2018 Legal Update

Greater Cincinnati Compensation & Benefits Association

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Today's Presentation

- **Select issues raised by the Tax Cuts and Jobs Act**
  - Family and Medical Leave Act credit
  - Impact on HSA contributions
  - Transportation and parking benefits
  - Retirement plan loans
  - Retirement plan disaster relief
  - Grandfathering under Code Section 162(m)
- **Recent agency actions relating to missing retirement plan participants**
- **Update on the Affordable Care Act employer mandate penalty process**
- ***AARP v. EEOC* and its impact on wellness programs for 2018 and 2019**
- **Delayed disability claims regulations**

Tax Cuts and Jobs Act

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Family and Medical Leave Credit

- **New tax credit for employers**
  - Employer can take the credit ***or*** a deduction – not both
  - Employer can opt out of the credit
  - Applies only for 2018 and 2019

Family and Medical Leave Credit

- **Employer must have a written policy that provides:**
  - Qualifying full-time employees (customarily employed for at least 30 hours per week):
    - Not less than two weeks of annual paid family and medical leave
  - Qualifying part-time employees (customarily employed for fewer than 30 hours per week):

$$\text{The amount of leave granted to qualifying full-time employees} \times \frac{\text{The employee's expected work hours}}{\text{An equivalent full-time employee's expected work hours}}$$

Family and Medical Leave Credit

- **Employer must have a written policy that provides:**
  - The qualifying employee receives at least 50% of his/her normal pay during the leave
  - If an employer is not subject to the FMLA or offers family and medical leave to a qualifying employee that is not entitled to FMLA leave:
    - The employer will not interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under the policy.
    - The employer will not discharge or in any other manner discriminate against any individual for opposing any practice prohibited by the policy.

Family and Medical Leave Credit

- **Qualifying employees**
  - Have been employed by the employer for at least one year; and
  - For the preceding year, had compensation of no more than 60% of the amount applicable for such year under the 401(k) plan highly compensated employee definition
    - For 2018, 2017 compensation must have been no more than $72,000 (60% x $120,000)
    - May be adjusted for 2019

Family and Medical Leave Credit

- **Recommended Action Steps**
  - Work with tax professionals to determine whether a credit or a deduction is more advantageous
  - If the credit is more advantageous:
    - Consider any changes that would need to be made to the FMLA policy to qualify for the credit
    - Adopt a written policy if one is not already in place
  - If the employer does not currently offer paid family and medical leave, consider whether to begin
    - Remember that the credit is effective only for two years

Impact on HSA Contributions

- **Prior law**
  - Employee and employer contributions to an HSA together may not exceed

    1/12 x Applicable Limit x Months of Eligibility

  - Applicable limit
    - Single coverage - $3,400 for 2018
    - Family coverage - $6,900 for 2018
    - Subject to cost-of-living adjustment each year

Impact on HSA Contributions

- **Tax Cuts and Jobs Act**
  - Changed how cost-of-living adjustments are calculated, beginning with 2018
  - Revenue Procedure 2018-18 announced adjustments
  - Applicable limit
    - Single coverage - $3,400 for 2018
    - Family coverage - ~~$6,900~~ $6,850 for 2018

Impact on HSA contributions

- **Prior and Current Law**
  - If HSA contributions exceed the applicable limit:
    - Excess contributions are taxable
    - A 6% excise tax penalty applies unless the excess contributions and interest are withdrawn by the due date of the employee's tax return

Impact on HSA Contributions

- **Example 1**
  - Employee anticipates being enrolled in qualifying family coverage all year long
  - Employee contributes $6,900 to his HSA on January 5, 2018
  - Employee must withdraw $50 plus interest by April 15, 2019 to avoid the 6% excise tax
    - Can the employer withdraw the excess?
  - Employer is not required to treat the $50 as taxable compensation or report it in Box 1 of Form W-2

Impact on HSA Contributions

- **Example 2**
  - Employee anticipates being enrolled in qualifying family coverage all year long
  - Employee elects to contribute $287.50 per semi-monthly paycheck
    - $287.50 x 24 = $6,900
  - Employee does not adjust his election and employer honors the election
    - Can the employer automatically adjust the election?
  - Employer must treat $50 of the final contribution as taxable compensation and include it in Box 1 of Form W-2
  - Employee must withdraw $50 plus interest by April 15, 2019 to avoid the 6% excise tax
    - Can the employer withdraw the excess?

