BENEFITS INSIDER

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The ***Benefits Insider*** is a bimonthly member exclusive publication prepared for WEB members by the American Benefits Council ("the Council"), a premiere benefits advocacy organization based in Washington, DC. This newsletter provides the latest news and analysis on the most important benefits-related policy matters in Congress, executive branch agencies and the federal judiciary.

Please note: any views or opinions expressed in these stories represent the advocacy positions of the American Benefits Council and its membership. They do not necessarily reflect the views of WEB or its membership. To inquire about membership with the American Benefits Council, contact Deanna Johnson at (202) 289-6700 or djohnson@abcstaff.org.

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RECENT LEGISLATIVE ACTIVITY

President Signs into Law Omnibus Bill with SECURE 2.0, Telehealth Provisions

On December 29, 2022, President Biden signed into law **the Consolidated Appropriations Act, 2023**. The $1.7 billion measure funds the government through the end of the fiscal year (ending September 30, 2023) and includes two long-standing American Benefits Council priorities: (1) bipartisan "SECURE 2.0" retirement legislation, and (2) a two-year extension of pandemic-era telehealth flexibility for health savings account (HSA)-eligible plans.

The Council issued public statements praising the inclusion of both measures in the final passage, as described below.

During its consideration of the bill, the Senate approved a handful of amendments, including the PUMP for Nursing Mothers Act (H.R. 3110), providing workplace protections for nursing mothers, and the Pregnant Workers Fairness Act (S. 4431), requiring certain accommodations for pregnant workers. None of the other approved amendments addressed workplace policy or affected the SECURE 2.0 or telehealth provisions.

SECURE 2.0 Retirement Legislation

Division T of the omnibus bill is dubbed the "SECURE 2.0 Act," a reference to the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 (enacted as part of the Consolidated Appropriations Act, 2020). On December 22, Congress' Joint Committee on Taxation issued its official revenue estimate for the SECURE 2.0 Act.

This comprehensive, bipartisan package of retirement policy reforms is designed to expand coverage and reduce barriers to retirement savings for workers, specifically targeting low and middle-income families, and includes numerous provisions developed in cooperation with the Council.

Lynn Dudley, the Council's senior vice president, global retirement and compensation policy, said in **a media statement**, "This measure builds on the bedrock of employer plan sponsorship while addressing the challenges of today's economy. While there are further improvements we will continue to pursue, this measure is a victory for American workers and a reminder of what can be achieved through bipartisanship. We hope lawmakers in the new Congress will embrace this approach to our nation's challenges."

Because the legislation is so wide-ranging and includes dozens of provisions, the regulatory effort to implement the bill will be significant. The Council will be working closely with executive branch officials in the new year to shape the necessary guidance and ensure that employer compliance requirements are reasonable.

Extension of Telehealth Flexibility

As strongly supported by the Council, the omnibus bill includes a two-year extension of a temporary provision allowing first-dollar coverage of virtual care under health savings account (HSA)-eligible high-deductible health plans (HDHPs), so individuals can access telehealth services without needing to first meet a deductible.

This flexibility was originally provided under the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 and then extended on a prospective and temporary basis from April 1, 2022, through December 31, 2022. The omnibus bill extends this deadline extends this deadline for plan years beginning after December 31, 2022, and before January 1, 2025.

Ilyse Schuman, the Council's senior vice president, health policy, said in **a media statement**, "the Council has consistently supported increasing employers' ability to offer telehealth coverage, recognizing that telehealth services expand employee access and choice of health providers, especially with regard to mental and behavioral health. We will continue to advocate for legislation to make the CARES Act provision permanent, if and when it is reintroduced next Congress."

RECENT REGULATORY ACTIVITY

Agencies Issue Good Faith Relief, Other Guidance on Prescription Drug, Health Care Cost Reporting

On December 23, 2022, the U.S. departments of Labor, Health and Human Services and Treasury (the "tri-agencies") issued much-anticipated **guidance on the prescription drug and health care cost reporting requirements** under the Consolidated Appropriations Act, 2021 (CAA).

Among other things, the guidance provides, with respect to the 2020 and 2021 data submissions that are due on December 27, 2022, the tri-agencies will not take enforcement action with respect to any plan or issuer that uses a good faith, reasonable interpretation of the regulations and reporting instructions in making its submission. The guidance also provides a submission grace period through January 31, 2023, under which the tri-agencies will not consider a plan or issuer to be out of compliance if a good faith submission is made on or before January 31, 2023. The issuance of this guidance is a very welcome development and something the Council has been strongly advocating for over the past several months.

