Patterson Belknap Webb & Tyler LLP

Employee Benefits & Executive Compensation Alert October 2014

New Developments and Impending Deadlines for Employer Group Health Plans

As the federal government agencies continue to push forward with implementation and administration of health care reform (i.e., the Patient Protection and Affordable Care Act), there are two recent developments that we want to highlight that should be of interest to employers who sponsor group health plans. We also discuss an impending deadline for employers who sponsor self-insured health plans.

DOL Issues New COBRA Continuation Coverage Notices

Earlier this year, the U.S. Department of Labor ("DOL") indicated that its ten-year old model COBRA notices, issued in 2004 with the original regulations under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), were outdated. To that end, the DOL issued updated versions of: (1) the model COBRA general notice[1] and (2) the model COBRA election notice.[2] The updated notices generally reflect the existence and implication of the Health Insurance Marketplace as a result of the Patient Protection and Affordable Care Act. As a reminder, COBRA, and its applicable notice requirements, generally apply to a group health plan for a calendar year if the employer maintaining the plan employs 20 or more employees on a typical business day during the preceding calendar year.[3]

The updated model COBRA notices are available in electronic form on the DOL's website at www.dol.gov/ebsa/cobra.html. However, as with the DOL's old model notices, the new model notices must be customized with respect to each applicable employer's relevant applicable group health plans and COBRA procedures. While the DOL has invited comments on ways to improve or streamline the new model notices, which indicates that the updated model notices are in flux and further changes may apply in the near future, the DOL will consider use of the recently published model notices to be good faith compliance with the notice content requirements of COBRA for the time being. The DOL has also noted that use of its model notices is not required, although given the DOL's deference to its models, we do recommend their use (although with customized changes to fit each employer's plans and procedures) to be able to have safe harbor protection.

IRS Issues Guidance on New Permitted Election Changes for Health Coverage under Cafeteria Plans

In September, the Internal Revenue Service ("IRS") issued Notice 2014-55 (available at http://www.irs.gov/pub/irs-drop/n-14-55.pdf), which expanded the application of the permitted change rules for health coverage under a cafeteria plan (also referred to as a "Code Section 125 plan").

---

[1] The COBRA general notice, required to be distributed to employees and eligible family members following their enrollment in the applicable group health plan, gives individuals initial information about their future right to COBRA under the plan (oftentimes this notice is provided in the plan's summary plan description).

[2] The COBRA election notice, required to be provided to employees and their eligible family members (known as "qualified beneficiaries") who have lost (or will lose) coverage under the group health plan as a result of a "qualifying event" (i.e., termination of employment, reduction in hours, divorce, death of covered employee, etc.), gives information regarding rights and obligations in electing COBRA as well as the form to use to elect COBRA.

[3] All controlled group entities are aggregated for purposes of determining whether the "employer" is one to which COBRA applies to its applicable group health plans.

As a reminder, a cafeteria plan is a written plan maintained by an employer under which employees can choose to pay for certain benefits (e.g., group health plan coverage, flexible spending accounts, etc.) on a pre-tax basis. Employee elections under a cafeteria plan are generally made before the beginning of a year (or at the time a new employee is hired) and cannot be changed during the year except to the extent that the relevant cafeteria plan includes permitted election change rules (such as a change in status—e.g., marital status, birth of a child, employment status, etc.—or a HIPAA special enrollment right) pursuant to the IRS's regulations under Section 125 of the Internal Revenue Code (the "Code").

Under the current election change rules, a cafeteria plan may not allow an employee to revoke an election under the group health plan during a year solely to enroll in a health plan offered through the health care reform market exchanges, unless the employee otherwise can satisfy one of the permitted election change rules. Therefore, an employee would have to wait until the end of the cafeteria plan's plan year (generally the calendar year) to stop paying towards employer-provided health insurance coverage if the employee instead wanted to enroll in an exchange plan.

Recognizing the hardship that these stringent change in election rules may cause for employees, the IRS has liberalized its interpretation of the rules to allow a cafeteria plan to permit a participating employee to revoke an election of coverage under a group health plan if he or she intends to obtain coverage through an exchange plan or other plan. If an employer so chooses, it may amend its cafeteria plan to allow an employee to prospectively revoke an election of coverage under the employer's group health plan if the following conditions are met:

(1) *An employee's hours of service are reduced:* If an employee was reasonably expected to work on average at least 30 hours per week and there has been a change in the employee's status such that the employee will now be reasonably expected to work on average less than 30 hours per week, the employee may revoke his or her election of coverage under the employer's group health plan even if the change in work schedule does not result in the employee losing coverage under the employer's group health plan, provided that the revocation of the election of coverage under the employer's group health plan corresponds to the employee's (and any related family members') intended enrollment[4] in another plan that provides "minimum essential coverage"[5] and that new coverage is effective no later than the first day of the second month following the month that includes the date the original coverage under the employer's group health plan is revoked; or

(2) *Enrollment in an exchange plan:* If an employee is eligible for a special enrollment period to enroll in a qualified health plan through an exchange or the employee seeks to enroll in a qualified health plan through an exchange during an exchange's open enrollment period, the employee may revoke his or her election of coverage under the employer's group health plan provided that such revocation corresponds to the intended enrollment of the employee and any related family members in a qualified health plan through an exchange,[6] and such new coverage is to be effective beginning no later than the day immediately following the last day of coverage in the employer's group health plan.

