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Agencies Issue More COVID-19 Vaccine Guidance

The Departments of Health and Human Services, Labor, and Treasury have issued a new set of frequently asked questions ("FAQs") to address a variety of questions relating to group health plans and the COVID-19 vaccination. This guidance is particularly timely and helpful as many employers are now legally obligated to require or encourage their employees to be vaccinated.

Coverage of COVID-19 Vaccinations

The Coronavirus Aid, Relief, and Economic Security (CARES) Act requires group health plans that are not "grandfathered" (as defined in the Affordable Care Act) to provide coverage for any "qualifying coronavirus preventive service" without any cost-sharing requirements. Pursuant to this, plans must now cover COVID-19 vaccines and their administration, without cost-sharing, to the extent they are authorized under an Emergency Use Authorization (EUA) or Biologics License Application (BLA).

This requirement became effective on January 5, 2021, which was 15 business days after the CDC's' Advisory Committee on Immunization Practices (ACIP) issued its recommendation with respect to COVID-19 vaccines.

The FAQs confirm that this coverage requirement extends to the "administration of an additional dose to certain individuals, administration of booster doses, or the expansion of the age demographic for whom the vaccine is authorized or approved."

Wellness Programs

As noted in the FAQs, the HIPAA nondiscrimination rules prohibit group health plans from discriminating with respect to eligibility and premium contributions based on an individual's health status. As a result, the FAQs reiterate that plans cannot condition plan eligibility on being vaccinated.

But what about employers that have started offering group health plan premium discounts for vaccinated employees (or imposing premium surcharges on those who are not vaccinated)? The FAQs confirm that these premium discounts or surcharges are a form of health-status based discrimination with respect to premium contributions, and thus are not allowed unless they meet the wellness program exception to the HIPAA nondiscrimination rules.

Basically, the following five requirements must be satisfied to meet the wellness plan exception:

1. Eligible individuals must be able to qualify for the reward at least once per year;
2. The total reward for all health-contingent wellness programs must not exceed 30% (or 50% for wellness programs designed to prevent or reduce tobacco use);
3. The program must be reasonably designed to promote health or prevent disease;
4. The full reward must be available to all similarly situated individuals, which includes allowing a reasonable alternative standard (or waiver) for obtaining the reward for anyone for whom it is unreasonably difficult due to a medical condition or medically inadvisable to satisfy the otherwise applicable standard; and
5. The plan must disclose the reasonable alternative standard in plan materials describing the wellness program.

The FAQs identify an attestation by an individual that they are following the CDC's guidelines for unvaccinated individuals as an example of a "reasonable alternative standard."

The FAQs confirm that the 30% limit is applied on an aggregate basis to all health-contingent wellness programs with respect to the plan. Additionally, the limit is based on the full cost of self-only coverage, including both the employer and employee share of premiums.

Finally, the FAQs address how premium discounts (and surcharges) interact with the ACA's affordability thresholds. In general, an employer may be subject to an ACA Shared Responsibility penalty for any full-time employee who is offered coverage if the required premium contribution for self-only coverage exceeds 9.83% of the employee's income.

According to the FAQs, these COVID-19 vaccine discounts are treated as not earned for purposes of the ACA affordability determination. So even if someone is vaccinated and actually paying a lower premium, the full premium amount (without the discount) is used to determine if the coverage is affordable to the employee.

By comparison, in the case of a premium surcharge, the surcharge amount is not disregarded for purposes of the ACA affordability determination. In other words, if the normal premium contribution is $100 but unvaccinated employees pay $110, then $110 is used to determine if the coverage is affordable.

The FAQs are available here.

IRS Issues Updated Employee Benefit Plan Limits for 2022

As it does every year at about this time, the IRS has published inflation-adjusted limits for tax-qualified retirement plans and health and welfare plans for 2022. Reflective of higher than normal overall inflation rates, several of the year over year increases are more significant than in the recent past.

The following table summarizes some of the key limits relating to 401(k) and 403(b) plans, defined contribution and defined benefit pension plans, and health and dependent care flexible spending arrangements (FSAs).

	2021	2022
401(k), 403(b), and 457 plan elective deferrals	$19,500	$20,500
Age 50 catch-up contribution limits	$6,500	$6,500
415(c) Annual Addition Limit for Defined Contribution Plans	$58,000	$61,000

415(b) Annual Benefit Limit for Defined Benefit Plans	$230,000	$245,000
401(a)(17) Covered Compensation Limit	$290,000	$305,000
Social Security Wage Base	$142,800	$147,000
Health FSA Salary Reduction	$2,750	$2,850
Dependent Care FSA Salary Reduction	$10,500*	$5,000

*The $10,500 limit for Dependent Care FSAs in 2021 was the result of a statutory change enacted as part of the American Rescue Plan Act of 2021.

For additional information, see IRS Notice 2021-61, Rev. Proc. 2021-45, and the Social Security Administration's website.

PBGC Releases Annual Report

The financial position of the PBGC's single-employer program is continuing to improve, according to the PBGC's fiscal year 2021 annual report. In fact, for the first time in almost 20 years, both the single-employer and multiemployer programs ended the year with a surplus.

Single-Employer Program

The single-employer program's surplus almost doubled from $15.5 billion at the end of FY 2020 to $30.9 billion at the end of FY 2021. The program's net income of $15,459 million included $5,282 million in credits due to change in interest factors, $4,531 million in net premium and other income, a gain of $4,058 million in investment income, and $3,940 million in credits from actuarial adjustments. These favorable factors were offset by $1,022 million in losses from completed and probable terminations, $762 million in charges due to expected interest related to PBGC's liabilities ($119.6 billion as of September 30, 2020), and $568 million in administrative, investment, and other expenses.

Multiemployer Program

Credit for the multiemployer program's dramatic improvement from a $64 billion deficit in FY 2020 to a $478 million surplus in FY 2021 largely goes to the American Rescue Plan Act's (ARP) special financial assistance to the most financially troubled multiemployer plans. Before the ARP, the multiemployer program was projected to become insolvent in FY 2026.

According to the Annual Report:

> The Multiemployer Program's deficit would have remained significant if not for the favorable impact of the ARP Act. The $64,227 million increase in the Multiemployer Program's FY 2021 cumulative results of operations is due to $63,736 million in credits from insolvent and probable plans-financial assistance, $369 million in net premium and other income, $143 million in

credits to actuarial adjustments, $46 million in credits due to change in interest factors, offset by $47 million in fixed investment losses, $9 million in administrative and investment expenses, and $11 million in charges due to expected interest on accrued liabilities.

The full text of the PBGC's FY 2021 Annual Report is available here.

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