Patterson Belknap Webb & Tyler LLP

Employee Benefits & Executive Compensation Alert September 2012

REMINDER: UPCOMING HEALTH CARE REFORM DEADLINES

Under the health care reform enacted in 2010 under the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (referred to collectively here as "PPACA") new obligations are imposed on employers and group health plans with respect to the provision of a summary of benefits and coverage and W-2 reporting requirements. Beginning in 2013, moreover, employee salary reduction contributions to health flexible spending arrangements will be limited to $2,500 per year. The following Alert highlights upcoming deadlines with respect to those obligations.

Summary of Benefits and Coverage Requirements

PPACA requires that a summary of benefits and coverage ("SBC") be provided to group health plan participants, beneficiaries and eligible enrollees (including COBRA qualified beneficiaries). The SBC is intended to allow individuals to easily compare coverage options across different types of plans and insurance products, and its content is somewhat different than the summary plan description which ERISA plan sponsors are already required to provide.

Employers must begin providing SBCs to group health plan participants and beneficiaries on the first day of the open enrollment period that begins on or after *September 23, 2012*, and to newly eligible individuals and special enrollees that enroll in coverage, other than through an open period, on the first day of the plan year that starts on or after September 23, 2012. If an insurer timely provides an SBC (that fully satisfies the SBC rules) on behalf of an employer, the employer's obligation to provide an SBC is satisfied.

As a reminder, an SBC must generally be provided at the following times:

- As part of any written application materials that are distributed in connection with initial enrollment (or by the first date on which the participant is eligible to enroll in coverage if the plan or issuer does not distribute written application materials for enrollment);[1]
- By the first day of coverage (only if there are any changes to the information in the SBC that was previously provided as part of the application/enrollment process). For plan participants who elect a different benefit package from the package in which they were previously enrolled, this requirement applies;

[1] With respect to a plan that offers multiple benefit packages, an employer must provide to newly eligible individuals an SBC with respect to each package option for which an individual is eligible to enroll. Similarly, with respect to SBCs distributed during a renewal period, it appears an employer must provide to an individual who is not enrolled in any benefit package an SBC with respect to each package option for which the individual is eligible to enroll. In contrast, with respect to an individual already enrolled in a benefit package, an employer is required to a provide a new SBC automatically on renewal only with respect to the benefit package in which the individual is enrolled; the employer is not required to automatically provide the SBC for other benefit packages to such an individual at that time. However, an individual may request an SBC with respect to a benefit package in which he/she is not enrolled but for which he/she is eligible. In addition, as described above, if an individual decides to enroll in a different benefit package from the package in which he she was enrolled, the individual will need to be provided with the SBC for the new benefit package, by the first day coverage under that benefit package begins.

- Within 90 days after mid-year enrollment, with respect to special enrollees;
- As part of renewal materials (if renewal is automatic, the SBC must generally be provided at least 30 days prior the first day of the new plan year);[1] and
- Upon request.

Detailed guidance has also been issued addressing issues related to the SBC's content, format, delivery methods and required recipients.[2] Employers should keep in mind there are limited exceptions from the SBC requirements. For example, an SBC is not required with respect to stand-alone dental and vision plans and certain health flexible spending arrangement plans.

For employers offering insured group health plans, we recommend that employers immediately consult with plan insurers to ensure that SBCs can be timely delivered. According to guidance issued with respect to the SBCs, it is anticipated that penalties will not be imposed on plans that are working diligently and in good faith to comply with the SBC requirement. However, full compliance should be the goal.

W-2 Reporting of Aggregate Cost of Employer-Sponsored Health Coverage

In our initial Alert on national health care reform, we also reported that PPACA generally requires employers to report the aggregate cost of employer-sponsored health coverage on an employee's W-2. Although PPACA initially required that employers begin W-2 reporting on this issue on W-2 Forms relating to 2011, that deadline was subsequently moved to first apply to W-2s issued with respect to the 2012 tax year.

