

HEALTH & WELFARE PLAN LUNCH GROUP

October 3, 2019

ALSTON & BIRD LLP

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

© 2019 All Rights Reserved

INDEX

1. Preparing for Open Enrollment



Preparing for Open Enrollment

© Alston & Bird LLP 2019

www.alston.com



Goals

- 2020 – what's new?
- Overview of typical annual notices
- SBC/SPD/SMM considerations
- Managing open enrollment – before, during, and after

© Alston & Bird LLP 2019

2

ALSTON & BIRD



What's new for 2020?

■ HSA Limits

- Minimum Deductible
 - \$1,400 self-only/\$2,800 other than self-only
- Out-of-Pocket Maximum
 - \$6,900 self-only/\$13,800 other than self-only
- Contribution Limit
 - \$3,550 self-only/\$7,100 other than self-only
 - Age 55 catch-up - \$1,000



What's new for 2020?

- ACA OOP max is different!
 - Out-of-Pocket Maximum
 - \$8,150 self-only/\$16,300 other than self-only
- Individual mandate in certain states takes effect with corresponding Employer notice requirements
 - California
 - Rhode Island
 - Vermont
 - New Jersey
 - D.C.
- California notice for terminating FSA participants



What's new for 2020?

- Health Care FSA Limit
 - Not announced yet – usually announced in October
 - Estimated to be \$xxxx (\$2,700 in 2019)
- Dependent Care FSA Limit
 - \$5,000 – does not change from year-to-year



What's new for 2018?

- Disability claims procedures
 - Intended to mirror protections available for group health plan claims under the ACA



Annual Notices

- Medicare Part D Creditable/Non-Creditable Coverage
 - Best practice is to give to all participants and beneficiaries
 - Required before October 15th annually



Annual Notices

- Women's Health and Cancer Rights Act (WHCRA)
 - Provide annually to all participants and beneficiaries



Annual Notices

- **HIPAA Notice of Privacy Practices**
 - Plans must provide notice or notice of its availability every three years
 - Notice of availability is short, so suggest providing every year with annual enrollment materials
 - Electronic delivery not permitted unless specific consent requirements are met
 - **New notice required if material changes**
 - Reminder – if there is a benefits website, then the HIPAA privacy notice must be posted there



Annual Notices

- **CHIPRA Notice**
 - Must provide to ALL employees regardless of benefits eligibility
 - No specific deadline
 - Model available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/chipra/model-notice.doc>



Annual Notices

- **REMINDER**
 - COBRA qualified beneficiaries generally get annual notices and open enrollment materials!
 - Employees on paid or unpaid FMLA generally have open enrollment rights, as well
 - “Alternate Recipients” covered pursuant to QMCSO have rights to receive notices as well (but not separate enrollment rights)



Wellness Notice

- Required if the plan offers a wellness program that requires individuals to meet a standard related to a health factor (e.g., be a non-smoker) in order to obtain a reward (e.g., premium discount).
- Availability of reasonable alternative method to earn the reward must be disclosed in all plan materials that describe the terms of the wellness program
 - Does not include SBC



Wellness Notice

- EEOC also has notice requirement to comply with Americans with Disabilities Act (ADA)
 - Overlaps with DOL notice, but not the same
 - Must provide before providing any health information and with enough time to decide whether to participate
 - In other words, before completing health risk assessment or medical exam
 - <https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm>
 - Note: AARP v. EEOC does not impact current compliance requirements



Wellness Notice

- Availability of reasonable alternative method to earn the reward must be disclosed in all plan materials that describe the terms of the wellness program
 - Does not include SBC
- **ATTENTION: DOL enforcement priority!**
 - *Acosta v. Macy's Inc.*, S.D. Ohio, No. 1:17-cv-00541 (August 16, 2017).
 - When in doubt, include disclosure
 - Model disclosure



GINA Wellness Consent

- Consent must be obtained before spouse provides health information for a wellness program
 - For example, consent must be obtained before spouse completes a health risk assessment
 - Impact of GINA on incentives to provide such information (even with consent) is unclear in light of vacated regulations



Annual Notice Resources

- DOL Compliance Assistance - <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/health-plans>
- DOL Reporting and Disclosure Guide - https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/reporting-and-disclosure-guide-for-employee-benefit-plans_0.pdf
- HIPAA Notice of Privacy Practices - <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/model-notices-privacy-practices/index.html>



Summary of Benefits and Coverage (SBC)

- New format for 2018
- Distribution requirements are different than many other forms
- Posting on enrollment website will satisfy disclosure requirements in many cases
 - However, website must note that paper versions are available free of charge upon request



Summary Plan Description (SPD)

- Generally required every five years (if changes in the plan)
- Some annual notices can be included in the SPD if it will be provided at open enrollment, but others must/should be provided as separate document



Summary of Material Modifications (SMM)

- If new SPD will not be provided, then consider providing SMM with open enrollment materials
 - Can annual enrollment materials serve as SMM?
- Notice of material changes to plan generally required within 60 days of change



ACA Section 1557 Notice and Taglines

- Requirement for Tagline Notice repealed by Proposed Regulations
- Loosening on scope of documents for which notice is required



Electronic Distribution

- Poses many challenges
- Rules vary by notice
 - for example, different standards for SPD vs. HIPAA notice of privacy practices
- In some cases, electronic distribution is not practical (e.g., COBRA).
- Suggest consulting with counsel
- However, nothing in ERISA prohibits online enrollment! Rules in the IRC generally apply to 125 elections but no real hurdles



Who are your enrollees?

- Newly eligible
- Employees on leave (FMLA, military)
- COBRA qualified beneficiaries
- Alternate Recipients of QMCSOs
- If retiree coverage, then spouse/dependents of deceased retirees
- Guardians/representatives of incapacitated persons still covered by the plan



Are there different materials for different groups?

- Do you have different employee groups that receive different materials? For example, different locations.
- Materials should be accurate, complete, and not misleading
- Materials should be consistent with SPD, plan document, and name the document that governs if there is a conflict



Elections

- Will elections carry over?
 - Should specify in SPD
- Distinguish between automatic “basic” benefits and those that must be elected.
- Generally, FSA and HSA elections do not carry over
 - Have you adequately communicated that FSA and HSA will not carry over?
- Include clear statement of consequences of failing to enroll. State that elections can only be changed mid year when permitted by law.



Additional Content

- Deadlines
- Changes to benefit from last year
- Employee contribution amount
- Special eligibility rules (e.g, rehired employees, union employees)
- Actively at work requirements
- Evidence of insurance requirements
- Contact information



Additional Content

- Statement that employer can amend or terminate benefits at any time
- Warnings about enrolling ineligible individuals
 - Plan's right to audit and request proof of eligibility
- If applicable, statement regarding medical plan's grandfathered status under the ACA
- Special tax considerations (e.g., domestic partners, pre-tax vs. post-tax payment of disability coverage, etc.)



During Enrollment

- Have documents ready to send if asked (e.g., SPD, SMM)
- Have a procedure for responding to questions
 - Select and train employees responsible for answering questions
 - Employees should refer to written enrollment materials or SPD when responding to questions
 - Prepare list of FAQs
- Keep records of which enrollment materials were furnished – how, who, and when



After Enrollment

- Develop procedure for dealing with spouses and dependents dropped at open enrollment
 - Determine if spouse was dropped in anticipation of divorce, spouse might have COBRA rights
 - COBRA rights for child dependent who lost dependent status
 - Ensure child is not covered by court order (QMCSO/NMSN)
- Ensure employees who enroll in non-HDHP did not make HSA election
- Send confirmation letters