October 25, 2018

Into The Weeds – Again! Answers to Specific Employer Benefits Questions

Benefit Comply

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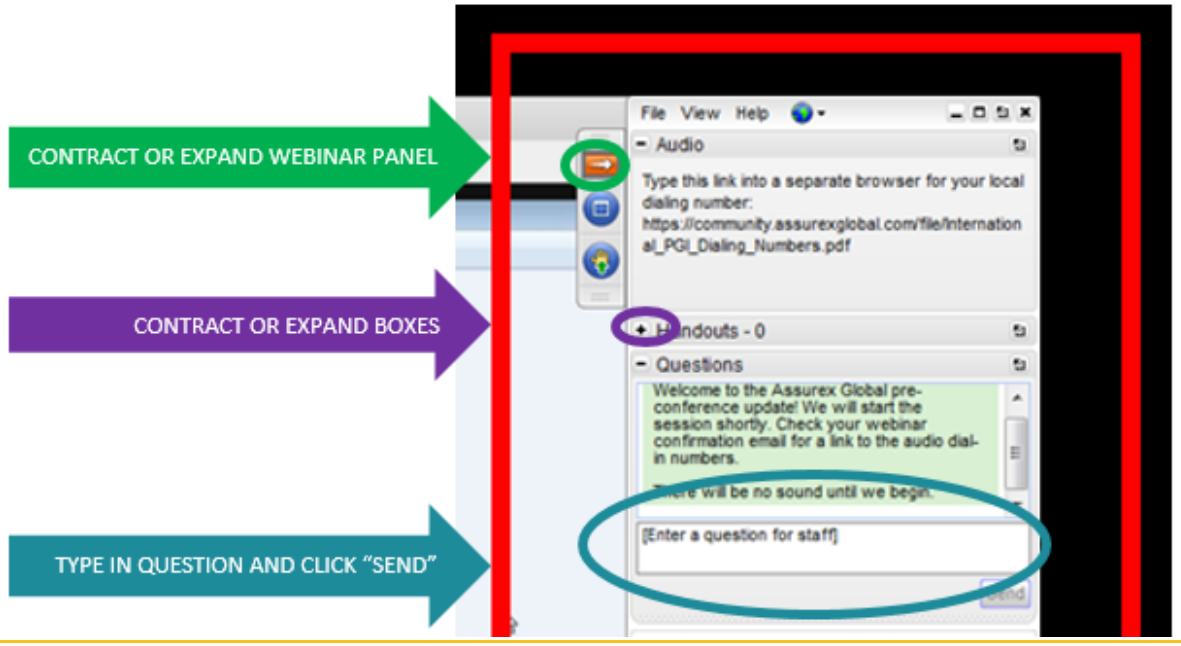
- Welcome! We will begin at 3 p.m. Eastern
- There will be no sound until we begin the webinar. When we begin, you can listen to the audio portion through your computer speakers or by calling into the phone conference number provided in your confirmation email.
- You will be able to submit questions during the webinar by using the “Questions” or “Chat” box located on your webinar control panel.
- Slides can be printed from the webinar control panel – expand the “Handouts” section and click the file to download.



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QUESTION 1 –
Does an MLR rebate have to be distributed to plan participants?

MLR Rebates

- MLR Background
  - ACA requires health insurance carriers to meet specific claims loss ratios
    - 85% for large group plans
    - 80% for small group and individual plans
  - If carrier claim costs do not meet minimum ratios, it must distribute a refund to individual and group policy holders
- MLR Basics
  - If the employer paid 100% of the premium, the employer keeps the entire rebate
  - If participants paid a portion of the premium, a corresponding portion of the rebate is considered plan assets
    - Calculate % of the total annual premium that was contributed by plan participants during the calendar year - Example:
      - Total annual plan premiums = $1,000,000
      - Employer paid $650,000 (65%)
      - Employees and COBRA participants contributed $350,000 (35%)
      - 35% of the MLR rebate is considered plan assets

MLR Rebates

- What Should Employers Do With Plan Assets?
  - General Rule – Must be used to benefit the plan
- Most Common Approach – Distribute to Plan Participants
  - Rebate may be distributed in 1 of 3 ways:
    - Cash back (taxable income)
    - Reduce employee contributions (“premium holiday”)
    - Benefit enhancement
- Distribution Rules
  - MLR rebates must be distributed within 3 months of receipt to avoid being subject to ERISA trust requirements
  - If multiple fully-insured plans are offered a rebate, the rebate must be distributed to participants in the plan that generated the rebate

MLR Rebates

- Distribution Rules (continued)
  - Rebate may be distributed to:
    - (i) current plan participants (including COBRA participants); or
    - (ii) current participants who also participated in the previous plan year
  - Not necessary to include former plan participants
    - Cost of distributing to former participants typically exceeds the value of the distribution
  - Benefit Enhancement Thoughts
    - Although an employer could provide benefit enhancement (e.g. reduced copay for prescriptions), the rebate is supposed to be distributed within 3 months or else put in trust
    - Might also be a hassle to take away any benefit enhancement in the future

QUESTION 2 –
I manage a small business with less than 50 employees, but our owner has a stake in other businesses. Am I subject to the ACA employer mandate?

