COMPLIANCE
UPDATE

AssuredPartners

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Medicare Part D Notices

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 requires group health plan sponsors, that provide prescription drug coverage, to annually disclose to individuals eligible for Medicare Part D whether the plan's coverage is creditable or non-creditable.

Creditable Coverage

This notice is important because Medicare beneficiaries who are not covered by creditable prescription drug coverage and who do not enroll in Medicare Part D when first eligible will likely pay higher premiums if they enroll at a later date. Although there are no specific penalties associated with this notice requirement, failing to provide the notice may be detrimental to employees and may cause consequences for employers if an employee does have to pay a higher premium.

Plan sponsors must provide the annual disclosure notice to Medicare-eligible individuals before October 15, 2019 —the start date of the annual enrollment period for Medicare Part D.

Disclosure Notices

CMS has provided two model notices for employers to use:

- Creditable Coverage Disclosure Notice for when the health plan's prescription drug coverage is creditable; and
- Non-Creditable Coverage Disclosure Notice for when the health plan's prescription drug coverage is not creditable.

These model notices are also available in Spanish on CMS' website. Plan Sponsors should carefully review and customize these notices to ensure they accurately reflect their plan provisions.

Disclosure notices must be provided to all Part D eligible individuals who are covered by, or who apply for, the plan's prescription drug coverage, regardless of whether the prescription drug coverage is primary or secondary to Medicare Part D.

The disclosure notice requirement applies to Medicare beneficiaries who are active or retired employees, disabled or on COBRA, as well as Medicare beneficiaries who are covered as a spouse or dependent. To simplify plan administration, we recommend plan sponsors provide the disclosure notice to ALL plan participants.

Rx Plans May Exclude Value of Drug Manufacturers' Coupons Until Further Notice

The DOL, HHS, and IRS have jointly issued an FAQ addressing whether health plans must count drug manufacturers' coupons toward the annual cost-sharing limits under the Affordable Care Act (ACA). (Note: these limits apply to non-grandfathered group health plans, including self-insured and insured small and large group market health plans.) Regulations that announced the 2020 benefit and payment parameters (including the maximum annual cost-sharing limits) provided that, for plan years beginning on or after January 1, 2020, plans and insurers need not count the value of drug manufacturers' coupons toward the annual cost-sharing limits when a medically appropriate generic equivalent is available.

After the regulations were released, stakeholders pointed out that this provision implies that, in any other circumstances, plans and insurers must count such coupon amounts toward the annual cost-sharing limits, and that such a requirement could create a conflict with certain rules for high deductible health plans (HDHPs) that are intended to allow eligible individuals to establish HSAs.

Explaining that, for purposes of determining whether the HDHP minimum deductible has been satisfied, HDHPs must disregard drug discounts and other manufacturers' and providers' discounts and may only take into account amounts actually paid by the individual, the FAQ acknowledges that HDHP insurers or sponsors may be unable to comply with both rules simultaneously. The agencies intend to address this conflict in the regulations that announce the 2021 benefit and payment parameters. Until such regulations are effective, the agencies will not initiate an enforcement action if an insurer or plan excludes the value of drug manufacturers' coupons from the annual cost-sharing limits, including when no medically appropriate generic equivalent is available.

The rule announced in the 2020 benefit and payment parameters was intended to discourage providers and patients from choosing expensive brand-name drugs when a less expensive and equally effective alternative is available. HHS also proposed other rules designed to encourage the use of generic drugs but did not include them in the final parameters, noting their complexity and administrative burden. It will be interesting to see what direction the agencies take when the 2021 benefits and payment parameters are proposed, including how they reconcile any conflicting rules such as the one addressed in this FAQ.

Additional Resources:

- CMS/HHS/DOL ACA FAQ Part 40, August 26, 2019
- May 9, 2019 - HHS 2020 Benefit Limits and Updates

Source: AP Benefit Advisors Blog – September 4, 2019

Summary Annual Reports

The Employee Retirement Income Security Act (ERISA) requires plan administrators to provide covered participants with a Summary Annual Report (SAR), a narrative summary of a plan's Form 5500, by the last day of the ninth month following the end of the plan year. **For calendar year plans, the deadline is September 30th.** Calendar year plans that filed for an extension for filing their Form 5500 also have a two-month extension to provide the SAR. Sample SAR language can be found here, on the Department of Labor's website.

Plans that are exempt from filing Form 5500 are also exempt from the SAR requirement.