Impact on HSA Contributions

- **Recommended Action Steps**
  - Confirm whether any employees have already contributed more than $6,850
  - Confirm whether any employees have elected to contribute more than $6,850
    - Confirm whether the cafeteria plan gives the employer the ability to automatically adjust elections
    - Confirm how to address employer contributions

Impact on HSA Contributions

- **Recommended Action Steps**
  - Prepare a targeted or general communication about the reduced limit
    - Instructions on how to withdraw excess contributions
    - Instructions on how to change elections
    - Impact of failure to withdraw/change election (without giving tax advice)
  - Confirm whether any enrollment materials or communications need to be revised to reflect the reduced limit

Transportation and Parking

- **Prior Law**
  - Employer can take a deduction for the expenses of providing qualified transportation fringe benefits to an employee
  - Employees may exclude qualified transportation fringe benefits (up to a certain limit) from taxable income
- **Qualified Transportation Fringe Benefits**
  - Commuter transportation
  - Transit passes
  - Qualified parking
  - Qualified bicycle commuting reimbursement

Transportation and Parking

- **Tax Cuts and Jobs Act**

Qualified Bicycle Commuting Reimbursements	All Other Qualified Transportation Fringe Benefits
Taxable to employee	Not taxable to employee
Deductible by employer	Not deductible by employer
For 2018-2025	Beginning 2018
Beginning 2026, treated like all other qualified transportation fringe benefits	

  - Employer may not take a deduction for any other expenses relating to transportation between the employee's home and work, except as necessary for ensuring the employee's safety

Transportation and Parking

- **Recommended Action Steps**
  - Confirm that tax and payroll have made the appropriate changes
  - Consider whether to continue to offer some or all of the qualified transportation fringe benefits
  - Confirm whether any communications need to be adjusted
  - Confirm impact on the definition of “compensation” under applicable benefit plans

Retirement Plan Loans

- **Prior Law**
  - If a participant defaults on a loan when the participant's plan account is eligible for distribution, the outstanding loan amount is "offset" and treated as a taxable distribution to the participant
  - The amount treated as a taxable distribution is eligible for a tax-free rollover, but the rollover must be made within 60 days following the date of the offset
    - The employee essentially has an additional 60 days to repay the loan and avoid treatment as a taxable distribution

Retirement Plan Loans

- **Tax Cuts and Jobs Act**
  - Applies to offsets that occur on or after January 1, 2018
  - Applies to defaults due to:
    - Plan termination
    - Severance from employment
  - Deadline for making the rollover contribution is extended until
    - The due date of the participant's tax return for the year in which the offset occurred

Retirement Plan Loans

- **Recommended Action Steps**
  - Consider whether the loan policy or plan provisions should be updated
  - Confirm whether any communications need to be updated
    - The model 402(f) notice would need to be updated

If you have an outstanding loan that is being offset

If you have an outstanding loan from the Plan, your Plan benefit may be offset by the amount of the loan, typically when your employment ends. The loan offset amount is treated as a distribution to you at the time of the offset and will be taxed (including the 10% additional income tax on early distributions, unless an exception applies) unless you do a 60-day rollover in the amount of the loan offset to an IRA or employer plan.

Retirement Plan Disaster Relief

- **New relief for disasters that occurred in 2016**
- **Applies to distributions:**
  - Taken in 2016 or 2017
  - By employees who
    - Lived in an area declared by the president in 2016 to be a disaster area and
    - Sustained an economic loss as a result of the disaster

Retirement Plan Disaster Relief

- **Qualifying distributions are**
  - Not subject to the 10% early distribution tax
  - Not subject to 20% mandatory withholding
  - Not eligible for rollover treatment
  - Taxed over a three-year period
  - Permitted to be recontributed within three years
- **Plan amendments to take advantage of the relief may be adopted retroactively at any time until the end of the 2018 plan year**

Retirement Plan Disaster Relief

- **Determine whether any employees lived in impacted areas in 2016**
- **Determine whether to take advantage of relief**
  - Confirm whether/how systems, policies and communications may need to be updated to reflect the three-year recontribution option
  - Confirm whether a plan amendment is necessary

Grandfathering Under 162(m)

