ERIC | THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

ANNETTE GUARISCO FILDES
President & CEO

April 19, 2021

The Honorable Janet Yellen
Secretary
U.S. Department of Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

The Honorable Martin Walsh
Secretary
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Ave., SW
Washington, DC 20201

The Honorable Charles Rettig
Commissioner
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

The Honorable Gordon Hartogensis
Director
Pension Benefit Guaranty Corporation
1200 K St., NW
Washington DC 20005

Dear Secretary Yellen, Secretary Walsh, Secretary Becerra, Commissioner Rettig, and Director Hartogensis,

On behalf of large employers, we are writing to urge specific actions your Agencies can take – alone and together -- to support employees coming back to work and growing the post-pandemic economy.

ERIC is a national advocacy organization that exclusively represents large employers that provide health, retirement, paid leave, and other benefits to their nationwide workforces, their families, and retirees. With member companies that are leaders in every sector of the economy and with operations in every state, ERIC advocates on the federal, state, and local levels for policies that promote flexibility and uniformity in the administration of nationwide employee benefit plans.

Americans engage with an ERIC member company many times a day, such as when they drive a car or fill it with gas, use a cell phone or a computer, watch TV, dine out or at home, enjoy a beverage, fly on an airplane, visit a bank or hotel, benefit from our national defense, receive or send a package, go shopping, or use cosmetics.

ERIC member companies work diligently to provide robust benefits to their employees and to tailor the benefits to meet the needs of their unique workforce. By offering comprehensive health coverage, retirement savings plans, and paid leave and wellness programs, our member companies ensure their workforce is healthy and prepared for a secure retirement.

ERIC's work is focused on enabling large employers to offer comprehensive employee benefits, from providing affordable, high-value health care coverage for their employees to maintaining the voluntary, employer-provided system to expanding retirement savings opportunities for employee and retirees. We believe your leadership can help American workers, retirees, and their families by improving the regulatory framework that governs certain employee benefits, and we urge you to consider implementing specific policies to help prepare for the post-pandemic economy.

While some of the policies outlined below are under tri-agency jurisdiction, others specify which agency could promulgate the necessary guidance or regulatory relief.

Tri-agency Immediate COVID Relief

In order to tackle the COVID-19 pandemic head-on, your Agencies should take additional actions to improve COVID-19 testing, promote COVID-19 vaccine availability, and provide other immediate COVID-19 relief for employees and employers.

We believe the Administration can use existing statutory authority to help accelerate our member companies' ability to vaccinate their workforce, reopen the economy, and protect the workforce from high medical costs including:

- Maintain and improve protections to avoid out-of-network price-gouging when patients obtain COVID testing and vaccinations
- Empower employers to create and expand incentives for employees to get vaccinated
- Issue a nonenforcement policy for vaccination programs
- Expand policies to protect employers that rely on governmental guidance to protect employees and the public
- Suspend enforcement of Internal Revenue Service (IRS) employer shared responsibility penalties for companies and industries experiencing rapid workforce transitions and hardship due to the pandemic
- Require that health care providers accepting COVID relief funds may not send "surprise" medical bills to patients during 2021, as the recently enacted surprise billing ban does not take effect until 2022
- Adopt a permanent notification safe harbor that recognizes any document delivered to a participant's electronic location of choice is considered delivered

Expand the Definition of "Infectious Diseases" in IRS Notice 2004-23. The initial guidance in Notice 2020-15 that a HDHP/HSA could offer COVID-19 testing (and even treatment) without imposing a deductible was welcome—and, in our view, an important confirmation of the infectious disease testing already permitted as a safe harbor for a HDHP/HSA arrangement under the Screening Services appendix to IRS Notice 2004-23. We encourage the Agencies to adopt a broader and all-inclusive definition of "Infectious Diseases" in future Notices, especially the IRS in updating Notice 2004-23 so that testing for all infectious diseases (whether triggered through a pandemic, public health emergency, or other unanticipated event) is permissible—since it is only a matter of time until another infectious disease makes it way around the globe. We also suggest that the Agencies clarify that the expanded definition of "Infectious Diseases" applies to plan years beginning on and after January 1, 2019. The IRS should also consider permanently extending the allowance under IRS Notice 2020-15 for a HDHP to cover treatment costs for patients suffering from an infectious disease – the temporary allowance will help to mitigate the current crisis, but in the future, plan sponsors will be able to pivot and adapt more quickly if this flexibility is made permanent.

