SEYFARTH SHAW

Health Care Reform Management Alert Series

Bi-Partisan Legislation Passed by Lame Duck Congress

Issue 103

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This is the one hundred and third issue in our series of alerts for employers on selected topics on health care reform. (Click here to access our general Summary of Health Care Reform and other issues in this series.) This series of Health Care Reform Management Alerts is designed to provide an in-depth analysis of certain aspects of health care reform and how it will impact your employer-sponsored plans.

On December 7th, Congress passed a bi-partisan bill covering a number of topics in the health care area, intended to address perceived discrete problems with the current legislative landscape. President Obama is expected to sign the legislation. We highlight a few of the covered topics below:

Health Reimbursement Arrangements

One of the frequent complaints from small employers is the inability to sponsor a heath reimbursement arrangement or HRA as a stand-alone health care offering. Agency regulations implementing the Affordable Care Act interpreted the rules against annual or lifetime limits in a manner that would prohibit stand-alone HRAs that were not integrated with a more traditional group health plan, as the amount that could be reimbursed for medical care expenses in a given year is limited to the balance in the HRA. [See prior Alert in this series here.]

Under a division of the bill entitled *Increasing Choice, Access, and Quality in Health Care for Americans Act*, the new legislation allows employers who are not "applicable large employers" to offer a stand-alone HRA, called a "qualified small employer health reimbursement arrangement," to their employees as long as they do not otherwise offer a group health plan. In order to satisfy the standards for offering a qualified small employer HRA, the arrangement must:

- be offered on the same terms to all eligible employees of the small employer;
- be funded solely by the employer (i.e., no salary reduction contributions are allowed);
- limit reimbursement in a year to no more than $4,950 for expenses of the employee, or $10,000 if the arrangement provides for reimbursement of expenses for family members;

Eligible employees include all employees of the small employer unless they:

- have not completed 90 days of service;
- are under age 25;
- are part-time or seasonal;
- are non-resident aliens without US source income; or
- are represented by a union that has not bargained for coverage.

An employer contribution will be considered to be made on the same terms to all eligible employees even if it is based on the cost of an insurance policy in a market that varies depending on age or number of covered family members.

The sponsor must also provide a notice to each eligible employee, not later than 90 days before the start of each year, that describes the qualifying small employer HRA.

Note that having the HRA available does not satisfy the individual mandate for an employee. If the employee does not otherwise have minimum essential health coverage in place, s/he will have to pay the individual mandate tax and the amounts reimbursed under the HRA will be taxable income. The notice must also inform the employees of this consequence. The availability of the qualifying small employer HRA will also reduce the tax credit that may otherwise be available to the employee.

Mental Health Parity

The *21st Century Cures Act*, the first division of the bill, is aimed at improving mental health access. States are required to use mental health block grants toward early intervention, as well as assertive community treatment along with court-ordered assisted outpatient treatment for those with serious mental illness. Many provisions are aimed at getting the mentally ill help while keeping communities safer by creating crisis intervention teams and helping those who are in the criminal justice system. These grants will have to be funded by a future Congress.

This legislation attempts to break down barriers to the provision of mental health services by creating a committee that will link leaders of federal agencies involved in mental health care. A new position will be created to oversee the Substance Abuse and Mental Health Services Administration—the assistant secretary for Mental Health and Substance Use.

In addition, to these general public access provisions, the legislation contains changes to the mental health parity provisions that apply to health plans under the *Helping Families in Mental Health Crisis Reform Act of 2016*. The Act instructs the relevant federal agencies to put together a compliance program as well as guidance, to ensure that the rules surrounding parity of non-quantitative treatment limitations between mental health on one side, and medical and surgical benefits on the other, are being complied with by group health plans and insurers. This information is to be released within 12 months and is to look at the criteria, methods, processes, strategies, evidentiary standards and other factors that go into applying such non-quantitative treatment limitations. Examples given of criteria to be looked at for determining appropriate types of limitations are "medical management standards based on medical necessity or appropriateness or whether a treatment is experimental or investigative" and "use of fail-first or step therapy protocols."

In the event that a group health plan or insurer has violated the mental health parity rules at least five times, the appropriate agency must audit the plan documents to improve compliance.

HIPAA Privacy Rules

The legislation also expressed the sense of Congress that HIPAA privacy should be clarified to address permissible communications between healthcare professionals and caregivers of persons with mental health disorders. Specifically, the legislation directs HHS to issue rules within one year clarifying when patients in this context must give consent to disclosure,

when they have the right to object to disclosure, what discretion should be afforded to providers acting on professional judgment, and when communications are permissible to family members and caregivers.

Benjamin Conley and Diane Dygert are partners in the firm's Chicago office. If you have any questions about the future of the Affordable Care Act, please contact your Seyfarth Shaw LLP attorney, Benjamin Conley at bconley@seyfarth.com or Diane Dygert at ddygert@seyfarth.com.

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