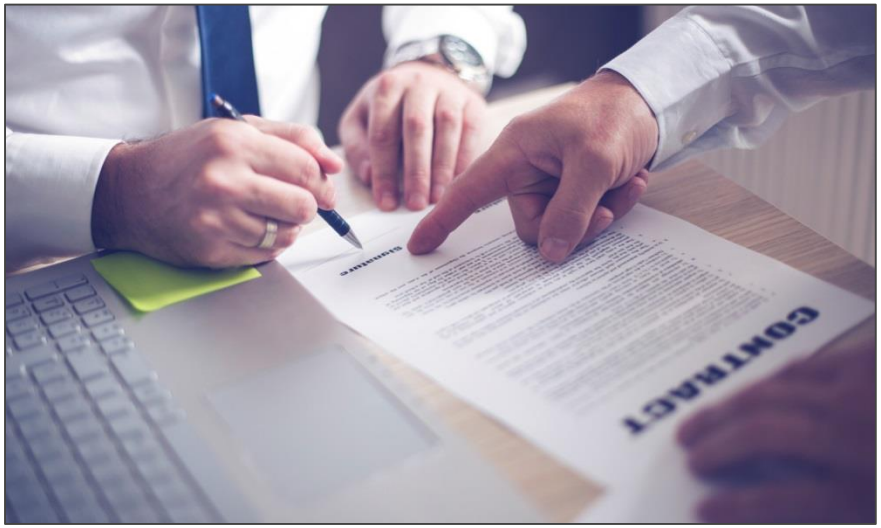
- **Prior Law**
  - Code Section 162(m) limits the deduction that public companies can take for annual compensation paid to certain employees
    - Deductible compensation generally is limited to $1 million
  - Code Section 162(m) includes an exception for qualified performance-based compensation

Grandfathering Under 162(m)

- **Tax Cuts and Jobs Act**
  - Eliminates the exception for qualified performance-based compensation
  - Contains a grandfathering rule for compensation payable pursuant to a written binding contract that was
    - In effect on November 2, 2017 and
    - Is not materially modified after that date

Grandfathering Under 162(m)

- **Recommended Action Steps**
  - Identify the written contract governing performance-based compensation
  - Determine whether the contract provides any negative discretion



Recent Agency Actions on Missing Participants

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Example

- Employee who participated in the 401(k) plan terminated employment
- Employee reaches age 70½ without requesting a distribution from his/her account
- Employer has sent letters to the employee but the letters have been returned as undeliverable
- The plan must make required minimum distributions or could lose qualified status

IRS Field Directive

- **Guidance to IRS agents – not to employers**
- **Agent should not challenge a qualified plan for failure to make required minimum distributions to a missing participant if the plan has:**
  - Searched plan and related plan, sponsor, and publicly available records or directories for alternative contact information;
  - Used any of these search methods
    - a commercial locator service,
    - a credit reporting agency or
    - a proprietary internet search tool for locating individuals; ***and***
  - Attempted contact via U. S. Postal Service certified mail to the last known mailing address and through appropriate means for any address or contact information (including email addresses and telephone numbers).

PBGC Program for DC Plans

- **Open to defined contribution plans terminating after December 31, 2017**
- **Voluntary program**
- **Plan can choose to either:**
  - Provide the PBGC with information about the missing participant's benefit; or
  - Transfer the account to the PBGC
    - Must transfer accounts of all missing participants
    - Must pay a one-time fee of $35 per participant (except where the account value is $250 or less)
- **Plan must perform a diligent search or know where the participant is**
  - Search must be made within nine months

Missing

- **The plan does not know with reasonable certainty the location of the participant;**
- **The participant has not elected a form of distribution in response to a notice of distribution; or**
- **The participant fails to accept a lump sum payment that is otherwise due.**
  - A failure to accept occurs if a payment check is not cashed by a certain date.

