JUNE 2024

SSG COMPLIANCE RECAP

What every HR leader should know about compliance.

STRATEGIC SERVICES GROUP

June saw the ACA Preventive Care Mandate upheld, with an exception that could open it up for future challenges. There was more movement on reproduction rights and privacy, where healthcare providers are barred from disclosing sensitive information to law enforcement without patient consent. Enforcement began on the Pregnant Workers Fairness Act (PWFA), which mandates that employers provide reasonable accommodations to employees affected by pregnancy, childbirth, or related medical conditions. The Supreme Court issued a unanimous decision in upholding the FDA's current protocol for mifepristone, commonly known as the abortion pill. Employers prepared to file IRS Form 5500.

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Stay one step ahead with an easy-to-understand summary of these legislation highlights.

ACA Preventive Care Mandate Remains In Place With An Exception

In a recent decision, the U.S. 5th Circuit Court of Appeals upheld a key provision of the Affordable Care Act (ACA) that mandates private insurance cover preventive services without cost to patients. However, the court also ruled that the plaintiffs are exempt from complying with this mandate, setting the stage for potential future challenges. The appellate panel emphasized that the task force responsible for determining which preventive services should be covered must receive congressional confirmation, raising questions about the authority of groups making recommendations on contraception and vaccines.

The case stemmed from a lawsuit by Texas-based Christian companies Braidwood Management and Kelley Orthodontics, arguing that the ACA's requirement to cover preventive care such as contraception, HPV vaccines, and HIV prevention drugs violated their religious beliefs. Initially, a district court sided with the employers, prompting an appeal by the Biden administration.

While the 5th Circuit overturned the lower court's nationwide nullification of the preventive services mandate, it acknowledged concerns over the constitutional authority of the U.S. Preventive Services Task Force (USPSTF) to issue binding recommendations. The court's decision requires USPSTF members to undergo presidential nomination and Senate confirmation moving forward.

The ruling's implications are significant for the approximately 164 million Americans receiving employer-based health insurance, as it preserves access to vital preventive care services. Despite this immediate relief, advocacy groups caution that the decision could pave the way for future legal challenges that may threaten broader access to these essential health benefits.

EMPLOYER CONSIDERATIONS

Employers must ensure that their health plans continue to comply with the ACA's preventive care mandate, which requires coverage of certain preventive services without cost-sharing for employees. This includes staying updated on the latest guidelines from the U.S. Preventive Services Task Force (USPSTF) and other relevant regulatory bodies to ensure that all mandated services are covered.

HIPAA Privacy Rule to Support Reproductive Health Care Privacy

The Biden administration's new rule aimed at safeguarding the privacy of protected health information related to lawful reproductive health care went into effect in June. Under the **HIPAA Privacy Rule to Support Reproductive Health Care Privacy**, healthcare providers are now barred from disclosing sensitive information such as contraception use, pregnancy-related care, and infertility treatments to law enforcement without patient consent.

Effective June 25, with compliance required by December 23, 2024, the rule addresses concerns that arose following the overturning of Roe v. Wade in June 2022. This decision prompted concern that patients seeking lawful reproductive health services across state lines could face unwarranted scrutiny, compromising their privacy and potentially exposing them to legal repercussions.

The rule mandates that HIPAA-covered entities must now obtain a signed attestation that the request is not for prohibited purposes before disclosing protected health information (PHI) for specific purposes like health oversight, judicial proceedings, and law enforcement inquiries.

In the coming months, the Office for Civil Rights plans to release a standardized attestation form to facilitate compliance with the new regulations. This measure aims to ensure that individuals can confidently access reproductive health care without fear of their private medical information being misused or exploited.

EMPLOYER CONSIDERATIONS

Healthcare providers, health plans, and healthcare clearinghouses regulated under the Final Rule must update their Notice of Privacy Practices (NPPs) to align with the requirements for safeguarding reproductive healthcare privacy.

Employers should update HIPAA policies and procedures to ensure they specify when an attestation is required to disclose PHI and train employees on the new rules.

Supreme Court Rules on Medication Abortion

The Supreme Court issued a unanimous decision in upholding the FDA's current protocol for mifepristone, a drug used in medication abortions. The ruling dismissed a challenge based on procedural grounds, asserting that the challengers lacked standing to contest the FDA's regulations. Despite this decision, the Court left open the possibility of future challenges related to access to the drug.

