

Federal Agencies Give Informal Guidance on Benefits Laws

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Every year the American Bar Association's Joint Committee on Employee Benefits (ABA JCEB) has meetings with various federal agencies on the gray areas of benefit laws. This year's guidance provides some insights to employers and insurance professionals alike.

The ABA JCEB received health benefits comments from three agencies:

The Internal Revenue Service (IRS)

The Department of Labor (DOL)

The Centers for Medicare and Medicaid Services (CMS)

While the responses are unofficial and nonbinding, they do provide insight into how these agencies would rule in similar circumstances. Even in cases where an agency declined to respond, it is an indicator of an important gray area that may see official guidance in the near future.

IRS

Highlights include:

Retiree Benefits: An employer wants to provide lifetime health coverage to a retiree who was formerly a highly compensated employee (HCE). The HCE pays the COBRA rate on an after-tax basis. This is not considered income to the HCE – as long as the COBRA rate is at least the fair market value of the coverage – and the arrangement does not violate nondiscrimination testing rules.

Wellness Rewards: Gift cards are common giveaways in wellness campaigns. The IRS views them as taxable income, even when given by a third party vendor, and should be reflected on the employee's Form W-2.

Health Coverage for Assumed Non-Dependents: An employer must give employees the chance to demonstrate that domestic partners and others are qualifying relatives. If they can do so, the coverage is tax-free. Otherwise, an employer must impute the value of their coverage as an after-tax premium.

COBRA and Health FSAs: Employees cannot take advantage of the election change rules and change their deduction to \$0 because of a change in status and then elect COBRA based on that premium. The IRS summed up this inventive argument this way: "the employee was attempting to game the change in status rules."

DOL

Highlights include:

COBRA Premium Increases: While COBRA does not require a particular length of advance notice for an annual premium increase, the DOL confirmed that coverage should not be terminated for insufficient payment unless qualified beneficiaries have had reasonable advance notice of the increase and a reasonable opportunity to pay.

Wellness Programs: The DOL declined to clarify what circumstances would make a stand-alone wellness program subject to ERISA, pointing instead to earlier Advisory Opinions on related Employee Assistance Plans as well as a HIPAA wellness checklist found in DOL Field Assistance Bulletin 2008-02.

HRAs and Individual Health Insurance (Q/A-12): The DOL declined to answer whether an HRA that reimburses only individual insurance policies would be subject to HIPAA nondiscrimination violations because of individual underwriting. It needed to collaborate with Treasury and HHS. However, it did state that such an individual policy would not qualify as a voluntary plan because of employer contributions.

Conditional HRAs and other Plans: Again, the DOL declined to answer whether an employer could set up an HRA or other plan because of a state or city law (e.g., San Francisco's Health Care Security Ordinance) and condition its existence on whether the law is preempted by ERISA in litigation.

Non-English Language Assistance: The DOL was asked how a plan would know how many participants are literate only in a non-English language when speaking a particular language is not an essential function of the job. This comes into play for purposes of summary plan descriptions (SPDs) where you must provide non-English language assistance in certain situations, but need not translate the SPD into that language. For plans with fewer than 100 participants, 25 percent must be literate in the same non-English language. For all other plans, the lesser of 10 percent or 500 participants must be literate in the same non-English language. The DOL stated that plans must weigh the costs of conducting a detailed language inquiry of its participant base against simply offering the non-English language assistance.

CMS

Highlights include:

Health Savings Accounts (HSAs) and Medicare Secondary Payer Rules: CMS made it very clear: HSAs are not subject to the MSP rules.

Remote Use of Electronic Media and HIPAA Security: Covered entities must determine whether to adopt encryption standards for laptops with PHI. If not, they must have a suitable alternative and document the reasons for its selection.

Security Audits: CMS is starting to conduct audits, which will initially be triggered by complaints. The goal is not to impose monetary penalties but obtain cooperation when a failure is noted.