Diligent Search – DOL Guidance

- **Use certified mail**
- **Check related plan and employer records**
- **Check with designated plan beneficiary**
- **Use free electronic search tools**
  - Internet search engines
  - Public record databases
  - Obituaries
  - Social media
- **Depending on the size of the participant's account and the cost of further search efforts, other steps may be appropriate**

Recommended Action Steps

- **Follow Field Directive steps and DOL guidance to diligently search for missing participants**
- **Consider adopting a missing participants policy**
- **If and when appropriate, consider whether to take advantage of the PBGC program**

Update on ACA Employer Mandate Penalty Process

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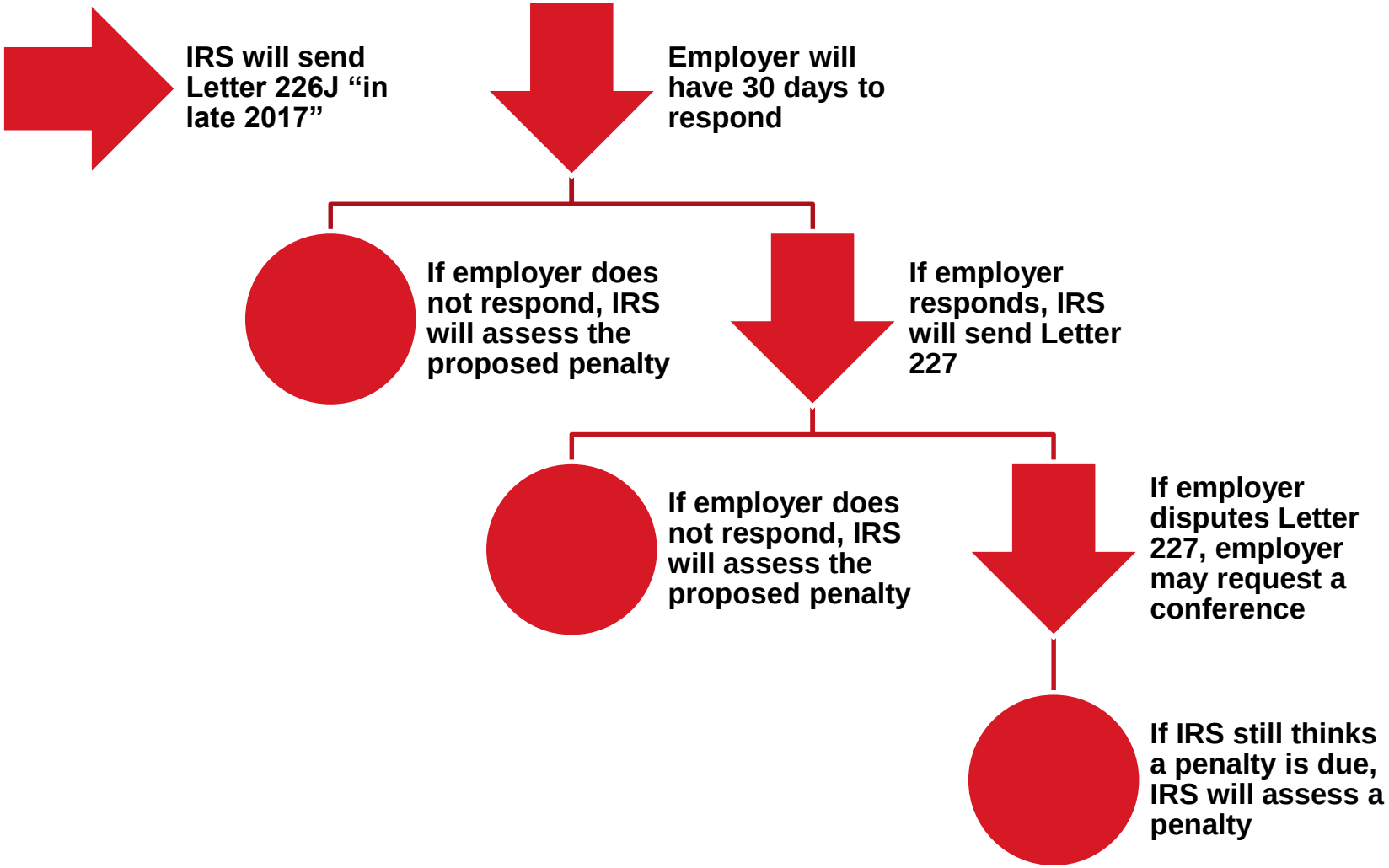
ACA Employer Mandate Penalties

