COMPLIANCE OVERVIEW

Consolidated Appropriations Act: Employee Benefits Provisions

The Consolidated Appropriations Act, 2021 (CAA), which was signed into law on Dec. 27, 2020, includes a $900 billion coronavirus relief package that provides funding to individuals and businesses.

The CAA also includes many benefits and tax provisions affecting **employers**, **group health plan sponsors**, **health benefits brokers** and **health insurance issuers**. Some provisions are currently effective, while others begin on future dates.

This Compliance Overview summarizes the employee benefits provisions relating to tax-favored accounts, surprise medical billing, health plan transparency and mental health parity. It also includes various tax credits, exclusions and deductions that may be of interest to employers, along with a brief discussion of key retirement plan provisions.

LINKS AND RESOURCES

- Legislative text of the Consolidated Appropriations Act, 2021
- Summary of Appropriations Provisions by the House Appropriations Committee

Key Benefits Provisions

The CAA provisions impacting employers and group health plan sponsors include those related to:

- ☑ Health and dependent care flexible spending accounts (FSAs)
- ☑ Surprise medical billing
- ☑ Health care transparency
- ☑ Mental health parity
- ☑ Retirement plans

Tax Provisions

The CAA also contains a number of tax provisions related to:

- ☑ Paid family and medical leave
- ☑ Health coverage tax credits
- ☑ Employee retention credits
- ☑ Student loan repayments
- ☑ Business meal deductions

Special Rules for FSAs

The CAA provides temporary special rules for employers with **health and dependent care flexible spending accounts (FSAs)**. The rules allow employers to provide employees with additional time to use funds in these accounts, since employees are more likely to have unused funds due to the coronavirus pandemic.

Extended Periods

For plan years ending in 2020 and 2021, the CAA allows employers to:

- Permit employees to **carry over unused amounts** remaining in these FSAs to the next plan year.
- **Extend the grace period** to 12 months after the end of such plan year.
- Permit employees who **cease plan participation** during 2020 or 2021 to continue to receive reimbursements from unused amounts through the end of the plan year in which their participation ended.

The CAA also includes a special carry forward rule for dependent care FSAs where the dependent aged out during the pandemic. For purposes of determining dependent care assistance that may be paid or reimbursed, the maximum age is increased from 13 to 14 years of age.

Change in Election Amounts

Employees are also able to elect to **prospectively modify** the amount of their FSA contributions for plan years ending in 2021, even if they have not experienced a change in status. However, the applicable dollar limitations will continue to apply.

Plan Amendments

Employers can retroactively adopt plan amendments incorporating these FSA provisions, if specific requirements are met:

- The plan must be operated consistently with the amendment terms until the amendment is adopted.
- The amendment must be adopted by the last day of the first calendar year following the plan year in which it is effective.

Ban on Surprise Medical Bills

The No Surprises Act is also included in the CAA, which is a ban on surprise medical bills. The provisions of the Act apply to plan or policy years beginning on or after **Jan. 1, 2022**.

Surprise Medical Bills

Surprise medical bills occur when patients unexpectedly receive care from out-of-network health care providers. For example, a patient may go to an in-network hospital for treatment, such as surgery or emergency care, but an out-of-network doctor may be involved in the patient's care. Patients often cannot determine the network status of these providers during treatment in order to avoid the additional charges, and are often not involved in the choice of provider at all.

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No Surprises Act

The No Surprises Act applies to surprise bills from doctors, hospitals and air ambulances. It will prohibit these providers from billing patients who have health coverage for unpaid balances. Rather, providers will have to work with the group health plans or health insurance issuers to determine the appropriate amount to be paid by the plan or issuer, under the methodology provided in the Act. The Depts. of Health and Human Services, Labor and the Treasury will work together to issue regulations regarding this methodology and other requirements of the Act. Implementing regulations are required to be issued by **July 1, 2021**.

Health Care Transparency

The CAA makes a number of changes to increase transparency in health care. These changes have varying effective dates and impact health plans, health insurance issuers, brokers and consultants.

Removal of Gag Clauses

The law bans gag clauses in contracts between providers and health insurance plans that prevent:

- Enrollees, plan sponsors or referring providers from seeing **cost or quality of care** information or data on providers.
- Plan sponsors from accessing **de-identified claims data** that could be shared, under Health Insurance Portability and Accountability Act (HIPAA) business associate agreements, with third parties for plan administration and quality improvement purposes.

Group health plans or issuers must annually submit an attestation of compliance with these requirements. The ban on gag clauses is effective on the CAA's enactment date of **Dec. 27, 2020**.

