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.

TABLE OF CONTENTS:

RECENT REGULATORY ACTIVITY

COVID-19 Public Health Emergency and National Emergency to End May 11

On January 30, the Biden administration formally announced that, at present, its plan is to extend both the COVID-19 National Emergency (NE) and Public Health Emergency (PHE) to May 11, and then to end both emergencies on that date. Currently, the COVID-19 PHE is set to expire on April 11 and the COVID-19 NE is set to expire on March 1. The announcement comes in response to efforts by Republicans in the House of Representatives to end the PHE.

There are several requirements (and forms of relief) associated with the PHE and/or NE, including the requirement to cover diagnostic testing for COVID-19 without cost-sharing (tied to the PHE) and the requirement to extend certain plan-related time frames, including COBRA election and premium deadlines, generally speaking, during the NE. There are also important requirements that will largely remain the same but will change in some ways, such as the requirement for health plans to cover the COVID-19 vaccine without cost-sharing. And then there are other forms of relief which are COVID-19 related but which are not tied to the NE or PHE, such as the relief provided in IRS Notice 2020-15 allowing high deductible health plans to cover COVID-19 testing and treatment pre-deductible.

Another related issue that the Council is monitoring is when the federal government will stop paying for COVID-19 vaccines and therapeutics, at which point the commercial market will be responsible for purchasing these drugs. The Biden administration has indicated that this move to "commercialization" will occur this year and this change is likely to raise important issues for plan sponsors and plan participants alike, including with regard to cost and access. Council staff has spoken with White House staff and plans to continue to engage on this issue.

Council Urges HHS to Maintain Current Essential Health Benefits Guidance

On January 31, the American Benefits Council responded to a recent request for information issued by the U.S. Department of Health and Human Services (HHS) and Centers for Medicare and Medicaid Services (CMS) related to essential health benefits (EHBs), a concept that is relevant for several purposes under the Affordable Care Act (ACA).

Under the ACA, health plans in the individual insurance market and fully insured plans in the small group insurance market must cover all EHBs. Self-insured plans and fully insured plans in the large group market are not required to cover EHBs. However, the definition of EHB is still relevant to self-insured and large group plans because the ACA limit on maximum out-of-pocket spending applies to EHBs and the prohibition on annual and lifetime dollar limits applies to EHBs.

EHBs are generally defined to include ten categories of items and services (e.g., emergency services, prescription drugs) and to be equal to the scope of benefits provided under a typical employer plan. Over the years, HHS has issued several regulations providing further definitions and HHS is required by the ACA to periodically review the EHB definition. In

general, each state selects an EHB benchmark plan which serves as a reference plan for benefits considered to be EHBs in the state.

Under current guidance, established by HHS along with the U.S. departments of Labor and Treasury (collectively, the "tri-agencies"), self-insured and large group market plans may define EHBs using the EHB-benchmark plan selected by any state versus individual and small group market coverage which must define EHBs in accordance with the EHB-benchmark plan in the state in which the coverage is issued.

CMS is evaluating whether EHBs should be modified or updated to account for changes in medical evidence and scientific advancements, as it does periodically.

In response to the agency's RFI, the Council explains that the current guidance allowing self-insured and large group market plans to use the definition of EHB in any state has been a success, especially for multi-state employers, in that it both ensures robust market reform protections for participants and their families, as intended by the ACA, and avoids rules that are overly burdensome or unworkable for employers and the plans they sponsor. The Council urges the tri-agencies to maintain this current guidance.

In addition, the Council:

- Notes that while self-insured plans and large group market plans are not required to cover EHBs, these plans are affected by the definition of EHBs. We ask the agencies to keep this in mind in future policymaking and to ensure that changes come with an opportunity for all stakeholders to comment.

- Explains that employers generally provide robust, affordable coverage and are constantly working to enhance this coverage and to provide high-value care. In response to specific questions in the RFI, we also describe employer efforts regarding telehealth, including the ability of telehealth to strengthen behavioral and mental health.

