HUNTON
ANDREWS KURTH

Benefit Plan End of Year To-Do List

Presentation for:
Employee Benefits Academy
December 7, 2023

Presentation by:
Michelle Lewis, Counsel, Hunton Andrews Kurth
Tyler Richardson, Associate, Hunton Andrews Kurth

Housekeeping: Questions

HUNTON
ANDREWS KURTH

- Questions during this presentation
  - We encourage questions (even though your audio lines are muted)
  - To submit a question, simply type the question in the blank field on the right-hand side of the menu bar and press return
  - If time permits, your questions will be answered at the end of this presentation. And if there is insufficient time, the speaker will respond to you via e-mail after this presentation

Housekeeping: Recording, CE Credits and Disclaimer

HUNTON ANDREWS KURTH

- Recording
  - This presentation is being recorded for internal purposes only
- Continuing education credits
  - A purpose of the webinar series is to provide FREE CE credits
  - To that end, each presentation is intended to provide 1 credit hour in the following areas:
    - CLE: 1 credit hour (CA, FL, GA, NC, NY, TX and VA)
    - CPE: 1 credit hour (Texas)
    - HRCI: This activity has been approved for 1 (HR (General)) recertification credit hours toward California, GPHR, PHRi, SPHRI, PHR, and SPHR recertification through the HR Certification Institute
    - SHRM: This program is valid for 1 PDC for the SHRM-CPSM or SHRM-SCPSM
  - If you have any questions relating to CE credits, please contact Anna Carpenter at acarpenter2@huntonak.com.
- Disclaimer
  - This presentation is intended for informational and educational purposes only, and cannot be relied upon as legal advice
  - Any assumptions used in this presentation are for illustrative purposes only
  - No attorney-client relationship is created due to your attending this presentation or due to your receipt of program materials

Michelle Lewis

HUNTON
ANDREWS KURTH

Counsel
Email: mlewis@HuntonAK.com
Phone: 202-955-1859

2200 Pennsylvania Avenue NW
Washington, DC 20037

Michelle concentrates her practice in the areas of health and welfare plans, qualified retirement plans, and executive deferred compensation plans.

She delivers insightful and practical advice to clients in addressing a broad spectrum of employee benefit issues, including drafting plan documents, preparing IRS submissions, resolving ERISA and Internal Revenue Code compliance issues, advising on benefit claims and appeals, addressing various litigation issues, and negotiating employee benefit vendor contracts and HIPAA business associate agreements.

Tyler Richardson

HUNTON
ANDREWS KURTH

Associate
Email: trichardson@HuntonAK.com
Phone: 214-468-3307

1445 Ross Avenue, Suite 3700
Dallas, TX 75202

Tyler concentrates his practice in the areas of executive compensation and employee benefit arrangements.

He advises clients on a range of compensation and benefits matters, along with related issues of tax, accounting, securities, and corporate governance.

What We'll Cover

HUNTON ANDREWS KURTH

- Our primary focus will be on the end of year to-do items for both:
  - Health and Welfare Plans
  - Qualified Plans
- We will also discuss upcoming 2024 changes which will affect both health and welfare and qualified plans.

Health and Welfare Plans

HUNTON ANDREWS KURTH

- Gag Clause Prohibition Compliance Attestation
- Mental Health Parity Comparative Analysis
- Expanded Price Comparison Tool
- Prescription Drug and Health Care Cost Reporting
- Covered Service Provider Fee Disclosure
- Updated Notice for No Surprises Act
- COVID-19 Provisions
- Reporting to the IRS and Employees
- Annual Notice/Disclosure Requirements
- Other Year-End Considerations

