Tulsa Employee Benefits Group Legislative Update

August 22, 2023

CONNER WINTERS

Retirement Plans

CONNER WINTERS

SECURE 2.0: GUIDANCE NEEDED

- Required Roth Catch-up Contributions
  - The American Benefits Council ("ABC") and many other organizations have asked the IRS to delay enforcement of the age 50 catch-up contributions/Roth contributions requirement for 2 years.
  - Can a plan require that all catch-up contributions be made on a Roth basis, including for participants with FICA wages under $145,000?
  - How to handle correction of erroneous pre-tax contributions (which should have been Roth) and re-characterization of pre-tax deferrals as Roth contributions.

CONNER WINTERS

SECURE 2.0: GUIDANCE NEEDED

- Roth Employer Matching on Nonelective Contributions
  - Available to partially-vested participants?
  - Can only a portion of the contribution receive Roth treatment, at the election of the participant?
  - Are the contributions:
    - Wages for income tax withholding purposes?
    - Excluded from wages for FICA purposes?
    - Taxable in year of contribution even if made with respect to the prior plan year?
    - Reported on Form 1099-R?
    - Treated like Roth elective deferrals for starting 5-year Roth holding period to begin running?

CONNER WINTERS

SECURE 2.0: GUIDANCE NEEDED

- Terminally-Ill Individual Withdrawals:
  - Is this a permitted withdrawal event? (It appears not.)
  - What is the "sufficient evidence" a plan administrator needs to receive to determine if a distribution is eligible for this early distribution penalty exception?
    - ABC requested that self-certification be permitted to protect an individual's privacy.
- Surviving Spouse Election of Participant Status for RMDs:
  - Is this mandatory?
  - What are the notice and election requirements?

CONNER WINTERS

SECURE 2.0: GUIDANCE NEEDED

- Protected Benefits and In-Service Withdrawals:
  - Are the new types of in-service distributions (emergency personal expense, domestic abuse victim withdrawals, qualified disaster recovery distributions, and qualified long-term care distributions) protected benefits?
- Safe Harbor for Correcting Elective Deferral Failures
  - Statute refers to an eligible automatic contribution arrangement (EACA). Need to confirm the safe harbor is available to non-EACAs.
- De Minimis Financial Incentives: Can these be provided by vendors?

CONNER WINTERS

SECURE 2.0: Potential Technical Corrections

- Potential technical corrections to:
  - Fix inadvertent elimination of all catch-up contributions beginning in 2024.
  - Clarify the RMD age change from 73 to 75 in 2033.
  - Apply the Roth catch-up requirement to SECA wages (instead of just FICA wages).
  - Clarify 2025 effective date for increased catch-up contributions for participants age 60-63.
  - Permit "pension-linked savings accounts" for non-ERISA plans.

CONNER WINTERS

SECURE 2.0: RMD Relief

- SECURE 2.0 changes to RMD "applicable age":
  - For an individual who attains age 72 after December 31, 2022, and age 73 before January 1, 2033, the applicable age is 73.
    - Applies to distributions required to be made after December 31, 2022, with respect to individuals who attain age 72 after such date.
  - For an individual who attains age 74 after December 31, 2032, the applicable age is 75.

CONNER WINTERS

SECURE 2.0: RMD Relief
IRS Notice 2023-54

- Plan administrator does not fail to satisfy the 402(f) notice requirement, the rollover rules or the withholding rules merely because of a failure to treat the following as eligible rollover distributions:
  - A distribution made between 1/1/23 and 7/31/23;
  - To a participant born in 1951 (or that participant's surviving spouse); and
  - The distribution would have been an RMD but for the SECURE 2.0 change in the required beginning date.

CONNER WINTERS

SECURE 2.0: RMD Relief
IRS Notice 2023-54

- 60-day rollover period for any such distribution extended to 9/30/23.
  - Example: A participant who was born in 1951 received a single-sum distribution in January 2023, part of which was treated as ineligible for rollover because it was mischaracterized as an RMD, that participant will have until September 30, 2023, to roll over that mischaracterized part of the distribution.
- Similar relief for IRA distributions (with special provisions related to one rollover per year rule).

CONNER WINTERS

SECURE 2.0: RMD Relief
IRS Notice 2023-54

- Relief related to the "at least as rapidly" rule.
- Proposed regulations apply the "at least as rapidly" rule to designated beneficiaries who are not eligible designated beneficiaries (EDBs) – along with the new 10-year rule under SECURE 1.0. This was a surprise to the retirement plan community.
- Relief given in Notice 2022-53 for amounts not paid in 2021 or 2022 due to confusion.
- Similar relief given in Notice 2023-54.

CONNER WINTERS

SECURE 2.0: RMD Relief
IRS Notice 2023-54

- Excise tax not applicable to distributions that would be required under the "at least as rapidly" rule for the year in which the employee (or designated beneficiary) died if the payment would be required to be made to:
  - a designated beneficiary of an employee if: (1) the employee died in 2020, 2021, or 2022, and on or after the employee's required beginning date, and (2) the designated beneficiary is not using the lifetime or life expectancy payments exception; or
  - a beneficiary of an EDB if: (1) the EDB died in 2020, 2021, or 2022, and (2) that EDB was using the lifetime or life expectancy payments exception.

CONNER WINTERS

Expanded Use of Self-Correction

CONNER WINTERS

Expanded Use of Self-Correction Pre-SECURE 2.0

- Significant operational failures can be self-corrected by the last day of the third plan year following the plan year for which the failure occurred.
- Insignificant operational failures can be self-corrected at any time.
- To be eligible to self-correct, a plan sponsor must have established practices and procedures designed to promote and facilitate overall compliance with applicable Code requirements.
- To be eligible to self-correct significant plan failures, a plan must be the subject of a favorable letter and satisfy other requirements in IRS procedure document.

