

CURRENT DEVELOPMENTS

Association of Employee Benefit Planners of New Orleans

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1. Notice 2011-28 – Guidance for Reporting Value of Health Insurance on W-2's

- Code § 6051(a)(14) (as added by Affordable Care Act § 9002) requires employers to report the aggregate cost of employer provided health coverage on W-2s
- Notice 2011-28, issued March 29, 2011, delayed the effective date of Code § 6051(a)(14) until the 2012 Forms W-2 which are generally required to be issued in January 2013 (2014 for small employers). Voluntary reporting is permitted for 2011.
- Provides guidance on how to calculate the cost of coverage
- W-2 reporting not applicable to the following health coverage:
 - Amounts contributed Archer MSAs, HSAs, and FSAs
 - Coverage offered under a multiemployer plan and self-insured plans not subject to COBRA
 - Stand alone dental or vision plans and certain “excepted benefits”
- Employer can calculate the aggregate cost of coverage using one of the following four methods:
 - COBRA premium method (self-insured plan)
 - Premium charged method (insured-plans)
 - Modified COBRA premium method (where employer subsidizes coverage)
 - Composite rate (plans that charge the same premium for different types of coverage under a plan (i.e., a premium for self-only coverage versus family coverage))

2. HHS Issues New Rules Regarding Health Insurance Rate Hikes

- Rule issued May 19, 2011 goes into effect on September 1, 2011
- Individual and small group markets only
 - As defined in state law or regulation, or, if state law is silent, fewer than 50 employees
 - In Louisiana, small groups are employers with at least 2 but no more than 35 employees. LA RS 22:1091.
- If an insurance rate increase is 10 percent or more over 12-months:
 - Increase will be subject to closer scrutiny by state and federal regulators
 - Stricter public disclosure requirements with public opportunity to comment on rate increases when subject to review
 - Requires insurers to explain the need for such increases
- Power to deny or modify rate increases remains with the states

3. Medicare Part D Creditable Coverage Notices Now Due October 15

- Old deadline was November 15, but the Medicare enrollment period was moved up to October 15, necessitating the earlier notification.
- Updated Creditable and Non-Creditable model notices issued by CMS (<http://www.cms.gov/CreditableCoverage/Model%20Notice%20Letters.asp>)

4. HSA 2012 Limits: Rev. Proc. 2011-32

- 2012 deductible amounts for high deductible health plans (HDHP) are:
 - Individual coverage – not less than \$1,200 (no change from 2011)
 - Family coverage – not less than \$2,400 (no change from 2011)
- 2012 annual out-of-pocket expenses limits (deductibles, co-payments, and other amounts, but not premiums) are:
 - Individual coverage – \$6,050
 - Family coverage – \$12,100
- 2012 annual contribution limits for health savings accounts (HSA) are:
 - Individual coverage – \$3,100
 - Family coverage – \$6,250

5. States that Still Tax Health Benefits Provided to Non-Dependent Children (Age 26 nonconformity issue)

- Alabama (apparently only as to fully insured plans)
- Georgia
- Hawaii
- New Jersey
- Oregon (2010 only)
- South Carolina (corrective legislation is pending)
- Wisconsin
- Massachusetts (in some cases)
- Michigan (if individual chooses to start with 1996 federal tax code rather than 2011)

6. Cigna Corp. v. Amara, No. 09-804, 2011 WL 1832824 (U.S. May 16, 2011)

- Vacated a district court order requiring CIGNA to reform its cash balance plan and pay increased benefits based on a claim to enforce “the terms of the plan” under ERISA § 502(a)(1)(B)
- ERISA § 502(a)(1)(B) does not authorize a remedy for alleged misrepresentation of the terms of a plan in the SPD, because SPD terms are not “terms of the plan”
- ERISA § 502(a)(3) may provide a remedy for SPD mistakes if plaintiffs can show actual harm by a preponderance of the evidence. In dicta, the Court stated that relief for notice violations under ERISA § 502(a)(3) for “other appropriate equitable relief,” may include:
 - Reformation of contract
 - Estoppel
 - Monetary compensation against a trustee

- No absolute requirement that plaintiffs must show detrimental reliance to recover for mistakes made in SPDs (also dicta) – in other words, relief may be available even if the participant never read the inaccurate SPD

7. Cajun Industries LLC 401(k) Plan v. Kidder, 09-267-BAJ-SCR & 10-CV-099-BAJ-SCR (M.D. LA Apr. 24, 2011)

- The default beneficiary under the 401(k) plan is a participant’s spouse unless an election is made to waive the spouse as beneficiary. The deceased participant made no such election.
- The court held that the participant’s new spouse of 6 weeks was the beneficiary of plan benefits, rather than the participant’s children who he named as beneficiaries prior to the marriage.
- The court also held that state law claims of malpractice and negligent misrepresentation against the employer and its plan administrator for failing to properly perform contractual obligations regarding the plan were preempted by ERISA.

8. ROBS (Rollovers as Business Startups) Continue to Draw IRS Attention

- Andy Zuckerman of IRS said at May 2011 ABA Tax Seminar that the IRS is concerned about the “unsophisticated individuals in small businesses setting these up,” and “[a]s a general rule, our overall concerns [about ROBS] appear to be well-founded.” “My advice is to be very careful with these arrangements because you’re risking a lot.”
- IRS officials described ROBS as an “inherently imprudent practice” since it puts retirement funds in jeopardy.

9. HHS Proposed HIPAA Privacy Rule Revision

- The proposed rule would give people the right to obtain a report of who has electronically accessed their protected health information.
- Per HHS: “People would obtain this information by requesting an access report, which would document the particular persons who electronically accessed and viewed their protected health information. Although covered entities are currently required by the HIPAA Security Rule to track access to electronic protected health information, they are not required to share this information with people.” HHS News Release May 31, 2011

10. DOL is Reviewing its Electronic Disclosure Regulations and Soliciting Comments

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