Uniformity for Summary of Benefits and Coverage

The U.S. Department of Health and Human Services, U.S. Department of Labor and U.S. Treasury released for comment on Feb. 25 a proposed revision of the Summary of Benefits and Coverage (SBC) template, individual and group instructions, and uniform glossary. The template incorporates many recommendations from the National Association of Insurance Commissioners' stakeholder group that provided the departments with a tested SBC template. The revised version includes sections dedicated to pre-deductible services, embedded deductibles, tiered networks, core limitations and exceptions, abortion, coverage examples, a glossary and hyperlinks to definitions. It is also translated into Spanish, Navajo and Tagalog. An NAIC-recommended cover page that explains the purpose of the SBC and how to use it is not in the proposed revision.

TELEMEDICINE › SCOTT SINDER, JONI ANDRIOFF AND CAMERON ARTERTON

Telemed Tradeoff

Telemedicine is a great healthcare tool. But it can eliminate HSA eligibility.

Telemedicine—covering a broad range of health-related services delivered via phone or Internet—is being touted as the latest, greatest cost-saving regime. Employers are seeing its potential to reduce costs and provide greater healthcare convenience for employees. But offering a telemedicine program appears to eliminate employees' eligibility for a health savings account unless the telemedicine program falls into one or more of three safe harbors.

Telemedicine services can range from generic information about health conditions to diagnostic services, medical advice and prescriptions. Employees may be charged per use for these services, or they may pay a monthly or annual fee to receive a specified number of services or even unlimited services.

Telemedicine may be offered as a discount to individuals who "join" or subscribe to the service.

Telemedicine can have risks if you offer an HSA. The rules for health savings account eligibility are complicated, and offering a telemedicine program could unintentionally render your employees ineligible to contribute to the account on a tax-advantaged basis.

Under the tax code, a health savings account allows participants to defer compensation on a pre-tax basis for the purpose of paying eligible medical expenses. HSA eligibility rules require that an individual be covered under a high-deductible health plan and not be covered under another health plan that does not have a high deductible.

The Internal Revenue Service has issued guidance outlining the types of benefits and programs that may be offered in a telemedicine program without jeopardizing eligibility for a health savings account. We have examined this guidance with respect to likely telemedicine arrangements.

Preventive Services: A telemedicine program generally will allow HSA participation if the program provides preventive care before the deductible is satisfied. So employer contributions, payments and reimbursements for preventive care would be permissible regardless of whether the deductible has been met. Preventive services in this context include periodic health evaluations, routine prenatal and well-child care, immunizations, tobacco cessation programs, obesity weight-loss programs and certain screening services.

While the IRS does not include treatment of an existing illness, injury or condition under these preventive care terms, it is interesting to note that drugs and medications may be considered preventive care when used to treat risk factors to prevent the recurrence of a disease or a disease that has not yet manifested itself.

Employee Assistance Programs: A telemedicine program that is not characterized as preventive may still

REGULATORY NEWS TICKER

Richard Loconte named DFS executive deputy super for communications and strategy. He moves from AIG, where he was head of government affairs and associate general counsel. Jennifer Smith joins DFS as special assistant to superintendent. She was attorney at Skadden Arps. **www.dfs.ny.gov**

NORTH DAKOTA New oil industry regulations proposed, including bonding for crude oil and saltwater pipelines and installation of berms at least 12 inches tall around well sites. Public hearings on proposals set for April. **www.nd.gov/ndins**

OKLAHOMA Workers Compensation Commission decides opt-out program under 2013 Oklahoma Employee Injury Benefit Act is unconstitutional. Ruling in *Vasquez v. Dillards* may head to state Supreme Court. Vasquez case is first brought before commission due to denial of benefits under opt-out program. Commission found opt-out law creates dual system that treats workers unequally. Appeal expected. » H.B. 2482 proposes multistate compact with 25 other states that would allow nurses to work across borders with multistate license that meets agreed-upon standards. The suggested law would put Oklahoma in multistate compact if approved by other 25 states that are members. Inclusion in compact could attract telemedicine companies to state. **www.oid.ok.gov**

PENNSYLVANIA Approves overall average workers comp loss cost decrease of 0.9% effective April 1. **www.ins.state.pa.us/ins/site/default.asp**

SOUTH CAROLINA FEMA updates flood plain maps, adding 18,000 properties in Horry County to flood zones, bringing total flood zone properties to about 83,000. Most are in Conway and Bucksport areas. » State government joins the University of South Carolina, state National Guard and other leading industry and academic partners to form SC Cyber, an initiative to secure state's crucial cyber infrastructure through training government employees, businesspeople and business owners to counter cyber crime. **www.doi.sc.gov**

Send company news to **NewsEditor@LeadersEdgeMagazine.com**.

allow participation in a health savings account if the program constitutes an employee assistance program that satisfies certain requirements. The IRS has indicated that an EAP is an "excepted benefit" and does not jeopardize HSA eligibility as long as the program does not provide "significant benefits" in the nature of medical care; coordinate benefits with any other group health plan; require employee contributions or premiums to participate; or require any cost sharing.