Gag Clause Attestation

HUNTON ANDREWS KURTH

- The Consolidated Appropriations Act (CAA) prohibits group health plans to enter into an agreement with a TPA, a provider, a network of providers, or an entity offering access to a network of providers that includes a "gag clause."
- A "gag clause" is a contractual term that restricts a health plan from sharing specific information with another party.
- Plans may not enter into agreements that would prevent the disclosure of data or cost, quality of care, or certain other information to participants, beneficiaries, enrollees, plan sponsors, referring providers, or business associates.
- Plans must submit an annual attestation of compliance with this requirement to the Departments of Labor, Health and Human Services, and Treasury by **December 31, 2023**. The attestation is made online at https://hios.cms.gov/HIOS-GCPCA-UI.
- Self-insured plans may enter into an agreement with a service provider to make the submission, but the legal requirement remains with the plan.
- An insurer that provides administrative services to self-insured plans may submit a single attestation covering the insurer, its fully insured plans, and its self-insured plan clients; the agencies recommend coordination to avoid duplication.

Mental Health Parity Comparative Analysis

HUNTON ANDREWS KURTH

- Group health plans offering mental health and substance use disorder benefits that impose NQTLs on such benefits must perform an analysis to ensure that the limitations are not more stringent for mental health and substance use disorder benefits than they are for medical or surgical benefits.
- This includes limitations based on medical necessity, prior authorization, and standards for admission to a provider network.
- Must be provided to the DOL within 10 days of the request.
- The DOL self-compliance tool can be found online.
- This requirement has been in place since February 10, 2021.
- Mental health parity is an area of focus for the DOL.

Expanded Price Comparison Tool

HUNTON ANDREWS KURTH

- CAA requires plans to offer a price comparison tool on their website that allows individuals to compare the amount of cost sharing they would be responsible for paying with respect to a specific item or service by a provider.
- The information was required to be available for plan years beginning on or after January 1, 2023 for 500 items and services identified by the Departments.
- Beginning on January 1, 2024, the public website must include information about **all** items and services, not just the top 500 services.

Rx and Health Cost Reporting

HUNTON ANDREWS KURTH

- CAA requires group health plans and health insurance issuers offering group, individual, and self-funded health insurance coverage to report information about prescription drugs and healthcare spending to the DOL, HHS, and Treasury.
- Reporting is due June 1 of each year. Submitted online on the CMS website.
- Self-funded plans should confirm, in writing, what information its TPA, PBM, and other vendors will submit to CMS and, to the extent necessary, coordinate amongst the third parties to ensure that the plan satisfies its reporting obligations.

Covered Service Provider Fee Disclosure

HUNTON ANDREWS KURTH

- Under the CAA, "covered service providers" to group health plans must disclose to the plan's fiduciary the direct and indirect compensation that the covered service provider expects to receive from providing services to the plan.
- Covered service providers include persons who provide "brokerage services" or "consulting" to ERISA-covered group health plans and reasonably expect to receive $1,000 or more in direct or indirect compensation in connection with providing those services.
- Before entering into, extending, or renewing a service agreement with a covered service provider, plan fiduciaries should ask to see the ERISA section 408(b)(2) disclosure.

Updated Notice for No Surprises Act

HUNTON ANDREWS KURTH

- Group health plans and insurers were required to provide the initial notice regarding patient rights under the No Surprises Act by January 1, 2022.
- The annual notice must be made publicly available, posted on the plan's website, and included in explanations of benefits.
- The government provided a model notice to meet the disclosure requirements that can be used to ensure good-faith compliance with the disclosure requirement.

COVID-19 Considerations

HUNTON ANDREWS KURTH

- The federal public health emergency for COVID-19 ended on May 11, 2023.
- Health plans are no longer required to cover diagnostic tests and related services without cost sharing.
- COVID-19 immunizations remain a recommended preventive service and thus are covered under the ACA, however, out-of-network vaccinations are no longer required to be covered by health plans.
- A high deductible health plan that renews after January 1, 2024, may not waive deductibles for COVID-19 testing and treatment.

