



Hot Topics in Benefits Law

Presentation by:

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Webinar

Executive Summary

Representatives from employers, providers, brokers and other stakeholders attended the fifth and final BHCG symposium of the 2020 Delivering Value Series via webinar. Attendees heard how COVID-19 is impacting employee benefits and learned about new transparency and wellness regulations, other legislative updates and what the election results mean for health care legislation, as well as other benefits law topics.

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Hot Topics in Benefits Law

- **Health & Welfare plan changes**
 - Pandemic imposes new requirements for employers
 - Must cover coronavirus testing without deductibles, copays or other requirements (regardless if positive or negative result) during an emergency period
 - Will not affect high deductible health plan status
 - Can use pre-negotiated rate or look to price on provider's website or negotiate a price
 - Mandatory provision to start covering vaccinations and preventive care within 15 days
 - OTC drug expenses can now be reimbursed through FSA, HRA, HSA reimbursement, without the need for a prescription
 - Optional (can be retroactive to 1/1/20)

- Menstrual care products can be reimbursed
 - Many questions on FSA elections (e.g., Dependent Care FSA); some flexibility if there is a change in the cost of care (pressure on IRS to be more liberal)
- Telehealth can be provided by a high deductible plan without destroying HSA eligibility
 - Can be offered in high deductible health plans on first dollar coverage with time limitation
- Student loan tax exclusion available for employer payments for certain employee student loans (\$5,250) through 12/31/20
- New regulations providing relief for plan enrollees for certain deadlines
 - Effective 3/1/21—eight different sources of relief when they can elect or make payments (see slides 6 & 7)
 - Triggered by national emergency declaration
 - Would seem to need to end 2/28/21; keyed off when feds end national emergency – then deadlines last another 60 days; then for whatever time period is unused
- HSA modernization act update
 - Pressure on Congress to allow more access to clinics and small providers (and other expansion) and be clear as to what services can be provided
- **Affordable Care Act update**
 - Possible to change FSA and DCAP elections
 - PCORI fees are reinstated for additional 10 years (cost is \$2.54 per enrollee)
 - New template of summary of benefits and coverage – some tweaks
- **IRS reporting**
 - New forms for 1094/1095 (modest changes)
 - Reporting individual coverage HRAs (ICHRA)
 - Multiemployer plan relief continues (e.g., unionized workforce)
 - Modest extension for furnishing forms
 - Filing not extended (follow typical due dates from previous years)
 - Employers still need to file even though individual mandate is gone
 - Some concerns – pressure to collect more in penalties from employers; 2021 will be last year for good faith relief
- **State law mandates**
 - ERISA preempts state laws (most BHCG members subject to ERISA)
 - Some states trying to find a way around it (e.g., Oakland, CA minimum wage of \$15 or \$20 if no health plan)
 - Questions about states breaching notification laws and data reporting
 - Rutledge v. Pharmaceutical Care Management Association – sometimes pharmacies lose money filling an Rx, states try to protect them to ensure plans are paying more (45 states have some regulation)
 - ERISA says it impacts ERISA covered plans
 - SCOTUS heard arguments 10/6 on whether state law is preempted by ERISA. Recent decision (after the presentation) upheld the state regulation. Impact in this one situation is likely not terrible for self-funded employers. But it likely “opens the door” to further state regulation that employers may not like.
 - Drug coupons had to count toward deductibles out-of-pocket max said CMS in 2019; CMS guidance sometimes in conflict with IRS

- Do not have to count it under federal law but you might have to under state laws
 - Cross-plan offsetting – TPA uses one plan's recovery to help another plan recoup overpayment; may violate ERISA, class action case filed
- **New HRA options**
 - ICHRA new in 2020 – reimbursement for cost of individual coverage; subject to some provisions
 - Excepted benefit HRA (EBHRA) also new in 2020; stand-alone HRA is exception to ACA rule
 - Employer contribution limited to \$1,800; subject to some provisions
- **Bostock ruling**
 - HHS weakened 1557 regulations under ACA; discrimination “on the basis of sex” does not include gender identity
 - SCOTUS ruled June 15 Title VII prohibits employment discrimination based on LGBTQ status; HHS regs challenged
 - Employers should verify if subject to 1557 (only applies if you are receiving federal funds)
- **COBRA litigation**
 - Large employers have been sued over deficient COBRA notices; however, should be directed at COBRA administrator, not plan administrator
 - Recent court decision in employers' favor – “no harm, no foul”
 - New model notice issued in May; good time to review and update notice (consider COVID rules summary too)
- **ACA litigation**
 - SCOTUS heard arguments re. ACA 11/10
 - Individual mandate reduced to \$0 by Congress; TX and some other states argue provision is unconstitutional since mandate is no longer considered a tax. No decision as of January 6, 2021
 - Court could strike down just the mandate, provisions related to the mandate or entire ACA (Trump administration argued ACA must fall)
 - Unlikely entire ACA will fall (political pressure for Congress to act immediately if it does)
- **Drug pricing**
 - New rules on importing prescription drugs from Canada (complex process may be too difficult for employers)
 - Trump's executive orders on “most favored nation” drug pricing and Medicare Part D rebates may be in limbo; could raise prices for employers
- **Surprise billing legislation**
 - Addresses out-of-network large bills for enrollees
 - One proposal to require in-network payment rates – not sure where it will go
 - Maybe consider better communication and help with choosing providers
 - Recent legislation (December 2020) addresses this and will require further consideration by employers
- **Price Transparency regulations**
 - Flow from ACA rule, applies to most plans
 - Goal to make it easy for enrollees to access cost sharing info through the internet; initial list of 500 common medical items and services must be available by 1/1/23, entire list by 1/1/24

