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Divide Among State Abortion Laws Widens as New Laws Pass in Florida and North Dakota

Florida and North Dakota recently joined a growing number of states that, in the nearly one year since the Supreme Court overturned *Roe v. Wade*, have enacted limits on abortion. Pending the outcome of ongoing litigation, Florida will ban nearly all abortions after six weeks. North Dakota now bans abortions at any gestational age, with limited exceptions.

Florida

On April 13, 2023, Florida Governor Ron DeSantis signed a bill (S.B. 300) to ban abortions after six weeks of pregnancy. The law contains limited exceptions, including: (1) to save the pregnant woman's life or avert the risk of serious injury; (2) when the fetus has a fatal abnormality, but only if the pregnancy has not reached the third trimester; and (3) when the pregnancy is the result of rape, incest, or human trafficking, but only if the fetus is 15 weeks or less.

The Florida law also specifies that a physician may not use telehealth to perform an abortion, and any medication intended for use in a medical abortion must be dispensed in person by a physician and not through any type of postal or shipping service.

The law is currently not in effect. The six-week ban effective date is contingent on the outcome of ongoing litigation involving Florida's current 15-week ban. The 15-week ban is being challenged by a local Planned Parenthood chapter on the grounds that it violates the Florida constitution's right to privacy. If the Florida Supreme Court decides to uphold the 15-week ban, then the six-week ban will go into effect. Thus, until the outcome of the case is settled, abortions in Florida remain legal up until 15 weeks.

North Dakota

On April 24, 2023, North Dakota Governor Doug Burgum signed a near-total abortion ban (S.B. 2150), which went into effect immediately. Under the new law, it is a felony for a person to perform an abortion at any stage in pregnancy. Exceptions exist (1) for ectopic or molar pregnancies; (2) to prevent the death of or a serious health risk to the pregnant woman; and (3) where the pregnancy is the result of abuse or incest, but only if the fetus is six weeks or less.

Other State Updates

Developments in other states continue to change rapidly. In North Carolina, for example, on May 16, 2023, the legislature overrode the governor's veto of a bill (S.B. 20) to ban most abortions after 12 weeks. The new law will take effect on July 1, 2023.

Still other states are moving toward further protecting abortion access. For instance, in April, Governor Maura Healey of Massachusetts issued an executive order protecting access to abortion medications, such as mifepristone (the FDA approval of which is the subject of ongoing litigation). Also in April, the Michigan

legislature repealed a law from the early 1900s that prohibited abortions in all cases except when necessary to the mother's life. That law had been the subject of a prolonged court battle, and was permanently blocked by a court in September 2022.

Agencies Can Resume Full Enforcement of ACA Preventive Services Mandate

As previously reported in RPI 2023-7, a Federal District Court in Texas recently issued a national injunction preventing the Departments of Labor, Health and Human Services, and Treasury ("Agencies") from enforcing certain aspects of the Affordable Care Act's preventive services mandate for non-grandfathered group health plans. Late last year the District Court ruled a key component of the mandate was unconstitutional. The U.S. Department of Justice is appealing that ruling to the 5th Circuit Court of Appeals, and the case eventually could end up at the U.S. Supreme Court. In the meantime, the 5th Circuit Court of Appeals has issued a stay of the District Court's injunction – meaning that the Agencies can continue enforcing all aspects of the ACA's preventive services mandate while the appellate courts consider the merits of the District Court's substantive decision.

Overview of the ACA Preventive Services Mandate

In general, the ACA requires group health plans to cover the following preventive services without cost-sharing:

- Evidence-based items or services with an A or B rating by the United States Preventive Services Task Force (USPSTF)
- Immunizations for routine use as recommended by the Centers for Disease Control's Advisory Committee on Immunization Practices (ACIP)
- Preventive care and screenings for children as provided for in guidelines supported by the Health Resources and Services Administration (HRSA)
- Preventive care and screenings for women as provided for in guidelines supported by the HRSA

The USPSTF periodically updates its ratings. In 2019, for example, USPSTF issued an A rating for preexposure prophylaxis (PrEP) drugs. These drugs are designed for use by individuals who are at higher risk of HIV infection. The A rating for PrEP drugs means group health plans are now required to cover them without any cost-sharing.

District Court Ruling

The Texas District Court generally held that the preventive services mandate with respect to USPSTF ratings of A or B issued on or after March 23, 2010 (the date the ACA was enacted) violates the Constitution's Appointments Clause. This leaves the mandate in place with respect to preventive services with a USPSTF rating of A or B issued before March 23, 2010, as well as with respect to preventive services recommended by ACIP and HRSA.

Separately, the district court also ruled the PrEP mandate violates the Religious Freedom Restoration Act (RFRA), which generally prohibits the government from "substantially burdening" an individual's exercise of religion. As such the district court determined the PrEP mandate could not be enforced against those with religious objections.