"A" Penalty	"B" Penalty
Applies if: • Employer failed to offer coverage to at least 95% (70% in 2015) of its ACA full-time employees; and • At least one ACA full-time employee qualifies for the premium tax credit	Applies if: • Employer offered coverage to at least 95% (70% in 2015) of its ACA full-time employees; and • At least one ACA full-time employee qualifies for the premium tax credit
Calculated based on the full number of ACA full-time employees	Calculated based on the number of ACA full-time employees who qualify for the premium tax credit

Penalty Process



ESRP Summary Table

ESRP Summary Table

	Information Reported to IRS						
Month	a. Form 1094-C, Part III, Col (a) Minimum essential coverage offer indicator offered to at least 70%	b. Form 1094-C, Part III, Col (b) Full-time employee count for ALE member	c. Allocated reduction of full-time employee count for IRC Section 4980H(a)	d. Count of assessable full-time employees with a PTC for IRC Section 4980H(a)	e. Count of assessable full-time employees with a PTC for IRC Section 4980H(b)	f. Applicable IRC Section 4980H provision	g. Monthly ESRP amount
Jan	No	144	80	2	-	498CH(a)	$ 11,093.33
Feb	No	148	80	4	-	498CH(a)	$ 11,786.66
March	No	149	80	5	-	498CH(a)	$ 11,960.00
Apr	No	159	80	5	-	498CH(a)	$ 13,693.33
May	No	159	80	4	-	498CH(a)	$ 13,693.33
June	No	163	80	4	-	498CH(a)	$ 14,386.66
July	No	159	80	3	-	498CH(a)	$ 13,693.33
Aug	No	154	80	4	-	498CH(a)	$ 12,826.66
Sep	No	157	80	3	-	498CH(a)	$ 13,346.66
Oct	No	167	80	3	-	498CH(a)	$ 15,080.00
Nov	No	177	80	3	-	498CH(a)	$ 16,813.33
Dec	No	193	80	2	-	498CH(a)	$ 19,585.66
					Total Proposed ESRP		$ 167,959.95

Premium Tax Credit Listing

Form **14765**
(April 2017)

Department of the Treasury - Internal Revenue Service

Employee Premium Tax Credit (PTC) Listing

Any month not highlighted is a month that the employee received a PTC and nc safe harbor or other relief from the ESRP was applicable. The employee is an assessable full-time employee for that month.

Employer name | Employer ID number | Tax Year 2015

Employee Name, (last, first)	SSN (last 4 digits)	All 12 months Indicator Codes (Form 1095-C, lines 14 and 16 combined)	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Additional Information Attached
		First row - as filed Second row - for corrections	1H/2A	1H/	1E/	1E/	1E/	1E/	1E/	1E/	1E/	1E/	1E/	1E/	
		First row - as filed Second row - for corrections	NoPTC	1H/	1H/	1H/	1H/	1H/	1H/	1H/	1H/	1H/	1H/	NoPTC	
		First row - as filed Second row - for corrections	1H/	1H/	1H/	1H/	NoPTC	NoPTC	NoPTC	1H/	1H/	1H/	1H/	1H/	
		First row - as filed Second row - for corrections	1H/	1H/	1H/	1H/	1H/	1H/	NoPTC	NoPTC	NoPTC	NoPTC	NoPTC	NoPTC	
		First row - as filed Second row - for corrections	NoPTC	NoPTC	NoPTC	NoPTC	1H/	1H/	1H/	1H/	NoPTC	NoPTC	NoPTC	NoPTC	
		First row - as filed Second row - for corrections	NoPTC	NoPTC	1H/	1H/	NoPTC	NoPTC	NoPTC	NoPTC	NoPTC	NoPTC	NoPTC	NoPTC	

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Recommended Action Steps

- **Alert appropriate persons to be on the lookout for a letter and instruct them on where to send it**
- **If you receive a letter**
  - Compare the ESRP Summary Table to the Form 1094-C filed
  - Confirm the information included in the Premium Tax Credit Listing
  - Request an extension if necessary
  - Consider appropriate response

AARP v. EEOC and Its Impact on Wellness Programs

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ADA

- ADA generally prohibits medical examinations or disability-based inquiries unless done as part of a voluntary wellness program
- Program is voluntary if an employer neither requires participation nor penalizes employees who do not participate
- EEOC issued regulations in 2016

ADA Wellness Program Regulations

- **A wellness program will not violate the ADA if it**
  - Is reasonably designed to promote health or prevent disease
  - Is voluntary
    - A wellness program that provides incentives will not be considered involuntary if the incentives do not exceed 30% of the cost of coverage
    - Notice must be provided
  - Is confidential
  - Otherwise complies with the ADA