Treat Telemedicine as an "Excepted Benefit" Under ACA and ERISA Rules. Telemedicine has made great strides over the past year but is still subject to many regulatory shackles that make widespread, uniform adoption difficult for all employees across a nationwide workforce. To alleviate this, the Tri-Agencies should treat telemedicine (under its broad definition in the CARES Act) as an "excepted benefit" that is not subject to the dictates and requirements of the Affordable Care Act (ACA) or ERISA. Telemedicine, given its limited nature, is best considered to be like a HIPAA excepted benefit, which are not major medical benefits and fills gaps by major medical coverage. Some examples include coverage for a specific disease or illness or supplemental coverage like vision and dental insurance. While there may be many illnesses that can be diagnosed or treated through telemedicine, the traditional nature of hands-on medical treatment, blood draws, setting broken bones, or stitching a wound are all absent in and impossible with, telemedicine. Indeed, any reasonable evaluation of telemedicine benefits, which are often contracted to and run by vendors separate from health plans, are simply incompatible with many ACA requirements, such as 1st dollar coverage for vaccines (which cannot be administered remotely). As a result – and in accordance with the CARES Act, which both created a safe harbor for telemedicine and instructed that it be disregarded for HDHP/HSA purposes – telemedicine should be treated as an excepted benefit that can be offered as a supplement to employees and dependents who are eligible for traditional group health coverage and also to employees (and their dependents) who are ineligible for any employer group health coverage without suffering any additional ACA entanglements. It should also not trigger any of the traditional ERISA reporting and disclosure requirements as long as the employer makes a one-time "excepted benefit" filing similar to the existing top-hat filings.

Condition Provider Balance Billing Upon Identification of Non-Network Status. Medical/Industrial complex interests are attempting to undermine employer group health plan cost and quality management techniques by forcing employers to pay too much for services provided by non-network providers – including for COVID testing services that are now mandated under the CARES Act to be covered with no cost-sharing or medical management imposed by the plan. This will have the result of raising costs for self-insured plans, resulting in increased premiums for beneficiaries in future plan years. We call upon the Tri-Agencies to prevent non-network providers from frustrating the legitimate interest of employer group health plan cost and quality management techniques. Employers should be able to build, monitor, and modify their in-network provider structures in a way that best serves their participants and directs scarce plan dollars to the best network of quality physicians—and even refuse to pay for ANY services provided by a non-network provider (the way an HMO does). To this end, we urge that the Tri-Agencies issue guidance that requires any provider to identify, upon request, that it is a non-network provider before the receipt of services by a participant. We urge you to make clear that failure to identify their non-network status will mean that they are ineligible for ANY reimbursement by a group health plan, and cannot balance bill the participant. Upon identification of their non-network status, the provider should be entitled to receive reasonable reimbursement - which the Agencies have correctly identified as Medicare rates for COVID vaccination services, unless an employer voluntarily determines that its reimbursement rates will be higher. Right now, protections are limited and inconsistent when comparing COVID testing and vaccination. Further, the Tri-Agency guidance should make clear that any non-network providers availing themselves of said reimbursement from an employer plan are prohibited from balance billing participants for any service delivered during this episode of care.

Remove the Mandatory 60-day Advance Notice Requirement for Benefit Enhancements. Summaries of Benefits and Coverage (SBCs) have always had a limited utility, particularly for employers that describe in great detail the health plan options available to plan participants. Now, as a result of mandated and optional benefit expansions under the pressures of COVID-19, it is also apparent that the mandatory 60-day advance notice requirement has made SBCs an actual impediment to responding to this declared national emergency. As such, we call upon the Tri-Agencies to drop any SBC requirement surrounding advance notice of benefit enhancements. Instead, such enhancements should follow the long-established ERISA rule requiring no sooner than a 60-day trailing notification of a material modification.

U.S. Department of Labor Rules Impacting Health and Retirement Plans

Extend Notice and Filing Deadlines Required by ERISA. The CARES Act amended Section 518 of ERISA to expand the Department of Labor's (DOL) authority to extend notice and filing deadlines for up to one year in the case of public health emergencies as declared by the Secretary of Health and Human Services (HHS). Such a public health emergency has been declared for the COVID-19 crisis, and plan sponsors are facing unprecedented demands responding, both in terms of ensuring the health and safety of their employees as well as responding to challenging business conditions. In addition, personnel for many plan sponsors and relevant third-party providers (recordkeepers, trustees, auditors, actuaries, and legal counsel, etc.) are still operating in a remote working environment that will further impact their ability to timely complete required notices and filings. For these reasons, the DOL should exercise its authority to extend the notice and filing deadlines for a wide range of required notices and filings otherwise required by ERISA, including, without limitation, the following:

1. *Annual Funding Notice*. The annual funding notice required for pension plans pursuant to Section 101(f) of ERISA in 2020 should be delayed for at least three months (note that April 29 is the due date for calendar year plans).

