Potter Anderson Corroon LLP

YOUR DELAWARE ADVANTAGE

Employee Health & Welfare Benefits
A Practical Guide

October 6, 2017

Presentation to the Delaware SHRM State Conference

Health & Welfare Benefits - What is included?

- Sec. 125 Cafeteria Plans
- Flexible Benefit Plans
- Group benefit plans – insured, self-insured, uninsured
- Miscellaneous Benefits (e.g., Education Assistance, Transit/Parking Plans, Severance Plans)

- **Governing Laws:**
  - Tax Code
  - ERISA
  - Affordable Care Act
  - HIPAA, HITECH, COBRA
  - USERRA, FMLA, GINA, etc.

Section 125 Cafeteria Plans

Tax Code governs (pre-tax income), but not ERISA

- All participants are employees
- Employees choose between 2 or more benefits, including taxable (e.g., cash) and non-taxable, “qualified” benefits
- Plan must be in writing
- **Beware**: cash in lieu of benefits must be offered through a Cafeteria Plan

Cafeteria Plan Qualified Benefits

- Cash or taxable benefit
- Major medical (insured and self-funded), dental, vision, drug
- Certain health reimbursement arrangements (if HIPAA excepted, subject to strict rules)
- Flexible spending – healthcare, dependent care,
- Adoption FSA; employer adoption assistance
- Health Savings Accounts
- Employee Assistance Plans (if HIPAA excepted)
- Group term life insurance, AD&D insurance
- Short-term and long-term disability insurance
- Elective vacation days, prepaid legal services (private employers only)

Cafeteria Plans: Non-Qualified Benefits

- Deferred compensation
- Long-term care insurance
- Individual medical insurance
- Health reimbursement arrangements; Archer Medical Savings Accounts
- Life insurance other than group term for the employee only
- Transportation assistance
- Group legal, auto, and homeowners
- Education assistance/tuition assistance plans; scholarships

Cafeteria Plans - Examples

- **Opt-out Bonus**
  - Employee has choice of Medical coverage or taxable cash bonus
  - Amount of bonus considered a cost of insurance (ACA affordability)

- **Premium-Only/Salary Reduction Plans**
  - Limited to health and disability benefits
  - Need only pass “eligibility” test for nondiscrimination

- **Core Benefits with Buy-Up**

- **Choice with Net Pricing**

- **Flex Credit Plans**
  - **Issue: how to establish pricing?**

Cafeteria Plans - Examples

- **Simple Cafeteria Plans (ACA): Employers with an average of 100 or fewer employees during the preceding 2 years**
  - All employees with 1,000 hours of service must be eligible
  - All eligible employees must be allowed to select any available benefit option
  - Same terms and conditions must apply to all participants
  - Eligible employees who are not key or highly compensated employees must receive employer contributions that are a uniform percentage and are at least (a) 2% of the employee's compensation for the plan year, or (b) the lesser of 6% of the employee's compensation for the plan year or twice the employee's salary reduction(s).
- If the foregoing are satisfied, the plan is nondiscriminatory.

Benefit Plans Subject to ERISA

- Most Cafeteria Plan components (group medical, life, disability, flexible spending accounts, etc.)
- **But not** the following employer-sponsored group benefits:
  - Payroll practices (e.g., self-funded short-term disability) for current employees
  - Simple severance in exchange for a release (409A may apply)
  - Workers' compensation benefits
  - Qualified transportation assistance
  - Educational assistance plans (nondiscrimination applies)
  - Bereavement pay, holiday pay, sick pay and vacation pay plans
  - Most equity compensation plans (stock grants, options, and restricted stock)
  - Most Health Savings Accounts (limited employer involvement)
  - **Cafeteria Plans** (subject to IRS documentation requirements)

ERISA-Covered Plans Outside Cafeteria Plans

- Severance benefits requiring an "administrative scheme"
- Qualified transportation plans (parking, transit) [pre-tax] ($255/month, employee + employer)
- Medical savings and reimbursement accounts [deductible/pre-tax]
- "Voluntary," individual plans? It depends.
  - Offered by an insurer/administrator as an add-on (e.g., individual policies or accounts - e.g., supplemental STD, LTD; long-term care, Aflac)
  - Employer may:
    - Permit the insurer to publicize the plan
    - Collect premiums through payroll deductions
    - Remit premiums to the insurer (**but not pre-tax**)
  - Employer may not:
    - Assist employees in filing claims or with disputes
    - List the plan in materials along with employer-sponsored ERISA benefits
    - Take credit for arranging the plan or promote the plan

