Brown & Brown

EMPLOYEE BENEFITS

Health Plan Transparency Compliance:

Written Agreements with Insurance Carriers, Third-Party Administrators or Pharmacy Benefit Managers

Federal law (in particular the Affordable Care Act (ACA) and the No Surprises Act (NSA)) includes a variety of health plan transparency requirements applicable to group health plans and health insurance issuers. Some of these requirements are already in effect, and others have yet to take effect.[1]

While a group health plan's insurance carrier or third-party administrator will, in many cases, do most of the heavy lifting to comply with these requirements, plan sponsors should still be proactive to help ensure they are compliant. The requirements apply directly to an employer's group health plan. Under federal law, the group health plan is distinct from the insurance carrier issuing an insurance policy providing benefits under the group health plan or from any third party that provides claims administration services to the plan. As a result, plan sponsors may be subject to penalties or enforcement action if their group health plans do not independently comply with these transparency requirements.

That being said, the regulations implementing the transparency requirements that have been issued to date have generally allowed group health plans (and their sponsors) to rely on third parties (e.g., insurance carriers, TPAs, PBMs, etc.) to assist them in complying, so long as certain conditions are satisfied. These regulations include:

(1) The ACA transparency regulations, which require group health plans (i) to make available, on a public website, certain machine-readable files (MRFs) containing health plan data by the later of July 1, 2022, or the first day of the plan year beginning in 2022 and (ii) to make available to participants, on an internet website, a self-service tool that may be used to obtain cost-sharing and pricing information by the first day of the plan year beginning in 2023; and

(2) The regulations issued under the prescription drug reporting requirements of the NSA (under which the initial reporting is due December 27, 2022).

These regulatory provisions, which differ depending on whether the plan is fully insured or self-insured, are discussed below.[2]

[1] *Information regarding the various effective dates is available in this article.*

[2] *Regulations have not yet been issued for other transparency rules that require similar disclosures or reporting. For instance, no regulations have been issued under the NSA provisions requiring group health plans to issue advance EOBs, to make available to participants a price comparison tool and to maintain up-to-date network directories. Similarly, the regulations issued implementing the surprise medical bill rules of the NSA did not address the requirement that group health plans and health insurance issuers publish, on a public website, a notice describing the NSA's surprise medical bill protections. While it remains to be seen, the agencies may take a similar approach to unnecessary duplication with respect to those other transparency obligations.*

Fully Insured Plans

Although the transparency requirements for fully insured plans apply to **both** the employer's group health plan ***and*** the insurance carrier issuing the group insurance policy, the regulatory agencies generally do not expect the group health plan and insurance carrier to comply separately with the requirements. The regulations issued so far have included an "unnecessary duplication" provision, such as the following provision that was included in the final ACA transparency regulations:

> *Special rule for insured group health plans.* To the extent coverage under a group health plan consists of group health insurance coverage, the plan satisfies the requirements of this paragraph (b) if the plan requires the health insurance issuer offering the coverage to provide the information required by this paragraph (b) in compliance with this section pursuant to a written agreement. Accordingly, if a health insurance issuer and a plan sponsor enter into a written agreement under which the issuer agrees to provide the information required under this paragraph (b) in compliance with this section, and the issuer fails to do so, then the issuer, but not the plan, violates the transparency disclosure requirements of this paragraph (b).[3]

Self-Insured Plans

The regulatory agencies have taken a slightly different approach with self-insured group health plans. While such plans can comply with the various requirements to make information available to the public or participants by contracting with a third party to perform those tasks on the plan's behalf, the ultimate responsibility remains with the group health plan. For example, the relevant provision in the final transparency regulations issued under the ACA provides:

> (ii) Other contractual arrangements. A group health plan . . . may satisfy the requirements under this paragraph (b) by entering into a written agreement under which another party (such as a third-party administrator or health care claims clearinghouse) will provide the information required by this paragraph (b) in compliance with this section. Notwithstanding the preceding sentence, if a group health plan . . . chooses to enter into such an agreement and the party with which it contracts fails to provide the information in compliance with this paragraph (b), the plan . . . violates the transparency disclosure requirements of this paragraph (b).[4]

[3] *DOL Reg. §§ 2590.715–2715A2(b)(3)(i) and 2590.715–2715A3(b)(4)(i). The similar provision contained in the NSA regulation governing the reporting of certain prescription drug cost information is found in DOL Reg. § 2590.725-2.*

[4] *DOL Reg. §§ 2590.715–2715A2(b)(3)(ii) and 2590.715–2715A3(b)(4)(ii).unnecessary duplication with respect to those other transparency obligations.*

Plan Sponsor Action

In light of the regulatory provisions discussed above, sponsors of group health plans subject to these transparency requirements should consider taking action to protect themselves against potential liability.

Action Item for Sponsors of Fully Insured Plans

The regulatory provisions indicate that liability for failing to comply with these requirements will be shifted solely to the insurance carrier only if the "health insurance issuer and a plan sponsor enter into a written agreement under which the issuer agrees" to perform the action required by the law. Accordingly, to help protect themselves, sponsors of fully insured plans should consider entering into a written agreement with the insurance carrier indicating the carrier agrees to comply with the transparency requirement on behalf of the group health plan.

The regulations do not indicate what constitutes a written agreement for this purpose. The safest approach might be to use a written document signed by both parties, describing the carrier's agreement to comply with the requirement on behalf of the employer's group health plan (identified by name).

It is possible some other writing might satisfy the written agreement requirement. For instance, an email or other written communication from the insurance carrier to the plan sponsor reflecting the carrier's agreement to comply with the transparency requirement on behalf of the sponsor's group health plan may suffice, but that is unclear. Sponsors of fully insured plans that have questions about whether they have an adequate written agreement with their insurance carrier should seek the advice of legal counsel.

Action Item for Sponsors of Self-Insured Plans

The regulatory provisions indicate that, even if a third party agrees (in writing) to comply with the transparency requirement on its behalf, the liability for failing to comply remains with the self-insured group health plan. As a result, the significance of the "written agreement" between the plan sponsor and the third party handling the transparency action on behalf of the group health plan takes on additional significance in the self-insured plan context. Not only is the written agreement necessary for the group health plan to be able to take credit for the third party's actions, but the written agreement should also address other issues, given that the group health plan remains responsible for the consequence of noncompliance.

In the self-insured context, a written document signed by both parties will likely be necessary. That document could take the form of a stand-alone amendment to the existing contract between the parties or re-working the current contract whereby additional provisions are added to that contract and it is re-executed by the parties. Some issues that should be considered in the written agreement include:

- Specific agreement by the third party to take the required actions (e.g., make available the required MRFs on a public website, report the prescription drug pricing information to the DOL, etc.) in accordance with all applicable guidance regarding the requirement.
- In situations where the third party is hosting the MRFs, whether the third party will maintain copies of the MRFs and, if so, for how long.
- The third party's agreement to make information/data available to the plan sponsor at any time in the event the plan sponsor must take action itself to comply with the transparency requirements.
- Any applicable fees.
- Indemnification.

Contractual issues can be complex. As a result, sponsors of self-insured plans should work with legal counsel to draft the agreement.

How Brown & Brown Can Help

Connect with your Brown & Brown service team to learn more about how we can help find solutions to fit your unique needs.

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