CONNER WINTERS

EXPANDED USE OF SELF-CORRECTION
SECURE 2.0

- An eligible inadvertent failure (EIF) may be self-corrected under EPCRS, except to the extent that:
  - The failure was identified by the Secretary prior to any actions that demonstrate a specific commitment to implement a self-correction with respect to such failure, or
  - The self-correction is not completed within a reasonable period after identification of the failure.

CONNER WINTERS

EXPANDED USE OF SELF-CORRECTION
SECURE 2.0

- Definition of eligible inadvertent failure:
  - A failure that occurs despite the existence of practices and procedures that satisfy: (i) the standards set forth in section 4.04 of IRS Revenue Procedure 2021-30 ("RP 2021-30"), or (ii) similar standards in the case of an IRA.
  - An EIF does not include any failure that is egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction.

CONNER WINTERS

EXPANDED USE OF SELF-CORRECTION
SECURE 2.0

- For self-correction of an EIF, the "correction period" is (generally) indefinite and has no last day, other than:
  - Failures identified by the Secretary prior to any actions that demonstrate a specific commitment to implement a self-correction with respect to the failure; or
  - A self-correction that is not completed within a reasonable period.
- EIFs relating to a loan may be self-corrected according to the rules of section 6.07 of RP 2021–30.
  - DOL to treat correction as meeting VFCP requirements.

CONNER WINTERS

EXPANDED USE OF SELF-CORRECTION
SECURE 2.0

- EPCRS to be expanded to allow IRA custodians to address EIFs with respect to IRAs, including but not limited to:
  - waivers of the excise tax under Code section 4974, and
  - rules permitting a non-spouse beneficiary to return distributions to an inherited IRA in a case where, due to an inadvertent error by a service provider, the beneficiary had reason to believe that the distribution could be rolled over without inclusion in income of any part of the distributed amount.

CONNER WINTERS

Expanded Use of Self-Correction
SECURE 2.0

- IRS to issue guidance on correction methods that are required to be used to correct EIFs, including general principles of correction if a specific correction method is not specified by the IRS.
- Relief does not apply unless the correction of the EIF is made in conformity with the general principles that apply to corrections of such failures under the Code, regulations or other guidance and those principles and corrections set forth in RP 2021–30.
- IRS to revise RP 2021-30 within 2 years.

CONNER WINTERS

Expanded Use of Self-Correction
Notice 2023-43

- A plan may self-correct an EIF before RP 2021-30 is updated, if:
  - The failure was not identified by the Secretary prior to any actions demonstrating a specific commitment to implement a self-correction with respect to the failure.
  - The self-correction is completed within a reasonable period after the failure was identified.
  - The failure is not egregious (per RP 2021-30, Section 4.10), does not directly or indirectly relate to an abusive tax avoidance transaction (per RP 2021-30, Section 4.12(2)), and does not relate to the diversion or misuse of plan assets.

CONNER WINTERS

Expanded Use of Self-Correction Notice 2023-43

- Self-correction of an EIF must also satisfy the provisions applicable to self-correction set forth in RP. 2021-30, including that:
  - Sponsor must have established practices and procedures reasonably designed to promote and facilitate overall compliance with applicable Code requirements, as described in RP 2021-30, § 4.04;
  - Sponsor must apply the correction principles and rules of general applicability set forth in RP 2021-30, § 6;
  - Sponsor may, but is not required to, self-correct using a correction method set forth in Appendix A or B of RP 2021-30; and
  - A plan sponsor may not use a correction method that is prohibited under RP 2021-30.

CONNER WINTERS

Expanded Use of Self-Correction Notice 2023-43

- A plan may <u>not</u> self-correct the following <u>before</u> RP 2021-30 is updated:
  - A failure to initially adopt a written plan
  - A failure in an orphan plan (as defined in § 5.03(1) of RP 2021-30).
  - A significant failure in a terminated plan.
  - Correction via amendment that is less favorable to participants.
  - Certain demographic failures.
  - Certain other failures related to SEPs / SIMPLEs / ESOPs.

CONNER WINTERS

Expanded Use of Self-Correction Notice 2023-43

- Provisions of RP 2021-30 that do not apply with respect to self-correction of an EIF:
  - Favorable letter requirement.
  - The prohibition of self-correction of all demographic failures and employer eligibility failures.
  - The prohibition of self-correction of significant SEP and SIMPLE failures.
  - The prohibition of self-correction of certain loan failures.

CONNER WINTERS

Expanded Use of Self-Correction Notice 2023-43

- Provisions of RP 2021-30 that do not apply with respect to self-correction of an EIF (continued):
  - Provisions relating to self-correction of significant failures that have been substantially completed before the plan or plan sponsor is under examination.
  - Requirement that a significant failure must be completed or substantially completed by the end of a specified correction period (in general, the last day of the third plan year following the plan year for which the failure occurred).

CONNER WINTERS

Expanded Use of Self-Correction Notice 2023-43

- An EIF is treated as having been identified by the Secretary when the plan or plan sponsor comes under examination, as defined in Section 5.08 of RP 2021-30.
- Accordingly, before RP 2021-30 is updated, once the plan or plan sponsor comes under examination, the EIF is no longer eligible for self-correction unless the plan sponsor has, before the plan or plan sponsor comes under examination, demonstrated a specific commitment to implement a self-correction with respect to the EIF.
    - Insignificant failures can still be corrected even if the sponsor is under exam or if the failure is discovered on exam.