Health Care Reporting – ACA and States

HUNTON ANDREWS KURTH

- Forms 1094-C and 1095-C must be reported to the IRS as in prior years
  - Per the IRS, the due date for furnishing Form 1095-C to individuals is January 31, 2024 (but no later than March 1, 2024)
  - Deadline to file with IRS is March 31, 2024 (electronic only)
- Several states have reporting obligations relating to state-level individual mandates:
  - Massachusetts
  - New Jersey
  - Washington, DC
  - California
  - Rhode Island

Welfare Benefits – Annual Notice/Disclosure Requirements

HUNTON ANDREWS KURTH

- Summary of Benefits and Coverage
  - Provide with open enrollment materials
  - Must follow prescribed format
  - Significant potential penalties for failure to provide to participants
  - Notice of modification to SBC content is required 60 days before the effective date of the change
- Summary annual report
  - Must be provided the later of: Nine months after end of plan year or two months after the Form 5500 is due (i.e., if filed for an extension)
- Medicare Part D creditable coverage notice
  - States whether the plan's prescription drug coverage is "creditable" or "non-creditable" for purposes of Medicare Part D
  - Required annually, due October 15th

Welfare Benefits – Annual Notice/Disclosure Requirements (cont'd)

HUNTON ANDREWS KURTH

- CHIP notice
  - Description of possible premium assistance opportunities
  - Must be provided to all employees in relevant states (not just plan participants) annually
- Women's Health and Cancer Rights Act (WHCRA) notice
  - Description of mastectomy-related benefits
  - Required upon enrollment and annually thereafter
- Newborns' and Mothers' Health Protection Act notice
  - Required to be included in SPD
- HIPAA notice of special enrollment rights
  - Description of special enrollment rules
  - Must be provided to all employees eligible to enroll in a group health plan, at or before the time a participant enrolls
  - Often included in annual enrollment materials

Welfare Benefits – Annual Notice/Disclosure Requirements (cont'd)

HUNTON ANDREWS KURTH

- HIPAA Notice of Privacy Practices
  - Describes how protected health information (PHI) may be used and disclosed by a group health plan and individual's rights and plan's duties with respect to PHI
  - Required at time of enrollment, and within 60 days after material revision
  - Must remind participants of the availability of the notice every 3 years
- Notice of Patient Protections
  - Informs participants of plan terms regarding designation of primary care physician
  - Must be provided at same time as SPD; often included in SPD
- Notice of Grandfathered Status
  - If applicable, states that the plan believes it is a grandfathered plan
  - Include in any plan materials describing benefits

Welfare Benefits –Year-End Considerations

HUNTON ANDREWS KURTH

- Were any discretionary changes made that should be documented in any amendment?
- Are SPDs and/or SMMs up to date?
  - Required every 5 years if plan has been amended
- Are COBRA notices up to date and accurate?
  - Most recent DOL model notices issued in May 2020
- Service provider contracts – are any in need of renewal/amendment?
  - Consider whether changes are needed or appropriate in light of No Surprises Act

Qualified Plans- SECURE Act Provisions

HUNTON ANDREWS KURTH

- The Setting Every Community Up for Retirement Enhancement Act of 2019 ("Secure Act") enacted on December 20, 2019 and the Secure 2.0 Act of 2022 ("Secure Act 2.0") enacted certain provisions that are both required to be implemented by qualified retirement plans and other provisions which are optional.
- **<u>Required Operational Changes under the Secure Act</u>**.
  - **Long-Term Part-Time Employees**.
    - Beginning for plan years in 2024 under the SECURE Act, 401(k) plans will now be required to permit part-time employees who perform work for at least 500 hours of service over three consecutive years to contribute to a 401(k) plan. In addition, effective for plan years beginning on January 1, 2025, the consecutive 12-month periods of 500 hours will be reduced from 3 years to 2 years.
      - The IRS made clear in Proposed Regulations issued in November that a Plan may use the same entry dates for long-term, part-time employees as apply to other eligible employees. That is, participation must be no later than the earlier of the first day of the first plan year beginning after the date the employee satisfies the eligibility requirements or the date 6 months after satisfying the eligibility requirements.
      - The Proposed Regulations also made clear that a plan must count all 12-month periods beginning the later of the employee's hire date or January 1, 2021, including periods in which the employee was in an ineligible classification.