Agencies Finalize Mental Health Parity Resources

The Department of Labor, Health and Human Services and the Treasury (Departments) have finalized resources to help plan sponsors comply with the Mental Health Parity and Addiction Equity Act (MHPAEA). MHPAEA requires parity between mental health and substance use disorder (MH/SUD) benefits and medical and surgical benefits. These final resources include important clarifications to the proposed FAQs and other guidance issued in 2018. The resources include:

- Final FAQs on mental health parity
- A final model form for plan participants to use when requesting information about their MH/SUD benefits
- A self compliance tool
- Checklist of warning signs of potential MHPAEA violations

According to the FAQs, the Departments intend to provide additional MHPAEA implementation information on a regular basis, including revised compliance program documents and enforcement data.

Employers are encouraged to work with their insurance providers and benefit administrators to ensure their health plan's coverage of MH/SUD benefits complies with MHPAEA, including any non-quantitative treatment limitations (NQTLs). Employers should also consider using the DOL's final resources to understand MHPAEA's requirements and review their plan designs.

For the most up-to-date information on MHPAEA compliance, see the DOL's website for MH/SUD parity.

Additional Resources:

- 2018 Pathway to Full Parity
- Previously issued Fact Sheets & FAQs

Source: AP Benefit Advisors Blog - September 4, 2019

Affordable Coverage

For plan years beginning in 2020, employer-sponsored coverage will be considered affordable if the employee's required contribution for self-only coverage does not exceed **9.78 percent** of the employee's household income for the year, for purposes of both the pay or play rules and premium tax credit eligibility.

MLR Rebates

The Affordable Care Act (ACA) established medical loss ratio (MLR) rules to help control health care coverage costs and ensure that enrollees receive value for their premium dollars. The MLR rules require health insurance issuers to spend 80-85 percent of premium dollars on medical care and health care quality improvement, rather than administrative costs.

Issuers that do not meet these requirements must provide rebates to consumers. According to the Kaiser Family Foundation, insurance companies are expected to pay out a record of at least $1.3 billion in rebates this year.

Rebates vary by state and by insurer and must be issued by September 30 following the end of the MLR reporting year. For the 2018 reporting year, issuers are required to issue rebates by September 30, 2019.

Employers that receive a rebate must quickly determine what their MLR requirements are (requirements vary depending on the type of plan and whether the funds are plan assets) and what options they have for distributing these funds. **Employers have only 90 days from the date they receive a rebate to complete their handling and any distribution of the rebate.**

Source: Kaiser Family Foundation Issue Brief – September 10, 2019

ACA Pay or Play Still Applies

In a letter dated June 28, 2019, the IRS Office of Chief Counsel confirmed that applicable large employers (ALEs) must continue to offer acceptable coverage to their full-time employees (and dependents) or be liable for an employer shared responsibility payment (ESRP) ("penalty"). The letter also confirms that the law does not provide a waiver of an ESRP and that although some forms of transition relief were available for 2015 and 2016, no such transition relief is available for 2017 and beyond.

Background

Applicable large employers (ALEs) are those employers with at least 50 full-time employees, including full-time equivalent employees, on business days in the preceding calendar year. The ACA's Employer Mandate ("Pay or Play" rules) requires ALEs to offer affordable, minimum value coverage to essentially all (95% or more) of its full-time employees or pay an employer shared responsibility penalty.

Confusion seems to stem from an executive order signed by President Trump in early 2017, in which he directed the Department of Health and Human Services and other federal agencies to waive, delay or grant exemptions from ACA requirements that may impose a financial burden. However, as pointed out in the IRS letter, Trump's executive order did not change the law. Changes to the ACA must be made by Congress. Therefore, taxpayers must continue to follow the law and pay any applicable ESRP that they may owe.

IRS Letters and Notifications

There are several IRS letters and notifications related to the ACA Pay or Play rules that employers, especially ALEs, should be aware of:

Letter 5699 - This notice is mailed to employers that the IRS believes are ALEs in violation of IRC Section 6056 because they have not filed Forms 1094-C and 1095-C in previous years. Employers that receive this letter have **30 days from the date of the letter** to respond with one of the following five options:

1. The employer was an ALE for the tax year(s) in question but filed its Forms 1095-C with a different entity;
2. The employer was an ALE for the tax year(s) in question and is including the Forms 1094-C and 1095-C with its response to the Letter 5699 (note this is only an option if the employers has fewer than 250 Forms 1095-C);
3. The employer was an ALE for the tax year(s) in question and will be filing the Forms 1094-C and 1095-C with the IRS by a specified date (not more than 90 days from the date on the Letter 5699);
4. The employer was not an ALE for the tax year(s) in question; or
5. Another reason with a statement explaining why the employer has not filed the Forms 1094-C and 1095-C and the actions the employer plans to take to remedy the situation.