CONNER WINTERS

Expanded Use of Self-Correction Notice 2023-43

- A reasonable period is determined by considering all relevant facts and circumstances.
- Except with respect to certain employer eligibility failures, a failure that has been corrected by the last day of the 18th month following the date the failure is identified by the plan sponsor will be treated as having been completed within a reasonable period after it is identified.
- For employer eligibility failure, sponsor must cease all contributions to the plan as soon as practicable but no later than last day of 6th month after failure is identified.

CONNER WINTERS

Expanded Use of Self-Correction
Notice 2023-43

"Q-8. Before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, is a plan sponsor prevented from self-correcting an Eligible Inadvertent Failure on or after December 29, 2022, merely because the Eligible Inadvertent Failure occurred prior to December 29, 2022?

A-8. No."

CONNER WINTERS

Expanded Use of Self-Correction
Notice 2023-43

- Self-correction of an EIF with respect to which an excise tax or additional tax applies does not automatically result in the waiver of the tax.
  - A plan sponsor may still request that the IRS not pursue certain excise taxes or additional taxes that apply with respect to the EIF through a VCP.
- VCP can still be used to correct an EIF.

CONNER WINTERS

Expanded Use of Self-Correction Notice 2023-43

- Section 305 of SECURE 2.0 does not impose new recordkeeping requirements, but current requirements continue to apply.
- If requested upon an exam, a plan sponsor must be able to provide documentation substantiating the self-correction, such as documentation that:
  - identifies the failure, including the years of occurrence, the number of employees affected, and the date the failure was identified;
  - explains how the failure occurred and demonstrates there were established practices and procedures (formal or informal) reasonably designed to promote and facilitate overall compliance that were in effect when the failure occurred;

CONNER WINTERS

Expanded Use of Self-Correction Notice 2023-43

- If requested upon an examination, a plan sponsor must be able to provide documentation substantiating the self-correction, such as documentation that (continued):
  - identifies and substantiates the correction method and the date of the completion of the correction; and
  - identifies any changes made to those established practices and procedures to ensure that the same failure would not recur.

CONNER WINTERS

FIDUCIARY LITIGATION: NORTHWESTERN UPDATE

- Allegations of violation of ERISA's fiduciary duty of prudence with respect to:
  - Monitoring and controlling recordkeeping fees.
  - Offering "retail" share classes of mutual funds and annuities with higher fees than identical "institutional" share classes of the same investments.
  - Offering too many investment options (over 400) that resulted in participant confusion and poor investment decisions.

CONNER WINTERS

FIDUCIARY LITIGATION: NORTHWESTERN UPDATE

- The District Court granted defendants' motion to dismiss and the 7th Circuit affirmed, citing the plan's array of investment choices that included the types of funds plaintiffs wanted (e.g., low cost index funds).
  - In the 7th Circuit's view, these offerings "eliminat[ed] any claim that plan participants were forced to stomach an unappetizing menu."
  - "[P]lan participants had options to keep the expense ratios and, therefore, recordkeeping expenses, low."

CONNER WINTERS

FIDUCIARY LITIGATION: NORTHWESTERN UPDATE

- The Supreme Court disagreed with the 7th Circuit's rationale, concluding that the 7th Circuit's focus on investor choice ignored plan fiduciaries' obligation to conduct their own independent evaluation to determine the prudence of investment options.
- Case remanded for the 7th Circuit to consider whether the plaintiffs' plausibly alleged a violation of the duty of prudence using the pleading standard articulated in *Tibble v. Edison Int'l*.
  - Tibble: A fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones.

CONNER WINTERS

FIDUCIARY LITIGATION: NORTHWESTERN UPDATE

- "At times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise."

CONNER WINTERS

FIDUCIARY LITIGATION: NORTHWESTERN UPDATE MARCH 2023 SEVENTH CIRCUIT DECISION

- On remand, 7th Circuit rejected Northwestern's argument that the heightened pleading standard applicable to ESOPs should also apply to 401(k) plans.
- A plaintiff must plausibly allege fiduciary decisions outside a range of reasonableness. The range of reasonableness will depend on circumstances at the time the fiduciary acts.
  - If there is an obvious explanation for a fiduciary's conduct that the plaintiffs cannot overcome, a motion to dismiss will likely be granted.
  - If there are multiple reasonable explanations for the conduct, the motion to dismiss should fail.

CONNER WINTERS

FIDUCIARY LITIGATION: NORTHWESTERN UPDATE MARCH 2023 SEVENTH CIRCUIT DECISION

"Sometimes an alternative explanation for an ERISA fiduciary's conduct may be patently more reasonable and better supported by the facts than any theory of fiduciary duty violation pleaded by a plaintiff. In such a scenario, courts should not hesitate to dismiss an ERISA claim for breach of the duty of prudence."

CONNER WINTERS

FIDUCIARY LITIGATION: NORTHWESTERN UPDATE MARCH 2023 SEVENTH CIRCUIT DECISION

"This will often be the case where a plan fiduciary has actually performed the requisite diligence in monitoring plan expenses and fund prudence. If a plan fiduciary sufficiently monitors funds and expenses, its informed course of action is much more likely to be within 'the range of reasonable judgments a fiduciary may make based on her experience and expertise.'"