Qualified Plans- SECURE Act Provisions

HUNTON ANDREWS KURTH

- Employers will not be required to start counting hours of service. The IRS made clear in the Proposed Regulations that Employers may continue to use the Elapsed Time Method to determine eligibility to participate for Long-Term Part-Time Employees or the Equivalency methods to credit hours of service and determine eligibility.
- Employers will not be required to make employer contributions (i.e. matching or nonelective contributions) for Long-Term Part-Time Employees. Long-Term Part-Time Employees are also not required to be permitted to make catch-up contributions or Roth contributions.
- The Proposed Regulations clarified that for purposes of vesting of employer contributions for long-term part-time employees, each 12-month period of 500 hours of service on or after January 1, 2021 must be counted, whether or not the employee received an employer contribution during that period.
- Employers may elect to exclude Long-Term Part-Time Employees from the following nondiscrimination testing and coverage tests: ***(1)*** nondiscrimination requirements under Code Section 401(a)(4), ***(2)*** ADP test under Code Section 401(k)(3), ***(3)*** the ACP test under Code Section 401(m)(2), ***(4)*** ADP safe harbor provisions under Code Sections 401(k)(12) and (13), ***(5)*** the ACP safe harbor provisions under Code Sections 401(m)(11) and (12), and ***(6)*** the minimum coverage requirements under Code Section 410(b).
- Long-Term Part-Time employees must be included under Code Section 416(g) to determine whether a Plan is top-heavy.

Qualified Plans- SECURE Act Provisions

HUNTON ANDREWS KURTH

- The Proposed Regulations make clear that a long-term, part-time employee becomes a "former long-term, part-time employee" on the first day of the first plan year beginning after the earlier of the year in which the employee (1) completes 1,000 hours of service in a 12-month period or (2) becomes an ineligible employee. At that time, the long-term, part-time employee exclusion from nondiscrimination and coverage testing purposes and employer contribution requirements no longer applies to that employee.
- The Proposed Regulations also make clear that long-term part-time employees are required to be counted for purposes of Form 5500 reporting if they have an account balance as of the first day of the plan year.
- For now, operational compliance is required. Plan amendments are not required until the last day of plan year beginning in 2025.

Qualified Plans- SECURE Act Provisions

HUNTON ANDREWS KURTH

- **Increase to Required Minimum Distribution Age for 2023.**
  - Beginning on January 1, 2023, the required minimum distribution age increased from age 72 to age 73. Note that the beginning date for required distributions is April 1 of the calendar year in which the taxpayer attains the "applicable age."
  - Therefore, those individuals who were born in 1951 and who turn 72 in 2023 are not required to take a Required Minimum Distribution until April 1, 2025 because they do not turn 73 until 2024.
  - A Plan may continue to have any earlier Required Minimum Distributions. However, if the plan just references the applicable age limit under 401(a)(9) then an amendment will be needed if an earlier age is desired.
  - The IRS recently extended the deadline for amendments to December 31, 2025 to implement the new required Minimum Distribution Age requirements.

Qualified Plans- SECURE Act Provisions

HUNTON ANDREWS KURTH

- **Optional Operational Changes under the Secure Act**.
  - **Emergency Savings Accounts**.
    - Beginning in 2024, Plans will have the ability to offer non-highly compensated employees with pension-linked emergency savings accounts.
    - Employees would make contributions to these accounts on a Roth basis (after-tax) up to $2,500 and could make withdrawals as frequently as monthly penalty free.
    - Plan sponsors would have the ability to automatically opt employees into these accounts at a rate of up to 3% of eligible wages.
  - **Hardship Withdrawals**.
    - Effective for Plan Years after December 29, 2022, Plan sponsors may now rely on an employee's written self-certification that their Hardship Distribution meets the requirements of one of the seven safe harbor hardship withdrawal reasons and that the distribution is not in excess of the amounts required to satisfy the financial need.
  - **Student Loan Payments**.
    - Effective for plan years after December 31, 2023, Plan Sponsors can now make matching contributions with respect to an employees' qualified student loan payments as if they were pretax, Roth or after-tax contributions.
    - Employers can offer the match to any employee eligible to participate in the plan, even if the employee isn't contributing to the plan.