Disclosure of Broker Compensation

The CAA creates new requirements for brokers and consultants to disclose to ERISA-covered group health plan sponsors any **direct or indirect compensation** they may receive for referral of services. Similar disclosure to enrollees in the individual market or enrollees purchasing short-term limited duration insurance is required for referral of coverage. These new disclosure requirements generally apply to contracts entered into, extended or renewed on **Dec. 27, 2021**.

Current Disclosure Requirements

The Employee Retirement Income Security Act of 1974 (ERISA) requires plan fiduciaries to, among other things, ensure that arrangements with their service providers are "reasonable" and that only "reasonable" compensation is paid for services. In order to meet these obligations, plan fiduciaries must be able to obtain sufficient information to enable them to make informed decisions about an employee benefit plan's services, the costs of such services and the service providers.

A 2012 final rule requires covered service providers (CSPs) to provide plan fiduciaries with information they need to assess reasonableness of total compensation, both direct and indirect, received by the CSP, its affiliates and/or its subcontractors. However, this rule only applies to ERISA-covered defined benefit and defined contribution pension plans and **does not apply** to employee welfare benefit plans.

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New Disclosure Requirements

The CAA creates similar disclosure requirements for CSPs in order for a contract between an ERISA-covered group health plan and a CSP to be considered reasonable. For this purpose, the term "covered service provider" means one that enters into a contract with the plan and reasonably expects **$1,000 or more in compensation** (direct or indirect) to be received in connection with providing one or more of the services listed below—regardless of whether the services will be performed or compensation will be received by the CSP, an affiliate or a subcontractor.

Specifically, disclosure is required for:

- **Brokerage services** provided to a covered plan with respect to the selection of insurance products (including vision and dental), recordkeeping services, medical management vendors, benefits administration (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness services, transparency tools and vendors, group purchasing organization preferred vendor panels, disease management vendors and products, compliance services, employee assistance programs, or third party administration services;
- **Consulting services** related to the development or implementation of plan design, insurance or insurance product selection (including vision and dental), recordkeeping, medical management, benefits administration selection (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness design and management services, transparency tools, group purchasing organization agreements and services, participation in and services from preferred vendor panels, disease management, compliance services, employee assistance programs, or third-party administration services.

Content Requirements

A CSP must disclose to a plan fiduciary, in writing, the following:

- ☑ A description of the services to be provided to the plan pursuant to the contract.
- ☑ If applicable, a statement that the CSP, an affiliate or a subcontractor will or expects to provide services pursuant to the contract directly to the plan as a fiduciary.
- ☑ A description of all direct compensation, either in aggregate or by service, that the CSP, an affiliate or a subcontractor reasonably expects to receive in connection with the services.
- ☑ A description of indirect compensation that the CSP, an affiliate or a subcontractor reasonably expects to receive in connection with the services.
- ☑ A description of the arrangement between the payer and the CSP, an affiliate or a subcontractor (as applicable) pursuant to which such indirect compensation is paid.
- ☑ Identification of the services for which the indirect compensation will be received, if applicable;
- ☑ Identification of the payer of the indirect compensation.
- ☑ If compensation is set on a transaction basis (such as commissions, finder's fees or other similar incentive compensation based on business placed or retained), a description of the services for which such compensation will be paid and identification of the payers and recipients.
- ☑ A description of any compensation the CSP, an affiliate or a subcontractor reasonably expects to receive in connection with termination of the contract, and how any prepaid amounts will be calculated and refunded upon termination.

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- ☑ A description of the manner in which the compensation will be received.

Timing Requirements

Disclosure must be made no later than the date that is **reasonably in advance of the date on which the contract is entered into, and extended or renewed**. If there any change to the required information, the CSP must inform the plan fiduciary as soon as practicable, but generally no later than 60 days from the date on which the CSP is informed of the change. Lastly, upon written request of the plan fiduciary, the CSP must disclose any other information relating to compensation received in connection with the contract.

Plan Fiduciary Requirements

If the CSP fails to provide the required information above, the plan fiduciary may be required to notify the Department of Labor and terminate the contract.

Reporting on Pharmacy Benefits and Drug Costs

The CAA requires group health plans to report information on plan medical costs and prescription drug spending to the Secretaries of HHS, Labor and the Treasury. Specifically, plans must report the following:

- ☑ The beginning and end dates of the plan year.
- ☑ The number of enrollees.
- ☑ Each state in which the plan is offered.
- ☑ The 50 brand prescription drugs most frequently dispensed by pharmacies for claims paid by the plan, and the total number of paid claims for each drug.
- ☑ The 50 most costly prescription drugs with respect to the plan by total annual spending, and the annual amount spent by the plan for each drug.
- ☑ The 50 prescription drugs with the greatest increase in plan expenditures over the prior plan year, and for each drug, the change in amounts expended by the plan in each plan year.
- ☑ Total spending on health care services by the group health plan, broken down by the type of costs, the average monthly premium paid by employers (as applicable) and by enrollees, and any impact on premiums by rebates, fees and any other remuneration paid by drug manufacturers to the plan.
- ☑ Any reduction in premiums and out-of-pocket costs associated with rebates, fees or other remuneration.