Welfare Benefit Plans – Special Rules

- Healthcare: Plan Year commitments, subject to:
  - "Special enrollment"
  - "Change of status" [subject to plan sponsor discretion]
  - Rules for re-hired employees
- Major medical: ACA requirements (50 or more FTEs)
  - Large Employers: Offers of coverage to 95% of FT employees
  - Large Employers: Affordability
  - Minimum essential coverage
  - Nondiscrimination
    - Self-insured plans
    - Fully-insured enforcement on "hold"
- Limited "excepted" benefits

Welfare Benefit Plans – Special Rules

- Healthcare FSAs:
  - $2600 employee contribution limit (2017)
    - 2-1/2 month grace period permissible for additional qualified expenses. Grace period must be included in the employer's cafeteria plan document or it does not apply; OR
    - $500 carryover for any given year
  - Total benefit (i.e., including employer contribution) may not exceed the greater of 2 x employee's salary reduction OR the reduction plus $500
  - First day availability
  - Dependent child through age 26
  - Special COBRA rules
  - Special FMLA rules
  - Must qualify as HIPAA excepted – i.e., linked to ACA-compliant major medical plan

Welfare Benefit Plans – Special Rules

- Dependent Care FSAs
  - Contribution limit = smaller of:
    - $5000 if married & filing joint tax return
    - $2500 f married & filing separate tax return
    - The employee's earned income
    - The spouse's earned income
  - $$ limits apply to combined employer + employee contributions
  - No first day availability
  - 2-1/2 month grace period permitted [but no carry-over]
  - Eligibility rules for dependents
    - Child under 13 or disabled
    - Generally, no coverage for children of domestic partners
  - Substantiation requirements

Welfare Benefit Plans – Special Rules

- Health Savings Accounts: NOT subject to irrevocability
  - HSA change in elections must be permitted at least monthly, on a prospective basis, for any reason
  - Dependent child must be "qualifying child" or a "qualifying relative" under Tax Code
  - Employee enrolled in HSA may only participate in a "limited purpose" healthcare FSA (e.g., dental, vision, expenses above the statutory deductible for a qualified HDHP)
    - Healthcare FSA grace period or carry-over may rule out HSA participation
    - Participant may decline grace period or carry-over prior to next plan year
- Vacation Buy-Sell Plans
  - Elective days must be used last
  - Only future, unearned days may be bought or sold

Welfare Benefit Plans - Special Rules

- Disability Insurance: pre-tax treatment will make benefits taxable
- Life Insurance: pre-tax treatment will create imputed income on amounts over $50,000
- Healthcare FSAs: qualified medical expenses & substantiation

Welfare Benefit Plans – who is responsible?

- Responsible for what?
  - Documentation [Plan Sponsor/Employer]
  - Disclosures [Plan Sponsor/Employer; Insurer or TPA]
  - Fiduciary duties [Plan Sponsor/Employer]
  - Claims procedures [Insurer; Plan Sponsor/Employer/TPA]
  - Form 5500 filings [Plan Sponsor/Employer]
  - Discrimination testing [Plan Sponsor/Employer]
  - Liability for legal violations [Plan Sponsor/Employer]

“Plan Document” Requirements

Important Note: An insurance company's Master Contract, Certificate of Coverage, or Summary of Benefits is not a Plan Document or SPD.

- **Corporate Resolutions** – a written document describing action taken by board of directors or authorized agent.
  - Initial resolution must authorize an individual(s) to act on behalf of the corporation.
  - File with Plan Document(s)

Cafeteria Plan Documents

- **Plan Document**
  - Contains the legal requirements and controlling provisions of the Plan, including all SPD elements
  - Provide to participants & beneficiaries upon request only
  - Required elements defined in relation to SPD
- Additional, recommended elements:
  - Claim procedures – the Plan vs. the benefits
  - Administrator's authority - discretionary
  - Conflict resolution
  - Contributions during leave
  - Repayment; subrogation
  - Irrevocability and "Change in Status"
  - Plan amendment & termination – rights & authority

