Employee Benefits Report

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President Trump Issues New Health Coverage Responsibilities for Employers of Immigrants

New and proposed immigration requirements for documented and undocumented immigrants could impact employers who offer health care coverage.

Prior to the new requirement, immigrants who wanted to qualify for an employer-sponsored health plan had to be able to show that they had a green card, permanent resident or citizenship status. Undocumented immigrants could get coverage if their spouses legally worked in this country and had access to an employer-sponsored plan.

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Small Employers Can Now Band Together to Offer Retirement Plans

A new U.S. Department of Labor (DOL) rule enables small businesses the opportunity to offer benefit packages comparable to those provided by large employers.

The rule went into effect Sept. 30. Small businesses may offer retirement savings plans through Association Retirement Plans (ARPs). This opens the door to "closed" Multiple Employer Plans (MEPs) by associations, trade groups, chambers of commerce, Professional Employer Organizations (PEO) and others sponsoring retirement plans.

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New Requirements

All refugees, asylum seekers or people on temporary visitor visas now must prove they can obtain health insurance before they receive a visa. Visa applicants will have to demonstrate that they will be covered by an approved health insurance plan within 30 days of entering the United States or they will have to prove that they have the financial means to "pay for reasonably foreseeable medical costs."

The new requirement was put into effect on Nov. 3 and is part of a presidential proclamation on immigrants and health care, issued by President Trump on Oct. 4.

The requirement is grounded in the U.S. immigration law's "public charge" doctrine. A public charge is someone who receives certain public benefits. Under Section 212(a)(4) of the Immigration and Nationality Act (INA), an individual seeking admission to the United States or seeking to adjust their status to permanent resident (obtaining a green card) must not be (or likely to be) a public charge at the time they apply.

If you hire an employee who is in the process of obtaining a visa, you will need to ensure they comply. They will not be in compliance if they purchase a plan using subsidies through the Affordable Care Act (ACA) Health Insurance Marketplace or Exchanges; or through the Children's Health Insurance Program ("CHIP") for dependents. However, employer-provided coverage, individually purchased plans, and catastrophic or short-term limited-duration plans will count.

As an employer, you are required to provide notices to employees about the availability of health insurance through the Marketplace and annually provide information about the availability of CHIP. You may want to consider adding information to these notices regarding the potential impact on their immigration status by accepting either of these benefits.

Another option is to upgrade your health benefits, particularly for dependents, so your non-U.S. citizen employees will not be tempted to use Marketplace or CHIP coverage.

Proposed Regulations

Recently, a draft of proposed Department of Homeland Security ("DHS") regulations was leaked. If the draft is approved, it would modify the public charge rules several ways:

1. *Any* dependence on public benefits would be an issue (the previous rule allowed not more than 50 percent public benefits).
2. Adding benefits would place the recipient on the public benefits list.
3. Assistance received by a non-US citizen for the benefit of dependents, even US citizen dependents, would be considered in the public charge.

If these regulations are approved, employers could find more non-US citizen employees asking to transfer from the Marketplace, CHIP or Medicaid to their employer's health plan. This may not be possible because employees only can make changes in plan elections during open enrollment or when certain changes occur. The proposed rules would not count as a change in status.

Associations of employers in a city, county, state, or a multi-state metropolitan area; or in a particular industry nationwide can now offer ARPs.

A MEP is a group retirement plan operated by two or more unrelated employers. A closed MEP is a recognized arrangement sponsored by a group or association, while an open MEP is not recognized or sponsored by a bona-fide group or association. A PEO is a human-resource company that contractually assumes certain employment responsibilities for its employer clients.

The DOL released the rule in response to President Donald Trump's Executive Order 138547, "Strengthening Retirement Security in America."

The DOL estimates that as many as approximately 38 million private-sector employees in the United States do not have access to a retirement savings plan through their employers.

The Future

Almost half of Americans have health coverage through their employer, according to the Kaiser Foundation. Also almost half of the 10.5 million undocumented immigrants in 2017 did not have health coverage, according to the Pew Research Center. Many of the immigrants who are employed work in low-

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wage jobs that do not provide employer-sponsored health benefits, or they cannot afford coverage.