This ruling holds significant implications, as medication abortion, which includes mifepristone and misoprostol, accounts for a substantial majority of abortions in the United States. The Court's decision preserves existing access to medication abortion amid rising restrictions on reproductive healthcare.

Currently, coverage for abortion, including medication abortion, varies widely among employers due to state laws and individual plan provisions. While some states mandate coverage, others prohibit it, creating a complex landscape for employers to navigate. Additionally, access to mifepristone can be challenging, as distribution is limited to certified providers, impacting both in-person and mail-order availability.

EMPLOYER CONSIDERATIONS

Employers should review their medical and pharmacy plans to ensure coverage of mifepristone and assess participant access to certified providers.

Enforcement of Pregnant Workers Fairness Act Begins

Effective June 18, 2024, the Equal Employment Opportunity Commission (EEOC) will enforce the final rule on the **Pregnant Workers Fairness Act (PWFA),** which mandates that employers provide reasonable accommodations to employees affected by pregnancy, childbirth, or related medical conditions. This applies to all employers with 15 or more employees, encompassing both public and private sectors. Employees are eligible for accommodation regardless of their tenure with the company.

Under the PWFA, employees can request accommodations akin to those permitted under the Americans with Disabilities Act (ADA). These include adjustments such as breaks, modified schedules, remote work, and changes to work environments, among others. Unlike the ADA, the PWFA stipulates four accommodations that employers are generally expected to grant without extensive documentation, such as access to water, restroom breaks, modified seating, and breaks for eating.

Notably, the PWFA requires employers to provide accommodation even if an employee is temporarily unable to perform essential job functions due to pregnancy-related conditions, provided the employee can resume these functions in the near future. Employers cannot mandate specific healthcare providers for medical certification unless certain conditions are met, ensuring flexibility for employees in documenting their accommodation needs.

Regarding undue hardship, employers must assess accommodations based on factors like those used under the ADA, considering the impact on business operations and resources. Accommodations that impose significant costs, disruptions, or alter the fundamental nature of business operations may qualify as undue hardship.

EMPLOYER CONSIDERATIONS

Employers are advised to update their policies and informational materials to reflect PWFA requirements, including handbook updates and the display of updated federal anti-discrimination posters. They should be prepared to accommodate reasonable requests promptly and without unnecessary bureaucratic hurdles, ensuring compliance with both federal and applicable state laws that offer greater protection to pregnant employees.

Preparation For Filing Form 5500 For Calendar Year Plans

ERISA plans with 100 or more plan participants as of the first day of the plan year are required to file IRS Form 5500 by the last day of the seventh month following the end of the plan year. See the **IRS Form 5500 Corner** for information.

Employers may obtain an automatic extension to file Form 5500, Form 5500-SF, Form 5500-EZ, Form 8955-SSA, or Form 5330 by filing IRS Form 5558. The extension will allow return/reports to be filed up to the 15th day of the third month after the normal due date.

Due to administrative issues within the IRS, electronic filing of Form 5558 through EFAST2 will be postponed until Jan. 1, 2025. Plan sponsors and administrators should continue to use a paper Form 5558 to request a one-time extension of time to file a Form 5500 series or Form 8955-SSA (up to 2½ months after the normal due date for Form 5500s or Form 8955-SSA).

Question of the Month

Q: For small group clients that do not have to offer medical plans, should we discourage the use of a cafeteria plan for pre-tax premiums if they want to allow employees to drop the medical plan mid-year if they cannot afford it?

A: If you avoid using a cafeteria plan to allow employees to pay for medical premiums, the downside is that the employees must pay for the premiums on an after-tax basis. The upside is you avoid all of the Section 125 rules that generally require elections be irrevocable for the year, unless there is a qualifying life event (and insurance being too expensive is not a qualifying life event). So a good solution for employers that want to offer employees maximum flexibility is to allow them to pay premiums on an after-tax basis.

If giving employees the choice between pre-tax (through a cafeteria plan) or after-tax premiums is too confusing or administratively complex, the employer could choose NOT to offer a cafeteria plan and make all premiums be paid on an after-tax basis. Of course, if the employer does not think the financial hardship issue will occur too frequently, offering a cafeteria plan makes the most financial sense for the employees and the employer.

Answers to the Question of the Week are provided by Kutak Rock LLP. Kutak Rock provides general compliance guidance through the UBA Compliance Help Desk, which does not constitute legal advice or create an attorney-client relationship. Please consult your legal advisor for specific legal advice.