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The ACA and Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA): Implications for Smoking Cessation Therapies

Legal Issues

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ACA Preventive Services Mandate

- ACA created significant changes for employer-sponsored health coverage
- Non-grandfathered health plans must cover certain preventive services without cost-sharing
 - A plan cannot charge a copayment, coinsurance, or a deductible for such services
 - In other words, certain services must be provided to covered individuals free of charge!

ACA Preventive Services Mandate

- Applies to fully-insured and self-funded health plans
- One type of service that must be covered includes counseling on tobacco cessation
- ACA does not specify a frequency, method, or setting for tobacco cessation counseling

ACA Preventive Services Mandate

- What services must employers provide as preventive coverage for tobacco cessation?
 - Non-grandfathered plans must cover tobacco cessation prescriptions and counseling as dictated by the USPTF
 - FAQ guidance indicates that employers may use reasonable medical management techniques
- Plans would be compliant with tobacco cessation mandate if at least the following are covered at no cost or prior authorization
 - Screening for tobacco use
 - At least two tobacco cessation attempts per year

ACA Preventive Services Mandate

- Two tobacco cessation attempts per year
 - Four tobacco cessation counseling sessions of at least 10 minutes each
 - Includes telephone, group, and individual counseling
 - All FDA-approved tobacco cessation medications for a 90-day treatment regimen when prescribed by a health care provider
 - Prescription and over-the-counter medications

Be careful! Limitations on tobacco cessation medications or other services may trigger issues under the Mental Health Parity and Equity Addiction Act (“MHPAEA.”)

MHPAEA's Impact on Tobacco Cessation Programs

- Mental Health Parity and Equity Act (“MHPAEA”) does not require plans to provide mental health or substance use disorder benefits
- If a plan provides these benefits, then the financial requirements and treatment limitations for those benefits can't be more restrictive than medical/surgical benefits (the parity rule)
- Nicotine addiction is considered a substance use disorder
 - Therefore, benefits provided for the treatment of nicotine addiction is subject to the parity rule under MHPAEA

MHPAEA's Impact on Tobacco Cessation Programs

- Plans providing tobacco cessation programs are prohibited from
 - Including higher or separate deductibles for mental health/substance use disorder treatments (within the same classification)
 - Assigning **all** drugs used to treat nicotine addiction to a higher copay tier than what is required for prescriptions to treat medical or surgical conditions
 - Requiring programs that cover the cost of prescription drugs for nicotine addiction to be more restrictive than those covering the cost of prescription drugs for medical or surgical conditions (within the same classification)
 - Imposing visit limits on Tobacco cessation programs if it does not have visit limits on medical or surgical benefits (within the same classification)
- GHPs providing preventive mental health and substance use disorder benefits solely to comply with the preventive services mandate not required to provide additional mental health and substance use disorder benefits

MHPAEA's Impact on Tobacco Cessation Programs

- What about HIPAA wellness programs?
- ACA and HIPAA regulations permit differences in required contributions for smokers and non-smokers
 - Must be part of a compliant wellness program
- Wellness programs have different Tobacco cessation programs
 - Educational materials
 - Tobacco cessations classes (Reasonable Alternative Standard)
 - Covering the cost of prescription drugs to help stop Tobacco



MHPAEA's Impact on Tobacco Cessation Programs

- Wellness programs that provide medical care, including the cost of prescription drug coverage, are subject to MHPAEA
- HIPAA and ACA regulations have not addressed how MHPAEA applies to wellness programs
 - Unclear how much wellness programs could restrict covering prescription drugs (without creating a problem)
 - Employers should seek legal counsel when imposing limitations on Tobacco cessation drugs or counseling!

Enforcement

- No specific penalty or enforcement rule for MHPAEA violations under ERISA
- However, participants, beneficiaries, and the DOL may potentially file an ERISA §502 claim in court for fiduciary breach
 - Damages for unpaid benefits, interest, and attorney's fees
- IRS may impose excise taxes of \$100 per day for each affected individual for failure to comply
 - Persons liable for an excise tax must file IRS Form 8928

Enforcement

- State insurance regulations
- HHS may enforce
 - Against issuers if the state fails to enforce MHPAEA
 - Against non-federal governmental plans

Upcoming webinars:

- Cadillac Tax
- Supreme Court Decisions
 - Same Sex Marriage
 - King v. Burwell

Thank you!

The intent of this presentation is to provide you with general information regarding the status of, and/or potential concerns related to, your current employee benefits issue. It does not necessarily fully address all your specific issues. It should not be construed as, nor is it intended to provide, legal or tax advice. Questions regarding specific issues should be addressed by the your organization's general counsel, tax advisor, or an attorney who specializes in this practice area.