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United States | Human Capital | 11 February 2022

Rewards Policy Insider
2022-3

In this Issue:

OSHA Withdraws COVID-19 Vaccination and Testing Mandate for Private Employers

The Occupational Safety and Health Administration (OSHA) on January 25 announced it was withdrawing the

emergency temporary standard (ETS) it issued late last year that would have required private employers with 100 or more employees to implement policies requiring employees either to be vaccinated or regularly tested for COVID-19. The announcement came after the Supreme Court blocked implementation and enforcement of the rule earlier this month.

Why Did OSHA Withdraw the ETS?

The Supreme Court's order did not require OSHA to withdraw the ETS. However, it did raise serious doubts about whether OSHA would prevail in lawsuits challenging its authority to issue the ETS. The Court's majority opinion noted, for example, "The [Occupational Safety and Health] Act empowers [OSHA] to set *workplace* safety standards, not broad public health measures."

Perhaps acknowledging the long odds it now faces in court, OSHA indicated it would now be "prioritizing its resources to focus on finalizing a permanent COVID-19 Healthcare Standard." Towards that end, it did not withdraw the ETS as a proposed rule. That may give OSHA flexibility to issue a permanent COVID-19 Healthcare Standard in final form without having to first issue a new proposal with a separate notice and comment period.

So far, the timing and parameters of a permanent standard are not known.

Next Steps for Employers

The Biden Administration is continuing to encourage employers to require their employees to be vaccinated. Employers can choose to do that, although they still need to comply with other applicable laws including the Americans with Disabilities Act. Different state laws may be relevant as well. For example, two states (Tennessee and Montana) prohibit private employers from requiring their employees to be vaccinated, and nine others place limits on private employer mandates.

Certain healthcare providers are also still subject to the Centers for Medicare and Medicaid Services' (CMS) vaccine mandate for healthcare workers. Even though that mandate is being challenged in court, the Supreme Court refused to block its implementation and enforcement. Still in play is the federal contractor mandate, which currently is not being enforced in the United States pending the 11th Circuit Court of Appeals review of a nationwide injunction issued by a federal district court. The Supreme Court eventually might be asked to rule on that as well.

There is also the New York City mandate, which is still in effect.

It all adds up to a complex and dynamic regulatory environment for employers to navigate. Even incentives for employees to be vaccinated can raise questions under the ADA, the Genetic Information Nondiscrimination Act, and HIPAA, among other laws.

Employers should work closely with legal and other professional advisers to understand what they can do and what they have to do with respect to their strategies for getting employees vaccinated.

Supreme Court Issues Ruling in "Excessive Fee" Case

Offering a wide range of investment alternatives does not relieve 401(k) and other participant-directed plan fiduciaries from their duties of prudence with respect to selecting and monitoring each investment alternative, a unanimous Supreme Court held on January 24. The Supreme Court's decision is an important development in the "excessive fee" litigation that has targeted hundreds of plan sponsors over the last several years.

Case Background

The case involved two participant-directed retirement plans offered by a private university to its employees. The plans offered a menu of over 400 investment alternatives, including in some cases retail class funds instead of institutional funds.

A group of participants sued claiming the plans' fiduciaries had breached their duties by:

- Failing to monitor and control recordkeeping fees;
- Offering retail share classes that carried higher fees than otherwise identical institutional share classes of the same investments; and
- Offering too many investment options, leading to participant confusion and poor investment decisions.

A federal district court granted the defendants' motion to dismiss, and the Seventh Circuit Court of Appeals affirmed. The Seventh Circuit ruled that the fact the plan fiduciaries met their fiduciary obligations to offer an adequate array of investment choices – including lower cost index funds – "eliminat[ed] any claim that plan participants were forced to stomach an unappetizing menu."

Supreme Court's Ruling

The Supreme Court disagreed noting that the Seventh Circuit "erred in relying on the participants' ultimate choice over their investments to excuse allegedly imprudent decisions by respondents."

The Supreme Court cited its prior decision in *Tibble v. Edison Int'l.*, 575 U.S. 523 (2015), in which the Court explained that "even in a defined-contribution plan where participants choose their investments, plan fiduciaries are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options." Furthermore, "If the fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty."

As a result, the Supreme Court concluded the Seventh Circuit "erred in relying on the participants' ultimate choice over their investments to excuse allegedly imprudent decisions by" plan fiduciaries.