AARP v. EEOC

- **AARP challenged the incentive limitations under the EEOC's ADA and GINA rules**
- **Court did not find anything in the administrative record to explain the EEOC's conclusion that the 30% incentive limit is the appropriate measure for voluntariness**
  - August 2017 - Court ordered the EEOC to reconsider the 30% incentive limit but left incentive rules in effect
  - December 2017 - Court ordered the incentive rules to be vacated beginning January 1, 2019

Impact of Decision

- **ADA rules remain in effect for 2018**
- **All ADA rules except the incentive limits remain in effect after 2018**
  - Notice still must be provided
- **Incentive safe harbor is eliminated effective January 1, 2019**
  - What incentives will cause a program to be involuntary?

Recommended Action Steps

- **Before preparing the design of a 2019 wellness program, confirm whether the EEOC has issued any guidance or proposed regulations**
- **Consider the amount of the incentive to be offered in 2019 and determine the level of risk the company is willing to take**

Final Disability Claims Regulations – Required Changes

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Final Regulations

- Published December 19, 2016
- Originally intended to be effective for disability claims filed on or after January 1, 2018
- Effective date delayed to April 1, 2018

Scope of Final Regulations

- **Applies to both retirement and welfare plans**
  - Including non-qualified plans
- **Applies when the plan conditions a benefit's availability on a showing of disability**
  - The claims adjudicator must make a disability determination to decide a claim
  - Does not apply if the disability finding is made by a party other than the plan
    - Example: Pension benefit is available only if a person has been determined to be disabled by the Social Security Administration
    - Example: Pension benefit is available only if a person has been determined to be disabled under the employer's long-term disability plan

New Content for Denial Notices

- **Notices of adverse benefit determination ("denial notices") must include**
  - A discussion of the decision, including an explanation of the reason for disagreeing with or not following
    - The opinion of a health care professional who treated the claimant, if the opinion is provided by the claimant
    - The opinion of a vocational professional who evaluated the claimant, if the opinion is provided by the claimant
    - A disability determination from the Social Security Administration, if the determination is provided by the claimant
    - The opinion of a medical or vocational expert whose advice was obtained in connection with the claim or appeal (even if the advice was not relied upon)

New Content for Denial Notices

- The specific internal rules, guidelines, protocols, standards or other criteria that the plan relied upon in making the determination
  - If the plan did not rely on any such rules, it must include a statement that no such rules apply

New Content for Denial Notices

- **Notices denying an initial claim also must include a statement that the claimant is entitled to receive, upon request and free of charge, reasonable access to and copies of all documents, records and other information relevant to the claim for benefits**
  - Note: This requirement currently applies only to notices denying an appeal
- **Notices denying an appeal also must include a description of any limitations on the claimant's right to sue under ERISA, such as a time limit or a limit on where suit can be brought**
  - If a time limit applies, the notice must identify the calendar date of the deadline for filing suit

Time Out

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Limitations on the Right to Sue

- Time for filing suit
  - ERISA does not contain a statute of limitations for claims under Section 502(a)
  - Courts typically apply the statute of limitations for the most analogous state-law claim
  - The U.S. Supreme Court has confirmed that plan-imposed statutes of limitations may be upheld if they are reasonable

Limitations on the Forum or Venue

- Location for filing suit
  - ERISA Section 502(e) provides that claims can be brought in any federal district where
    - The plan is administered
    - The breach took place
    - A defendant resides or may be found
  - Courts typically uphold a forum selection or venue selection clause if it is reasonable

Disclosure Requirements

- **29 C.F.R. § 2560.503-1**

  (j)(4)(ii) In the case of a plan providing disability benefits, in addition to the information described in paragraph (j)(4)(i) of this section, the statement of the claimant's right to bring an action under section 502(a) of the Act shall also describe <u>any applicable contractual limitations period that applies to the claimant's right to bring such an action, including the calendar date on which the contractual limitations period expires for the claim</u>

Current Regulations

- **Applicable to all types of claims governed by ERISA**
- **29 C.F.R. § 2560.503-1**

(g) Manner and content of notification of benefit determination.

