ALSTON & BIRD

HEALTH & WELFARE PLAN LUNCH GROUP

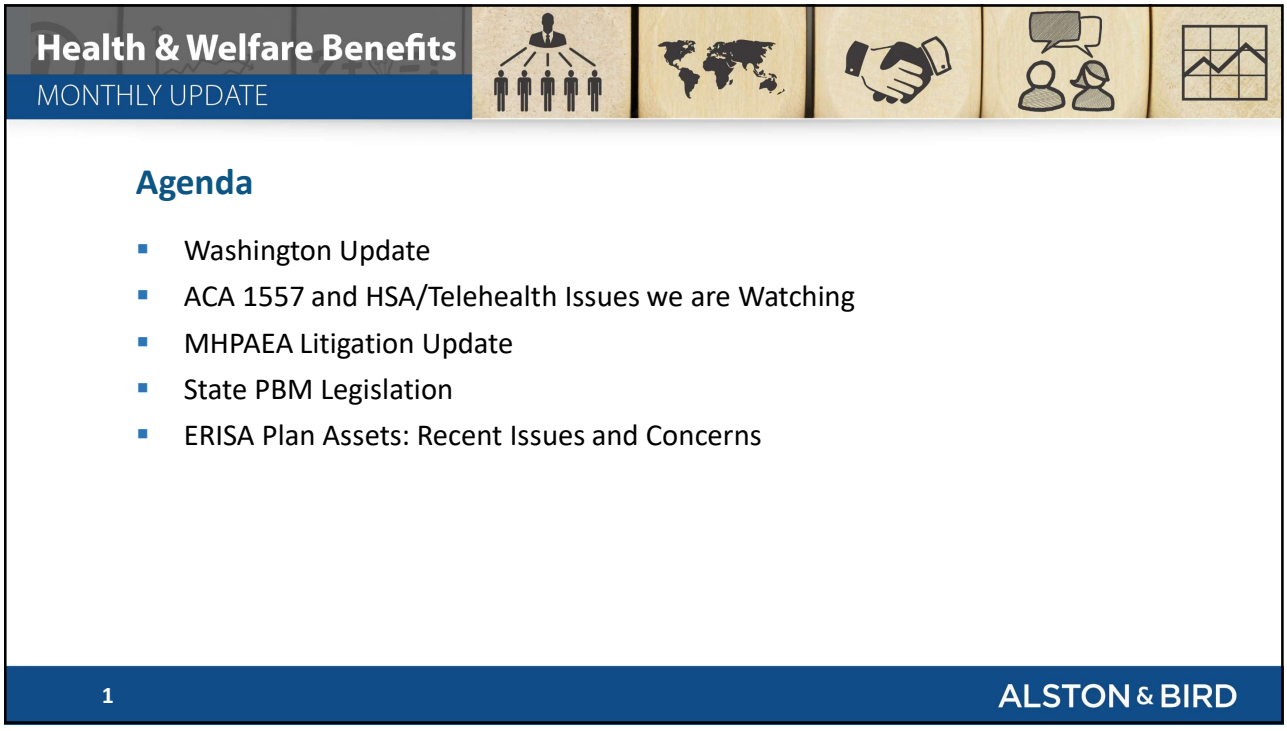
April 7, 2022

One Atlantic Center
1201 W. Peachtree Street
Atlanta, GA 30309-3424
(404) 881-7885
E-mail: john.hickman@alston.com

INDEX

ALSTON & BIRD

0



1

Health & Welfare Benefits
MONTHLY UPDATE

Washington UPDATE

2

Health & Welfare Benefits
MONTHLY UPDATE

President's Fiscal Year 2023 Budget

3

Health & Welfare Benefits
MONTHLY UPDATE

Focus on Mental Health Parity

Enforcement provisions

- Authorize DOL to pursue parity violations by entities that provide administrative services to group health plans
- Amend ERISA to allow participants and beneficiaries to recover losses due to parity violations
- Authorize DOL to impose civil monetary penalties for MHPAEA noncompliance
- $275 million in funding for DOL NQTL audits

