

Benefits Compliance Checklist: 2010 Year End

Most of us think of 2010 as being the year of Health Care Reform, the Patient Protection and Affordable Health Care Act, or “PPACA.” While year end action is required for PPACA compliance (for calendar year plans), a number of other areas require attention as well:

1. PPACA’s major impact on group health administration requires appropriate participant notices by year end. The required notices are outlined at <http://benefitslawgroupofchicago.com/HTML/2010/health-care-reform-2010.htm>. Participant notices required under the PPACA claims review procedures (both internal and the new external claims review procedure) are published on the Department of Labor web site, www.dol.gov/ebsa/healthreform. Self-funded group health plans that are not “grandfathered” may have to engage outside independent review organizations (“IROs”) to administer their external claims review procedure. In any event, all plan documents (including cafeteria plans and HRAs) as well as participant communications (including plan summaries) need to be PPACA compliant. Bear in mind that PPACA requires that summary plan descriptions now be written in a “culturally and linguistically appropriate” manner.

2. PPACA also extends nondiscrimination rules to insured group health plans that are not grandfathered. These rules are similar to those that currently apply to employer-funded health reimbursement arrangements, but provide stiffer penalties on employers with 50 or more employees and insurers who provide health plans that discriminate on the basis of benefits or eligibility. The target of the new rules includes arrangements that provide executives and other highly compensated employees with enhanced benefits or subsidized coverage. For example, a group health waiting period that is waived for a newly-hired executive or a terminating executive who is offered a COBRA subsidy that is not made available to other employees. Because the penalties are substantial (\$100 per day per employee who is discriminated against – that’s *all* eligible employees except the executives in the examples) and compliance involves coordination outside the benefits area, this may be a particularly challenging compliance concern.

3. The last chance for penalty-free correction of “nonqualified deferred compensation plans” under Section 409A of the Internal Revenue Code expires December 31, 2010. Transitional relief covers both document deficiencies (IRS Notice 2010-6) and operational failures (IRS Notice 2008-113). Corrections can still be made after December 31, 2010, but such corrections may require payment of income taxes and the 20 percent excise tax on a portion of the deferred income. In either case, both the “service recipient” (generally an employer) and the “service provider” (the employee or independent contractor) will have to file explanatory statements with their income tax returns for the year of the correction.

4. Group health plans must be amended to provide mental health and substance abuse benefits on the same financial basis as medical and surgical benefits under the Mental Health Parity and Addiction Equity Act.

5. Qualified retirement plans need to be updated for the Heroes Earnings Assistance and Relief Tax Act (“HEART Act”). There are required changes, principally the mandatory treatment of participants who die during qualified military service as though they had returned to plan participation for purposes of the plan’s death benefits. There are also optional changes for employers who make payments of a “wage payment differential” to employees while on military duty. Section 403(b) and 457(b) plans of tax-exempt organizations are also subject to the HEART Act requirements. Other types of qualified retirement plans (cash balance plans, plans invested in employer securities, and 401(k) plans with automatic contribution arrangements) will require additional changes.

6. The Worker, Retiree and Employer Recovery Act of 2008 (“WRERA”) also requires qualified retirement plans to be amended to permit rollovers by non-spouse beneficiaries.

7. “Cycle E” filers need to prepare plan restatements and file IRS determination applications for their qualified retirement plans by January 31, 2011. Cycle E filers are sponsors of custom plans (plans other than prototypes and volume submitter plans) whose employer identification number ends in “0” or “5.” This IRS filing deadline does *not* postpone the December 31, 2010 deadlines for HEART Act and WRERA amendments.

Recommendations: Sponsors of calendar year plans need to act now to assure compliance of their group health plans and qualified retirement plans. Although insurers and third party administrators (TPAs) can help, PPACA still poses substantial compliance challenges in areas outside the “jurisdiction” of those service providers. Consider discussing your compliance concerns with competent legal counsel, particularly if your insurer or TPA is not in a position to provide information tailored to your circumstances.

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