People in the country illegally do have some options. Undocumented immigrants can obtain low-cost care through community health centers. Also, federal law requires hospitals to screen and stabilize any patient who seeks emergency care, with some costs covered by Medicaid. Six states and Washington, D.C. use state-only funds to provide Medicaid coverage for income-eligible children through age 18 regardless of immigration status. California recently expanded coverage to young adults through age 25. For a sliding-scale fee, illegal immigrants can receive primary care and prescription drugs at federally funded health care centers in 11,000 communities.

Many of the 2020 Democratic presidential candidates showed interest in expanding health care coverage for undocumented immigrants, although none has provided details of how it would be accomplished.

While some observers worry that free health coverage for illegal immigrants would be expensive and attract more immigrants, others say the expense of providing primary care would eventually pay off, because it would keep people from waiting until they were very sick to seek treatment. The Congressional Budget Office has not provided estimates on actual costs.

If you need help and advice regarding how immigration rules may affect your firm's health care program, please contact us.

How Employers Can Avoid FMLA Pitfalls

The FMLA has been law since 1993 but employers can still find the rules confusing.

The Family and Medical Leave Act's (FMLA) paid leave and leave stacking rules aren't new, but they can sometimes trip employers up. FMLA rules generally apply to employers who have 50 or more employees within a 75-mile radius, and only to employees who have been employed for 12 months and worked at least 1250 hours during the past year.

The FMLA allows employees to take 12 weeks of leave in a 12-month period for certain medical reasons. Employees also can use FMLA leave to take care of critically ill family members or for the birth or adoption of a child. Leave can be taken all at once, intermittently or on a reduced schedule. Special rules apply to service members with a serious injury or illness, or their family members caring for them.

FMLA leave generally is unpaid, although employers can require employees to run FMLA at the same time as other leaves. Running the leaves concurrently prevents "leave stacking" where employees use all of their unpaid and paid leaves to be away from the workforce for more than 12 weeks.

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Paid Leave Exceptions

Employers can require employees to use earned vacation, sick time or paid time off (PTO) time concurrently with FMLA leave. However, employers are not obligated to allow an employee to substitute paid sick leave for unpaid FMLA leave in order to care for a child with a serious health condition when the employer's normal sick leave rules only allow employees to take off work for their own illness.

There is an exception regarding paid leave. The Department of Labor (DOL) states that, "Leave taken under a disability leave plan or as a workers' compensation absence that also qualifies as FMLA leave due to the employee's own a serious health condition may be designated by the employer as FMLA leave and counted against the employee's FMLA leave entitlement. Because leave under a disability benefit plan or workers' compensation program is not unpaid, the provision for substitution of accrued paid leave does not apply."

However, the DOL adds that if state law permits it, employees can use accrued paid leave to supplement the paid plan benefits, such as in a case where a plan only provides replacement income for two-thirds of an employee's salary.

Year-End Considerations

If you track FMLA leave according to a calendar year, you might end up with a situation where an employee who is giving birth or adopting late in the year can take 12 weeks at the end of the year through Dec. 31 and then on or after Jan. 1 take off another 12 weeks for a total of 24 weeks in less than 12 months. Called leave stacking, it is allowed by federal regulations. Employers are not obligated to help employees maximize their leave duration, but they must provide employees with accurate and truthful information about FMLA.

If you want to avoid leave stacking, you can use a rolling FMLA year. This allows employers to review the previous 12 months and determine how much FMLA leave the employee has used and how much remains,

Employers are permitted by federal law to change their FMLA year to a rolling FMLA year if they give all employees at least 60 days' notice of the change. Any employee on FMLA at that time must be transitioned in a way that provides the employee with the full benefit of their leave.

State laws vary. For example, employers in Wisconsin must use the calendar year when determining FMLA leave. Please call us if you have any questions about FMLA.

When is Indemnity Health Insurance an Acceptable Alternative to a Fully-Insured Plan?

Here's a look at the advantages and disadvantages.