Thus, the case now goes back to the Seventh Circuit to reconsider, in light of the Supreme Court's decision, if the participants' claims are sufficient to survive the motion to dismiss.

What Does it Mean?

For the plan's participants, the Supreme Court's decision means they have another chance to prove their fiduciary breach claims. For 401(k) and 403(b) plan fiduciaries, it is a valuable reminder that they should be certain to fulfill their fiduciary obligations with respect to selecting and monitoring each investment alternative offered to plan participants, as opposed to relying on the fact that a wide range of investment alternatives with different asset classes, risk profiles, and fee structures, etc. are available.

Additionally, the decision potentially will make it harder for 401(k) and 403(b) plan fiduciaries to get "excessive fee" claims dismissed. That, in turn, might encourage the plaintiffs' bar to pursue more of these types of claims.

Agencies Report on Shortcomings in Mental Health Parity Compliance to Congress

Health plans and health insurance issuers are falling short of their obligations under the Mental Health Parity and Addiction Equity Act (MHPAEA) according to a bi-annual report to Congress issued on January 25 by the Departments of Health and Human Services, Labor, and Treasury (Departments). Significantly, the report highlights the Departments' related enforcement efforts, including with respect to the new comparative analyses requirements relating to non-quantitative treatment limitations (NQTLs).

Background

The Consolidated Appropriations Act, 2021 (CAA) amended the MHPAEA to require plans and issuers to provide comparative analyses of their NQTLs to the Departments upon request and to authorize the Departments to determine whether those NQTLs comply with MHPAEA. The comparative analyses had to be available beginning on February 10, 2021 – just 45 days after the CAA was enacted.

If asked by the relevant regulatory authority for its comparative analyses, the plan or issuer also must provide:

- The specific plan or coverage terms regarding NQTLs;
- The factors used to determine that the NQTLs will apply;
- The evidentiary standard used for each factor; and
- The specific findings and conclusions reached, including anything indicating whether the plan is or is not in compliance with the relevant requirements.

Report Highlights Enforcement Efforts to Date

Regarding the comparative analyses requirements for NQTLs, the report notes the Department of Labor's Employee Benefits Security Administration (EBSA) has so far issued 156 letters to plans and issuers since February of 2021. Forty percent of plans and issuers receiving these letters responded by asking for an extension of time to respond.

According to the report, none of the comparative analyses reviewed to date initially included sufficient information. The common themes in deficiencies included the following:

- Conclusory assertions lacking supporting evidence or detailed explanation;
- Lack of meaningful comparison or meaningful analysis;
- Documents provided without adequate explanation;
- Failure to identify the specific Mental Health/Substance Use Disorder (MH/SUD) and medical/surgical benefits or MHPAEA benefit classification/s affected by an NQTL;
- Limiting scope of analysis to only a portion of the NQTL at issue;
- Failure to demonstrate the application of identified factors in the design of an NQTL; and
- Failure to demonstrate compliance of an NQTL as applied.

As a result of these inquiries, EBSA so far has:

- Issued 80 insufficiency letters for over 170 NQTLs, requesting additional information and identifying specific deficiencies;
- Issued 30 initial determination letters finding 48 NQTLs imposed on MH/SUD benefits lacking parity with medical/surgical benefits (36 unique NQTLs); and
- Received corrective action plans from 19 plans in response to initial determination letters. These corrective action plans address 36 NQTLs (30 unique NQTLs).

Outlook

The report indicates that EBSA will continue to be committed to dedicating resources to enforcing the comparative analyses requirements, as well as other aspects of the MHPAEA. Plans and issuers that have not done so already should begin the process of preparing their comparative analyses as soon as possible. Those that have done their comparative analyses probably should carefully review the Departments' report for help identifying any gaps in those analyses, so that they will be better prepared if/when they receive a demand letter.

The full text of the Department's report is available here.

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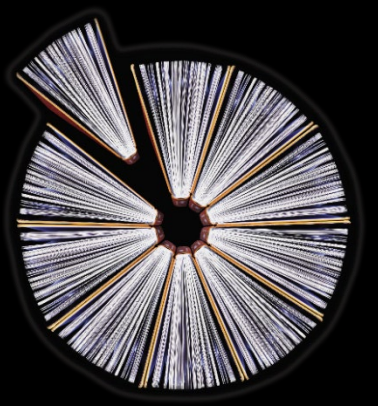

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