



The
ERISA
Industry
Committee

March 7, 2014

U.S. Department of Labor
U.S. Department of Health and Human Services
U.S. Treasury Department

RE: Amendments to Excepted Benefits Proposed Regulations

Ladies and Gentlemen:

The ERISA Industry Committee (“ERIC”) is pleased to respond to the request of the U.S. Department of Labor, U.S. Department of Health and Human Services, and U.S. Treasury Department (collectively, the “Departments”) for comments regarding the proposed rules relating to Amendments to Excepted Benefits (the “proposed regulations”).¹ ERIC appreciates the efforts of the Departments to expand the application of the rules for excepted benefits to additional types of benefit programs.

ERIC’S INTEREST IN THE PROPOSED REGULATIONS

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and other welfare benefits of America’s largest employers. ERIC’s members sponsor some of the largest private group health plans in the country. These plans provide health care to millions of workers and their families. In addition to major medical coverage, ERIC’s members provide a wide variety of benefit plans to their workers, including dental and vision benefits as well as Employee Assistance Programs (EAPs).

SUMMARY OF COMMENTS

ERIC’s comments include the following recommendations with respect to the proposed regulations:

- The Department should provide a safe harbor definition of “significant benefits”.
- Disease management and other wellness programs that do not offer significant medical benefits should be eligible for the excepted benefit exclusion available to EAPs.
- The Departments should clarify that providing more generous benefits under a plan does not cause an EAP to be considered to be coordinating benefits with another group health plan.

¹ U.S. Dep’t of Labor, U.S. Dep’t of Health and Human Services, and U.S. Treasury Dep’t, *Amendments to Excepted Benefits*, 78 Fed. Reg. 77632 (Dec. 24, 2013).

- The rule prohibiting the coordination of benefits provided under an EAP and a major medical plan should be interpreted broadly in specified instances.
- The Departments should confirm that EAPs that are excepted benefits are also exempt from the PCORI fee.
- EAPs that are excepted benefits should be exempt from COBRA's requirements.

OVERVIEW

Certain benefits known as “excepted benefits”² are not subject to specific provisions in the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). For example, excepted benefits are not required to comply with certain market reforms contained in the Affordable Care Act. The definition of “excepted benefits” includes programs such as limited-scope dental or vision benefits. The proposed regulations would expand the programs considered to be “excepted benefits” to include EAPs.

ERIC's members provide workers and their families with the opportunity to participate in a diverse group of benefit plans. The rules for excepted benefits are critical as our members offer these valuable benefits not just to full-time employees and their families, but often to the entire workforce and their dependents. These new rules will enable our members to continue to provide benefits that are tailored specifically to their needs.

Some states require or encourage companies to offer EAPs if they operate a workplace drug-testing program. For example, Maine requires a company with more than twenty full-time employees to have an EAP before it can establish a substance abuse testing program.³ Minnesota provides that an employer may not terminate an employee who has received a positive drug or alcohol test result unless “the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under an employee benefit plan, either a drug or alcohol counseling or rehabilitation program.”⁴ Also, many employers include an EAP as part of a progressive discipline process, even where state law does not require them to do so. Accordingly, it is critically important that EAPs be treated as excepted benefits, so that employers will be able to provide EAPs to employees (such as temporary or part-time employees) who might not be eligible for the employer's group health plan.

Additionally, workers who do not have other group health coverage will benefit if EAPs are treated as excepted benefits. Previously, enrollment in an EAP was considered minimum essential coverage for purposes of eligibility for subsidized coverage in the Exchanges. Thus, employees who were enrolled just in an EAP would not have been eligible for subsidized coverage in an Exchange, despite their lack of major medical coverage. The only available “solution” to this dilemma was for the company to either eliminate the EAP or to restrict eligibility for the EAP. In either case, this

² ERISA § 732(c); DOL Reg. § 2590.732. The references in this letter are to the provisions contained in the Employee Retirement Income Security Act of 1974 and corresponding proposed regulations, except as otherwise noted. Please note that identical provisions are contained in the Public Health Service Act and the Internal Revenue Code and their corresponding proposed regulations.