An employer's failure to file Forms 1094-C and 1095-C under IRC Section 6056 may result in the assessment of penalties under IRC Section 6721 and 6722 for a failure to file information returns. Fully cooperating with the IRS could lessen or eliminate a potential penalty under sections 6721 and 6722. Therefore, a prompt response to the IRS and filing of the Forms 1094-C and 1095-C is essential.

In addition to Letter 5699, an employer may receive a follow up letter, **Letter 5698.**

Letter 5005-A/Form 886-A – This letter and form notify an employer of their liability for a tax penalty under IRC Section 6721 and 6722. Both are mailed to employers that have failed to file Forms 1094-C and 1095-C with the IRS and have failed to furnish Form 1095-C to its full-time employees, as required. ***Should an employer fail to respond to Letter 5699 or to follow up Letter 5698, the IRS will assume the employer did not file/furnish the required forms and will propose penalties for such failures.***

Letter 226-J - IRS Letter 226J is the ESRP penalty notice issued by the IRS to those ALEs the tax agency believes have failed to comply with the ACA's Employer Mandate by not offering Minimum Essential Coverage (MEC) to at least 95% of their full-time employees (and their dependents) or if coverage was provided to 95% of full-time employees, it was unaffordable or did not provide minimum value.

Employers that receive a Letter 226J must respond to the letter, either agreeing with the proposed penalty or disagreeing with part or all or the proposed ESRP amount **by the response date indicated on the letter.** The IRS provides an employer response form, Form 14764, for employers to use for this purpose.

Letter 227 – The various Letters 227 are acknowledgement letters sent to close an ESRP inquiry or provide the next steps to an ALE regarding the proposed ESRP. There are five different 227 letters:

1. **Letter 227-J** acknowledges receipt of the signed agreement Form 14764, ESRP Response, and that the ESRP will be assessed. After issuance of this letter, the case will be closed. No response is required.
2. **Letter 227-K** acknowledges receipt of the information provided and shows the ESRP has been reduced to zero. After issuance of this letter, the case will be closed. No response is required.
3. **Letter 227-L** acknowledges receipt of the information provided and shows the ESRP has been revised. The letter includes an updated Form 14765 (PTC Listing) and revised calculation table. The ALE can agree or request a meeting with the manager and/or appeals.
4. **Letter 227-M** acknowledges receipt of information provided and shows that the ESRP did not change. The letter provides an updated Form 14765 (PTC Listing) and revised calculation table. The ALE can agree or request a meeting with the manager and/or appeals.
5. **Letter 227-N** acknowledges the decision reached in Appeals and shows the ESRP based on the Appeals review. After issuance of this letter, the case will be closed. No response is required.

Employers should read the letter and attachments carefully. The documents explain the next steps available and provide information on how the case will be resolved. Note, some letters do require a response.

CP220J – This notice is essentially a bill that is mailed to ALEs that have been assessed an ESRP. It includes the due date, amount due and payment options for the ESRP.

Additional Resources:

- Chief Counsel Letter
- IRS - Understanding-your-letter-226-j
- IRS - Understanding-your-letter-227
- IRS- Understanding-your-cp220j-notice

ACA Reporting 2019

The IRS has yet to release the 2019 forms and related instructions for the ACA reporting required under IRC Section 6055 and 6056. However, that doesn't mean employers should delay gathering information and getting prepared. The 2019 deadlines are:

- **January 31, 2020** - Individual statements must be furnished to individuals
- **February 28, 2020** – Forms must be filed with the IRS **(March 31, if filed electronically)**

Did You Know?

An employee's need to attend school meetings addressing the educational and special needs of his/her children is a qualifying reason for taking FMLA leave?

Employers that are covered by the FMLA must allow eligible employees to take unpaid, job-protected leave to care for a family member with a serious health condition. This includes physical and psychological care and making arrangements for changes in care. According to the DOL, an employee's need to attend a school meeting to discuss the Individualized Education Program (IEP) of her children (who have serious health conditions as certified by a health care provider) is a qualifying reason for taking intermittent FMLA leave.

Employers should consider whether employees' requests for time off to attend IEP (or similar) meetings for their children may qualify as FMLA leave. Although DOL opinion letters are specific to the facts presented, employers can look to them for guidance on the DOL's interpretation of the law.

Additional Resources:

- The Employer's Guide to the FMLA, a DOL publication
- The DOL's webpage on FMLA compliance, including links to model forms
- DOL Opinion Letter (FMLA2019-2-A) on school meetings as FMLA-covered leave

Should you have any questions or concerns about any of the topics addressed in this Newsletter, please contact a member of your AssuredPartners compliance team.