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REFORM Update

Issue Sixty-Three April 2013

April 9, 2013

The government has issued a great deal of guidance on the Affordable Care Act over the last few weeks. This *Reform Update* covers the following issues:

- Amendments to the 2014 operational requirements of the Small Business Health Options Program (SHOP)
- Whistleblower complaints and protections related to health care reform

The government still has to clarify many other health care reform issues. As a result, employers can expect a steady stream of guidance throughout 2013.

Amendments to the 2014 Operational Requirements of the Small Business Health Options Program (SHOP)

The SHOP portion of the public Exchange offers coverage options to small employers. States can define the size of small employers in 2014 and 2015. States can opt to define it as fewer than 50 or fewer than 100 employees. In 2016, however, all states will have to define small employer as fewer than 100 employees.

Recent guidance amends how the SHOP will operate in 2014. The SHOP was proposed to offer a range of choices to employees working for small employers. Originally, it was proposed to allow employers to select one metal tier in the Exchange. Employees could then choose to elect coverage under any plan offered in that metal tier. The SHOP would handle most of the administrative work for these choices. Keep in mind that most Exchange plans will have to meet a metal tier value. The platinum, gold, silver and bronze plans will have values of 90 percent, 80 percent, 70 percent and 60 percent, respectively.

An employer may choose, for example, to offer silver plan coverage. Employees could choose any silver plan on the SHOP. The SHOP would know the employer's contribution to coverage. The SHOP would inform employees of just the employee cost for various plan options. The SHOP would then bill the employer for all employees. The bill would reflect the employer contribution, the employee contribution and the total cost. The SHOP would enroll employees in the plans they choose, collect premiums from the employer, and forward the premiums to the appropriate insurance carriers.

The recent guidance changes the specific operating process in the SHOP for 2014 plan years only:

- State-run Exchanges would have two options for SHOP operations. The first is to let employers select a metal tier, and then offer access to all Qualified Health Plans (QHPs) in that metal tier. This is how the SHOP was designed to operate. However, states could choose a scaled-back operation, allowing the SHOP to require an employer to select a specific QHP for employees.

- Federally run Exchanges will permit employers in the SHOP to select only a single QHP.
- The premium aggregation function for SHOP has been delayed until 2015, because it is not needed until employees can choose from among all plans offered in a metal tier. Therefore, if a state Exchange provides the employee choice model in 2014, it must offer the premium aggregation function.

The government is proposing these changes in order to develop a process to administer a functional employee choice model. Insurance carriers, however, are concerned about the small group market and the potential for the employee choice model to result in adverse selection.

The government received significant feedback indicating that employers should have the option to choose a single QHP to offer employees. In 2015, employers using a federally facilitated Exchange will have two options within the SHOP. The first option allows employers to select a single QHP. The second option allows employers to choose the metal tier and allow employees to select any QHP in that tier.

The regulations also permanently change the operation of the SHOP:

- Special enrollment periods will be amended. Initially, the SHOP would allow special enrollment rights for specific events if notified within 60 days. This rule, however, conflicts with Health Insurance Portability and Accountability Act (HIPAA) rules. To resolve this issue, the SHOP now allows only a 30-day notice for employees when they acquire a new dependent (through birth, marriage, adoption or placement for adoption) or when they lose their eligibility for private insurance coverage.
- HIPAA does allow a 60-day notice if an employee or dependent becomes eligible for premium assistance under Medicaid or a state's Children's Health Insurance Program (CHIP). The new regulations add this as an event that would trigger a mid-year election change. Any desired change as a result of this event would have to be made within 60 days. Losing Medicaid eligibility would also be a triggering event. Changes must be made within 60 days.

The final Exchange regulations inadvertently omitted these trigger events for special enrollment rights. However, the ACA intended SHOP rules to align with the mid-year enrollment requirements for employer-sponsored group health plans.

Dealing with the Exchanges will be a challenge. Many states delayed developing Exchanges until after the Supreme Court ruling. For some states, it was difficult to spend tax dollars on developing Exchanges until it was confirmed that health care reform would survive judicial review. Thus, nearly all states are behind on their blueprint to launch Exchanges. The government may offer leniency in the first operational year of the Exchanges because of the short lead-time.

Whistleblower Complaints and Protections Related to Health Care Reform

Health care reform rules make health insurance coverage more affordable and more accountable to members. The new rules also protect whistleblowers from employer retaliation under the Fair Labor Standards Act.

An employer cannot retaliate against employees who choose subsidized coverage through the Exchange. An employer may be angry with employees who choose subsidized coverage. In most cases, employers will be subject to a penalty if a full-time employee elects subsidized coverage. Also an employer cannot retaliate against an employee for reporting the employer's alleged violations of Title I of the Affordable Care Act (ACA). Title I includes many of the required plan changes and insurance market reforms.

Employers may not discharge or retaliate against employees because they:

- Reported a possible violation of Title I of the ACA to any of following:
  - The employer
  - The federal government
  - The state's attorney general
- Testified, assisted or participated in a proceeding involving a violation of Title I of the ACA, or are about to do so
- Objected or refused to participate in an activity that they reasonably believe violates Title I of the ACA
- Received a premium subsidy or cost-sharing credits in the public Exchange when they purchased individual insurance coverage

If the employer retaliates against an employee for any of these actions, the employee may file a complaint with the Occupational Safety and Health Administration (OSHA).

An employer is retaliating if the whistleblower's actions result in any of the following:

- Firing or laying off
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failure to hire/rehire
- Intimidation
- Making threats
- Reassignment that affects prospects for promotion
- Reducing pay or hours

Employees must file complaints with OSHA within 180 days of the alleged violation. Written complaints can be mailed or faxed to the local OSHA office. Complaints may also be filed in person. Information on the local OSHA office can be found at www.osha.gov.

Once OSHA receives a complaint, it will conduct a preliminary investigation to determine whether the complaint is valid. This cursory examination simply verifies the complaint was filed in the required timeframe. Further examination will then determine whether the employer has violated ACA rules.

If the complaint is valid, OSHA will investigate it. The results are sent to both the employee and the employer.

If the evidence shows the employer is indeed retaliating, the employer should first try to reach a settlement with the employee. OSHA will step in if the two parties cannot agree. OSHA can issue an order requiring an employer to reinstate the employee, pay back wages and restore benefits. It can also require other relief, as needed, to make the employee whole.

OSHA will issue its findings and any required employer actions. Both will become the final order of the Secretary of Labor unless one of the parties appeals the findings. OSHA requires the appeal be made within 30 days. Either party can request a full hearing before an administrative law judge from the Department of Labor. The judge will hear the complaint and rule on the issue. If either party is not satisfied with the judge's ruling, the party could then appeal to the Department's administrative review board.

OSHA must handle the complaint and appeal processes promptly. If it does not file the final agency order within 210 days of the employee complaint, the employee may file a complaint in a United States district court. The employee may also file a complaint in a United States district court within 90 days after receiving OSHA's findings.

Employers need to be aware of these whistleblower protections. If OSHA notifies them of a pending investigation, they need to respond quickly.