³ Maine Revised Statutes, Title 26, § 683.

⁴ Minnesota Statutes § 181.953.

would have hurt employees who otherwise would benefit from enrollment in the EAP. Allowing EAPs to be considered “excepted benefits” under certain circumstances eliminates this issue and therefore allows employees who are enrolled in an EAP, but not the employer’s major medical plan, to seek subsidized coverage in the Exchanges.

ERIC appreciates the efforts of the Departments to update the excepted benefit rules and encourages the Departments to provide a workable definition of “excepted benefits” so that employers can continue to offer these valuable programs to their employees.

DETAILED COMMENTS

I. The Department should provide a safe harbor definition of “significant benefits”.

A group health plan is generally defined as an employer plan that provides medical care.⁵ Medical care is defined to include amounts paid for the diagnosis, treatment, or prevention of disease. Benefits that are deemed to be “excepted benefits” are not treated as providing medical care. The proposed regulations provide that benefits provided under an EAP are considered excepted benefits if, among other requirements, the EAP does not provide “significant benefits in the nature of medical care”.⁶ The preamble to the proposed regulations invites comments on this issue and requests feedback on a potential definition of “a program that provides no more than 10 outpatient visits for mental health or substance use disorder counseling, an annual wellness checkup, immunizations, and diabetes counseling, with no inpatient care benefits.”⁷

Plan sponsors customize their benefit programs to help workers with a variety of medical issues. In some circumstances, the design of these programs is in response to state laws, addresses a particular need of workers, or is a result of union negotiations.

A safe harbor definition of “significant benefits” would allow plan sponsors to clearly understand whether their plans would be considered excepted benefits. These plan sponsors would benefit from the certainty that comes from a clearly delineated safe harbor.

ERIC encourages the Departments to provide a safe harbor definition of “significant benefits”, but also state that the safe harbor is not the exclusive means for determining if a plan provides “significant benefits”.

II. Any safe harbor visit limits should be based on the number of visits per issue addressed in counseling and should not apply in the aggregate.

As discussed above, the preamble proposes that an EAP may be considered to provide excepted benefits if it is “a program that provides no more than 10 outpatient visits for mental health or substance use disorder counseling, an annual wellness checkup, immunizations, and diabetes counseling, with no inpatient care benefits.”⁸ While ERIC would rather have no limit at all, we do not

⁵ DOL Reg. § 2590.732.

⁶ Prop. DOL Reg. § 2590.732(c)(3)(vii)(A).

⁷ 78 Fed. Reg. at 77636.

⁸ *Id.*

oppose the cap of ten outpatient visits in the context of a safe harbor. We do have concerns, however, about imposing the cap based on the number of visits *in the aggregate* rather than *per issue*.

The preamble to the proposed regulations explains that “Employee assistance programs (EAPs) are typically programs offered by employers that can provide a wide-ranging set of benefits to address circumstances that might otherwise adversely affect employees’ work and health.”⁹ The benefits provided through these programs include a spectrum from help with everyday issues to those that have become crisis situations. EAPs are typically designed to provide short-term counseling (up to a certain number of visits); they may also provide for evaluation and referral to outside resources if the issue is beyond the limited number of counseling sessions that the EAPs provide.

Participants in EAPs may often resolve their problems with fewer than the maximum number of visits permitted under the program. Not infrequently, however, a participant in an EAP may face several life stresses at once and could benefit from more than one service, including grief counseling, stress counseling, depression, relationship issues, alcohol/substance abuse, anger management, balancing work and home life, family issues, work-related problems/management resource, legal issues and financial issues. For instance, a participant facing a critically ill spouse or a divorce might well struggle with depression and relationship issues. Although typically they would not exceed the maximum visit limit with respect to any one issue, they might well exceed this limit if visits for different purposes must be aggregated.