§414 Controlled Group Rules

- IRC §414 Controlled Group and Affiliated Service Group Rules
  - Determines when separate (different EINs) but related employers must be treated as a single entity for a number of employee benefit rules
  - All employers that are part of a controlled group or affiliated service group are considered part of an aggregated Applicable Large Employer (ALE) group and are subject to the §4980H employer shared responsibility rules and employer reporting requirements
  - Rules are very complex

§414 Controlled Group Rules

- Controlled Group Basics
  - Based on ownership
  - Examples of controlled groups
    - Parent company owns more than 80% of a subsidiary
    - Brother-sister controlled group: 5 or fewer individuals own 80% of two entities
- Affiliated Service Group Basics
  - Based on management structure and control, not on ownership %
  - Example – Clinic management company that manages operations of clinics each separately owned by different physicians

QUESTION 3 –
I have an employee who is on an indefinite leave of absence…when can benefits be terminated?

Leave of Absence

- Various Factors Employer Must Consider
  - FMLA / ADA Requirements
  - Plan Eligibility Rules
  - State Leave Requirements

Leave of Absence

- Family Medical Leave Act (FMLA)
  - If the employee qualifies for FMLA-protected leave, the employer is required to continue group health plan coverage with the same eligibility rights and employer contributions as if they are an active employee
- Americans with Disabilities Act (ADA)
  - If the employee qualifies for ADA protection, the employer may need to make reasonable accommodations such as providing the ability to work fewer hours or continue the leave of absence beyond what is required under FMLA
  - ADA does not require employer to continue health insurance unless benefits are made available to other part-time employees or employees on a leave of absence

Leave of Absence

- Plan Eligibility Rules
  - Does the employee still meet plan eligibility rules?
    - Does the employer use the look-back measurement method, and the employee is considered full-time through the remainder of the current stability period?
    - Does the employer have leave policies in place which extend eligibility for benefits beyond what is required under FMLA?
    - Are the plan eligibility rules clear about when the employee loses eligibility in the event of leave?
- State and Local Leave Laws
  - If an employer plan is subject to ERISA, state and local laws generally cannot require employer plans to continue eligibility due to ERISA preemption rules

Leave of Absence

- COBRA Continuation Rights
  - Beyond what is required under FMLA and any state leave requirements, if the employee no longer meets plan eligibility rules, coverage should be terminated and COBRA offered (as applicable)
  - Beware of extending coverage beyond plan eligibility rules or legal requirements
    - Continuing to offer coverage beyond what is required may lead to issues with carrier coverage of claims

QUESTION 4 –
When is coverage effective for a new spouse being added to the plan following a marriage?

HIPAA Special Enrollment Rights

- Mid-Year Enrollment Rights
  - Plan is required to allow mid-year enrollment upon the acquisition of a new dependent due to birth/adoption or marriage so long as notice is provided within 30 days
- Coverage Effective Date
  - Coverage must be effective no later than 1st of the month following receipt of notification
  - Some plans are more generous and allow the effective date to be retroactive to the date of the event (or 1st of the month following the event)

§125 Election Changes

- Election Irrevocability Rules
  - §125 rules prohibit mid-year election changes (i.e. changes in salary reduction elections) unless there is a recognized change in status that is consistent with the change being requested
  - HIPAA special enrollment rights are a recognized change in status under §125 rules permitting a mid-year election change
- Prospective Election Changes
  - §125 rules only permit election changes to be prospective, unless the change is for a new hire or for the birth/adoption of a new dependent
  - If coverage is made effective retroactively (e.g. back to the date of the marriage), employee contributions for the retroactive coverage have to be handled on an after-tax basis to avoid violating §125 rules