CONNER WINTERS

FIDUCIARY LITIGATION: NORTHWESTERN UPDATE MARCH 2023 SEVENTH CIRCUIT DECISION

- Court refused to dismiss claims related to:
  - Unreasonable recordkeeping fees; and
  - Imprudent fund retention due to high cost and poor performance (particularly the use of retail share classes instead of institutional).
- Court dismissed claims that Northwestern plan fiduciaries were imprudent by offering multiple duplicative funds.
  - "Unspecific allegations that a fiduciary provided too many funds, without more, do not state a claim for breach of the duty of prudence."

CONNER WINTERS

Other Fiduciary Litigation

- Multiple lawsuits filed in 2022 relating to plans using BlackRock's LifePath Index Funds.
- At least five dismissals due to plaintiffs' failure to allege facts regarding the selection process. Plaintiffs instead relied on alleged underperformance as evidence of breach of fiduciary duty.

CONNER WINTERS

Other Fiduciary Litigation Updates

- Focus on failure to consider float income:

  "McLane has not tracked, monitored, or negotiated the amount of compensation Merrill Lynch receives from float compensation. McLane never disclosed this compensation to Plan participants either. " Complaint in Barner v. McLane Company, Inc., No. 6:23-00301 (W.D. Tex filed 04/24/2023),

- DOL guidance on fiduciary obligations relating to float: Field Assistance Bulletin 2002-03
  - https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2002-03

CONNER WINTERS

Welfare Benefit Plans

CONNER WINTERS

OKLAHOMA PBM LEGISLATION

- PBM law was originally passed in 2019 (HB 2632) and was amended in 2022 (SB 737). It potentially impacts common Rx plan designs, such as the required use of mail-order pharmacies for specialty drugs.
- In 2022, a federal district court held that ERISA does not preempt its application to self-funded benefit plans. The trade group that brought the lawsuit is appealing.
- The Insurance Department indicated that it was prepared to enforce (https://www.oid.ok.gov/release_040522/) and negotiated a $4.8 million settlement with CVS regarding collection of transaction fees from pharmacies for Medicare Part D and ERISA plan claims (https://www.oid.ok.gov/release_012022/).

CONNER WINTERS

Oklahoma PBM Legislation

- On August 15, 2023, the 10th Circuit Court of Appeals held that:
  - ERISA preempts the access standards, discount prohibition, any willing provider provision, and provider probation prohibition as applied to ERISA plans; and
  - Medicare Part D preempts the any willing provider provision as applied to Medicare Part D plans.

CONNER WINTERS

Gag Clause Attestation

- Plans and insurers may not enter into contracts with providers, networks, TPAs or other service providers offering network access that would restrict the plan or insurer from:
  - Providing provider-specific cost or quality of care information or data through a consumer tool (or otherwise) to referring providers, plan sponsor, enrollees or individual eligible to enroll.
  - Electronically accessing de-identified claims and encounter information or data.
  - Sharing such info with HIPAA business associates.

CONNER WINTERS

Gag Clause Attestation

- Plans and insurers must annually attest to the government regarding compliance.
- The requirements were effective for plan contracts entered into (or renewed) on or after December 27, 2020.
  - Keep in mind prior vendors for attestation.

CONNER WINTERS

Gag Clause Attestation

- The initial deadline to submit the GCPCA is 12/31/23 and thereafter annually by 12/31.
  - First attestation covers period from 12/27/20 to the date of attestation.
  - Each annual attestation covers the period from last attestation.
- Potential $100 per day penalty per affected individual for failure to comply.

CONNER WINTERS

Gag Clause Attestation

- GCPCA requirements apply to:
  - Fully-insured and self-insured group health plans (church plans subject to the Code and ERISA plans) including grandfathered and grandmothered plans.
  - Health insurance issuers offering group health insurance coverage.
  - Heath insurance issuers offering individual health insurance coverage (including student health insurance coverage and individual health insurance coverage issued through an association).
- Plans offering only excepted benefits, HRAs, and other account-based plans do not need to submit.

CONNER WINTERS

Gag Clause Attestation

- February 23, 2023 guidance issued:
  - FAQs
  - Website for plans and issuers to use to submit attestations. https://hios.cms.gov/HIOS-GCPCA-UI
  - User Manual and Instructions on how to submit attestation through HIOS Gag Clause Prohibition Compliance Attestation (GCPCA) module. https://www.cms.gov/cciio/programs-and-initiatives/other-insurance-protections/gag-clause-prohibition-compliance
  - Template for use when submitting an attestation on behalf of multiple plans.

CONNER WINTERS

Gag Clause Attestation

- February 23, 2023 FAQs:
  - A self-insured plan may contract with a service provider (TPA, PBM, managed behavioral health organization) to attest on behalf of the plan. If the provider doesn't properly/timely attest on behalf of the self-insured plan, the compliance issue remains with the plan.
  - Fully-insured group health plans and its issuer must both submit GCPCA annually. However, if an issuer submits on its own behalf and also on behalf of the fully-insured plan, it is sufficient to meet the attestation requirement.

CONNER WINTERS

Gag Clause Attestation

- February 23, 2023 FAQs (continued):
  - An issuer/TPA may submit a single attestation on behalf of itself, its insured policy holders, and its self-insured plan clients.
  - Plans, issuers, and TPAs can individually determine and authorize the appropriate person within the organization to make the attestation.
  - Attestation submissions for a plan can be made separately for different provider agreements (medical, PBM, behavioral health).