Cafeteria Plan Documents

- **Summary Plan Description** (SPD)
  - "Condensed" from the plan document; provides details for participation in the plan
  - Detailed regulatory requirements; see https://www.law.cornell.edu/cfr/text/29/2520.102-3
  - Incorporation by reference & identification of vendors
  - Conflict resolution
  - Clear identification of non-Plan benefits
  - Provide to participants & beneficiaries
    - Participants: within 90 days after being covered
    - Beneficiaries: within 90 days after receiving benefits [but see "Plan Document"]
    - Updated & redistributed at least every 5 years (10 years if no changes)
    - But: Notice of any change in health care benefits at least 60 days **before** implementation, unless related to an annual enrollment period

Cafeteria Plan Documents

- **Related documents**
  - Enrollment and election forms
  - Insurance policies
  - Insurance company written materials
  - HIPAA business associate agreements
  - Mandatory disclosures

Plan Documents – Penalties & Risks

- Failure to provide ERISA/Cafeteria Plan documents upon request from participants or inspector
  - 30 days to provide
  - Penalty: up to **$110/day/individual + costs, interest, attorneys' fees** – determined based on:
    - Harm
    - Willfulness
    - Failure to produce significant document(s)
    - Unreasonable delay
    - Multiple requests
- Inadvertent creation of obligations
- Invalidation of Plan

ERISA Disclosure Requirements

- Comprehensive plan information
  - Plan Document
  - Summary Plan Description (SPD)
- Event-based information
  - Notices of benefit determinations
  - Notices of material modifications
  - Notices of material reductions of benefits
  - Inability to fund plans and/or other curtailments or terminations of plan benefits.
- Plan financial information
  - Form 5500 (100 participants or more) [upon request]
  - Summary Annual Report

ERISA Disclosure Requirements

- **Summary of Material Modification** (SMM) (or updated SPD)
  - Participants (& retirement plan beneficiaries) receiving benefits
  - Within 210 days of end of Plan Year
- **Summary Annual Report** (SAR)
  - Participants (& retirement plan beneficiaries) receiving benefits
    - Within due 9 months end of the Plan Year, or
    - If exempt from Form 5500 filing, within 9 months of close of the fiscal year of the party otherwise responsible for Form 5500

Health Care Plan Disclosure Requirements

- Summary of Benefits & Coverage (SBC) and Uniform Glossary
- SBC: Notice of Modification
- Grandfathered plan disclosure
- HIPAA
- COBRA (initial, election, unavailability, early termination)
- Creditable coverage
- Special enrollment rights
- Medical child support court order
- Employer CHIPRA notice (model available)
- Newborns' Act rights
- Women's Health and Cancer Rights Act

Health Care Plan Disclosure Requirements (cont.)

- Michelle's Law
- Mental Health Parity and Addiction Equity Act
  - MHPA notice of denial
- Wellness program disclosure
- Notice regarding designation of Primary Care Provider
- External Review Process Disclosure
- Internal claims and appeals and external review notices
- Employer Notice to Employees of Marketplace Coverage Options

- **Disclosure guide:** https://www.shrm.org/ResourcesAndTools/tools-and-samples/hr-qa/Documents/rdguide.pdf

Welfare Plans — Disclosure Methods

- **Delivery methods:**
  - Hand-delivered to employees at their worksite (merely posting material is not acceptable)
  - U.S. mail via first, second or third class only if return and forwarding postage is guaranteed and address correction is requested
  - Electronic media (in accordance with electronic distribution guidelines)

Welfare Plans — Disclosure Methods

- **Electronic distribution or hard copy?**
  - Regular work access to a computer?
  - Authorization, electronic address provided, and notice of rights provided?
    - SBC: enrolled on-line or made a request on-line?
  - Actual receipt likely?
  - Request for electronic delivery made?
  - Examples:
    - Email or attachment to email
    - Flash drive, CD-ROM, DVD or disk
    - posting on the plan sponsor's website or Intranet

Plan Documents - Risks

- Fines; participant penalties; Plan invalidation
  - Failure to have legally compliant plan documents
  - Failure to provide plan documents on request or as required by law
  - Failure to follow the Plan Document
  - Inconsistent communications and/or plan documents; lack of resolution procedure
  - Failure to provide or follow procedures in the Plan Document for amendment or termination
  - Failure to include language in Plan Document that permits adjustments to avoid discrimination
  - Failure to allocate risk with vendors
  - Failure to have a default election