2. *Form 5500*. The due date for Forms 5500 should be automatically extended for all filers without the need to file a Form 5558. That extended due date should be pushed out by three months (at least). This would allow a non-calendar year plan with a standard extended Form 5500 due date in April-September 2021 to have until December to file, and a calendar year plan would have until January of 2022 to file. Summary annual reports should be pushed back accordingly.

3. *Summary of Material Modifications.* The July 31 due date (for calendar year plans) for publishing summary description of material modifications to a plan required pursuant to 29 CFR § 2520.104b-3 should be extended by at least three months. In addition, we propose that for any plan year beginning on or after January 1, 2019, and ending on or after December 31, 2021, all other filing deadlines, ERISA participant notification and document production deadlines, and ACA Exchange requirements should be extended by at least three months.

Update Lifetime Income Disclosure Requirements to Reflect Current Practices. We urge the Administration to implement a rule that will provide meaningful information to plan participants and flexibility for plan sponsors to continue to provide innovative and individualized retirement education tools to their plan participants. A strict, one-size-fits-all disclosure requirement will confuse and mislead plan participants without advancing retirement security or lifetime income planning. Even though the disclosure is based on the participant's account balance, all other assumptions – such as age and marital status – are set in regulation. On the other hand, a retirement calculator allows participants to personalize (and change) these and other critical assumptions points like expected date of retirement, interest rate assumptions, etc. Therefore, we urge the DOL to allow plan sponsors to provide plan participants with use of online retirement calculators in place of a static, non-individualized calculation.

Maintain the Expansion of Electronic Delivery for Retirement Plan Notices. Electronic delivery of retirement plan disclosures helps participants better understand their benefits and become more engaged in maximizing the value of their hard-earned employee benefits. We urge the DOL to work with Congress maintain the safe harbor that was recently finalized in DOL regulations, which allows plan sponsors to provide electronic delivery of retirement plan notices as the default delivery method.

Continue with Guidance to Determine Plan Administrator Role to Locate Missing Participants. The DOL has recently issued guidance for finding missing or unresponsive participants in employer retirement plans. This guidance is an important first step in providing clarity and transparency for plan sponsors, but additional guidance is needed to ensure that plan sponsors may use processes to locate participants based on their particular factual situation. We urge the DOL to confirm that identical processes are not required by all employers. Furthermore, we urge the DOL to support legislation that creates a Pension Registry within the PBGC to provide additional support in finding missing participants.

U.S. Department of Health and Human Services Rules Impacting Employer-Sponsored Health Plans

Relax Telemedicine State Licensing Requirements. Telemedicine still also suffers from the strictures of state licensing requirements and the need to use physicians licensed in the same state as the patient. HHS leadership is critical here to unlock the availability of care across the country. We urge HHS to recognize that antiquated licensing and physical presence restrictions, in the year 2021 and when faced with a global (much less national) pandemic such as COVID-19, present a barrier to interstate employment and commerce and, as such, should be superseded by overarching federal regulation. HHS action could permit an employee in one corner of the country to visit via telemedicine with a physician anywhere in the United States. This is especially critical for mental health services where providers are located in select areas of the country, but needs are nationwide. The Centers for Medicare and Medicaid (CMS) has already undertaken similar actions to streamline telehealth services for Medicare beneficiaries; HHS should now apply these rules to the private sector as well. Specifically, the agency can:

- Promote licensing reciprocity to facilitate the interstate practice of medicine for telehealth providers

- Establish a uniform set of rules for multi-state telehealth benefit plans to eliminate state restrictions that block patients from telehealth benefits

Maintain and Expand Efforts to Implement Transparency and Accountability in Health Care. ERIC supported the efforts of the previous Administration in these areas and urges you to go even further, including to:

- Hold firm to implementation dates for price transparency

- Consider increasing penalties for hospital systems that hide pricing information from patients – as was detailed in a recent article, *"Hospitals Hide Pricing Data from Search Results"*

- Clarify that an employer may rely on a third-party administrator or carrier to comply with insurer transparency requirements, mental health parity analyses and disclosure, and other information disclosed to the public or beneficiaries

- Develop a standard for data to streamline aggregation and ease comparison shopping

- Use antitrust enforcement to eliminate market abuses by large hospital systems

- Consider applying fiduciary status to vendors involved in negotiating and purchasing health care products and services on behalf of plans and patients

- Move forward with efforts to ensure interoperability and patient access for electronic medical records

Reduce the Costs of Prescription Drugs. The time is now to build on efforts to control the high costs of prescription drugs. We request that you consider measures to:

- Deny patents used to form "patent thickets" or "evergreen" product exclusivity
- Rein in the manipulation of FDA "citizen petitions," which are being used to delay competition
- Use antitrust enforcement to end abuses such as "pay-for-delay" agreements, misuse of Risk Evaluation and Mitigation Strategy (REMS) safety protocols, generic blocking, rebate traps, and other anti-competitive practices in the prescription drug market
- Explore additional options to promote the use of safe and affordable biosimilar medications