CONNER WINTERS

Gag Clause Attestation

- February 23, 2023 FAQs (continued):
  - Example of gag clause: TPA contract provides the plan sponsor's access to provider-specific cost and quality care information is only at the discretion of the TPA (though TPA may place reasonable restrictions on public disclosure).
  - To the extent a term in a contract either directly or indirectly prevents a plan or issuer from providing, accessing or sharing the info or data, then it violates the gag clause prohibition.
  - Plans that do not timely submit attestations may be subject to enforcement actions.

CONNER WINTERS

End of "Outbreak Period" Relief

- Initial Relief: "Outbreak Period" time from March 1, 2020 until 60 days after the announced end of the COVID-19 national emergency.
- Notice 2021-21 Guidance: "Outbreak Period" determined on a *person by person* (*event by event*) basis and continues until the earlier of:
  - 60-days after the announced end of the COVID-19 NE, or
  - One year from when the person is first eligible for relief.

CONNER WINTERS

End of "Outbreak Period" Relief

- The "Outbreak Period" relief extended certain benefit plan deadlines during the COVID-19 national emergency.
  - HIPAA special enrollment.
  - COBRA elections and premium payments.
  - Claim and appeal submissions.
- National emergency ended May 11, 2023, so the tolling relief ended July 10, 2023 (or, if earlier, one year from when the person was first eligible for relief) and the time period for the applicable deadline started to run.

CONNER WINTERS

Mental Health Parity Guidance

- 2022 report on comparative analyses concluded that none of the 177 respondents provided a satisfactory response.
- DHHS/DOL/IRS issued the following on July 25, 2023:
  - Proposed regulations.
  - Technical release regarding data collection related to network composition.
  - 2023 Comparative Analysis Report to Congress.

CONNER WINTERS

Mental Health Parity Guidance

- Proposed regulations.
  - The substantially all/predominant level tests that currently apply to quantitative treatment limitations would also apply to nonquantitative treatment limitations (e.g., if an NQTL does not apply to 2/3 of benefits in a medical/surgical classification, it could not be applied to mental health/substance abuse benefits in that classification).
  - Processes and factors used in designing an NQTL for mental health/substance abuse must be comparable to and applied no more stringently than medical/surgical.

CONNER WINTERS

Mental Health Parity Guidance

- Proposed regulations.
  - Plans must collect data necessary to assess the impact of an NQTL on access to benefits, such as the percentage of claim denials and network composition information.
  - Material differences in access to mental health benefits will be considered a strong indicator of noncompliance.
  - Plans may not apply a separate treatment limitation only to mental health and not medical/surgical in the same benefit classification.

CONNER WINTERS

Mental Health Parity Guidance

- Proposed regulations.
  - Plans must provide meaningful benefits for treatment of a particular condition in each benefit classification. Example: exclusion of ABA treatment for autism but coverage of other treatments.
  - Specific content required for comparative analyses.
  - Plan fiduciary must certify that comparative analysis complies with content requirements.

CONNER WINTERS

Mental Health Parity Guidance

- Proposed regulations.
  - Specific deadlines for submission of comparative analysis (initial deadline of 10 business days following request).
  - Required participant notification of a determination of noncompliance.

CONNER WINTERS

Mental Health Parity Guidance

- Technical release addresses the data that plans and insurers would be required to collect and evaluate as part of their comparative analyses regarding network composition, including:
  - Out-of-network utilization;
  - Percentage of in-network providers actively submitting claims;
  - Network adequacy time and distance standards; and
  - Reimbursement rate information.

CONNER WINTERS

Mental Health Parity Guidance

- 2023 Comparative Analysis Report to Congress.
  - Similar deficiencies to 2022 report with respect to comparative analyses – primarily lack of meaningful analysis regarding factors considered in design and application of NQTL.

CONNER WINTERS

Health Plan Litigation: Kraft Heinz v. Aetna

- Filed in the Eastern District of Texas on June 30, 2023.
- Lawsuit filed by the plan committee and two Kraft plans.
- Aetna is TPA of Kraft self-funded plans.
- Allegations:
  - Aetna breached its fiduciary duty to identify, deny, and prevent the payment of false, fraudulent, or improper provider-submitted claims or other claims that do not satisfy the eligibility and other requirements of the Plans.
  - Aetna applied less rigorous claims adjudication standards to self-funded plan claims than it applied to insured plan claims.

CONNER WINTERS

Health Plan Litigation: Kraft Heinz v. Aetna

- Allegations:
  - Aetna did not properly provide medical claims data to Kraft.
  - Aetna engaged in cross-plan offsetting and, in doing so, used self-funded plans to subsidize its insured book of business.
  - Aetna reprocessed claims but did not credit the Kraft plans with the difference between the initial payment and the reprocessed amount.
  - Aetna commingled plan funds with Aetna's funds.

CONNER WINTERS

Family Glitch and Cafeteria Plan Elections

- An individual is ineligible to receive subsidized coverage through a health care exchange if the individual receives an offer of affordable employer-sponsored coverage.
  - Prior to 2023, the affordability of employer-sponsored coverage for a family member was determined based on the affordability of the employee-only coverage and not family coverage.
  - This was known as the "family glitch."
  - If the employee-only coverage was affordable, then other family members would not be eligible for subsidized coverage through the Exchange regardless of the additional cost for the family coverage.

CONNER WINTERS

Family Glitch and Cafeteria Plan Elections

- Regulations were issued October 13, 2022 (effective beginning January 1, 2023) that addressed the "family glitch."
  - Now the affordability of employer-sponsored coverage for a family member is based on the cost of the family coverage rather than the cost of employee-only coverage.
- This does not affect affordability calculations for purposes of the employer mandate.