Nondiscrimination Testing of Welfare Plans

- **Collectively bargained plans are non-discriminatory**
- **Cafeteria plans & component benefits – IRC Sec. 125**
  - Cannot favor "highly compensated employees"
    - An officer of the employer, or
    - A five percent shareholder of the employer, or
    - An individual who for the preceding Plan Year had compensation from the employer in excess of $120,000 (2017).
    - Additionally, a spouse or dependent of an individual described in one (or more) of the three categories above.
  - Aggregated testing

Nondiscrimination Testing — Cafeteria Plans

- **HCI eligibility test**: safe harbor, or unsafe harbor + reasonable classification
    - Note: include all employees, including part-time and leased employees, related companies, employed on any day of the Plan Year; exclude collectively bargained plans
- **HCI contributions & benefits test**: availability of benefits and actual utilization
    - Note: include employees actually eligible to participate; exclude collectively bargained plans
- **Key employee concentration test**: Keys receive no more than 25% of the aggregate of benefits provided to all employees
    - 5% (or greater) owner; 1% (or greater) owner of the employer with annual compensation of $150,000 (2017/2018)
    - Officer with annual compensation over $170,000/175,000 (2017/2018)
- **Nondiscrimination in operation**

Cafeteria Plans – Limited Nondiscrimination Testing

- **Premium Only Plans** (POP) safe harbor
  - Sole benefit: election between cash and premium payment
  - Eligibility test only
- **Cafeteria Plan offering only health and disability benefits:**
  - Eligibility and Benefits/Contributions tests only
- **Simple Cafeteria Plans** for small employers
  - Average 100 or fewer employees in the year (even if you grow to 200)
  - Eligibility: all employees with at least 1,000 hours of service for the preceding Plan Year are eligible to participate; and
  - Benefits: each employee eligible to participate may elect any benefit available under the plan (subject to terms and conditions that apply to all participants).
  - No additional discrimination testing

Nondiscrimination Testing – Cafeteria Plans

- **Health Flexible Spending Accounts (HCFSAs)**
  - Additional Eligibility test; varied definition of highly compensated
  - Additional Benefits test: the same benefits must be available to all
- **Dependent Care Flexible Spending Accounts (DCFSAs)**
  - Eligibility test w/ varied definition of highly compensated
  - Benefits availability test
  - 5% owner (and their spouses & dependents) concentration test
    - Owners receive no more than 25% of benefits
  - 55% average benefits test (utilization)
    - Average benefit provided to non-HCEs must be at least 55% of average benefit provided to HCEs

Nondiscrimination Testing

- **Group Term Life Insurance**
  - If Cafeteria Plan is determined to be nondiscriminatory, GTL is deemed nondiscriminatory
  - GTL offered outside a Cafeteria Plan
    - Eligibility test
    - Benefits availability: Keys vs. non-Keys: flat dollar amount, % of compensation, or classes of benefits (limited to no more than 15% key employees)

Updates: Healthcare

- **HR 1628: "American Healthcare Act of 2017"**
  - Eliminate individual and employer mandates, reduce the amount of federal funding for coverage over the next decade
  - Starting in 2020, reallocate ACA funding to state governments as block grants; Medicaid expansion or individuals enrolled irrelevant
  - Wide leeway to states to determine whom to cover and how. At risk:
    - Pre-existing conditions
    - Annual and Life-time maximums
    - Minimum essential coverage
  - Coverage for children through age 26
  - Future funding to grow at a set rate, not based on the number of people nationwide who sign up for coverage.
  - Funding expires after 2026

Updates: Wellness Programs

- **EEOC rules invalidated by D.C. District Court, Aug. 2017**
  - Primary issue: employee privacy (ADA, GINA)
  - 30% incentive threshold for "voluntary" plans held to be arbitrary
  - EEOC directed to reconsider
  - Rule not vacated – maintain the status quo
    - Employee health information shared cannot be made confidential
    - Payments/incentives granted need not be repaid

Contact:

Wendy K. Voss
Direct dial: (302) 984-6076
wvoss@potteranderson.com

Potter Anderson & Corroon LLP
1313 North Market Street
P.O. Box 951
Wilmington, DE 19899-0951

www.potteranderson.com