Qualified Plans- SECURE Act Provisions

HUNTON ANDREWS KURTH

- **Automatic Cash out Increase**.
  - Plans that provides for a mandatory distribution provision for small vested benefit amounts can now distribute an increased amount without the consent of the participant or the spouse.
  - For distributions made after December 31, 2023, Secure Act 2.0 increases the statutory limit for mandatory cash-outs from $5,000 to $7,000.
- **New Early Withdrawal Options.**
  - Secure Act 2.0 added new exceptions for early withdrawals that would not be subject be penalty under qualified plans. The exceptions include the following:
    - Disaster Relief. Effective for disasters after January 26, 2021, $22,000 for expenses related to a federally declared disaster if the distribution is made within 180 days of the disaster occurring.
    - Terminal Illness. Effective for 2023, distributions relating to a condition that will cause death within seven years as certified by a physician.
    - Emergency Expenses. Beginning in 2024, one distribution allowed per calendar year up to $1,000 for personal or family emergency expenses to meet unforeseeable financial needs.
    - Domestic Abuse. Beginning in 2024, entitled to lesser of $10,000 or 50% of the account value of a holder who certifies they were victim of domestic abuse.

Qualified Plans- Annual Notices

HUNTON ANDREWS KURTH

- There are several annual notices that are required for qualified defined contribution plans and defined benefits plans as described below:
- **<u>Notices for Defined Contribution Plans.</u>**
  - **Discretionary Matching Contribution Annual Notice**.
    - Pre-approved 401(k) plans that provide for discretionary matching contributions must notify participants that are eligible to receive the matching contribution annually.
    - If the employer funds matching contributions annually, then the employer must provide the employee notice within 60 days after the matching contribution has been made to the plan.
    - If the employer funds matching contributions less than annually (such as with every payroll, monthly, or quarterly), then the employer must provide the employee notice within 60 days after the last matching contribution has been deposited for the plan year.
    - The notice requirement does not apply to sponsors of individually designed plans but may be considered a best practice.

Qualified Plans- Annual Notices

HUNTON ANDREWS KURTH

- **Other 401(k) Plan Annual Notices**.
  - The following notices must be issued to participants by December 1, 2023 for a calendar year 401(k) plan.
    - 401(k) Safe Harbor Notices. Plan sponsors that intend to make safe harbor matching contributions for 2024 must provide a safe harbor notice to participants. The SECURE Act eliminated the notice requirement for plans that satisfy the safe harbor by making a nonelective contribution (e.g., a flat 3% of compensation contribution to all eligible plan participants).
    - QACA Notice. A Qualified Automatic Contribution Arrangement (QACA) is an automatic contribution 401(k) plan that is deemed to pass nondiscrimination testing. The QACA safe harbor requires that the annual notice be provided at least 30 days but not more than 90 days before each plan year.
    - EACA Notice. An Eligible Automatic Contribution Arrangement is another automatic enrollment plan that specifically permits a participant to withdraw automatic contributions made within 90 days after the first automatic contribution. The EACA safe harbor requires that the annual notice be provided at least 30 days but not more than 90 days before each plan year.