Thus, ERIC recommends that the proposed definition of “significant benefits” include a safe harbor that refers to a limited number of visits per issue addressed in counseling instead of a limit on the number of visits in the aggregate; further, any explicit limit should apply only with respect to a safe harbor and not to a general definition. Thus, if an employee were struggling with both depression and substance abuse issues, any maximum visit limit in a safe harbor definition would apply separately to each issue.

Additionally, EAPs frequently provide unlimited counseling for non-medical issues, such as financial issues, work/life balance, and familial relationships. ERIC urges the Departments to clarify that counseling designed to address these issues should not be regarded as “medical care,” even if it has the secondary effect of reducing stress and improving the employee’s overall health.

III. Some inpatient benefits and programs aimed at chronic disease should be allowed under the definition of “significant benefits”.

A. EAPs should be able to be considered excepted benefits if they provide limited inpatient benefits for substance abuse.

The proposed definition of “significant benefits” suggests that a program will be considered to provide excepted benefits only if it “provides no more than 10 outpatient visits for mental health or substance use disorder counseling, an annual wellness checkup, immunizations, and diabetes counseling, with no inpatient care benefits.”

⁹ *Id.*

Some programs provide very limited inpatient care benefits for substance abuse that can be critical for a participant without being provided with such frequency that they rise to the level of significant benefits. For example, a program may allow a participant with a substance abuse problem to receive inpatient substance abuse treatment that is available only two times. This coverage is particularly critical if the participant does not otherwise participate in the company's major medical plan and would thus not otherwise have access to this kind of assistance.

Furthermore, if certain programs cannot be treated as excepted benefits because they offer a limited amount of inpatient care, some employers may eliminate this benefit or provide it only through their major medical plan. This could result in the elimination of an important benefit for workers who may not otherwise have access to treatment.

ERIC urges the Departments to provide a definition of "significant benefits" as well as a safe harbor definition where a program will not be considered to provide significant benefits even though it provides up to three inpatient care visits for substance abuse.

B. An EAP should not be considered to provide significant benefits as a result of covering counseling programs aimed at chronic diseases.

Additionally, the proposed definition of "significant benefits" would exclude diabetes counseling, but not counseling programs for other types of chronic diseases.

Some programs provide benefits focused on a single chronic disease, in addition to diabetes counseling. While we agree that diabetes counseling is an important benefit that can be provided to participants, there are other diseases that are equally worthy of being addressed through an EAP.

ERIC urges the Departments to provide that an EAP will not be considered to provide "significant benefits" as a result of covering counseling programs aimed at any chronic disease (including diabetes counseling).

IV. Disease management and other wellness programs that do not offer significant medical benefits should be eligible for the excepted benefit exclusion available to EAPs.

The preamble to the proposed regulations, with reference to IRS Notice 2004-50,¹⁰ suggests that other health-related programs, such as certain wellness programs, may also qualify for the excepted-benefit exclusion available to EAPs.¹¹ This IRS Notice further describes certain disease management programs that would not be considered to offer significant medical benefits.

Disease management and other wellness programs provide valuable benefits to their participants. These programs help workers to manage their current concerns and prevent additional problems. Like EAPs, they help workers to address the underlying issues that may contribute to their health challenges. Companies want to ensure that workers can take advantage of and benefit from these programs. The IRS has recognized in IRS Notice 2004-50 that these programs generally do not provide "significant benefits in the nature of medical care or treatment."

¹⁰ Internal Revenue Service, *Notice 2004-50*, 2004-33 I.R.B. 196 (Aug. 16, 2004).

¹¹ 78 Fed. Reg. at 77636, footnote 28.