Eliminate Abusive Steerage of Beneficiaries. Schemes by kidney dialysis firms and their surrogates and certain prescription drug manufacturers significantly increase health care costs for all patients. This can be eliminated by:

- Finalizing the Obama Administration's rule to ban the third-party payment of premiums in the ACA exchanges. We urge you to expand this to cover the private sector as well (including COBRA beneficiaries), and to consider efforts launched in California to control costs of treatments for patients subsidized by self-interested "charities"
- Requiring that drug manufacturer coupons be means-tested, or otherwise targeted to the impoverished, rather than being used to deny market-share to generic and biosimilar competition

Improve Patient Safety Throughout the System. HHS can take several meaningful steps to save lives and improve health, including to:

- Require streamlined, comprehensive infection reporting to the Centers for Disease Control and Prevention (CDC) and ensure that this information is available to the public to improve plan design and safety
- Adopt policies in government programs like Medicare to mirror private sector strategies to eliminate medical errors including so-called "Never Events"
- Create an interagency coordinating committee to align federal government patient safety activities, including aggregating information, best practices, and promoting autonomous solutions

U.S. Department of Treasury Rules Impacting Employer Retirement and Health Plans

Retirement

Permanently Extend the use of Remote Authorization for Notarization of Spousal Consent. Existing law and regulations require spousal consent to be witnessed in the physical presence of a notary public or plan representative (Section 417(a)(2)(A)(iii) of the Internal Revenue Code and Treas. Reg. Sec. 1.401(a)-21(d)(6)(ii)). Due to the COVID-19 crisis, many employers have closed non-essential administrative offices and other locations with many working in a remote work environment. Similarly, many employees are isolated for health reasons, practicing social distancing, or unable to travel due to mass transit cutbacks, which makes it difficult to meet in the physical presence of a plan representative or notary public. In response to this situation and at the requests of plan sponsors, the IRS implemented temporary relief from the physical presence requirement in Notice 2020-42. This relief was extended through June of 2021 in Notice 2021-03. The use of widely available, secure technology during this time has demonstrated that there is not a need to return to the physical presence requirement. As such we ask that the remote authorization guidance be made permanent.

Health

Improve High-Deductible Health Plans (HDHPs). Tens of millions of Americans are enrolled in HDHPs, including many who have no other affordable options. Modernizing HDHP rules could vastly improve the coverage these individuals receive. Specifically, we urge Treasury and IRS to:

- Allow the coordination of HSA-eligible HDHPs with supplemental benefits like telehealth-only plans, direct primary care, TRICARE benefits, Medicare (in the case of working seniors), and other appropriate benefits

- Give employers the flexibility to offer 1st dollar coverage of high-value services, such as onsite employee health centers

- Provide technical guidance to eliminate the "spousal FSA glitch," broaden the definition of "dependents" to include adult children and domestic partners, and streamline rollovers from FSAs and MSAs into HSAs

Pension Benefits Guaranty Corporation Rules Relating to Employer Retirement Plans

Allow Relief from Single-Employer Pension Benefit Guaranty Corporation (PBGC) Premiums. The PBGC's trust fund for the single-employer system does not face – by the PBGC's estimates – any immediate or long-term threat of default. Therefore, reducing premiums for single-employer plan sponsors would not jeopardize the viability of the program. We urge the Administration to work with Congress to reduce premiums to provide needed flexibility for employers through the pandemic and beyond.

Guidance to Help Plan Administrators Locate Missing Participants. The PBGC's Participant and Plan Sponsor Advocate has been working on a Pension Plan Registry to help plan sponsors locate missing participants. We believe that this project could be very helpful and encourage the agency to work the Advocate to continue with this project. Moreover, the Pension Plan Registry Project would be very useful in conjunction with the guidance recently issued by the DOL for finding missing or unresponsive participants in employer retirement plans. We also encourage the PBGC to support legislation that creates a Pension Registry within the PBGC.

Conclusion

ERIC member companies are helping their employees by providing financial and other assistance to them when needed most. We urge you to issue guidance as soon as possible to provide appropriate relief for these companies and their employees and families, and welcome the opportunity to work collaboratively with your Agencies to facilitate this critical guidance. If you have questions concerning our COVID-19 requested guidance, or if we can be of further assistance, please contact our policy experts, Aliya Robinson, Senior Vice President for Retirement and Compensation Policy, at (202) 789–1400 or arobinson@eric.org, or James Gelfand, Senior Vice President for Health Policy, at 202-789-1400 jgelfand@eric.org.

Sincerely,

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