Many employers offer employees access to indemnity health insurance as a way to fill gaps in their health coverage. Now, as heath care plan costs increase, some employers who are priced out of the cost of traditional major medical coverage are turning to indemnity health insurance as a way to provide some type of health care coverage.

An indemnity health insurance plan often is referred to as a "fee for service" plan because it pays a set amount for services to health professionals and health facilities — but usually after a deductible is paid. The deductible is the amount an employee is required to pay for a service before policy benefits are provided.

Once the employee covers the deductible, the plan pays the remainder of health insurance costs up to the policy limit. Employees also might have to pay a co-insurance, which is a percentage of the remaining charges after the deductible is paid. Some indemnity health policies, though, set a maximum limit on how much an insured person must pay as co-insurance.

For example, if the provider's bill is $800 and the employee has a $200 deductible, the remaining $600 would be paid by insurance less the co-insurance, which in addition to the deductible would be the employee's responsibility If the co-insurance is 20 percent, the employee would be required to pay $120; a total of $320.

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Advantages

For employers who want to offer — or who are required by the Affordable Care Act to offer — coverage and cannot afford that coverage, indemnity insurance offers a low-cost alternative to traditional insurance premiums.

In addition, many indemnity plans allow insured members to choose any doctor, specialist or hospital willing to accept that reimbursement. Members do not have to choose a primary care doctor and they can choose any specialists they think they need without having to get a referral.

The ability to choose any provider is particularly helpful to members who want access to particular specialists who are not covered by Health Maintenance Organization (HMO) or Preferred Provider Organization (PPOs) plans in their area.

Disadvantages

While employers and employees can save money on fixed indemnity health plan premiums, they may have significant out-of-pocket costs since the carrier will only pay a set amount for each covered service.

Some indemnity health insurance plans may not cover preventative services, such as annual exams and other routine office visits that are designed to prevent illnesses.

Also, many indemnity policies require that insured members pay the hospital or doctor's office costs up front when the service is received. The employee would then have to submit a claim and wait to receive reimbursement from the insurance company.

Indemnity health insurance may also not meet the requirements of the ACA, still leaving employers subject to ACA penalties.

With fixed indemnity plans, the burden of researching costs rests on insured members. With health care networks, the providers have agreed on certain reimbursements. But doctors and specialists who are not in a network are free to set their own costs — which might be higher than in-network costs.

If you are seeking low-cost plans for health coverage for your employees, work with a qualified broker to discuss different coverage options, including fee for service amounts; whether preventative services are included; and which services count towards your deductible. ■

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Are Your Workplace Policies Up to Date about Vaping?

The popularity of vaping is sending some employers scrambling to craft workplace policies governing the use of electronic cigarettes.

Vaping is when users puff electronic cigarettes — also called e-cigs, vaporizers and electronic nicotine delivery systems — to inhale an aerosol that usually contains nicotine, and/or flavorings and other chemicals. The e-cigarettes are battery-operated and usually look like a traditional cigarette, pen or USB flash drive.

According to the federal Centers for Disease Control and Prevention (CDC), 33 deaths related to vaping have been confirmed in 24 states since Oct. 15, 2019.

Policy Considerations

Since smoking is banned from most workplaces, many employers are treating the smokeless alternative like cigarettes. If you decide to follow a similar track in your workplace, you should evaluate your smoking policies so they are clear about what products are banned and what areas of the worksite are covered by any ban.

Employers also should consider state and local regulations when developing a policy. For instance, some statutes — including Alaska, California, Delaware, Hawaii, Maine, Massachusetts, New Jersey, New York, North Dakota, Rhode Island, Utah and Vermont, as well as Washington, D.C. — prohibit vaping in places where smoking is banned. Other states have banned vaping in child care facilities, state government buildings, schools and enclosed workspaces. Some local municipalities also have enacted bans on e-cigarettes in enclosed workplaces.

Another consideration is whether your company employees belong to a union. If so, the union may want to have a say in any policies you develop about vaping.

If you decide to institute a new policy or update an old one, some states have regulations about how much notice you need to give employees. Human resource advisors suggest giving employees 60 to 90 days' notice. ■