Notably, a mid-year change for the reasons described above is not permitted with respect to elections under a health flexible spending account.

---

[4] This consistency requirement would prohibit an employee who is, for example, enrolled in the employer's group health plan with family coverage, from revoking coverage for all family members, but only enrolling himself in other minimum essential coverage.
[5] The term "minimum essential coverage" generally means coverage under any of the following: (a) a government-sponsored program, including coverage under Medicare Part A, Medicare advantage plans, Medicaid, the CHIP program, and TRICARE; or (b) an eligible employer-sponsored plan.
[6] Again, this consistency requirement would prohibit an employee who is, for example, enrolled in the employer's group health plan with family coverage, from revoking coverage for all family members, but only enrolling himself in exchange coverage.

The IRS has provided that an employer may rely on the reasonable representation of an employee with respect to whether he or she intends to or has enrolled in another plan that provides minimum essential coverage or coverage under an exchange plan under the requirements noted above.

Allowing the newly permitted election changes are optional for employers. To enable the new election change rules to apply, an employer's cafeteria plan must be amended to provide for such election changes. Such amendments generally must be adopted on or before the last day of the plan year in which the new elections are allowed, and may be retroactive to the first day of the plan year, provided that prior to adopting the formal amendment the cafeteria plan operates in accordance with the IRS's Notice and the employer informs participants of the change to the plan. The IRS has also given employers extra time to adopt amendments for the 2014 plan year, such that any such amendments can be adopted up until the last day of the plan year that begins in 2015—i.e., for cafeteria plans that operate on the calendar year, employers have until December 31, 2015 to adopt formal amendments to their plans to add these changes but can begin applying the rules immediately. However, in no case can an employee's election to revoke coverage be applied retroactively.

Deadline Approaching for Obtaining a Health Plan Identifier ("HPID")

Most health plans must obtain a HPID from the U.S. Department of Health and Human Services ("HHS")/Centers for Medicare and Medicaid Services ("CMS") by *November 5, 2014*. However, small plans—i.e., plans with annual receipts[7] of $5 million or less—have until November 5, 2015 to comply with this requirement. While the requirement applies to both insured and self-insured plans alike, insurers are generally responsible for obtaining HPIDs for insured plans. Employers, however, are required to obtain HPIDs for their applicable self-insured plans, but may authorize a third party administrator ("TPA") to obtain an HPID on its behalf.

There remain many questions about the application of the HPID rules—including, for example, to which type of self-insured plans do the HPID rules apply—and definitive answers are not expected from the applicable government agencies prior to the November 5, 2014 deadline. Therefore, employers of self-insured arrangements are urged to use their best efforts to timely comply with the requirements. Based on agency guidance issued to date, it seems that health flexible spending accounts ("FSAs") and health savings accounts ("HSAs") are not required to have HPIDs, but health reimbursement arrangements ("HRAs") likely do require HPIDs unless they cover only deductibles or out-of-pocket costs (i.e., because these types of HRAs function more like supplemental integrated benefits to an underlying medical plan than a stand-alone plan).

Obtaining an HPID is a multi-step electronic process. The most recent governmental guide to the registration process is available at http://www.cms.gov/Regulations-and-Guidance/HIPAA-Administrative-Simplification/Affordable-Care-Act/Downloads/HPIDQuickGuideSeptember2014.pdf, although we understand that the processes and systems are continually being updated in attempts to be more streamlined.

Please contact us for further information and if you would like assistance with your group health plans' COBRA notices, updating your cafeteria plans or if you have questions about the HPID requirements.

[7] For self-insured plans, "annual receipts" mean the total amount paid for health care claims by the employer during the plan's last full fiscal year. For fully-insured plans, the amount of total premiums paid for health insurance benefits during the plan's last full fiscal year should be used.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

David M. Glaser	212-336-2624	dmglaser@pbwt.com
Bernard F. O'Hare	212-336-2613	bfohare@pbwt.com
Bruce L. Wolff	212-336-2959	blwolff@pbwt.com
Jessica S. Carter	212-336-2885	jcarter@pbwt.com
Meridith Bogart Krell	212-336-2361	mkrell@pbwt.com

To subscribe to any of our publications, call us at 212.336.2186, email info@pbwt.com, or sign up on our website, www.pbwt.com/resources/publications.