- Emphasizes that health care costs are a major area of concern for employers and that in considering benefit expansions or revisions, cost must also be considered.

Council Supports, Recommends Further Changes to EBSA's Voluntary Correction Program

In January 20 written comments to the U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA), the American Benefits Council expressed its support for the agency's proposed expansion of benefit plan self-correction processes. The Council also recommended additional changes to improve the program and corresponding relief for plan sponsors.

EBSA's Voluntary Fiduciary Correction Program (VFCP) allows plan officials to identify and fully correct any of 19 specific transactions under ERISA, including prohibited purchases, delinquent participant contributions and improper plan expenses. If an eligible party documents the acceptable correction of a specified transaction, EBSA will issue a no-action

letter. Prohibited Transaction Exemption (PTE) 2002-51 provides corresponding excise tax relief for errors corrected through the VFCP.

In November 2022, EBSA proposed amendments to the VFCP and a proposed amendment to prohibited transaction exemption 2002-51 to "simplify and expand the original [VFCP], thereby making the Program easier for, and more useful to, employers and others." Most notably, the proposal would add a self-correction feature, clarify some existing transactions eligible for correction under the VFCP, expand the scope of other transactions currently eligible for correction and simplify certain administrative or procedural requirements for participation in and correction of transactions.

In its January 20 comment letter, the Council said it is "encouraged by the newly proposed self-correction component (SCC) and the other proposed changes that would expand DOL's existing correction procedures," but also noted that "DOL can make additional changes to further improve its correction program and the corresponding prohibited transaction relief."

Specifically, the Council:

- Supports the proposed creation of a new self-correction component that would be available to correct errors, comparing it favorably to the Internal Revenue Service's Employee Plans Compliance Resolution System (EPCRS).

- Supports the pair of new exceptions DOL to expand the VFCP's existing eligibility requirements. The first proposed exception would create an exception to the existing rule that generally prevents VFCP eligibility when there is any "evidence of potential criminal violations." The second proposed exception would provide a new exception to the existing VFCP eligibility rule that prohibits any plan or applicant from being under investigation.

- Supports the proposed changes that would expand the availability of PTE 2002-51, including the change that would eliminate the existing condition prohibiting a party from relying on the exemption if it has taken advantage of the relief provided by the VFCP and PTE 2002-51 for a similar type of transaction within the past three years.

The Council also recommended the final rules:

- Eliminate or increase the $1,000 lost earnings limitation.

- Eliminate the SCC notice requirement.

- Remove the requirement that employers pay to the plan the amount of the prohibited transaction excise tax that would otherwise be imposed under Internal Revenue Code Section 4975.

- Expand the *de minimis* exception related to distributions to former employees, their beneficiaries or alternate payees.

- Allow lost earnings to be paid out of a plan's forfeiture account.

- Allow service providers to make corrective contributions instead of employers.

WEB Members Invited to Submit Entries for Employee Benefits Simplification Award

The American College of Employee Benefits Counsel (ACEBC) is now accepting entries for the 2023 ACEBC Simplification Award. The Award -- along with a $10,000 prize -- will go to the best proposal to simplify an aspect of employee benefits law or regulation.

ACEBC is a highly regarded honorary society whose mission is to elevate the standards and advance the public's understanding of the practice of employee benefits law. American Benefits Council President James Klein and senior vice president, global retirement and compensation policy, Lynn Dudley, are members of the college. The ACEBC Simplification Award was established in 2018 to solicit and reward original legislative proposals to simplify an aspect of employee benefits law.

The 2023 winner will be honored at the ACEBC annual dinner and the winning proposal will be highlighted in a webinar cohosted by ACEBC, the Council, the ABA Joint Committee on Employee Benefits and other employee benefit organizations.

WEB members are encouraged to submit their own ideas for simplification of the benefits system. Details on the competition rules and the submission process can be found at www.acebc.com/simplification-award.