Coverage mandates

- Improve access to behavioral healthcare in the private insurance market - require all plans to cover mental health benefits
- Require coverage of three behavioral health visits and three primary care visits without cost-sharing

Reminder: Congress is also focusing on MHPAEA issues and we are likely to see legislation by summer

4

Health & Welfare Benefits
MONTHLY UPDATE

Taxation of fixed indemnity health benefits

- Proposal: Amend §105(b) to "clarify" that the exclusion for benefits under employer-provided accident or health plans applies only to an amount paid directly or indirectly for a specific medical expense.
- Currently: Only any excess benefit (i.e., excess over related medical expenses) is taxable income if the premium is paid before-tax.
  - See, e.g., Rev. Rul. 69-154, confirmed in CCA 201719025.
- Proposed effective date: Taxable years beginning after Dec. 31, 2022.

5

Health & Welfare Benefits
MONTHLY UPDATE

Funding for post-retirement medical and life insurance benefits

- Proposal: Post-retirement benefits must be funded over the longer of:
  - the working lives of covered employees on a level basis or 10 years;
  - *unless* the employer commits to maintain the benefits over a period of at least 10 years.
- Rationale: Current law allows for accelerated funding of post-retirement benefits, even if those benefits are not actually provided and the funds are then directed towards the cost of providing welfare benefits to current employees.
- Note: Many PLRs allowed use of overfunded retiree medical assets for active employee welfare benefits subject generally to same plan (ERISA requirement) and advance deduction recapture rules.
- Proposed effective date: Taxable years beginning after Dec. 31, 2022.

Health & Welfare Benefits
MONTHLY UPDATE

New/Up-coming regulations

Proposed rule fixes "family glitch" related to eligibility for ACA premium tax credits

- Intended to provide greater access to PTCs for family members who are eligible for employer-sponsored coverage
- Provides a separate affordability test for family members based on the cost to the employee of the family coverage
- Does not change the employer responsibility rules
  - No changes to the affordability calculation for the employee or the safe harbors
- Expected effective date: 2023

ACA section 1557 nondiscrimination rules

- Proposed rule under review by OMB will change some Trump Administration rules
- Expected to reflect SCOTUS decision in *Bostick* and explicitly provide (again) that discrimination based on sex includes discrimination on the basis of sexual orientation and discrimination on the basis of gender identity
- Could also revisit the scope of entities that are subject to section 1557
- Could also revisit other issues, such as tag line requirements

Other

- Other rules on tap for this year include MHPAEA proposed rules, final rules under NSA, a proposed rule changing the definition of STLDI

Health & Welfare Benefits
MONTHLY UPDATE

ACA 1557 and HSA/Telehealth Issues we are Watching

ALSTON & BIRD

8

Health & Welfare Benefits
MONTHLY UPDATE

ACA 1557 Impact on Group Health Plans

- Requirements of 1557
  - Tagline communications
    - 2020 regulations eliminated the requirement to include nondiscrimination notices and tagline translation notices, instead providing for a more flexible approach requiring "reasonable steps" to ensure meaningful access for individuals with limited English proficiency.
  - Substantive coverage requirements . . .
    - Nondiscrimination based on race, color, national origin, sex, age, or disability

9

ALSTON & BIRD

9

Health & Welfare Benefits
MONTHLY UPDATE

ACA 1557 Impact on Group Health Plans

- Scope of 1557 applicability
  - 2020 regulations – "health program or activity," any part of which is receiving federal financial assistance (including credits, subsidies, or contracts of insurance) provided by HHS
  - Application?
    - GHPs of Medical providers that receive federal funding
    - GHPS of insurers?
    - GHPS of non-health care employers? Impact of . . .
      - EGWPs ?
      - Retiree creditable coverage subsidy?

