Compliance Alert

04/02/24 Alert 2024-01

Employee Benefits Compliance

Final Rule on Fixed Indemnity Excepted Benefits Coverage Requires New Notice but Does Adopt Design and Tax Provisions from Proposed Rule

Introduction

On March 28, 2024, the Departments of Labor, Treasury, and Health and Human Services (the Departments) issued final rules on short-term, limited-duration insurance (SDLI) and "independent, non-coordinated excepted" benefits coverage, including hospital and other fixed indemnity plans. These Final Rules adopt some, but notably not all, of the amendments from the Proposed Rule issued on July 7, 2023. For a review of the Proposed Rule, see our Alert 2023-07. The Proposed Rule contained a number of potential key changes that could impact how certain employer plan sponsors offered this type of coverage, including certain requirements for hospital indemnity or other fixed dollar indemnity insurance to be considered an excepted benefit, and also addressed the tax treatment of certain fixed dollar indemnity payments, and requested comment on level-funded plan arrangements. The Final Rule is more limited in scope and largely contains certain notice requirements and reserves other key issues—level funded plans, the design of excepted benefits fixed indemnity plans, and tax treatment of payments under those plans—for further consideration. We address here the hospital and fixed indemnity portions of the Final Rule because those provisions most significantly impact group health plan offerings.

The Final Rule on Hospital and Other Fixed Indemnity Plans

Background

The Affordable Care Act (ACA) market reform mandates, as well as HIPAA portability rules, do not apply to any group health plan that qualifies as an excepted benefit. This makes excepted benefit status very important for certain medical plans and policies that cannot satisfy ACA market reform rules, such as the required coverage of preventive care or the prohibition against lifetime and annual limits on essential health benefits. One category of excepted benefits is independent, non-coordinated excepted benefits, which includes coverage for only a specified disease or illness (such as cancer-only policies), hospital indemnity, and other fixed indemnity insurance. To qualify as an excepted benefit, these policies have to satisfy all of the following conditions:

- the benefits are provided under a separate policy, certificate, or contract of insurance (no self-funded plans);
- there is no coordination between the provision of such benefits and any exclusion under any plan maintained by that employer; and
- the benefits are paid for an event regardless of whether benefits are provided for the same event under any group health plan maintained by the same plan sponsor.

These requirements reflect the purpose of fixed dollar indemnity insurance, which is not to provide major medical coverage but to provide a cash-replacement benefit for those individuals with other health coverage. As a result, hospital or other fixed indemnity insurance must pay a fixed dollar amount per day (or other period) of hospitalization or illness, regardless of the amount of expenses incurred. This includes most traditional hospital indemnity policies as well as specific illness policies.

Notice Requirement

The Final Rule provides that effective plans years beginning on or after January 1, 2025, employer plan sponsors that offer these fixed indemnity plans must provide a notice to participants enrolled in the plan outlining the coverage provided under the policy, including the limitations of the coverage, and that it is not a replacement for comprehensive coverage. Specifically, the following language is required on the first page of any marketing, application, and enrollment materials in at least 14-point font:

IMPORTANT: This is a fixed indemnity policy,
NOT health insurance

This fixed indemnity policy may pay you a limited dollar amount if you're sick or hospitalized. You're still responsible for paying the cost of your care.

- The payment you get isn't based on the size of your medical bill.
- There might be a limit on how much this policy will pay each year.
- This policy isn't a substitute for comprehensive health insurance.
- Since this policy isn't health insurance, it doesn't have to include most Federal consumer protections that apply to health insurance.

Looking for comprehensive health insurance?

- **Visit HealthCare.gov or call 1-800-318-2596** (TTY: 1-855-889-4325) to find health coverage options.

- To find out if you can get health insurance through your job, or a family member's job, contact the employer.

Questions about this policy?

- For questions or complaints about this policy, contact your State Department of Insurance. Find their number on the National Association of Insurance Commissioners' website (naic.org) under "Insurance Departments."
- If you have this policy through your job, or a family member's job, contact the employer.

Plan Design and Payment Issues in the Proposed Rule Are Not Addressed in the Final Rule

In the Proposed Rules, the Departments sought to codify and clarify certain existing sub-regulatory guidance concerning the excepted benefit status of fixed dollar indemnity plans and proposed additional amendments regarding the payment standards and non-coordination requirements for these plans (for details, see Alert 2023-07). These proposals were intended to address the Departments' concern over the marketing of certain products that seemingly attempted to circumvent protections under the ACA and HIPAA by offering employees a "package" of coverage options that included fixed indemnity policies. For example, these offerings would pair a fixed dollar indemnity plan with other limited coverage such as a Minimum Essential Coverage only plan or skinny MEC plan (sometimes referred to as a limited medical plan), leaving employees without those ACA and HIPAA protections. The Departments noted their ongoing concern over this issue in the Final Rule, but declined to finalize the amendments, opting to address these issues in future rulemaking.

Conclusion

While the Final Rule contains a key notice provision, it does not immediately require employer plan sponsors to consider plan design changes or reconsider the taxation of payments under these plans. Plan sponsors and issuers should, of course, ensure compliance with the notice requirements for fixed indemnity excepted benefits coverage for plan years beginning on or after January 1, 2025. In addition, while immediate changes may not be necessary for these types of plans, the Departments did specifically note that plan sponsors should not assume current market practices that are inconsistent with the 2023 Proposed Rule are compliant with the existing federal regulations. In other words, employers should still closely consider plan designs that pair certain products in a way that may circumvent certain long-standing ACA and HIPAA protections.

CA License No. 0C36861