services (HHS), Labor, and Treasury (the Departments) to develop regulations and guidance that could permit new health insurance options for employers and consumers.<sup>12</sup>



The executive order seeks to allow the Departments to look for ways to make it easier for small businesses to join Association Health Plans, expand on the availability and use of Health Reimbursement Arrangements (HRAs), as well as allow the sale of insurance across state lines.

The executive order does not specify a date in which a proposed rule from the Departments will be released.

### **IRS will reject individual tax returns that are silent on health coverage question**

The Internal Revenue Service (IRS) announced it will not accept electronically filed tax returns, and may suspend paper returns, where the individual does not answer the health coverage question.<sup>13</sup> Employers will need to ensure they are furnishing the Form 1095-B or the Form 1095-C, whichever is applicable, to certain employees by January 31, 2018.

## **What are the public's concerns**

Two recent studies show that Americans rank health care policy changes as one of their biggest concerns.<sup>14,15</sup>

The Transamerica Center for Health Studies study found that more than two-thirds (67 percent) of Americans reported having at least one chronic health condition, and 42 percent say losing health care because of a pre-existing condition is among their biggest fears.

The uncertain political environment around health care and the rising costs of health care undoubtedly cause stress, which ultimately affects the individual's health status. In addition, many individuals are not taking advantage of the incentive programs and/or wellness programs offered by their employers, even though more employers are offering such programs.<sup>16,17</sup>

## **How to communicate plan changes and spread awareness of incentives**

In order to neutralize the impact of uncertainty on plan participants, plans will need to engage more authentically with plan participants. For example, if a plan is removing coverage of a benefit, the plan administrator, or representative, should articulate the reason for the change, and be responsive to the plan participants' feedback. And if new benefits or programs are being added to the plan, those should be communicated as well. As the results from the Transamerica Center study indicate, while employers might believe that their wellness and incentive programs are clear as day to their employees, many employees aren't even aware that these programs exist in their employer-sponsored health plans.

In addition, there are notice requirements under ERISA and the ACA that plans need to follow when making plan changes. A recent lawsuit from the DOL reiterates the importance of complying with the ERISA documentation requirements. The DOL filed suit against Macy's and two of its TPAs alleging violations of ERISA's fiduciary duties.<sup>18</sup> The DOL states that at some point the plan changed the formula to calculate reimbursement of out-of-network claims, but Macy's did not update its plan documents to notify plan participants of this change. The lawsuit states that this caused plan participants to overpay on certain claims.

This lawsuit shows the continued importance of keeping ERISA plan documentation up-to-date and ensuring that plan administration is consistent with the written terms of the plan.

## Conclusion

For plans and TPAs, being well-informed on regulatory developments is always of the upmost importance, but is particularly important for this renewal and open enrollment season due to rapid changes in the regulatory landscape. In addition to keeping plan documents updated, employers and plans should also clearly communicate any changes to help ease the transition for plan participants and avoid liability landmines.

*Corrie Cripps is a plan drafter/compliance consultant with The Phia Group. She specializes in plan document drafting and review, as well as a myriad of compliance matters, notably including those related to the Affordable Care Act. ■*

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