CONNER WINTERS

Family Glitch and Cafeteria Plan Elections

- IRS Notice 2022-41 and IRS Announcement 2022-22: Beginning 1/1/23, cafeteria plans may allow prospective mid-year changes under a group health plan (not a health FSA) to revoke an election of family coverage if:
  - One or more family members are eligible for an Exchange special enrollment period or want to enroll in Exchange coverage during the Exchange's annual open enrollment period, and
  - The election change corresponds with the enrollment of the family member(s) in the Exchange coverage that is effective no later than the day immediately following the last day of coverage under the employer's plan.

CONNER WINTERS

Family Glitch and Cafeteria Plan Elections

- New enrollment in the employer-provided coverage is not allowed if Exchange coverage is dropped mid-year. The guidance only applies if eligibility to enroll in Exchange coverage is gained.
- Notice 2022-41 originally only permitted this for non-calendar year cafeteria plans, but the IRS subsequently removed the non-calendar year plan requirement.
- Plans can rely on employee's representation regarding their family member's enrollment or intention to enroll in appropriate Exchange coverage.

CONNER WINTERS

Family Glitch and Cafeteria Plan Elections

- If an employer wants to allow the optional election events, a cafeteria plan amendment will be needed.
  - Must be adopted on or before the last day of the plan year in which election changes are permitted and it can be effective retroactively to the first day of the plan year (if the plan operated in accordance with the IRS guidance and participants are informed of the amendment).
  - However, amendments for a plan year beginning in 2023 can be adopted on or before the last day of the plan year beginning in 2024.
  - Election change still must be prospective.

CONNER WINTERS

Preventive Coverage Mandate

- The ACA preventive services coverage mandate requires non-grandfathered health plans to cover the following preventive services without cost sharing, when provided in-network:
  - The U.S. Preventive Services Task Force (USPSTF) recommended preventive services rated “A” or “B.”
  - CDC and Prevention Advisory Committee on Immunization Practices (ACIP) recommended immunizations.
  - Any additional preventive care and screenings for women not recommended by the USPSTF but provided for in the Health Resources and Services (HRSA) guidelines.
  - Preventive screenings and care for infants, children, and adolescents that are provided for in the HSRA guidelines.

CONNER WINTERS

Preventive Coverage: Braidwood Management, Inc. v. Becerra

- In September 2022, District Court judge concluded that the U.S. Preventive Services Task Force (USPSTF) was improperly allocated authority to establish preventive services requirements.
- On March 30, 2023, the judge enjoined enforcement of the ACA requirement to cover USPSTF preventive services with "A" or "B" ratings issued on or after March 23, 2010.
- 5th Circuit stayed enforcement of the order pending appeal.

CONNER WINTERS

Preventive Coverage: Braidwood Management, Inc. v. Becerra

- Ruling did not impact:
  - USPSTF recommended preventive services with "A" or "B" ratings before March 23, 2010.
  - Preventive care mandates for immunizations that have ACIP recommendations.
  - Preventive care and screenings for women and for infants, children and adolescents provided in HRSA guidelines.

CONNER WINTERS

Preventive Coverage: Braidwood Management, Inc. v. Becerra

- The *Braidwood* court also addressed the plaintiff's objection to the required coverage of a HIV prevention medication on the basis that such coverage violated the plaintiff's religious beliefs.
- The court concluded that the mandated coverage violated the Religious Freedom Restoration Act (RFRA) with respect to the plaintiff (a for-profit corporation with a self-funded health plan).

CONNER WINTERS

Preventive Coverage: Agencies' Response to Braidwood

- The DOL, HHS, and IRS jointly issued FAQs related to the *Braidwood* on April 13, 2023.
  - Plans and issuers are not prevented from continuing to provide coverage for preventive items and services recommended with an "A" or "B" USPSTF rating on or after March 23, 2010 and the agencies "strongly encourage" plans to continue such coverage.
  - The decision does not impact USPSTF recommended preventive services with "A" or "B" ratings before March 23, 2010 and the agencies anticipate providing additional guidance regarding what those recommendations were.

CONNER WINTERS

Preventive Coverage: Agencies' Response to Braidwood

- FAQs (continued).
  - To the extent there is overlap with: 1) the USPSTF "A" or "B" ratings on or after March 23, 2010, and 2) the ACIP or HRSC guidelines, plans or issuers must continue to provide preventive coverage without cost sharing for such ACIP overlapping items and services.
  - The *Braidwood* decision does not impact the COVID-19 vaccine requirements. The current COVID-19 vaccine requirements stem from immunization recommendations from the ACIP.

CONNER WINTERS

Preventive Coverage: Agencies' Response to Braidwood

- FAQs (continued).
  - HDHPs/HSAs: Until further guidance is issued, items and services recommended with an "A" or "B" rating by the USPSTF on or after March 23, 2010 will be treated as preventive care for purposes of the HDHP safe harbor under Code section 223(c)(2)(C), regardless of whether the ACA requires such preventive care without cost sharing.
  - The Braidwood decision does not impact the application of applicable state laws.

CONNER WINTERS

Preventive Coverage: Agencies' Response to Braidwood

- FAQs (continued).
  - The agencies remind plans and issuers to consider other applicable federal and state laws when determining whether to make any mid-year plan/policy changes.
    - For example, notice requirements such as the advance SBC notice requirement, applicable state laws, or other contractual obligations including collective bargaining agreements.
    - Plans subject to ERISA would also need to consider a SMM related to any mid-year changes.