- Includes prescription drugs (will have to coordinate with PBM)
- Massive endeavor, TPAs and insurers will fight against it
 - Huge database requirements; want to keep pricing confidential; lawsuits expected
 - Must disclose what enrollee has incurred so far – have to give accurate information on the fly
- Fully insured plans can satisfy regulations by written agreement with insurer; self-funded plans will look to TPA and PBM for help
- Massive game changer regulation – prices decrease, increase; what do third parties do with data?; will employers implement financial incentives to use best cost providers, what about quality?
 - Final regulations out – first hurdle is 1/1/22, should begin working on requirements now (could be some changes with new administration but not very likely in near future); be sure to monitor lawsuits
- **Wellness regulations**
 - Wellness regulations are set but EEOC has ADA regulations in turmoil
 - AARP filed lawsuit; EEOC had to draw new regulations – approved in June but haven't been published yet
- **Direct Primary Care (DPC)**
 - Contract between an individual and a primary care provider (x amount a month for a list of services, no third-party billing)
 - IRS says medical care is nontaxable, but hint it will be an ERISA covered plan (less practical for an employer to implement as a group health plan alternative)
- **Mental health parity update**
 - Continues to be a high priority item (half of government actions were related to mental health parity)
 - Checklist clarified reimbursement rate but can't use different factors to establish rates (constant process)
 - Need documentation from TPA/PBM
- **Association health plans, etc.**
 - Current administration wanted to expand rules but remain in limbo (will Biden end new rules and keep old test?)
 - Odd case challenges DOL on what can be an ERISA plan
 - Data marketing partnership set up health plan covering tens of thousands of limited partners
 - DOL says it is not an employer plan; court said yes, it is
- **HIPAA update**
 - January 2018 substance use disorder regulations required providers to have contract to protect substance use disorder records
 - Could apply to group health plans and require updates
 - CARES Act (March 2020) modified rules to be consistent with HIPAA – expect regulations by March 2021 with more detail
 - Enrollees have right to access medical records (increased enforcement of this rule)
 - First ever enforcement action followed by a number of settlements
 - Employers may want to review BAAs, policies and procedures
- **What to expect going forward**

- Coronavirus will continue to shape many aspects of life
 - Increase in telehealth, mental health and childcare benefits (innovative benefits and continued tweaks)
 - Shutdowns, layoffs, furloughs
 - Additional federal stimulus (may include COBRA subsidies)
 - COVID-19 vaccines (questions about employer requirements)
 - Increase in coronavirus-related vaccination
- Cybersecurity and data security are hot topics as more people work from home
 - 401(k) account scams
 - DOL guidance forthcoming for plan sponsors and providers
 - States could enact more data privacy laws
 - Questions about how to protect plan information (plan asset?)
- Congressional lame duck session
 - New coronavirus relief bill (were not far apart in Oct.)?
 - COBRA subsidy unlikely in any bill
 - Surprise billing component possible
- **Biden administration**
 - Likely to issue executive order to review all proposed regulations (may delay effective dates)
 - Coronavirus is job number one and additional relief possible (could impose additional regulations)
 - DOL expected to change focus to employee protections – may impact guidance on gig workers, state vs. federal, etc.
 - No significant changes (i.e., ACA, tax increases) if GOP holds the Senate
 - Health care vision
 - Protect and build on ACA
 - Support new public option
 - Increase tax credits for premiums
 - Address lack of health system market competition and its effect on driving up prices; abuse of power by pharmaceutical companies
 - Expand access to contraception and protect abortion rights and enforce health care protections
- **UHC and electronic payment cards**
 - UHC sent notice to employers they want to move from paper checks sent to providers to electronic payment cards
 - 1%-3% may be paid to UHC or subsidiary
 - Balance billing questions; unwilling to specifically indemnify
 - Employers may be able to opt out; should check if process will save money
- **Closing (Jeff Kluever)**
 - Please consider BHCG membership – a must for employers looking to make an impact on health care value (GNS Physician Study and Rand results show significant potential savings opportunities)
 - Look for more information/invitation about the new BHCG dual medical plan administrator model (meetings in mid-December)

[Slides](#) or a [recording with slides](#) from the webinar are available for review.