ERIC urges the Departments to provide that any program offering wellness benefits, including a disease management program, is eligible to be considered as offering “excepted benefits” under the exclusion for EAPs that do not offer significant medical benefits, provided the wellness program otherwise meets the requirements for the EAP exclusion.

V. Self-insured dental and vision plans should be considered excepted benefits even if the participant is not required to contribute to the cost of the plan.

Under prior rules, self-insured dental and vision plans could not qualify as excepted benefits unless the participant was required to pay an additional contribution for these benefits. Many companies wanted to offer limited-scope dental and vision plans to participants at no cost but were constrained by this requirement.

Under the proposed regulations, limited-scope dental and vision plans may be considered excepted benefits even if no contribution is imposed on participants. Both plans and participants will significantly benefit from this change.

The proposed regulations, however, provide that self-insured limited-scope dental benefits are considered excepted benefits only if participants can opt out of coverage. Even if participants are not required to contribute towards the cost of the plan, they are still required to have the ability to opt out of coverage. This requirement creates an additional burden on companies and disadvantages employees who want to pursue subsidies through the Exchanges. In the event that a company fails to provide workers with the ability to opt out of no-cost coverage, the plan would not be considered to provide excepted benefits, and workers would be unable to receive subsidies through the Exchanges.

When the Departments finalize the proposed regulations, ERIC urges the Departments to keep the proposed rule that allows no-cost dental and vision plans to be considered excepted benefits, but to provide that the opt-out requirement does not apply if there are no participant contributions or premiums.

VI. The exception for EAPs should be clarified with respect to dependents and spouses.

The majority of large companies offer EAP benefits to spouses and dependents of employees as well as to the employees themselves. While the proposed regulations appear to apply in the same manner to spouses and dependents as well as employees, there is some ambiguity with respect to the language. For example, the proposed regulations indicate that “No employee premiums or contributions may be required as a condition of participation in the employee assistance program.” A possible interpretation of this language is that the employee may not be charged a premium or contribution, but that it could be charged to the employee’s dependents and/or spouse.

ERIC requests that the Departments clarify that the proposed regulations apply in the same manner to spouses and dependents as they apply to employees.

VII. The Departments should clarify that providing more generous benefits under a plan does not cause an EAP to be considered to be coordinating benefits with another group health plan.

The proposed regulations specify that benefits provided under an EAP are excepted benefits if certain conditions are met, including that “[p]articipants in the other group health plan must not be required to exhaust benefits under the employee assistance program (making the employee assistance program a gatekeeper) before an individual is eligible for benefits under the other group health plan...”¹²

Some EAPs provide a particular benefit or service, such as substance abuse treatment, at no cost to participants, while the major medical plan imposes cost-sharing for the benefit or service. Although the EAP does not serve as a gatekeeper, there is a significant incentive for participants to use the EAP in this instance before the major medical plan. ERIC urges the Departments to clarify that coordination is not deemed to occur merely because an EAP imposes fewer restrictions, or provides more generous benefits, for a specific benefit or service than are available to the participant under the group health plan.

VIII. Smoking cessation programs should not be considered to be coordinated with benefits provided under another group health plan merely because smoking-related medications are covered under the program only if they are not already available to the worker through the company’s major medical plan.

The proposed regulations specify that benefits provided under EAPs are excepted benefits if they satisfy certain conditions, including that “the benefits under the employee assistance program cannot be coordinated with benefits under another group plan, as follows...[p]articipant eligibility for benefits under the employee assistance program must not be dependent on participation in another group health plan.”¹³

Some self-insured employee assistance programs provide benefits designed to treat a particular condition, such as nicotine addiction. These smoking cessation programs may cover certain smoking-related medications if they are not already available to the worker through the company’s major medical plan. As a result, workers who participate in the major medical plan can obtain the necessary medications through the medical plan, while those workers who do not participate in the medical plan will be able to obtain them through the smoking cessation program. This plan design allows a self-insured program to ensure that all workers are able to fully avail themselves of the benefits of a smoking cessation program, whether covered by the major medical plan or the EAP.