CONNER WINTERS

Electronic Filing

- Prior to 2024, certain IRS filings were permitted to be made on paper if the organization filed less than 250 returns.
- Final regulations issued in February 2023 reduce the 250-return to 10, so an organization with 10 or more returns must file those electronically beginning with 2024 filings (which will reflect information for the 2023 tax year).
- This applies to many types of returns, but employers need to be particularly aware of the impact on Forms W-2, 1095-C and 1099.

CONNER WINTERS

Fixed Indemnity Wellness Policies

- IRS Chief Counsel Memorandum 202323006 (6/9/23).
- Employer provides optional fixed-indemnity health insurance (separate from comprehensive coverage).
- Employees pay $1,200 monthly premiums through 125 plan. No employer contribution.
- Plan provides $1,000 payment per month if employee participates in certain health or wellness activities that are already covered under the comprehensive health plan (e.g., preventive care or vaccinations).
- Plan also provides wellness counseling, nutrition counseling, telehealth at no additional cost and per-day hospitalization benefit.

CONNER WINTERS

Fixed Indemnity Wellness Policies

- Memo concludes that $1,000 per month payment is subject to income tax and employment taxes because it is paid without regard to whether the employee has any unreimbursed health expenses.

CONNER WINTERS

Fixed Indemnity Wellness Policies

- In July 2023, IRS proposed regulations clarifying that amounts a plan pays amounts regardless of the amount of medical care expenses actually incurred are not payments for medical care under Code section 105(b) and are included in the employee's gross income under Code section 105(a).
  - This is potentially a significant departure from how the tax treatment of indemnity policies has been viewed by employers and insurers.
- Proposed regulations also address the requirements for fixed indemnity insurance to be an excepted benefit for ACA purposes.

CONNER WINTERS

Telehealth Pre-HDHP Deductible and HSA

- The Consolidated Appropriations Act of 2023, the year-end legislation that included SECURE 2.0, includes a change related to HDHPs.
  - The CAA 2023 temporarily extends the flexibility for HDHPs to cover telehealth and other remote care services prior to a participant's satisfaction of their HDHP.
  - This optional design is allowed without jeopardizing a HDHP participant's eligibility to contribute to an HSA.

CONNER WINTERS

Telehealth Pre-HDHP Deductible and HSA

- This design option was initially first allowed under the CARES Act in 2020 through 12/31/21.
- It was again available from 4/1/22 through 12/31/22. There was a gap during which the option was not available from 1/1/22 through 3/31/22.

CONNER WINTERS

Telehealth Pre-HDHP Deductible and HSA

- Under CAA 2023, the relief is allowed for plan years beginning after 12/31/22 and before 1/1/25.
  - This is optional.
  - For calendar year plans, this would be the 2023 and 2024 plan years.
  - For non-calendar year plans, this option would not apply until the beginning of the first plan year that begins after 12/31/22.

CONNER WINTERS

Telehealth Pre-HDHP Deductible and HSA

- The IRS has not provided any relief for the first gap period (1/1/22 – 3/31/22) or the second gap period (applicable to non-calendar year plans from 1/1/23 until the start of the 2023 plan year).
- Employers that would like to offer pre-deductible telehealth and other remote care services to HDHP participants will need to consider participant communications and whether a plan amendment is needed.
  - Note that a mid-year material modification to the SBC requires a 60-days advance notice. It is not clear if this would be considered a material modification.

CONNER WINTERS

No Surprises Act – IDR Update

- CMS Status Update issued April 27, 2023 (https://www.cms.gov/files/document/federal-idr-processstatus-update-april-2023.pdf)
- Between April 15, 2022 and March 31, 2023:
  - 334,248 disputes initiated; 14x greater than estimated.
  - 39,890 determined to be ineligible for IDR.
  - 42,158 payment determinations.
    - Initiating party prevailed in 71% of disputes.
    - Non-initiating party prevailed in 29% of disputes.

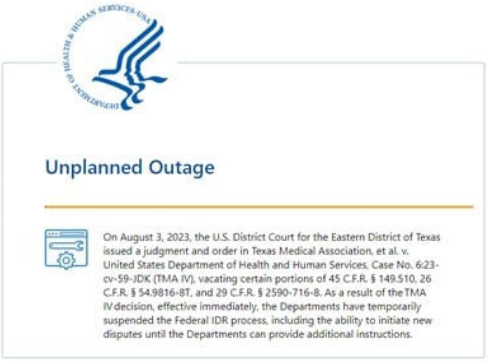
CONNER WINTERS

No Surprises Act – IDR Update

- In December 2022, DHHS/DOL/IRS increased IDR administrative fee from $50 to $350 for 2023 due to large volume and associated costs.
- In Texas Medical Association v. DHHS, Case 6:23-cv-00059-JDK (8/3/23), a provider association challenged the fee increase, along with procedures related to "batching" claims.
- Providers argued that changes were made without notice and comment and were arbitrary and capricious. Court agreed and vacated the administrative fee increase.
- New IDRs now suspended.

CONNER WINTERS

No Surprises Act – IDR Update



As of August 11, 2023, the Departments have directed certified IDR entities to resume processing all single and bundled disputes initiated on or before August 3, 2023. Additionally, on August 8, 2023, certified IDR entities resumed processing batched disputes where the IDR entity determined that the batched dispute was eligible and administrative fees have been paid (or the deadline for collecting fees expired) before August 3, 2023. Processing of other batched disputes and dispute initiation remain temporarily suspended. Disputing parties should continue to engage in open negotiation.

