EPSTEIN BECKER & GREEN, P.C.

ATTORNEYS AT LAW

1227 25th Street, NW, Suite 700
Washington, DC 20037-1175
202.861.0900
FAX: 202.296.2882
EBGLAW.COM

MEMORANDUM

To: National Grocers Association (N.G.A .)

From: Epstein Becker & Green, P.C.[1]

Date: December 27, 2010

Re: Health Care Reform Update

Overview

On December 23, 2010, Federal regulators released two significant guidance documents that could impact N.G.A. members' welfare benefit plans. First, the Department of Labor ("DOL"), Employee Benefits Security Administration, ("EBSA") released Frequently Asked Questions ("FAQs) addressing various health care reform issues and impacting certain welfare benefit plans. Second, the Internal Revenue Service ("IRS") released Notice 2011-01 requesting information on, and delaying the implementation of the non-discrimination provision under, Section 2716 of Patient Protection and Affordable Care Act ("PPACA").

I. EBSA FAQs

The FAQs released today are the fifth set of sub-regulatory FAQs that have been released by EBSA since the passage of PPACA.[2] The FAQs provide guidance on a variety of PPACA related issues of importance to employers. The stated purpose of these FAQs is to, "answer questions from stakeholders to help people understand the new law and benefit from it."

Below, we provide a summary of some of the more salient issues addressed in the FAQs. However, we understand that N.G.A. members might have differing concerns based upon their individual plan designs. We therefore recommend that N.G.A. members review the attached FAQs to determine whether any additional plan-specific concerns are specifically addressed.

I. Automatic Enrollment in Health Plans.

Section 1511 of PPACA requires employers with more than 200 full-time workers to automatically enroll new full-time employees in the employer's health benefit plan. However, PPACA did not articulate when employers were required to comply with this provision. Rather,

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[1] Mark Lutes and Adam Solander prepared this Update

[2] The previously released FAQs can be found at www.dol.gov/ebsa.

PPACA states that employer compliance with the automatic enrollment provisions shall be carried out, "[i]n accordance with regulations promulgated by the Secretary." This provision resulted in differing interpretations, within the employer community, where some employers interpreted this provision as effective upon enactment, while others interpreted this provision to be applicable concurrent with the "Free Rider Surcharge" and the majority of employer responsibilities in 2014.

In FAQ Q3, DOL clarifies that employers are not required to comply with this provision until specific regulations are released implementing this provision. According to FAQ Q3, the DOL intends to complete this rulemaking prior to 2014.

Impact on N.G.A. members.

To the extent N.G.A. members had expected that the automatic enrollment provision was applicable prior to 2014, this FAQ provides additional time for those members to refine their automatic enrollment systems. For example, many employers were concerned that if forced to implement this provision prior to 2014, they would not have the systems in place to ensure that new hires were not enrolled in Minimum Essential Coverage elsewhere.

II. Disclosure under Public Health Service Act ("PHSA") Section 2715(d)(4).

Section 2715 of PPACA requires the Secretary to develop standards[3] for group health plans to follow in compiling and providing a summary of benefits to enrollees. Section 2715 requires that, within 24 months of enactment, plans must provide a summary of benefits, to enrollees, in accordance with the standards developed by the Secretary.

Further, Section 2715(d)(4) requires that, if a plan makes a "material modification" to any of the terms or coverages under the plan, which are not reflected in the most recently provided summary of benefits, the plan must provide notification within 60 days of the effective date of the modification.

The relevant agencies have not yet issued guidance regarding a plan's duty to issue a summary of benefits that accurately describes the benefits and coverages under the plan. Because of this fact, FAQ Q4 states that "[p]lans…are not required to comply with the 60-day prior notice requirement for material modifications until plans are required to provide the summary of benefits and coverage explanation pursuant to the standards issued by the Departments."

Impact on N.G.A Members.

The delay in effective date of this provision will allow N.G.A. members to, until new regulations governing the content of summary plan descriptions are issued, make "material modifications"

[3] Within 12 months of enactment.

to their plans, including unforeseen modifications as a result of changes in the law, without incurring the expense of providing notification to enrollees outside of open enrollment.

