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Employee Benefit Plan Review

Ask the Experts

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Delinquent Long-Term Disability Plan Forms 5500

Q My company's new benefits consultant just informed us that we were supposed to have filed Form 5500s for our company's fully-insured long-term disability (LTD) plan that we set up in 2014. Our prior benefits consultant said that we do not need to file Forms 5500 for our LTD plan, since our LTD plan is exempt. When we first set up the LTD plan, we had 92 participants in the plan. Our company has grown in size in the last few years and we now have over 145 participants in our LTD plan. Are we required to file Forms 5500 for our LTD plan? What should we do if we did not file Form 5500s for prior years?

A Depending upon the number of participants you had in your company's long-term disability plan LTD plan in prior plan years, you may have been required to file a Form 5500 for the LTD plan for one or more of the prior plan years. If you were required to file Forms 5500 for the LTD plan for one or more prior plan years and missed the deadline, it may be possible to file the delinquent Forms 5500 now under a special amnesty program offered by the Department of Labor known as the Delinquent Filer Voluntary Compliance Program (DFVCP).

In general, a Form 5500 (Annual Return/Report of Employee Benefit Plan) is required to be filed with respect to an employee benefit plan subject to ERISA no later than seven months following the last day of the plan year. An automatic extension of up to two-and one-half months may be granted if a request for an extension is filed on IRS Form 5558 (Application for Extension of Time to File Certain Employee Plan Returns) before the initial seven-month deadline.

Employee benefit plans that (1) cover fewer than 100 participants as of the first day of the plan year, and (2) are unfunded, fully insured or a combination of insured and unfunded (and is not otherwise a multiple-employer plan required to file a Form M-1) are not required to file a Form 5500 for the plan year. If the LTD plan was fully insured and covered fewer than 100 employees on the first day of a plan year, it would not be necessary to file a Form 5500 for that particular plan year.

For purposes of determining whether the LTD plan covered 100 or more participants as of the first day of a plan year, an individual becomes a participant covered under an employee welfare benefit plan on the earliest of: (1) the date designated by the plan as the date on which the individual begins participation in the plan; (2) the date on which the individual becomes eligible under the plan for a benefit subject only to occurrence of the contingency for which the benefit is provided; or (3) the date on which the individual makes a contribution to the plan, whether voluntary or mandatory.

Before determining whether a separate Form 5500 is or was required to be filed for the LTD plan for a particular prior plan year, you should check with your benefits consultant or benefits counsel to determine whether the LTD plan is or was part of a "wrap" plan that filed a Form 5500 for the particular plan year. A "wrap plan" is an "umbrella" employee benefit plan that provides one or more different types of employee welfare benefits to participants. Wrap plans generally

have one plan number and file a consolidated Form 5500 covering the employee welfare benefits provided under the wrap plan. For example, an employer may establish a wrap plan covering its medical, dental, disability and severance benefits. If the LTD plan is part of a wrap plan sponsored by your company and the wrap plan filed a separate Form 5500 covering the LTD plan for the particular plan year, then it generally would not be necessary to file a separate Form 5500 for the LTD plan for that plan year.

If it is determined that your company was required to file a separate Form 5500 for the LTD plan for one or ore prior years, it may be possible to file the delinquent Forms 5500 now and pay a reduced penalty under the DFVCP.

Under the DFVCP, your company may be able to file a late Form 5500 for each year in which a Form 5500 for the LTD plan was required to be filed. For plans that cover 100 or more participants (large plans), the maximum per filing penalty under the DFVCP is $2,000. The maximum penalty for all delinquent Forms 5500 for a large plan is $4,000, regardless of the number of late returns for the plan. The Department of Labor offers an online calculator to assist companies in calculating the penalty for the late filings.[1]

If you do confirm that your company was late in filing one or more Forms 5500 for the LTD plan, it is important to make any DFVCP filing as soon as possible. To be eligible to file under the DFVCP, the DOL must not have notified your company in writing that your company has failed to file one or more timely Forms 5500 for the LTD plan.[2]

Preventative Care Under High Deductible Health Plans

Q Our firm offers a high deductible health plan (HDHP) option to our employees. I read recently that the IRS will now permit an HDHP to pay for insulin and a number of other drugs without regard to whether the deductible has been met. When does this change take effect and is our plan required to reimburse these amounts before the deductible is met or is this optional?