CONNER WINTERS

Contraceptive Coverage Proposed Rules

- Proposed contraceptive coverage rules were issued by the Departments 2/2/23.
- The proposed rules would change the 2018 rule's framework for moral and religious objections.
- The current final rules provide exemptions from the contraceptive coverage requirement for group health plans, institutions of higher education that arrange student health insurance coverage, health insurance issuers, and individuals with sincerely held religious or moral objections.

CONNER WINTERS

Contraceptive Coverage Proposed Rules

- The proposed rules maintain the religious exemption, and they also do not modify the optional accommodation that religious entities may elect to use.
  - The Departments state that they elected to retain the religious exemption due to RFRA and the large number of religious entities with religious objections to contraceptive coverage.
- However, the proposed rules eliminate the moral convictions exemption.
  - The Departments state that few entities used the moral exemption, RFRA does not apply to the moral exemption, and no other law protects the moral exemption.

CONNER WINTERS

Contraceptive Coverage Proposed Rules

- The proposed rules establish a new pathway for individuals to use when contraceptive coverage is not provided for religious reasons (and the optional accommodation is not provided).
- The proposed "individual contraceptive arrangement" pathway would not require any involvement or action (i.e., no communications or forms, etc.) on the part of the entity objecting for religious reasons.

CONNER WINTERS

Contraceptive Coverage Proposed Rules

- Through the new proposed pathway, a "willing provider" is required to furnish contraceptive services (including items and services that are integral to the furnishing of the contraceptives) to the "eligible individual" without imposing a fee or charge of any kind, directly or indirectly, on the individual or any other entity (including the objecting religious entity) for the cost of such items and services.
- Like the current process for TPA adjustments under the optional accommodation, the willing provider would seek reimbursement through an adjustment to its user fees from a participating qualified health plan issuer in the Federally Facilitated Exchange or a State Based Exchange on the Federal platform.

CONNER WINTERS

HSA/HDHP/EBHRA Limits

Revenue Procedure 2023-23

- 2024 limits for HSAs and HDHPs

	Calendar Year 2023		Calendar Year 2024	
	Self-only	Family	Self-only	Family
Annual Contribution Limit	$3,850	$7,750	$4,150	$8,300
HDHP Minimum Deductible	$1,500	$3,000	$1,600	$3,200
HDHP Out-of-Pocket Limit (includes deductibles, co-payments and other amounts but not premiums)	$7,500	$15,000	$8,050	$16,100

- The maximum amount that can be made available to excepted benefit HRAs in 2024 is $2,100 (up from $1,950 in 2023).

CONNER WINTERS

ACA Reminders

- ACA employer mandate (pay or play rules) still apply.
  - 4980H(a) (95% rule): $2,970 per employee for 2024.
  - 4980H)(b): $4,460 per employee for 2024.
- Affordability percentage adjusted to 9.12% for plan years beginning in 2023. (2022 was 9.61%.)
  - Confirm use of safe harbors if applicable.

CONNER WINTERS

ACA Reminders

- 2024 Out-of-pocket limits (note that HDHP limits are lower):
  - Individual: $9,450; Family: $18,900.
  - DOL FAQ 60 confirms that cost-sharing for services furnished by a "nonparticipating" provider for NSA purposes is not subject to the ACA OOP limit, but cautions that a direct or indirect contractual relationship with a provider will cause the provider to be "participating" for NSA and "in-network" for ACA OOP. https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-60
- Confirm newly required preventive services.

CONNER WINTERS

IRS Guidance on FSA/HSA Reimbursable Expenses

- IRS issued FAQs regarding eligibility of certain expenses for health care FSA or HSA reimbursements. (https://www.irs.gov/individuals/frequently-asked-questions-about-medical-expenses-related-to-nutrition-wellness-and-general-health)
- The following are generally reimbursable medical expenses:
  - Physicals, dental and eye exams.
  - Drug/alcohol use disorder treatment programs.
  - Smoking cessation programs.

CONNER WINTERS

IRS GUIDANCE ON FSA/HSA REIMBURSABLE EXPENSES

- Potentially reimbursable :
  - Therapy, if treatment for a disease (such as a diagnosed mental illness).
  - Nutritional counseling / weight loss program, but only if treating a specific disease diagnosed by a physician.
  - Gym membership, but only if purchased for the sole purpose of affecting a structure or function of the body (such as a prescribed plan for physical therapy to treat an injury) or the sole purpose of treating a specific disease diagnosed by a physician (such as obesity, hypertension, or heart disease).

CONNER WINTERS

IRS GUIDANCE ON FSA/HSA REIMBURSABLE EXPENSES

- Potentially reimbursable:
  - Food or beverages purchased for weight loss or other health reasons, but only if: (1) the food or beverage doesn't satisfy normal nutritional needs, (2) the food or beverage alleviates or treats an illness, and (3) the need for the food or beverage is substantiated by a physician.
    - Limited to the amount by which the cost of the food or beverage exceeds the cost of a product that satisfies normal nutritional needs.

CONNER WINTERS

IRS GUIDANCE ON FSA/HSA REIMBURSABLE EXPENSES

- Potentially reimbursable:
  - Nutritional supplements, but only if the supplements are recommended by a medical practitioner as treatment for a specific medical condition diagnosed by a physician.
- Over-the-counter drugs and medicines can be reimbursed by an FSA or HSA.
- Cost of exercise for the improvement of general health, such as swimming or dancing lessons is not a medical expense, even if recommended by a doctor.

CONNER WINTERS

The foregoing presentation is a summary of certain legislation and guidance. As with any summary, some details are omitted.

This summary should not be relied upon for legal or tax advice for particular situations.

CONNER WINTERS