WINSTON & STRAWN LLP

BLOG

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US DOL, EBSA Issues Guidance on Disclosure of Compensation for Brokerage and Consulting Services to Group Health Plans

In Field Assistance Bulletin No. 2021-03 (FAB), EBSA announced its temporary enforcement policy of the new ERISA Section 408(b)(2)(B) requirement that brokers and consultants to group health plans disclose specific information to plan fiduciaries about their receipt of direct and indirect compensation. The FAB clarifies that service providers can look to the ERISA pension plan disclosure requirements in 29 CFR § 2550.408b-2(c) for guidance, and such will be viewed as a good-faith and reasonable step toward compliance with ERISA Section 408(b)(2)(B). It also clarifies that the new requirements apply to certain benefit plans (such as those that provide dental- and vision-only benefits) that may normally be exempt from other disclosure requirements. In addition, although ERISA Section 408(b)(2)(B) does not define the terms "broker" or "consultant", the FAB provides a list of services that are considered brokerage or consulting services, which will be used by EBSA when determining whether a specific service must comply with the new disclosure requirements. Finally, the FAB confirms that service contracts entered into before December 27, 2021 are not subject to ERISA Section 408(b)(2)(B); however, if the contract is renewed at a later date, it will be subject to the new requirements.

Winston Takeaway: Group health plans should review their new or renewing brokerage and consulting service provider contracts to determine whether they comply with the ERISA Section 408(b)(2)(B) disclosure requirements.

Coverage of At-Home Diagnostic COVID-19 Tests to Go Into Effect January 15, 2022

The tri-agencies (the Departments of Labor, Health and Human Services (HHS), and the Treasury) published FAQs on January 10, 2022 in connection with the requirement that group health plans and issuers cover diagnostic over-the-counter (OTC) COVID-19 tests **without a physician's order, and without cost-sharing, prior authorization, or other medical management**. The requirement **is effective January 15, 2022** and remains effective during the COVID-19

public health emergency. Plans and issuers can either provide direct coverage for the tests or require participants to submit claims for reimbursement. **Only diagnostic tests are covered. The FAQs clarify that testing required for employment purposes is not covered.**

Plans and issuers cannot limit coverage to tests that are solely provided through preferred pharmacies or retailers; however, under a safe harbor described in the FAQs, a plan or issuer can arrange for direct coverage of OTC COVID-19 tests through both its pharmacy network and a direct-to-consumer shipping program **if it meets certain requirements**. **Plans and issuers that meet the safe harbor can limit reimbursement for tests from non-preferred pharmacies or other retailers to up to$12 per test (or the cost of the test, if lower).** Plans and issuers may elect to provide more generous reimbursement up to the actual price of the test. Under the FAQs, plans and issuers may limit the number of OTC COVID-19 diagnostic tests covered to **no less than eight tests per covered participant, beneficiary, or enrollee per 30-day period (or per calendar month)**. The FAQs clarify that **plans and issuers must also continue to cover COVID-19 tests administered by a provider or by prescription under prior rules**.

The FAQs allow plans and issuers to implement activities to prevent, detect, and address fraud and abuse. Examples include requiring attestation that the test was purchased for the covered person for diagnostic reasons and reasonable documentation of proof of purchase. Plans and issuers can also provide communication materials to covered persons with information on how to obtain a test or submit a claim.

Winston Takeaway: Plans and issuers should reach out to their insurers, pharmacy benefit managers, and administrators to ensure compliance with the OTC COVID-19 testing requirement and understand and communicate the requirements for any direct-coverage programs. They should also review any existing COVID-19 testing programs to ensure they comply with the new FAQs.

Winston & Strawn Paralegal Kristine Lofquist also contributed to this blog post.

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