No confidential information or trade secrets can be included in the report. The reporting requirement is effective **Dec. 27, 2021**, and no later than **June 1** of each year thereafter.

Mental Health Parity

The CAA includes provisions that strengthen enforcement of existing mental health parity laws and increase transparency with respect to how health plans are applying these laws. In particular, it requires group health plans and health insurance issuers to conduct **comparative analyses of the nonquantitative treatment limitations (NQTLs) used** for medical and surgical benefits as compared to mental health and substance use disorder benefits. The comparative analyses, and certain other information, must be made available upon request to applicable agencies **beginning Feb. 10, 2021**.

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If, upon review of the analyses, the Secretaries of Labor, HHS, and the Treasury find that a plan is out of compliance with mental health parity laws, corrective actions will be specified for the plan to come into compliance, which the plan will have 45 days to implement. If the plan is still not in compliance after those 45 days, the plan must notify all individuals enrolled in the noncompliant plan within seven days.

Tax Credits, Exclusions & Deductions

The following tax provisions of the CAA may be of particular interest to employers, as they involve tax credits for employee leave, retention and premium assistance, as well as exclusions and deductions for certain employer-provided benefits.

FFCRA Tax Credit Extension

While the CAA **did not** extend the leave mandates created by the Families First Coronavirus Response Act (FFCRA), it **did extend** the time limit for employer tax credits created by the FFCRA. The FFCRA's paid leave requirements sunset on Dec. 31, 2020. However, the tax credits will apply for FFCRA employee leave taken **through March 31, 2021**.

Thus, employers that provide FFCRA paid leave through March 31, 2021, are eligible for tax credits to cover leave costs. This includes employee wages, health plan expenses allocable to those wages, and the employer's portion of the Medicare tax related to the wages.

Extension of Employer Tax Credit for Paid Family and Medical Leave

The CAA **extends, through 2025,** the employer credit for paid family and medical leave, which permits eligible employers to claim an elective general business credit based on eligible wages paid to qualifying employees with respect to family and medical leave.

Health Coverage Tax Credit Extension

The CAA **extends, for all coverage months beginning in 2021**, the Health Coverage Tax Credit (HCTC). This means eligible individuals can receive a tax credit to offset the cost of their monthly health insurance premiums for 2021 if they have qualified health coverage for the HCTC.

Employee Retention Tax Credit

The CAA provides a tax credit for **40% of wages** (up to $6,000 per employee) paid by a disaster-affected employer to a qualified employee. The credit applies to wages paid without regard to whether services associated with those wages were performed. Certain tax-exempt entities are provided the option to claim the credit against payroll taxes.

Exclusion for Certain Student Loan Repayments

The law extends, through 2025, the allowance for employers to provide a student loan repayment benefit to employees on a tax-free basis. Specifically, the provision applies to **any student loan payments made by an employer on behalf of an employee before Jan. 1, 2016**.

Under the provision, employers may contribute up to **$5,250** annually toward an employee's student loans, and such payment would be excluded from the employee's income. The $5,250 cap applies to both the student loan repayment benefit as well as other educational assistance (e.g., tuition, fees and books) provided by the employer under existing law.

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Temporary Deduction for Business Meals

The CAA provides a 100% deduction for business meal food and beverage expenses, including any carry-out or delivery meals, provided by a restaurant that are paid or incurred in 2021 and 2022. Currently, the deduction is available for only 50% of such expenses.

Key Retirement Plan Provisions

The CAA includes a number of provisions impacting retirement plans. Significant rules in two key areas are addressed below, though this is not intended to be an all-inclusive list.

Temporary Rule Preventing Partial Plan Termination

The layoff of a significant number of employees could cause a plan to incur a partial plan termination, even in cases where it is expected that many employees may be rehired. Accordingly, the CAA modifies the current partial plan termination rules to ensure such termination does not occur if the active participant count as of March 31, 2021, is **at least 80%** of the number of active participants covered by the plan on March 13, 2020.

Special Disaster-related Rules for Use of Retirement Funds

The CAA provides an exception to the 10% early retirement plan withdrawal penalty for qualified disaster relief distributions, not to exceed $100,000 in qualified disaster distributions cumulatively. Amounts withdrawn are included in income ratably over three years or may be recontributed to a retirement plan to avoid taxable income and restore savings.

In addition, the CAA allows for the re-contribution of retirement plan withdrawals for home purchases canceled due to eligible disasters, and provides flexibility for loans from retirement plans for qualified disaster relief.

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