10

Health & Welfare Benefits
MONTHLY UPDATE

Impact of CAA 2022 on HSAs and Telehealth

- Section 307 of CAA 2022 extends the telehealth exception "for months beginning after March 31, 2022 and ending before January 1, 2023"
  - Issue for CY plans that included telehealth in January-March 31st
    - No issue for FY April 2021 (or later) plans, but issue for months after December 2022.
  - Individual Accountholder Risk varies based on whether full contribution made and/or eligible on December 1st
    - That quirky last month rule
    - Employer obligations if sponsor HDHP and allow pre-tax HSA contributions
      - Reasonable belief excludable at time contribution made?
  - Will plans be able to change to allow telehealth below deductible

11

Health & Welfare Benefits
MONTHLY UPDATE

MHPAEA Litigation Update

ALSTON & BIRD

12

Health & Welfare Benefits
MONTHLY UPDATE

General MHPAEA Litigation Trends

- New cases being filed almost weekly.
- One plaintiffs' firm in Utah bringing MHPAEA against plans of Fortune 500 companies and others.
- Plaintiffs' bar becoming more sophisticated on MHPAEA claims.
- Now focusing on NQTLs for residential treatment.
- Typical allegation is that for intermediate inpatient MH/SUD settings (e.g., residential treatment) plans or plan guidelines have acute level of care standard while for medical/surgical intermediate settings they have a sub-acute standard such as for skilled nursing facilities, inpatient hospice care, and rehabilitation facilities.
- Wilderness therapy exclusions continue to be challenged.

13

ALSTON & BIRD

13

Health & Welfare Benefits
MONTHLY UPDATE

General MHPAEA Litigation Trends

- Some complaints contain a separate count for a $100 per day penalty for failure to provide an MHPAEA nonquantitative treatment limitation (NQTL) comparative analysis under ERISA §502(c).
- ERISA §502(c) imposes the penalty on failure, within 30 days, to provide instruments under which a plan is established or operated under ERISA §104(b)(2).
  - Plaintiffs cite FAQ 6 of FAQs about Mental Health and Substance Use Disorder Parity Implementation and the Consolidated Appropriations Act, 2021 Part 45 issued in April 2021 stating that ERISA covered plans must make the MHPAEA NQTL comparative analysis available to participants and beneficiaries upon request under ERISA §104.
  - ERISA's MHPAEA regulations, 29 CFR §2590.712(d)(3), also provide that the processes, strategies, evidentiary standards, and other factors used to apply a NQTL with respect to medical/surgical benefits and MH/SUD benefits under a plan must be made available to participants and beneficiaries upon request under ERISA §104.
- Employers/Plans argue that the CAA only requires disclosure to the agencies not to participants and beneficiaries.
- Issue has been fully briefed in one case.

14

Health & Welfare Benefits
MONTHLY UPDATE

David Wit, et al v. United Behavioral Health

- District Court Proceedings
  - Case has generated press coverage and has been closely watched.
  - Originally brought in 2014.
  - Challenge to guidelines for processing mental health and substance use disorder (MH/SUD) claims.
  - Brought as an ERISA fiduciary breach cause of action and did not involve a separate MHPAEA count.
  - The allegations were that underlying coverage determination guidelines for MH/SUD benefits were contrary to the "General Accepted Standards of Care" (GASC) referenced in the plan documents.
  - Ten-day bench trial and in 2019 the California district court entered an extensive 106-page decision finding that the underlying MH/SUD guidelines did violate GASC as well as certain state parity laws for insured claims.

15

Health & Welfare Benefits
MONTHLY UPDATE

David Wit, et al v. United Behavioral Health

- District Court Proceedings (cont.)
  - In 2020, ordered the reprocessing of 67,00 MH/SUD claims (stayed pending appeal).
  - $19.6 million in attorneys' fees awarded in January 2022.
  - Unique questions on whether reprocessing (without a showing of entitlement to benefits) was appropriate equitable relief under ERISA and whether it could form the basis for class certification since the results of that reprocessing would be different for different members of the class.
- Ninth Circuit Court of Appeals Decision
  - March 22, 2022, unpublished (nonprecedential) decision reversed the district court.
  - Whether the guidelines violated GASC was not determinative.
  - While the plans at issue did not cover services inconsistent with GASC, the Ninth Circuit determined that did not answer the question because even certain services that were consistent with GASC were still excluded by other specific plan provisions.
    - For example, Defendants alleged that certain custodial care services could be consistent with GASC but those services were still specifically excluded by the plan documents.
  - Case is likely over absent the Ninth Circuit hearing the case en banc or the Supreme Court granting certiorari

