

CLIENT ALERTS

Open Enrollment Season is Here – Are You Prepared?

Client Alert

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Every fall, most employers that sponsor welfare benefit plans prepare for open enrollment for the upcoming calendar year. Doing so provides the perfect opportunity to ensure ongoing legal compliance of plan documents and summary plan descriptions, annual notices, and nondiscrimination testing. In this context, legal compliance may include changes in law. It may also involve properly documenting and administering any upcoming benefit-design changes, as well as negotiating with third parties relevant insurance or administrative agreements.

Plan Documents and Summary Plan Descriptions

Most employers utilize a benefit program or insurance booklet prepared by a third-party administrator or insurer as the substantive summary of key benefit provisions in their welfare plans. In fact, most plans and corresponding summary plan descriptions incorporate these very documents by reference. As a result, to keep the documents current, each employer should ensure that it requests from the third-party administrator or insurer the updated benefit programs and descriptions for 2023. Once in receipt, these documents will become the attached booklets and information for the official plan, as well as the summary plan description.

Furthermore, open enrollment season presents a key opportunity for employers to discuss plan design changes to take effect for the upcoming plan year. As opposed to implementing mid-year changes to plan design elements (potentially creating corresponding change in status events, additional notice obligations, and plan document amendment responsibilities), employers can time the changes with the start of the new plan year. As a result, open enrollment season can double as the modification roll-out period.

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Annual Notices

Each year, ERISA and the Internal Revenue Code require plan sponsors to distribute specific notices regarding welfare benefits. Open enrollment is generally the time to distribute these notices, as most employers can include the notices with any election forms provided to plan participants.

A sample of the relevant notices that must be distributed annually include:

- Summary of Benefits and Coverage
- Grandfathered Plan notice (if applicable)
- Notice of Patient Protections
- HIPAA Privacy notice
- Children's Health Insurance Program Reauthorization Act notice
- Women's Health and Cancer Rights Act notice
- Medicare Part D Creditable Coverage notice
- Michelle's Law notice (if the materials describe any requirement for certifying student status)
- Surprise Billing Notice

Nondiscrimination Testing

Certain welfare benefits must pass nondiscrimination tests on an annual basis. There are two tests for self-insured medical plans, three tests for cafeteria plans, and four tests for dependent care flexible spending accounts. These nine tests are required by the Internal Revenue Code, and failure to satisfy the tests results in taxation of these benefits to your highly compensated employees and possible under-withholding taxes and penalties.

Self-insured medical arrangements (including health flexible spending accounts and health reimbursement arrangements) are subject to the following two tests:

1. Eligibility
2. Benefits

Cafeteria Plans are subject to the following three tests:

1. Eligibility
2. Contributions and Benefits
3. Key Employee Concentration

Dependent care flexible spending accounts are subject to the following four tests:

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1. Eligibility
2. Contributions and Benefits
3. 5% Owners Concentration
4. 55% Average Benefits

Although there appears to be some redundancy in the tests above (e.g., Eligibility and Benefits tests), each of the tests operates somewhat differently, with different calculations and prohibited group members. Please note, there are other welfare benefits which have Internal Revenue Code-imposed testing obligations (e.g., health savings accounts are subject to either the cafeteria plan tests described above or a “comparability” test if contributions are not made through the cafeteria plan, and group life insurance plans also have eligibility and benefits testing obligations).

Overall Compliance

Due in large part to the Patient Protection and Affordable Care Act and COVID-19 relief, the Department of Labor has stepped up its welfare plan auditing. Common failures found by DOL include a lack of complete plan documentation, inadequate summary plan descriptions, deficient claims procedures, and COBRA notice failures. Beyond DOL enforcement, noncompliance could be a source of expensive participant claims, such as COBRA failures or HIPAA violations. Finally, the Internal Revenue Service requires employers to self-report various occurrences of welfare plan noncompliance and pay a corresponding excise tax (penalty).

In our experience, welfare plan sponsors’ “plans” and “summaries” often consist of an amalgamation of insurance or TPA contracts, open enrollment materials, COBRA or HIPAA notices and procedures, and summaries. Typically, these have come from different providers.

Simply put, overall coordination is essential. Failure can result in participant claims for damages or large statutory penalties, and will pose risks on DOL or IRS audits. As a result, we recommend annual legal review of your overall welfare plan compliance.

Assistance?

Butzel can help you prepare, or review, the annual notices to ensure compliance and avoid costly penalties imposed by ERISA and the Internal Revenue Code. Butzel can also review your current nondiscrimination testing methodology and results. Finally, Butzel can assist you to check current compliance, close and correct any deficiencies, and put your welfare plans on solid footing. With this done, future compliance will typically involve only attention to legal or design changes.

If you have any questions about the above issues related to your welfare benefit plans, or if you need assistance with compliance, please contact the author of this alert or your Butzel attorney.

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