By way of background, the new W-2 reporting requirement requires an employer to report the "aggregate" cost of employer-sponsored health coverage on an employee's W-2. IRS guidance has now clarified that an employer generally must report both the portion of the cost paid by the employer, as well as the portion of the cost paid by employee (regardless of whether the employee paid for his or her portion on a pre-tax or after-tax basis). Special reporting rules apply with respect to reporting the aggregate cost related to a health flexible spending account (Health FSA). No reporting is required for a Health FSA funded solely through employee salary reduction elections. But if the amount available for the Health FSA with respect to a plan year exceeds the salary reduction elected by the employee for the plan year, then an employer must report on the W-2 the available Health FSA amount which is in excess of the employee's Health FSA salary reduction election.[3] However, if the amount of salary reduction elected by an employee equals or exceeds the amount of the Health FSA for the plan year, the employer should not include the amount of the Health FSA in the aggregate reportable cost.

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[2] Important components of guidance regarding SBC obligations can be found at the following links: http://www.gpo.gov/fdsys/pkg/FR-2012-02-14/pdf/2012-3228.pdf, http://www.gpo.gov/fdsys/pkg/FR-2012-02-14/pdf/2012-3230.pdf, http://www.dol.gov/ebsa/faqs/faq-aca8.html, and http://www.dol.gov/ebsa/faqs/faq-aca9.html. For more information about those rules, contact one of the individuals listed at the end of this Alert.

[3] While it is presumed that this analysis should disregard any grace period carryovers, the IRS guidance is not clear on this issue.

Although generally all employers that provide employer-sponsored health coverage are subject to this reporting requirement, current IRS guidance exempts certain employers *on an interim basis*. In particular, under this transitional relief, an employer is not subject to the reporting requirement for a calendar year if it was required to file fewer than 250 Forms W-2 for the preceding calendar year (special rules apply to employers using an agent under Internal Revenue Code Section 3504). In addition, an employer is not required to report the cost of coverage provided under a self-insured plan *that is not subject to COBRA*. If a church employer otherwise exempt from COBRA requirements provides health coverage only through a self-insured arrangement, therefore, it is not currently subject to the reporting requirement. Finally, an employer is not obligated to report the cost of coverage on the Form W-2 provided to a terminated employee who requests to receive the Form W-2 prior to the end of the calendar year. The IRS has indicated that these exemptions are part of its transition relief, intended to facilitate compliance with the W-2 reporting requirements, and that future guidance may limit the availability of some or all of this transition relief. However, any future guidance limiting the availability of relief, and thus eliminating one or more of those temporary exemptions from the reporting requirement, will be prospective only and will not apply earlier than January 1 of the calendar year beginning at least six months after the date of the issuance of that future guidance.

Because an employer is not required to issue a Form W-2 reporting aggregate cost of employer-sponsored health coverage to an individual to whom an employer is not otherwise required to issue a W-2, an employer is not subject to this reporting requirement with respect to retirees who are receiving tax-free health coverage.

It is also notable that the aggregate reporting cost includes any portion of the health coverage cost that is includible in an employee's gross income. Therefore if an employer provides health coverage to an employee's non-tax dependent same-sex spouse or non-tax dependent domestic partner, the cost of the spouse's or domestic partner's health coverage will be reported on the W-2, even though the value of that coverage should already be included in the employee's W-2 income.

As a reminder, the purpose of the reporting requirement (to be entered in Box 12 of a W-2) is informational only; it does not affect whether any particular coverage is taxable.

$2,500 Annual Limit on Employee Contributions to Health FSAs

Beginning in 2013, an employee's salary reduction contributions to a Health FSA may not exceed $2,500 per *plan year*. This limit may be indexed for inflation in later years. It first applies to plan years starting after December 31, 2012.

The IRS has provided helpful guidance on this limit. In particular, if a plan includes a grace period feature, unused salary reduction contributions made to the plan in one plan year which are carried over to the grace period will not limit the amount an employee could contribute with respect to the subsequent plan year. In addition, if an employee is employed by two or more employers, who are not members of the same controlled group, the employee may contribute up to $2,500 (as indexed for inflation) under *each* employer's Health FSA.

A plan sponsor has until December 31, 2014 to amend a Health FSA to reflect the $2,500 contribution limit, so long as the plan is operated in accordance with this limit beginning with the first plan year starting on or after January 1, 2013. Nevertheless, immediate action is necessary to ensure operational compliance. In particular, a plan sponsor should review its employee election forms and any explanatory or communication materials related to employee 2013 plan year Heath FSA contributions, and revise these documents as necessary, to ensure compliance with the $2,500 limit.

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.

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