Qualified Plans- Annual Notices

HUNTON ANDREWS KURTH

- **Notices for Defined Benefit Plans.**
  - **Benefit Statements**.
    - Defined benefit plans are generally required to furnish participants with a pension benefit statement at least once every three years.
    - A permissible alternative notice requires an annual notice notifying the participant of the availability of the pension benefit statement and how to obtain it.
  - **Annual Funding Notice**.
    - Within 120 days after the end of the plan year (April 30 for calendar year plans), defined benefit plans must provide the PBGC, participants, beneficiaries, unions, and contributing employers with detailed information about: (1) the funded status of the plan; (2) the plan's investments; (3) the group covered by the plan; and (4) a description of the rules for terminating the plan.
    - Plans with fewer than 100 participants must provide the notice by the due date for filing the plan's annual return (Form 5500). Additional notice requirements apply if the plan is subject to benefit restrictions for being underfunded.

Looking Ahead to 2024

HUNTON ANDREWS KURTH

- **New Fiduciary Rule.**
  - On October 31, 2023, the Department of Labor unveiled its proposed "Retirement Security Rule" redefining who is an investment advice fiduciary under ERISA.
  - The New Fiduciary Rule, if adopted, would provide for a new definition of an "investment advice fiduciary" designed to better protect today's retirement investors by more strictly regulating financial advisors who give investment advice.
  - Specifically, under the New Fiduciary Rule a financial services provider would be considered an investment advice fiduciary under federal pension law and be subject to the requirement of an ERISA Fiduciary if:
    - the provider provides investment advice or makes an investment recommendation to a retirement investor,
    - he advice or recommendation is provided for a fee or other compensation, and
    - the financial services provider makes the recommendation in the context of a professional relationship in which an investor would reasonably expect to receive sound investment recommendations that are in their best interest
  - The Department of Labor intends for the New Fiduciary Rule to impose ERISA fiduciary duties specifically in cases where "retirement investors could reasonably place their trust and confidence in the advice provider".

Looking Ahead to 2024

HUNTON ANDREWS KURTH

- **More SECURE Act Guidance.**
  - On August 25, 2023, the IRS announced a two-year delay of requiring employees earning over $145,000 to make any retirement plan catch-up contributions as Roth contributions, i.e., after-tax, beginning in 2024 and now will not apply till 2026.
  - Amendments to conform to the Secure Act, Care Act and SECURE 2.0 must be adopted by the last day of the first plan year beginning on or after January 1, 2025, or December 31, 2025**,** for a calendar year plan.

- **HIPAA Regulations.**
  - It is expected that in 2024 that HHS Office of Civil Rights will issue a final rule relating to changes to the HIPAA Privacy Rule.
  - The changes are expected to change the current Privacy Rule standards by prohibiting uses and disclosures of protected health information by health plans, heath care clearinghouses, and most health care providers, as well as their business associates relating to criminal, civil, or administrative investigations into or proceedings against any person in connection with seeking, obtaining, providing, or facilitating reproductive health care, including abortion-related care.

Looking Ahead to 2024

HUNTON ANDREWS KURTH

- **Forfeiture Accounts.**
  - The IRS issued proposed regulations in February to address the timing and use of forfeitures that accumulate in a retirement plan as follows:
    - **Defined Contributions Plans**. Forfeitures may be used to pay plan administrative expenses, reduce employer contributions or increase benefits to other participants' accounts. The regulations generally require that plan administrators use forfeitures no later than 12 months after the close of the plan year in which the forfeitures are incurred. The plan document must provide for the treatment of forfeitures.
    - **Defined Benefit Plans**. Forfeitures cannot be used to increase the benefits of any employees. However, the anticipated amount of forfeitures can be used in determining funding under the defined benefit plan.
    - The proposed regulations will be effective after the IRS issues final regulations but can be relied on now. It is anticipated that final regulations will be effective on or after January 1, 2024. The proposed regulations offer a transition rule so that forfeitures incurred prior to January 1, 2024, are treated as having occurred in the first plan year on or after January 1, 2024.

Upcoming Webinars

HUNTON ANDREWS KURTH

Executive Compensation Academy

- Title: What Happened in 2023: Year-End Review of Executive Compensation Items
- When: December 14, 2023
- Time: 10:00 am – 11:00 am CT
  11:00 am – 12:00 pm ET