ERIC urges the Departments to clarify that a smoking cessation program is not considered to be coordinated with benefits provided under another group health plan if certain smoking-related medications are covered under the program only if they are not already available to the worker through the company’s major medical plan or if they are offered under both a smoking cessation program and a major medical plan.

¹² Prop. DOL Reg. § 2590.732(c)(3)(vii)(B)(1).

¹³ Prop. DOL Reg. § 2590.732(c)(3)(vii)(B).

IX. The Departments should confirm that EAPs that are excepted benefits are also exempt from the PCORI fee.

The Departments specify in the proposed regulations that benefits provided under an EAP are considered excepted benefits if, among other requirements, the program does not provide “significant benefits in the nature of medical care”.

The Internal Revenue Code provides that the Patient-Centered Outcomes Research Trust Fund fee is imposed on issuers of specified health insurance policies and plan sponsors of applicable self-insured health plans to help fund the Patient-Centered Outcomes Research Institute (PCORI).¹⁴ The Internal Revenue Service (“IRS”) has indicated that excepted benefits and EAPs that do not provide “significant benefits in the nature of medical care or treatment” are not subject to the fee.¹⁵

ERIC asks the Treasury Department and Internal Revenue Service to confirm that the term “significant benefits in the nature of medical care or treatment” in the PCORI regulations should be interpreted in the same way as the term “significant benefits in the nature of medical care” in the proposed excepted benefit regulations. That is, ERIC requests that they confirm that a program that is considered not to provide significant medical benefits under the proposed excepted benefit regulations will also be exempt from the PCORI fee.

X. EAPs that are excepted benefits should be exempt from COBRA’s requirements.

ERISA generally requires plan sponsors to continue to offer coverage to former employees as well as current and former employees’ spouses and dependents under a group health plan pursuant to the Consolidated Omnibus Budget Reconciliation Act (“COBRA”) under certain circumstances.¹⁶ Employees, however, are generally required to pay the full cost of the premiums charged for continuation of health coverage under COBRA. ERISA defines the term “group health plan” as “an employee welfare benefit plan providing medical care...”¹⁷

There are several exceptions to the COBRA rules. For example, they do not apply to qualified long-term care services that satisfy certain criteria. Exceptions also apply for plans sponsored by the federal government, churches, certain church-related organizations, and companies with fewer than twenty employees. Additionally, the IRS has created a limited exemption for health flexible spending accounts (“FSAs”) that are considered excepted benefits.¹⁸

Under the current rules, EAPs that are considered to provide medical care must establish and maintain compliant COBRA practices. However, the vast majority of qualified beneficiaries never elect COBRA for the EAP. In fact, some members cannot recall any qualified beneficiary every electing to continue coverage under the EAP. As a result, plan sponsors must devote resources to provide a benefit that is rarely, if ever, used. For example, companies will need to incur time and

¹⁴ 26 U.S.C. §§ 4375, 4376 and 4377.

¹⁵ Treas. Reg. § 46.4375-1. *See also*, Internal Revenue Service, *Patient-Centered Outcomes Research Trust Fund Fee (IRC 4375, 4376 and 4377): Questions and Answers*, Q&A-9.

¹⁶ ERISA § 601.

¹⁷ ERISA § 607(1).

¹⁸ Treas. Reg. § 54.4980B-2, Q&A-8.

expenses to make sure that COBRA notices are properly distributed for these benefits and that they are properly administered with respect to COBRA coverage.

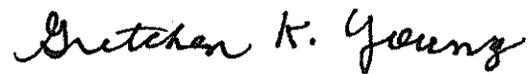
ERIC urges the Departments to exclude from the requirements under COBRA those EAPs that satisfy the requirements to be treated as excepted benefits.

ERIC appreciates the opportunity to provide comments on the proposed regulations. If the Departments have any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,



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