Health & Welfare Benefits
MONTHLY UPDATE

MHPAEA and Gender Dysphoria

- Gender dysphoria is a recognized diagnosis by the Diagnostic and Statistical Manual of Mental Disorders (5th ed.)
- In one case pending in Western District of Missouri, plaintiffs have challenged a plan design, while covering gender reassignment surgeries, allegedly impermissibly coverage for surgeries to improve gender specific appearance such as facial feminization surgery (FFS).
  - MHPAEA challenge based on the coverage of reconstructive surgery for medical/surgical and an as applied challenge under the plan's gender dysphoria policy that specifically excluded certain ancillary procedures as cosmetic-- such as FFS, rhinoplasty and reduction of the Adams apple.
  - Most claims fully briefed on a Motion to Dismiss with no decision.
- Of course, MHPAEA is not the only challenge employers and plans are seeing on limitations on gender reassignment/affirmation surgeries.
  - Title VII and the decision in *in Bostock v. Clayton County,* 140 S. Ct. 1731 , 590 U.S._ (2020)
    - Ongoing litigation on the interaction with the Religious Freedom Restoration Act
  - Section 1557 and the May 20, 2021 HHS Notification of Interpretation and Enforcement that HHS would interpret Section 1557 consistent with *Bostock*.
    - Waiting on new proposed regulations under Section 1557.

Health & Welfare Benefits
MONTHLY UPDATE

State PBM Legislation: Preempted by Federal Law

ALSTON & BIRD

18

Health & Welfare Benefits
MONTHLY UPDATE

Overview

- 48 state PBM laws (many of which were passed since 2020)
  - Regulate such areas as MAC lists, patient steering, network adequacy, transparency, rebate allocation
  - Some touch on participant cost share amounts and plan design (e.g. Tennessee)
  - Some expressly apply to self-funded plans
- Supreme Court in *Rutledge* held that Arkansas PBM law was not preempted by ERISA
  - How much room does *Rutledge* give states?
  - Georgia insurance commissioner has indicated that it will not enforce existing law against self funded plans
  - Tennessee has made it very clear that it will enforce against self funded plans
- 8th Circuit in *Wehbi* that North Dakota law was not preempted by ERISA but was preempted by Medicare Part D
  - Similar outcome in Oklahoma

19

ALSTON & BIRD

19

Health & Welfare Benefits
MONTHLY UPDATE

ERISA Plan Assets: Recent Issues and Concerns

ALSTON & BIRD

20

Health & Welfare Benefits
MONTHLY UPDATE

Insurer Refunds

- Some health and welfare insurers are issuing premium refunds due to the under utilization of benefits caused by the coronavirus-related closures.
- If the refund is composed, in whole or in part, of ERISA plan assets, the refund must be handled in accordance with ERISA's general fiduciary standards.

ALSTON & BIRD

21

Health & Welfare Benefits
MONTHLY UPDATE

Class Action Settlements

- The DOL action in the recent Blue Cross Blue Shield Class Action Settlement provides a clear warning (and complicated roadmap) to explore regarding similar settlements.
- The ERISA fiduciary issues differ if a settling defendant is a current plan service provider.
  - If a current service provider then the settling defendant is a party on interest under ERISA § 406(a).
  - Participation in the class action settlement and receipt of any funds (if contain plan assets) raises prohibited transaction concerns and use of an exemption such as PTE 2003-39 appears warranted
- ***Reminder:*** Self-funded group health plans impacted by the *Blue Cross Blue Shield Antitrust Litigation* have until **May 2, 2022,** to re-evaluate their settlement decision.

Health & Welfare Benefits
MONTHLY UPDATE

PTE 2003-39

- May require use of an independent fiduciary depending on the facts and circumstances surrounding the settlement, *e.g.* does the employer have an interest too
- The fiduciary acting on behalf of the plan must acknowledge in writing that it is a fiduciary with respect to the settlement of the litigation on behalf of the plan.
- The fiduciary must determine, among other things, if the terms of the settlement are reasonable using the following criteria:
  - the plan's likelihood of full recovery
  - the risks and cost of litigation
  - value of claims foregone if opt out
  - settlement must be no less favorable to the plan than comparable arm's-length terms and conditions that would have been agreed to by unrelated parties in similar circumstances.