For purposes of determining whether employee assistance program benefits are "significant," the IRS has indicated that the amount, scope and duration of covered services must be taken into account. For example, the IRS has stated that:

> [A]n EAP that provides only limited, short-term outpatient counseling for substance use disorder services (without covering inpatient, residential, partial residential or intensive outpatient care) without requiring prior authorization or review for medical necessity does not provide significant benefits in the nature of medical care. At the same time, a program that provides disease management services (such as laboratory testing, counseling, and prescription drugs) for individuals with chronic conditions, such as diabetes, does provide significant benefits in the nature of medical care.

Discount Card Programs: Another way employers may be able to use a telemedicine program along with a health savings account is through a discount card program. An individual who is covered by a high-deductible health plan and also has a discount card for healthcare services or products at managed care market rates will still be eligible for a health savings account, even if the individual is required to pay the costs of the healthcare (taking into account the discount) until the deductible is satisfied. The IRS provides the following helpful example of a pharmacy discount card:

> For a fixed annual fee (paid by the employer), each employee receives a card that entitles the holder to choose any participating pharmacy. During the one-year life of the card, the cardholder receives discounts of 15 percent to 50 percent off the usual and customary fees charged by the providers, with no dollar cap on the amount of discounts received during the year. The cardholder is responsible for paying the costs of any drugs (taking into account the discount) until the deductible of any other health plan covering the individual is satisfied.

> An employee who is otherwise eligible for an HSA will not become ineligible solely as a result of having this benefit.

The rules for health savings account eligibility are complicated, and offering a telemedicine program could unintentionally render your employees ineligible to contribute to the account on a tax-advantaged basis.

You and your clients are exploring every avenue to make healthcare delivery efficient and affordable. Telemedicine and health savings accounts/high-deductible health plans are two of the tools in your toolbox. Be careful when using them together.

Sinder, The Council's chief legal officer, is a partner at Steptoe & Johnson.
ssinder@steptoe.com
Andrioff is a Steptoe tax/benefits partner.
jandrioff@steptoe.com
Arterton is Steptoe tax/benefits of counsel.
carterton@steptoe.com

HOT BUTTON

Supreme Court ruled March 1 in *Gobeille vs. Liberty Mutual Ins. Co.* that ERISA preempts state law requiring ERISA plans to provide detailed reports on health plan claims and claim payments covering state residents to a state-run "all-payer claims database." The ruling, which dealt with Vermont requirements, covers health insurers, self-insured plans and TPAs. Almost half of states have or are creating such reporting rules.

"I see no reason why the **Secretary of Labor could not develop reporting requirements that satisfy the states' needs**, including some state-specific requirements, as appropriate."

—From Justice Stephen Breyer's concurring opinion on ERISA-plan reporting to states in *Gobeille vs. Liberty Mutual Ins. Co.*

TENNESSEE State rep who co-sponsored bill to establish a workers comp alternative program, Jeremy Durham, has resigned as state House majority whip and is on leave of absence after accusations he sexually harassed women via text message. Tennessee Employee Injury Benefit Alternative opt-out bill was amended last year and refiled in 2016, but a hearing on it was canceled in February. **http://state.tn.us/commerce**

TEXAS Gov. Greg Abbott appoints Gerald Ladner and reappoints Rosemary Gammon to board of State Office of Risk Management and names Lloyd Garland as presiding officer. Office administers insurance services for state agencies, including self-insured government employees' workers comp and state risk management programs. Ladner is VP and director of sales at State Auto Insurance Companies. Gammon is principal at Sage Healthcare Consultants. Garland is a retired board certified neurosurgeon and current private neurological consultant. » Department of Insurance Division of Workers Compensation offers grace period for employers that don't have workers comp or that ended coverage to report non-coverage status without a penalty by April 30. Grace period applies to non-subscribers with five or more employees that have not yet reported work injuries, illnesses or fatalities. Employers are required by law to notify DWC annually if they are not obtaining workers comp coverage and if they've had work-related fatalities or injuries/illnesses resulting in more than one day of lost time. **www.tdi.state.tx.us**

WISCONSIN Cari Lee named division administrator of regulation and enforcement in the Office of the Commissioner of Insurance. She oversees Bureau of Market Regulation and Bureau of Financial Analysis and Examinations. She was bureau director of market regulation at Division of Regulation and Enforcement. **www.oci.wi.gov**