§125 Election Changes

- Events Permitting a §125 Election Change
  - Change in Status Includes Six Categories of Events
    - Change in employee's marital status
    - Change in the number of dependents
    - Change in employment status
    - Dependent satisfies or ceases to satisfy definition of dependent
    - Change in residence
    - Commencement or termination of adoption proceedings
  - Cost or Coverage Changes
    - Cost changes with automatic adjustment of participant contributions
    - Significant cost changes
    - Significant curtailment of benefit or loss of benefit option
    - Significant expansion of benefit or addition of benefit option
    - Change in coverage under another employer's plan

§125 Election Changes

- Events Permitting a §125 Election Change (cont.)
  - Accommodation of Other Laws
    - HIPAA Special Enrollments
    - COBRA Qualifying Events
    - Judgments, Decrees or Orders
    - Medicare or Medicaid Entitlement
    - FMLA Leaves of Absence
    - ACA - Employee is eligible for an ACA Special Enrollment Period or the employee seeks to enroll in a plan through a Marketplace during annual open enrollment period
  - HSA contributions made through cafeteria plan (employer required to allow monthly changes)

QUESTION 5 –
An employee hired as full-time was moved to a part-time position 3 months after being hired…is the employee now subject to an initial measurement period upon the change in status?

Look-Back Measurement Method

- Measurement Period Basics
  - When defining full-time employees for ACA purposes, an employer can use the monthly measurement method or look-back measurement method
  - When using the look-back measurement method, an “initial measurement period” of up to 12 months can be imposed on part-time, variable hour, and seasonal employees
- Two Types of Look-Back Measurement Period Cycles
  - Standard Cycle
    - Standard measurement, administrative and stability period applicable to those employees who have been employed at least one full standard measurement period (“ongoing employees”)
  - Initial Cycle
    - Applicable to those employees who are not yet considered ongoing employees, but applied differently depending upon whether the employee is expected upon hire to be full-time or not full-time

Look-Back Measurement Method

- Initial Cycle
  - Full-time new hire
    - Coverage should be offered after the plan waiting period, but no later than 1st of the 4th month
    - Employee is measured monthly until the employee has completed one standard measurement period and is in a stability period with the rest of the ongoing employees
  - Example: Employee hired in early Apr. 2018 as a full-time employee, but then decides to work “as needed” (variable hour) in Jul. 2018. Assume a 12-month measurement cycle and a calendar plan year
    - Employee must be offered coverage no later than Aug. 2018
    - Employee is measured monthly Apr. 2018 through Dec. 2019 and must be offered coverage for any month hours of service are 130 or more
    - Employee is measured Nov. 2018 – Oct. 2019 to determine status for the Jan. – Dec. 2020 plan year (and then is in the standard cycle with the rest of the ongoing employees)

Look-Back Measurement Method

- Initial Cycle
  - Not full-time new hire (part-time, variable hour or seasonal hire)
    - Employee may be measured for an initial measurement period before there is any requirement to make an offer of coverage
    - Employee is also measured during the standard measurement period to determine eligibility following the initial cycle
  - Example: Employee hired in early Apr. 2018 as a variable hour employee. Assume a 12-month measurement cycle and a calendar plan year
    - Employee is measured May 2018 – Apr. 2019, and if the employee averages full-time hours, must be offered coverage Jun. 2019 – May 2020
      - No offer of coverage required prior to Jun. 2019, even if the employee has full-time hours in some months, unless there is a formal change in status to full-time
    - Employee is also measured Nov. 2018 – Oct. 2019 to determine status for the Jan. – Dec. 2020 plan year (and then is in the standard cycle with the rest of the ongoing employees)

QUESTION 6 –
How are Medicare and COBRA continuation rights coordinated upon retirement?

COBRA and Medicare

- If employee enrolls in (becomes “entitled to”) Medicare after electing COBRA continuation coverage, COBRA may be terminated early
- If employee was enrolled in (“entitled to”) Medicare prior to retiring, the employee must be offered COBRA continuation coverage for up to 18 months upon retiring
  - For spouses and dependents, COBRA continuation coverage must be made available for the longer of (i) 36 months from the employee’s Medicare entitlement; or (ii) 18 months from retirement

QUESTION 7 –
Can I provide an incentive to Medicare-eligible employees to help them pay for their Medicare coverage?