By way of background, under the CAA, plans and insurers are required to annually report to the tri-agencies certain information on prescription drug costs and health care spending. The tri-agencies are directed to use this information to provide a biannual public report on drug price and health care spending and trends. The reporting was originally due to be first reported in December 2021 but was delayed so that the first reporting (for 2020 and 2021) is due December 27, 2022, with reporting due by June 1 for each year thereafter.

Over the last year, the tri-agencies have released an array of guidance to implement this provision, including interim final regulations, reporting instructions and Frequently Asked Questions, and have set up a help desk to respond to isolated questions and have hosted several webinars.

The Council has provided comments on these provisions over the last several years, generally supporting increased transparency to address health care costs and raising implementation issues and questions. In recent months, Council staff has received many compliance-related questions from members on this provision. Based on the extent of questions and issues that have been raised, the Council worked with several other groups to assemble a list of priority recommendations to submit to the tri-agencies in a list of priority recommendations on November 1. The Council also had formal and informal conversations and meetings with tri-agency staff on these issues.

The new guidance favorably responds to the requests made by the Council and others in providing a good faith compliance standard and submission grace period for the reporting due December 27, 2022.

The guidance also provides some additional helpful clarifications and flexibilities related to the required reporting, with respect to the reporting requirements for the 2020 and 2021 data. These include:

- allowing for multiple submissions by the same reporting entity.
- allowing for more than one reporting entity to submit the same data file type on behalf of the same plan or issuer (instead of the multiple entities having to work together to consolidate all of the plan's or issuer's data into a single data file for each type of data).
- providing increased flexibility regarding the aggregation of reported data.
- allowing for email submissions (versus required use of the HIOS RxDC module) by group health plans that are submitting certain limited data sets, (v) making the reporting of certain vaccine information optional.
- making optional the requirement to report a value for amounts not applied to the deductible or out-of-pocket maximum.

The tri-agencies note that they will continue to monitor stakeholder efforts to comply to determine whether additional guidance is needed in advance of future deadlines. As preparations turn to the reporting due in June 2023, we note that we expect the reporting instructions will be updated.

Treasury and IRS Issue Technical Surprise Billing Guidance

The U.S. Treasury Department and Internal Revenue Service (IRS) issued Notice 2023-4 on December 20, 2022, which includes technical guidance relevant for 2023 related to the surprise billing provisions in the No Surprises Act (NSA).

The notice relates to the "qualifying payment amount" or "QPA," which is essentially the median in-network rate for an item or service for which the surprise billing prohibition in the NSA applies. The QPA is relevant for many purposes under the NSA – including that participant cost-sharing is based on the QPA and the QPA is one of the factors that arbitrators are to consider in the event a provider pursues arbitration for an item or service subject to the NSA.

As we have previously reported, there are extensive, detailed rules for how plans are to determine the QPA. Relevant to the most recent guidance, in general, the QPA is based on the median in-network rate for the relevant item or service on January 31, 2019, adjusted for inflation. For items and services furnished during 2023 or a subsequent year, the QPA will be determined by increasing the QPA in the immediately preceding year by the percentage increase published by Treasury and IRS. Thus, a plan's QPA will continue to be based upon the median in-network rate for the item or service on January 31, 2019, to the extent applicable – adjusted upward based on each annual percentage increase.

In Notice 2023-4, Treasury and IRS announced the inflation adjustment percentage that is to be used to determine the QPA for items and services furnished during 2023 and summarizes various related rules, including for newly covered services. The notice includes some helpful examples for how to calculate the adjusted QPA using the percentage increase from 2022 to 2023. For future years, Treasury and IRS note the QPA adjustment may be published in the annual revenue procedure containing inflation-adjusted items for the following tax year.

IRS Releases Final 2023 Forms W-4P, W-4R

The Internal Revenue Service (IRS) has formally posted **the final version of the 2023 Form W-4P**, *Withholding Certificate for Periodic Pension or Annuity Payments*, as well as the final 2023 Form W-4R, *Withholding Certificate for Nonperiodic Payments and Eligible Rollover Distributions*. The new Form W-4P must be used starting January 18, 2023. The new Form W-4R must be used starting January 15, 2023.

Historically, IRS Form W-4P has been used by individuals to make federal income tax withholding elections with respect to periodic payments and nonperiodic distributions they receive from annuity contracts, IRAs and qualified plans. In the summer of 2020, the U.S. Treasury Department and IRS proposed significant revisions to the form, including by splitting it in two by creating a new Form W-4R to be used only for nonperiodic distributions and eligible rollover distributions, while the Form W-4P is to be used only for periodic payments.

The IRS issued guidance earlier this year addressing the use of these forms for reporting federal income tax withholding from annuity, IRA and qualified plan distributions.