



Rewards Policy Insider 2022-5



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Omnibus Appropriations Bill Includes Provision to Reinstate Temporary Special HDHP Exception for Telehealth Services

The \$1.5 trillion omnibus appropriations bill that has passed Congress and is now awaiting the President's signature includes a provision to reinstate the temporary special exception for high-deductible health plans to provide below-the-deductible coverage for telehealth and other remote care services for April through December of 2022. Under the provision, the special rule will expire again at the end of this year if Congress does not take steps to extend it again.

Background

In order to be eligible to fund a health savings account (HSA), an individual generally must be covered by a high-deductible health plan (HDHP) and also may not be covered by any non-HDHP coverage (i.e., "disqualifying coverage"). With limited exceptions (e.g., preventive care), high-deductible health plans (HDHPs) generally may not provide coverage below the minimum required deductible.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 established a temporary exception for HDHPs to provide below-the-deductible coverage for telehealth and other remote care services. Additionally, the exception provided that coverage for telehealth and other remote care services would not be "disqualifying coverage." The temporary safe harbor applied to services provided on or after January 1, 2020, with respect to plan years beginning on or before December 31, 2021.

Special Exception Reinstated

The Omnibus Appropriations bill (H.R. 2471, the Consolidated Appropriations Act, 2022) includes a provision to make the special exception available for months beginning after March 31, 2022 and before January 1, 2023. The "disqualifying coverage" exception will also apply during that period.

What Does it Mean for Employers?

Because the special exception is being reinstated on a prospective basis only, employers offering calendar-year HDHPs will not need to worry about adjusting the treatment of claims for telehealth services incurred during the first three months of 2022. They may need to update their SPDs and other relevant plan documents to reflect below-the-deductible coverage for telehealth services going forward, but only if they choose to take advantage of the special exception.

For employers with non-calendar year HDHPs, the reinstatement may mean the special exception will apply continuously through the end of December. Note, however, that the special exception will expire after December of 2022 even if the plan year beginning in 2022 continues into 2023.

President Extends COVID National Emergency, Continuing COVID-Related Extensions of Certain Employee Benefit Time Limits

President Biden announced on February 18 that he was continuing the COVID-19 National Emergency first declared almost two years ago by President Trump. For employee benefit plan sponsors, that means the mandatory extensions of certain participant deadlines – including filing claims, making COBRA elections, and paying COBRA premiums, will continue for the foreseeable future.

In 2020 the Departments of Labor and Treasury issued guidance (the “Joint Guidance”) to extend certain employee benefit plan-related deadlines and other timeframes during the COVID National Emergency.

Briefly, the Joint Guidance provided that the period from March 1, 2020 through 60 days after the end of the Presidentially declared COVID National Emergency (i.e., the “Outbreak Period”) must be disregarded for purposes of determining certain periods and dates, including –

- The 30-day (or 60-day, if applicable) period for an employee to exercise his or her HIPAA special enrollment rights;
- The 60-day COBRA election period, as well as any deadlines for paying COBRA premiums;
- The deadline for filing claims for benefits, appealing adverse benefit determinations, and exercising other rights under the plan’s claims procedure rules.

The underlying statutory authority for the Joint Guidance is ERISA Section 518 and IRC Section 7508A(b), which limits the duration of “disregarded periods” to no more than one year. According to Employee Benefits Security Administration (“EBSA”) Disaster Relief Notice 2021-1 (“Notice”), the one-year limit applies on an individual-by-individual basis.

As a result, the relief provided with respect to a relevant time period will apply only until the earlier of (1) one year from the date the individual participant was first eligible for relief, or (2) the end of the Outbreak Period (i.e., 60 days after the National Emergency ends). Because of the President’s decision to extend the COVID-19 National Emergency, the Outbreak Period is still ongoing.

How Does the Outbreak Period Relief Work?

Under ERISA’s claims procedure rules, a retirement plan participant must be given at least 60 days to appeal an adverse benefit determination. If a participant receives a notice of adverse benefit determination on March 1, 2022, the relief provides that the 60-day period cannot begin to run until March 1, 2023 (unless the Outbreak Period ends earlier).

In the COBRA context, assume an employee experiences a qualifying event on June 1, 2022. Unless the Outbreak Period ends first, the employee's 60-day COBRA election period will not start running until June 1, 2023.

Even though the National Emergency is continuing, the Departments of Labor and Treasury could take steps to end the Outbreak Period relief earlier. However, there has not been any indication so far that will happen.

Read Rewards Policy Insider for additional updates.

Fifth Circuit Reverses District Court's Refusal to Temporarily Enjoin Employer's COVID-19 Vaccination Mandate for Certain Employees

A three-judge panel of the Fifth Circuit Court of Appeals has reversed a district court's denial of a temporary injunction to a group of employees who are on unpaid leave because they refused to be vaccinated against COVID-19 due to their religious beliefs. The employer granted the employees unpaid leave instead of terminating them in order to accommodate their religious beliefs, as required by Title VII of the Civil Rights Act.

The Fifth Circuit's decision illustrates the challenges facing employers that are pushing forward with COVID-19 vaccine mandates for employees.

Overview

The employer at issue implemented a COVID-19 vaccination mandate for all U.S. employees in August of 2021. Under the policy, employees who were not vaccinated by September 27, 2021 were to be terminated unless they qualified for a religious or medical exemption. The employer made it clear that religious exemptions would be rare. Employees seeking religious exemptions were questioned about how their religious beliefs affected their decisions to receive other vaccinations or use other types of medication. Some were asked to provide statements by pastors or other third parties supporting their claims that they sincerely held religious beliefs.

In cases where the employer granted a religious exemption, the employees were placed on unpaid leave instead of being terminated. The only way for these employees to return to active work is to get vaccinated or wait until the employer decides the pandemic has receded enough to allow them to return.

The district court denied the employees' request for a temporary injunction because it concluded they did not demonstrate that they would be irreparably injured by remaining on unpaid leave until their substantive legal challenge is resolved.

Fifth Circuit Decision

The Fifth Circuit agreed that the harms from being placed on unpaid leave – e.g., lost pay, lost seniority, marital strain, etc. – are not “irreparable.” But, the Fifth Circuit found the employer was placing the employees at issue in a position of effectively being coerced to violate their religious convictions by getting vaccinated in order to return to work. This “ongoing coercion” is a form of irreparable harm that would justify a temporary injunction, the Fifth Circuit concluded. As a result, it remanded the case back to the district court to reconsider the request for a temporary injunction in light of the Fifth Circuit’s decision.

What Does it Mean?

Although significant, the Fifth Circuit’s holding should not be construed too broadly. It did not suggest a temporary injunction was appropriate with respect to the employer’s mandate, but instead only with respect to the small group of employees who were on unpaid leave due to their religious beliefs. In fact, the employer’s authority to implement a vaccination mandate is not even at issue in the case.

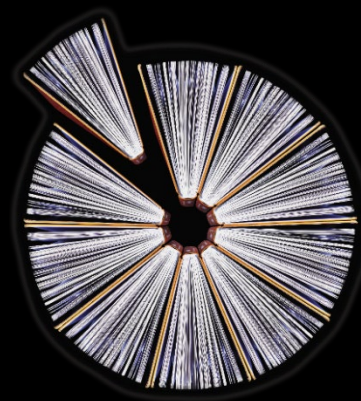
What it does mean, though, is that employees who resist vaccination mandates on religious or medical grounds do have rights that employers must carefully consider when deciding how to accommodate them.

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