A The Internal Revenue Service (IRS) recently issued Notice 2019-45 which expands the list of preventive care benefits that may be provided by an HDHP without a deductible or below the minimum deductible required for the type of coverage under the HDHP. The new guidance became effective on July 17, 2019. The new provision is optional and not mandatory.

Section 223 of the Internal Revenue Code (Code) provides for the establishment of health savings accounts (HSAs), which offer tax benefits to eligible participants. One of the requirements for establishing an HSA is that health coverage must be provided under an HDHP and the individual must have no disqualifying health coverage.

To qualify as an HDHP, the plan must impose certain minimum deductibles and out-of-pocket maximums. For example, the minimum deductible for 2019 is $1,350 for self-only HDHP coverage and $2,700 for family HDHP coverage. Generally, under Code Section 223(c)(2)(A), an HDHP may not provide benefits for any year until the minimum deductible for that year is satisfied.

PREVENTIVE CARE FOR SPECIFIED CONDITIONS	FOR INDIVIDUALS DIAGNOSED WITH
Angiotensin converting enzyme (ACE) inhibitors	Congestive heart failure, diabetes, and/or coronary artery disease
Anti-resorptive therapy	Osteoporosis and/or osteopenia
Beta-blockers	Congestive heart failure and/or coronary artery disease
Blood pressure monitor	Hypertension
Inhaled corticosteroids	Asthma
Insulin and other glucose lowering agents	Diabetes
Retinopathy screening	Diabetes
Peak flow meter	Asthma
Glucometer	Diabetes
Hemoglobin A1c testing	Diabetes
International Normalized Ratio (INR) testing	Liver disease and/or bleeding disorders
Low-density Lipoprotein (LDL) testing	Heart disease
Selective Serotonin Reuptake Inhibitors (SSRIs)	Depression
Statins	Heart disease and/or diabetes

However, Code Section 223(c)(2)(C) provides a safe harbor which permits certain preventive care benefits without a deductible or below the applicable minimum deductible.

The IRS has issued guidance from time to time which describes certain preventive care benefits that may be provided without a deductible or below the applicable minimum deductible.[3] In general, "preventive care" has been defined as care designed to identify or prevent illness, injury, or a medical condition, as opposed to care designed to treat an existing illness, injury, or condition.

Notice 2019-45 states that the Treasury Department and IRS have been directed to consider ways to expand the use and flexibility of HSAs and HDHPs consistent with the provisions of Code Section 223 and the appropriate standard for preventive care under Section 223(c)(2)(C).

In Notice 2019-45, the IRS acknowledged that certain individuals with chronic conditions fail to seek or make use of medical care that would prevent exacerbation of the chronic condition because of the high cost of such care. It also noted that the failure to address these chronic conditions can lead to consequences, such as amputation, blindness, heart attacks, and strokes, that require considerably more extensive medical intervention.

In response to these concerns, Notice 2019-45 expands the list of preventative care which may be provided under an HDHP without regard to satisfaction of the minimum deductible. This list, which is set forth in Appendix A to Notice 2019-45, is set forth on the prior page:

Notes

1. *See https://www.askebsa.dol.gov/dfvcepay/calculator*.
2. For more information on how to file through the DFVCP, *see https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/dfvcp.pdf*.
3. *See, e.g.*, IRS Notice 2004-23 (2004-1 C.B. 725), and Q&As 26 and 27 of Notice 2004-50 (2004-2 C.B. 196).

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