(1) Except as provided in paragraph (g)(2) of this section, the plan administrator shall provide a claimant with written or electronic notification of any adverse benefit determination. Any electronic notification shall comply with the standards imposed by 29 CFR 2520.104b-1(c)(1)(i), (iii), and (iv). The notification shall set forth, in a manner calculated to be understood by the claimant –

* * *

(iv) A description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review;

Current Regulations

- **29 C.F.R. § 2560.503-1**

(j) Manner and content of notification of benefit determination on review. The plan administrator shall provide a claimant with written or electronic notification of a plan's benefit determination on review. Any electronic notification shall comply with the standards imposed by 29 CFR 2520.104b-1(c)(1)(i), (iii), and (iv). In the case of an adverse benefit determination, the notification shall set forth, in a manner calculated to be understood by the claimant –

* * *

(i) A statement describing any voluntary appeal procedures offered by the plan and the claimant's right to obtain the information about such procedures described in paragraph (c)(3)(iv) of this section, and a statement of the claimant's right to bring an action under section 502(a) of the Act;

Disclosure of Limitations

- **Courts vary on whether "a statement of the claimant's right to bring a civil action under section 502(a)" must include a description of any limitations on that right**

The Department agrees with the conclusion of those federal courts that have found that the current regulation fairly read requires some basic disclosure of contractual limitations periods in adverse benefit determinations. In fact, in the Department's view, the statement of the claimant's right to bring a civil action under section 502(a) of ERISA following an adverse benefit determination on review would be incomplete and potentially misleading if it failed to include limitations or restrictions in the documents governing the plan on the right to bring a civil action.

Outstanding Questions

- **Must limitations be disclosed in claim denial notices?**
  - The disability claims regulations include the disclosure requirement only with regard to appeal denials
  - EOBs generally are not customizable
- **Must venue or forum selection provisions be disclosed?**
  - "Some commenters raised disability claims procedure issues pertaining to matters that the Department considers to be beyond the scope of this rulemaking. For example … Other commenters requested that the Department propose a rule requiring that adverse benefit determinations on review notify disability benefit claimants of the ERISA venue provisions. … Although the Department agrees that the issues raised by the commenters may merit an evaluation of additional regulatory actions on procedural safeguards and protections, those subjects are beyond the scope of this rulemaking. … Issues beyond this final rule may be addressed in a future regulatory action or other guidance by the Department."

    81 Fed. Reg. 92331 (Dec. 19, 2016)

Time In

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Language Assistance Services

- **If a denial notice will be sent to an address in a United States county where 10% or more of the county's residents are literate only in the same non-English language, the plan must**
  - Include in the denial notice a statement in that language indicating how the claimant can access language services provided by the plan
  - Provide denial notices in the non-English language upon request
  - Provide oral language services that include answering questions in that language and providing assistance with filing claims and appeals in that language

Note: This requirement is the same requirement applicable to non-grandfathered group health plans

Additional Requirements

- **The person(s) involved in deciding the claim or appeal (including experts who are consulted) must be independent from and impartial to the plan**
  - Decisions on hiring, termination, compensation, promotion or similar matters must not be based on the likelihood that the person will support a denial of benefits
- **A plan must automatically provide a claimant, free of charge, with any new or additional evidence or rationale considered, relied on or generated in connection with an appeal**
  - The plan must provide the new evidence or rationale as soon as possible and sufficiently in advance of the adverse determination so the claimant has time to respond before the determination is finalized

Additional Requirements

- **A rescission (i.e., a retroactive cancellation or discontinuance of coverage other than for failure to pay) must be treated as a denial of a claim; therefore, a denial notice and an opportunity to appeal must be given in connection with any rescission**

- **If the plan fails to comply with the claims and appeals regulations (except in the case of a very minor failure), the claimant is deemed to have exhausted his or her administrative remedies**
  - The claimant can sue for benefits without completing the appeals process
  - A court likely would review the case without giving any deference to the plan's decisions
  - The regulations provide additional rules that the plan must follow if it wants to take the position that the failure was so minor that the appeals process should not be deemed exhausted

Recommended Action Steps

- **Identify affected plans**
- **Contact disability claims administrators to confirm compliance**
  - Provide information about plan-imposed limitations on the right to sue
- **Update plan documents and/or SPDs**
- **Request that non-disability claims administrators add lawsuit limitation language to denial notices**

Questions?

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