III. Grandfathered Status.

Section 1251 of PPACA exempts certain plans, in existence on March 23, 2010, from certain PPACA Title I "market reforms." On June 17, 2010, the Departments issued an Interim Final Regulation ("IFR") which specified the changes the sponsor of a grandfathered health plan can make to the plan without relinquishing that plan's grandfathered status.[4][5]

A common benefit design links an enrollee's cost-sharing to that enrollee's income. Thus, enrollees with higher incomes pay higher cost-sharing amounts, enrollees with lower incomes pay lower cost-sharing amounts. Employers that utilize this type of plan design have expressed concern that, if an enrollee's income increases causing a corresponding increase in the cost-sharing requirements under the plan, that increase in cost-sharing could exceed the threshold for allowable cost-sharing changes articulated in the IFR. The result could cause the plan to relinquish grandfathered status, even if the formula for determining cost-sharing remained identical to the formula used on March 23, 2010.

FAQ Q7 provides guidance to employers who utilize these types of plan designs. According to FAQ Q7, "if a plan…has a fixed-amount cost-sharing requirement other than a copayment (for example, a deductible or out-of-pocket limit) that is based on a percentage-of-compensation formula, that cost-sharing arrangement will not cause the plan…to cease to be a grandfathered health plan as long as the formula remains the same as that which was in effect on March 23, 2010."

Impact on N.G.A Members.

This guidance will provide relief to N.G.A. members who utilize plans with a fixed-amount cost-sharing requirement based on a percentage of compensation formula and wish for such plans to remain grandfathered. Further, this guidance will allow members to increase compensation to deserving employees without fear of relinquishing grandfather status.

II. Non-Discrimination In Favor of Highly Compensated Individuals

On December 23, 2010, the Internal Revenue Service ("IRS") released Notice 2011-01 ("Notice") which delays compliance with, and enforcement of, the non-discrimination provisions

[4] 75 Fed. Reg. 34538.

[5] These changes generally include: Elimination of a benefit; Increase in a cost-sharing percentage; Increase in a fixed-amount cost-sharing requirement other than a copayment; Increase in a fixed-amount copayment; Decrease in contribution rate by employers and employee organizations; Changes in annual limits; Change in insurance carrier (subsequently repealed).

contained in Section 2716 of PPACA. The Notice states, "[b]ecause regulatory guidance is essential to the operation of the statutory provisions, the Treasury Department and the IRS, as well as the Departments of Labor and Health and Human Services (collectively, the Departments), have determined that compliance with § 2716 should not be required (and thus, any sanctions for failure to comply do not apply) until after regulations or other administrative guidance of general applicability has been issued under § 2716."

The Notice also requests stakeholder comments with regards to certain implementation issues that have arisen as a result of a previous request for comments that was released on September 20, 2010.

Beginning in plan years on or after September 23, 2010, Section 2716 makes Internal Revenue Code ("IRC") Section 105(h) applicable to non-grandfathered, insured group health plans.[6] This provision essentially requires that an insured group health plan not favor highly compensated individuals as to benefits provided under the plan or eligibility for participation in the plan. Under Section 105(h) highly compensated individuals are those who are: a) among the five highest paid officers; b) shareholders owning more than 10 percent of the employer; and c) the highest paid 25 percent of employees.

Employers have had considerable trouble applying the 105(h) rules in the insured context because of the vague statutory language and the fact no substantive guidance has been released to aid their compliance. Furthering the need for guidance, the penalty for non-compliance, articulated in IRC Section 4980D, provides for a self-reported excise tax of $100 per day per person discriminated against.

Impact on N.G.A Members.

With less than a week remaining until the vast majority of plans begin their new plan year, the Notice will allow plan sponsors to wait until definitive guidance has been released before implementing changes to their plans. Further, the notice will prevent costly penalties from being assessed on employers who undertook good-faith efforts to comply with the new requirements. We recommend that N.G.A. members review the attached Notice to determine if they have specific comments that they wish to furnish, directly or through N.G.A., in response to the IRS's request for information.

[6] IRC Section 105(h) has been applicable to self-insured plans for over 30 years.