Health & Welfare Benefits
MONTHLY UPDATE

Does the Award Contain ERISA Plan Assets?

- *If insured:*
  - Is the policy in the name of the plan or the plan's trust? If yes, then all of the refund is a plan asset in the absence of plan language to the contrary.
  - Is the policy in the name of the employer? If yes, then the employer may be able to keep some of the refund depending on the policy and plan language.
- If the plan language is silent, then the DOL looks to the relative portion of the premium paid by employees and the employer during the period that gave rise to the refund.

Health & Welfare Benefits
MONTHLY UPDATE

Plan Asset Guidelines

IF	THEN
The plan or plan trust is the policyholder	The entire refund is plan assets
The employer pays the entire premium or all claims/contributions	No part of the refund is plan assets; the employer is entitled to the entire refund
The participants pay the entire premiums or contributions	The entire refund is plan assets
The participants and employer each pay a fixed percentage	The percentage of the refund equal to the percentage of the premium/contribution paid by participants is plan assets
The employer pays a fixed amount and participants pay the rest	The refund is plan assets, except to the extent the refund exceeds the total amount paid by participants
Participants pay a fixed amount and the employer pays the rest	The refund belongs to the employer, except to the extent the refund exceeds the total amount paid by the employer

Health & Welfare Benefits
MONTHLY UPDATE

General ERISA Fiduciary Standards

- Most recent guidance is DOL Technical Release (TR) 2011-04 on MLR rebates, which restates general guidance on ERISA fiduciary principles.
- The plan fiduciary determines the allocation method among plan participants and the particular use of the refunds, *e.g.,* to reduce premiums, make cash distributions, or for other permitted plan purposes, in accordance with ERISA's general prudence standard.
- The plan fiduciary should take into account and document the relative costs and benefits of different approaches.
- If there is already a trust for the plan, then the plan assets must be placed in a trust.
- If there is not a trust, then TR 2011-04 does not require the assets be placed in trust if the cafeteria plan safe harbor applies under TR 92-01.

Health & Welfare Benefits
MONTHLY UPDATE

How to Allocate the Plan Assets

- Based on the TR 2011-04, as well as prior guidance, the following general principles apply:
  - No requirement to allocate precisely among plan participants based upon their premium/contribution payments.
  - Allocation method must be reasonable, fair, objective, and cannot benefit a plan fiduciary who is also a plan participant at the expense of other participants.
  - May be allocated to only current plan participants if the cost of allocating a portion of the refund to former plan participants is unreasonable.
  - General rule is to allocate the refund among the participants covered by the policy or benefit to which the refund relates.
    - Not required if the fiduciary determines under the circumstances that it is not prudent or in the best interests of plan participants.
    - It may be prudent in some circumstances to allocate the refund for all participants in a plan, not just those in the option that generated the refund.

Health & Welfare Benefits
MONTHLY UPDATE

How to Use the Plan Assets

- TR 2011-04 does not contain specific rules or safe harbors regarding permitted uses.
- Refunds may be distributed in cash, used to reduce future premiums, enhance benefits, or for any other permissible plan purposes consistent with ERISA fiduciary requirements.
- The amount of the refund will be a significant factor in determining an appropriate use.
  - Administrative costs of reducing future premiums or distributing cash refunds are likely to be prohibitive and other uses may be permissible.
  - May be appropriate to enhance benefits or offer a wellness benefit.
- Cannot use refunds from one plan for the benefit of participants in another plan.

28

Health & Welfare Benefits
MONTHLY UPDATE

Tax Considerations from IRS FAQs for MLR Rebates

IF	THEN
Employee portion of premium is pre-tax	• Any cash refund is taxable • If there is a reduction in premium cost (*i.e.* premium holiday) the increased portion in salary is taxable
Employee portion of the premium is after-tax	• Any cash refund or reduction in premium cost is generally is not subject to tax, exceptions include where an employee has previously deducted the premium on his or her federal income tax return

29

Thanks!

- Questions?