Compliance Monthly Update: January 2024

A brief update on what happened the prior month in group health plan compliance at the federal level—organized chronologically. If you would like additional information, please reach out to the GBS Compliance Team.

DOL issues FLSA independent contractor regulations. On January 10, the DOL published final regulations (and an associated news release, fact sheet, and FAQs) for determining whether a worker is classified as an employee or an independent contractor for purposes of the Fair Labor Standards Act (FLSA) effective on March 11, 2024. The final regulations restore a totality-of-the-circumstances approach in assessing the economic reality of the working relationship, requiring a balanced consideration of six factors. The six factors are the worker's opportunity for profit or loss, investments by the parties, the work relationship's permanency, the nature and degree of control over the work, whether the work is an integral part of the potential employer's business, and worker skill and initiative. Other factors may also be relevant. The outcome ultimately depends on whether the worker is economically dependent on the employer for work or is in business for themself.

- The result of this new independent contract rule should result in more workers being classified as employees under the FLSA.
- Note that most employee benefit plan rules determine employee status (and who is an eligible employee) under ERISA or the IRC (not the FLSA) in conjunction with the common-law standard. The FLSA standard, on the other hand, governs minimum wage and overtime requirements that apply to employees but not independent contractors. In other words, the definition of an employee under ERISA/IRC is different than and does not line up with the definition of an employee for purposes of the FLSA.
- For group health plan purposes, a common-law employee is distinguished from a worker who is an independent contractor or an employee of another entity. The test for common-law employee status generally focuses on the right to control the manner and means by which the work product is accomplished and considers the facts and circumstances of the particular situation under a multi-factor test in which no single factor is determinative. It is important to properly classify workers under the appropriate set of rules—particularly for purposes of the IRC's rules regarding retirement plans, cafeteria plans, and employer shared responsibility penalties.

DOL issues 2024 adjusted penalty amounts for group health plan violations. On January 11, the DOL published the 2024 annual adjustments to civil monetary penalties for a wide range of benefit-related violations. The adjustments are effective for penalties assessed after January 15, 2024, with respect to violations occurring after November 2, 2015. Here are the highlights:

- Form 5500 maximum penalty for failing to file increases from $2,586 to $2,670 per day that the filing is late.
- Summary of Benefits and Coverage (SBC) maximum penalty for failing to provide the SBC increases from $1,362 to $1,406 per failure.
- Multiple Employer Welfare Arrangement (MEWA) annual report (Form M-1) filing failures increases from $1,811 to $1,942 per day.
- Children's Health Insurance Program (CHIP) notice penalty for failing to provide the notice increases from $137 to $141 per day.

2024 federal poverty levels released—and the impact on affordability determination. 2024 poverty guidelines were released on January 17 and set the federal poverty line (FPL) at $15,060 (up from $14,580 in 2023) for a person living in the lower-48 states. The FPL is $17,310 for Hawaii and $18,810 for Alaska. Applicable large employer (ALEs) that utilize the FPL affordability safe harbor may use the FPL that is in effect within six months before the start of the plan year. So, January 1, 2024, plan years are still required to use the 2023 FPL because the new 2024 guidelines were not released prior to the beginning of the plan year. However, non-calendar plan years starting in 2024 can use the 2024 guidelines to increase the FPL safe harbor amount due to the increased 2024 guidelines. For example:

- 2024 calendar-year plans. The maximum affordable employee-only contribution for the lowest-cost plan based on the FPL safe harbor = $101.94 = (8.39% x $14,580 FPL for 2023) / 12.
- 2024 non-calendar-year plans. The maximum affordable employee-only contribution for the lowest-cost plan based on the FPL safe harbor = $105.29 = (8.39% x $15,060 FPL for 2024) / 12.

ACA FAQs (Part 64) released regarding the coverage of contraceptives as preventive care. On January 22, the regulatory agencies issued FAQ guidance addressing required coverage of contraceptive drugs.

- As a reminder, the ACA requires non-grandfathered plans to cover (without cost sharing) at least one form of contraception in each of 17 FDA-identified contraceptive categories, as well as any newer contraceptive service or FDA-approved, -cleared, or -granted contraceptive product that an individual and their medical provider have determined to be medically appropriate for the individual (regardless of whether those products have been specifically categorized).
- Plans may utilize reasonable medical management techniques within a specified category of contraception, so long as there is an "easily accessible, transparent, and sufficiently expedient" exceptions process that is not unduly burdensome and defers to the attending provider's recommendation. And with respect to those newer contraceptive products and services, the departments have allowed plans and insurers to use reasonable medical management techniques to determine which specific products or services to cover without cost-sharing so long as at least one of multiple, substantially similar products or services have been made available, and provided that it is medically appropriate for the individual.
- This FAQ guidance was in response to reports of "unreasonable medical management techniques and other problematic practices" imposing barriers to contraceptive coverage without cost-sharing including:
    - Requiring individuals to satisfy step therapy protocols using other products within the same category of contraception before approving coverage for the newer product.
    - Applying age-related restrictions for a product.
    - Imposing onerous documentation requirements or multiple levels of processes that result in denials of coverage or the imposition of cost-sharing requirements.
    - Requiring cost-sharing for services (e.g., anesthesia, pregnancy tests needed before the provision of certain forms of contraceptives, etc.) that are integral to the preventive services provided.
- So, the FAQs provide for an alternative "therapeutic equivalence approach" to compliance for contraceptive drugs and drug-led devices (i.e., combination contraceptive products comprised of a drug and a device). Under this approach, a medical management technique will be deemed reasonable if all FDA-approved contraceptive drugs and drug-led devices in a category are covered without cost-sharing, not including any for which there is at least one therapeutic equivalent drug or drug-led device that the plan or insurer covers without cost-sharing. Additionally, there must be an exceptions process available to individuals that allows them to access a specific therapeutic equivalent determined to be medically necessary by their attending

provider. A drug or drug-led device will be considered therapeutically equivalent based on the FDA's Approved Drug Products with Therapeutic Equivalence Evaluations (Orange Book).

Updated model CHIP Notice released. The DOL has released a new model employer CHIP Notice (available HERE) with information current as of January 31, 2024. As a reminder, group health plans that maintain a plan with participants who reside in a state that provides premium assistance under Medicaid or CHIP have an annual notice requirement to notify employees of the potential opportunities for premium assistance. The model CHIP notice is updated periodically to reflect changes in the states that offer premium assistance and changes to the relevant state contact information.