After the District Court issued its ruling and took time to consider possible remedies, it imposed a nationwide injunction against enforcement of those parts of the ACA's preventive services mandate that it had determined unconstitutional. On April 13, 2023 the agencies acknowledged the injunction in a set of "Frequently Asked Questions" (FAQ) that provided related guidance to group health plan sponsors.

Fifth Circuit Stay

On May 15, 2023, the 5th Circuit Court of Appeals issued an administrative stay of the District Court's injunction. As a result, the Agencies can resume enforcing all aspects of the ACA's preventive services mandate while the challenge to the mandate continues to be litigated in the federal courts. This means non-grandfathered group health plans should continue complying fully with the preventive services mandate unless and until the District Court's decision is upheld by the Fifth Circuit Court of Appeals and, potentially, the U.S. Supreme Court.

IRS Issues Reminder that All Health FSA Claims Must be Substantiated

A recent IRS Chief Counsel Memorandum (CCM) stated that Health FSA reimbursements that are not fully substantiated are includible in the employee's gross income and are treated as wages for certain tax purposes. While the IRS did not announce any novel guidance, the document serves as a reminder of the importance of proper substantiation of Health FSA reimbursement claims.

Background

Under the Internal Revenue Code ("Code"), an individual's gross income generally includes compensation for services, including fees, commissions, and fringe benefits provided by an employer. There are exceptions to this rule, including ones for employer-provided coverage under a group health plan and for amounts received through employer-provided accident or health insurance if the amounts are paid to reimburse expenses incurred by the employee for his or her medical care (or the medical care of the employee's spouse or dependents).

Under Code section 125, an employer can set up a cafeteria plan that permits an employee to choose among multiple benefits, including accident or health care coverage. The amount an employee contributes to the plan that is applied to buy such coverage is not included in gross income. If an employee chooses to participate in a health FSA as part of a section 125 cafeteria plan, the value of the health FSA's coverage is excludable from gross income as employer-provided accident or health coverage. Amounts reimbursed for medical expenses (under Code section 213(d)) in these cases are excludable from gross income.

All claims for reimbursement from a health FSA must be substantiated. Questions arise periodically, however, about whether plans can use sampling in lieu of substantiating every claim, or establish a de minimis rule whereby expenses below a certain dollar threshold do not have to be substantiated, among others.

IRS Guidance

On April 28, 2023, the IRS released a Chief Counsel Memorandum ("CCM") concluding that unsubstantiated reimbursements of medical expenses to an employee from a health FSA provided in a cafeteria plan are (1) includable in the gross income of the employee and (2) considered wages for FICA and FUTA tax purposes. Furthermore, the CCM provides that a section 125 plan that does not require substantiation of all health FSA expenses by an independent third party is not a valid 125 plan. That would mean all benefits provided through the 125 plan would be subject to income and employment taxes.

The CCM reiterates these key rules using several examples. In one example, the IRS presents a situation in which an employer provides a cafeteria plan with a health FSA that reimburses medical expenses incurred by employees. In that example, the plan only reimburses medical expenses that are substantiated by an independent third party, and the information from the third party describes the service or product, the date of the service or sale, and the amount. The IRS concludes that in this situation, nothing in the way the plan substantiates the claims prevents the employer from excluding the amounts reimbursed from the employee's income and wages for FICA and FUTA tax purposes.

The IRS also describes several situations in which the substantiation requirements are not met. In one situation, a plan reimburses employees for medical expenses for which the employee self-certifies the information regarding the expense but does not provide a statement from a third party verifying the information, and does not substantiate debit card charges with a statement from an independent third party. In another example, a plan does not require substantiation of a debit card charge through additional third-party information (such as the service or product and the date of the service or sale) that is less than a specified dollar amount. In both situations, the IRS concludes that the plans fail to satisfy the Code's requirements for substantiation. Therefore, the reimbursements are included in the gross income of the employees, and the plan is not a valid 125 plan.

The CCM also makes the point that an employer may not exclude reimbursements of dependent care expenses from an employee's gross income if any expenses of any employee under a dependent care assistance program are not substantiated after the expense has been incurred.

What are the Takeaways?

The IRS did not announce any new guidance or rules in the CCM. However, the CCM serves as a good reminder that full, independent third-party substantiation of all expenses that are being reimbursed is necessary to confer the proper tax benefits to the employer and employees.

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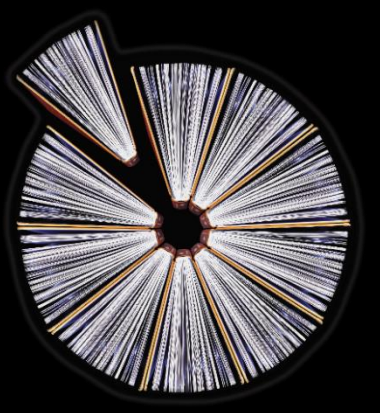

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