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# Update 2013-3 – DOL Guidance on Exchange Notices and Other Items

On January 24th, the Department of Labor released a new set of FAQs on the Affordable Care Act ("ACA"). These eight FAQs addresses the requirement to distribute notices to employees about the upcoming Health Insurance Exchanges, how Health Reimbursement Arrangements must be structured to comply with the ACA, rules regarding the disclosure of information related to firearms, self-insured prescription drug coverage supplementing Medicare Part D, what constitutes a "fixed indemnity insurance" program, and details on how multiemployer plans interact with the PCORI fees.

## Exchange Notices

The ACA as passed requires employers to distribute notices to employees about the upcoming Health Insurance Exchanges. This requirement was originally set for March, 2013, and ensures that the notices:

- Inform the employees about the Exchanges, how they operate, and how an employee can contact them;
- If the employer's health plan doesn't meet the 60% actuarial value test, inform the employee that they may be eligible for a tax credit if they choose to purchase coverage through the Exchange; and
- If the employee elects to purchase coverage through the Exchange, inform them that they may lose the employer contribution to their health benefits plan, as well as the tax break they currently receive for purchasing employer coverage.

Due to the delays in the implementation of the Exchanges and also the issuance of certain regulations, the DOL is deferring the requirement to distribute this written notice. They anticipate the new distribution date will be late summer or fall of 2013, which will correspond to the opening of the Exchanges. Finally, the DOL emphasized that they are looking at multiple options to assist the employer in preparing the notices, including the use of model notice language or other templates currently proposed. As more guidance is issued we will be assisting our clients with this notice.

## Health Reimbursement Arrangements

Health Reimbursement Arrangements, or HRAs, are a tax-free program, funded by an employer that reimburses employees for certain out-of-pocket medical expenses. HRAs are designated as group health plans under the ACA.

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All group health plans under the ACA are prohibited from having annual or lifetime limits on certain categories of expenses. HRAs generally operate on a fixed annual contribution defined by the employer, and do not meet this requirement. However, in many cases, they are also paired with a high-deductible health plan.

The ACA states that an HRA that is "integrated" with a health plan that otherwise has no annual or lifetime limits on the required categories of expenses is acceptable. However, an HRA that is a "stand-alone" HRA – not associated with a health plan – will have to comply with the no annual or lifetime limits as of January 1, 2014, or it will be out of compliance with the ACA.

The FAQs confirm this stance, and further elaborate that HRAs designed to reimburse individual health insurance premium costs will remain out of compliance with this requirement, regardless of whether the individual plan otherwise meets the no annual/no lifetime limit standards. Additionally, the DOL provides transition guidance for HRAs that were in place prior to January 1, 2014, that employers can use to either transition out of the HRA or transition the HRA into a compliant design.

This stance by the DOL will potentially affect those employers who were planning on moving to the employer-paid, individual coverage approach to satisfy their Shared Responsibility requirements under the ACA, and also those employers with employees in San Francisco that use an HRA to meet San Francisco's HCSO requirements. Assurance will evaluate options our clients will have starting January 1, 2014, and work with them to pursue appropriate alternatives as required.

## Disclosure of Information Related to Firearms

The ACA prohibits organizations operating wellness or health promotion programs from requiring the disclosure of information relating to certain information concerning firearms. The DOL has not issued any guidance on this provision, but they do affirm that nothing in the provision limits communication between health care professionals and their patients regarding firearms. As more information becomes available, we will continue to pass it on.

## Exemption for Certain Self-Insurance Prescription Drug Coverage that Supplement Medicare Part D

Some employers provide and supplement Medicare Part D coverage to their retirees under Employer Group Waiver Plans (EGWPs). This coverage, which relies on Medicare to provide certain types of coverage, while it supplements others, doesn't meet some of the ACA's group health plan requirements

when viewed on its own. However, the DOL has stated that they will not take any enforcement action against these arrangements pending further guidance, both from the DOL and from CMS.

## Fixed Indemnity Insurance

Fixed indemnity coverage in treated as an "excepted" benefit under the ACA, meaning it is not subject to all of the insurance reform mandates that traditional group health plans are. The DOL has noted a "significant increase" in the amount of plans that are being labeled as fixed indemnity coverage that, in reality, don't meet the standard. Therefore they have listed the following three requirements for a plan to be a fixed indemnity plan:

- The benefits have to be provided under a separate policy, certificate, or contract of insurance;
- There is no coordination between the provision of the benefits and an exclusion of benefits under any group health plan maintained by the same plan sponsor; and
- The benefits are paid with respect to an event without regard to whether benefits are provided with respect to the event under any group health plan maintained by the same employer.

Additionally, the regulations state that in order to be a hospital or other type of fixed indemnity insurance, the insurance must pay a fixed dollar amount per day (or other period) of hospitalization or illness, regardless of the amount of expenses incurred.

Essentially, the DOL has noticed that a lot of plans that are being labeled as fixed indemnity plans (and therefore not subject to the various ACA insurance mandates) aren't meeting the intended criteria. For instance, they may have a "per visit" reimbursement as opposed to "per day or other period of illness", or have varying amounts of benefits depending on the type of expense incurred. This type of plan more closely resembles a traditional plan, but supposedly be significantly less expensive as it wouldn't be required to meet all of the ACA's requirements. Employers purchasing this type of plan in the hopes of meeting their requirement to provide coverage would find that they were indeed not in compliance with the Shared Responsibility provisions, and subject to penalties. By clearing up any confusion about what a fixed indemnity plan is, the DOL is helping employers and carriers remain in compliance.

## Payment of PCORI Fees by Multi-Employer Plans

In certain multiemployer plan scenarios, the entity that is statutorily required to pay the PCORI fee would end up being a board of trustees that exists solely to administer the plan and which has no fund source to pay those fees. The new DOL guidance affirms that in some limited scenarios, the

multiemployer plan would be allowed to use plan assets to pay the fee, a practice that would not normally be allowed.

## Conclusion

These FAQs continue the DOL's issuance of guidance that is critical to employers and individuals as we move closer to the ACA's January 1, 2014 full implementation date. The delay on the Exchange Notification is welcome news, as much uncertainty existed as to how that Notice was to be drafted and distributed with only a month to go before the distribution deadline. Assurance will provide further guidance on the Notice and the other items addressed in this guidance as they are made available.