Medicare Secondary Payer (MSP) Rules

- Coordination of Benefits
  - MSP rules determine which plan is primary if an individual is covered by a group health plan and Medicare
    - Age-based Medicare entitlement
      - Employers with 20 or more employees, group health plan is primary
      - Employers with fewer than 20 employees, group health plan is secondary
    - Disability-based Medicare entitlement
      - Employers with 100 or more employees, group health plan is primary
      - Employers with fewer than 100 employees, group health plan is secondary
    - Retiree coverage, Medicare is primary

Medicare Secondary Payer (MSP) Rules

- When the Group Health Plan is Primary
  - Employer is required to offer the same benefits to individuals eligible for Medicare (e.g. employees and their spouses age 65 or older)
  - Employer is prohibited from discouraging individuals from enrolling in their group health plans or from offering any “financial or other incentive” not to enroll

QUESTION 8 –
I want to offer a severance to an employee after termination that includes 6 months of paid health insurance. When should I start COBRA?

Severance Agreements & COBRA

- COBRA Event Date
  - The termination of employment is a COBRA event if it causes the loss of coverage at the time of the termination OR “at some time in the future”
- Maximum COBRA Coverage Period
  - Depends upon how the employer handles the COBRA notice
    - COBRA period runs from actual event date unless the plan optionally extends the start of COBRA to the loss of coverage date
    - Option to extend COBRA from loss of coverage date
      - If coverage under the plan is lost at a date later than the qualifying event and the plan provides for the extension of the required periods, then the maximum coverage period is measured from the date when coverage is lost
      - In this case the employer is allowed to provide the COBRA notice after the loss of coverage

Severance Agreements & COBRA

- Maximum COBRA Coverage Period (cont.)
  - If employer wishes the COBRA period to run from actual event date even if paying for coverage during severance
    - Best practice is for employer to provide “special” COBRA notice at the time of the event stating the relevant dates and clarifying that employer will be paying for the first “X” number of months of COBRA
    - If COBRA notice is sent at the end of the extended coverage period, it must make clear what the maximum COBRA period is that applies to that person (i.e. from termination date, not the loss of coverage date)
- Warning!
  - Carriers may not be required to cover COBRA qualified beneficiaries beyond the original COBRA period
  - If employer wishes to offer the extended COBRA coverage, they should make sure their carriers will allow an extension of COBRA eligibility

QUESTION 9 –
Can an employer differentiate benefits or employer contributions between different categories of employees?

Benefit Nondiscrimination Rules

- Differentiation Is Allowed
  - Employers are allowed to differentiate benefits and contributions between different reasonable classifications of employees subject to benefit nondiscrimination rules
- Benefit Nondiscrimination Rule Basics
  - Rules restrict an employer's ability to favor highly compensated individuals if the benefits are provided on a tax-favored basis
  - Rules do not require all benefits be identical – rather they impose tests that limit how much benefits can vary based on financial demographics of the employees
  - §125 nondiscrimination rules
    - Apply to all benefits run through a cafeteria plan (e.g. fully-insured, self-insured, health FSA, dependent care account, HSA)
  - § 105(h) nondiscrimination rules
    - Apply to any self-insured group health plan
  - ACA fully-insured nondiscrimination rules are on hold indefinitely (until further regulations are released)

Benefit Nondiscrimination Rules

- Impact of Discriminatory Plans
  - If an employer chooses to differentiate benefits between categories of employees, employers should consider discrimination testing to ensure there isn't a violation of applicable nondiscrimination rules
  - If nondiscrimination rules are violated, benefits provided to highly compensated individuals will need to be treated as taxable income
- Red and Yellow Flags!
  - Clearly discriminatory in design 
    - Self-insured health plan with better benefits or shorter waiting period available only to upper management
  - Different health benefits offered to different locations 
    - Could be okay unless financial demographics vary significantly between locations (e.g. location 1 = executive offices, location 2 = low wage facility)
  - HSA run through a small employer cafeteria plan 
    - Highly compensated individuals often make larger contributions to their HSA accounts which can cause a problem with §125 tests

QUESTION 10 –
I am a large employer and have a large number of independent contractors. I am considering offering benefits to them. What issues should I be thinking about?

Independent Contractors

- Proper Worker Classification
  - Most important thing is to make sure workers are classified properly according to DOL and IRS rules
  - Misclassification of employees as independent contractors could trigger §4980H employer shared responsibility rule penalties
- Offering Coverage to Independent Contractors (ICs)
  - Would be considered taxable income to the ICs
  - Creates a multiple employer welfare arrangement (MEWA) because contractors are not employees
    - Must file Form M-1 with DOL unless ICs make up less than 1% of enrollment
    - Self-insuring a MEWA may violate state insurance law
    - Fully-insured plans should make sure group contract with carrier allows for a MEWA, otherwise carrier may refuse to honor claims incurred by ICs
- Association Health Plans (AHP)
  - An AHP can cover ICs, but an employer cannot directly sponsor an AHP

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