2023 Compliance Challenges: What employer plans sponsors need to be thinking about

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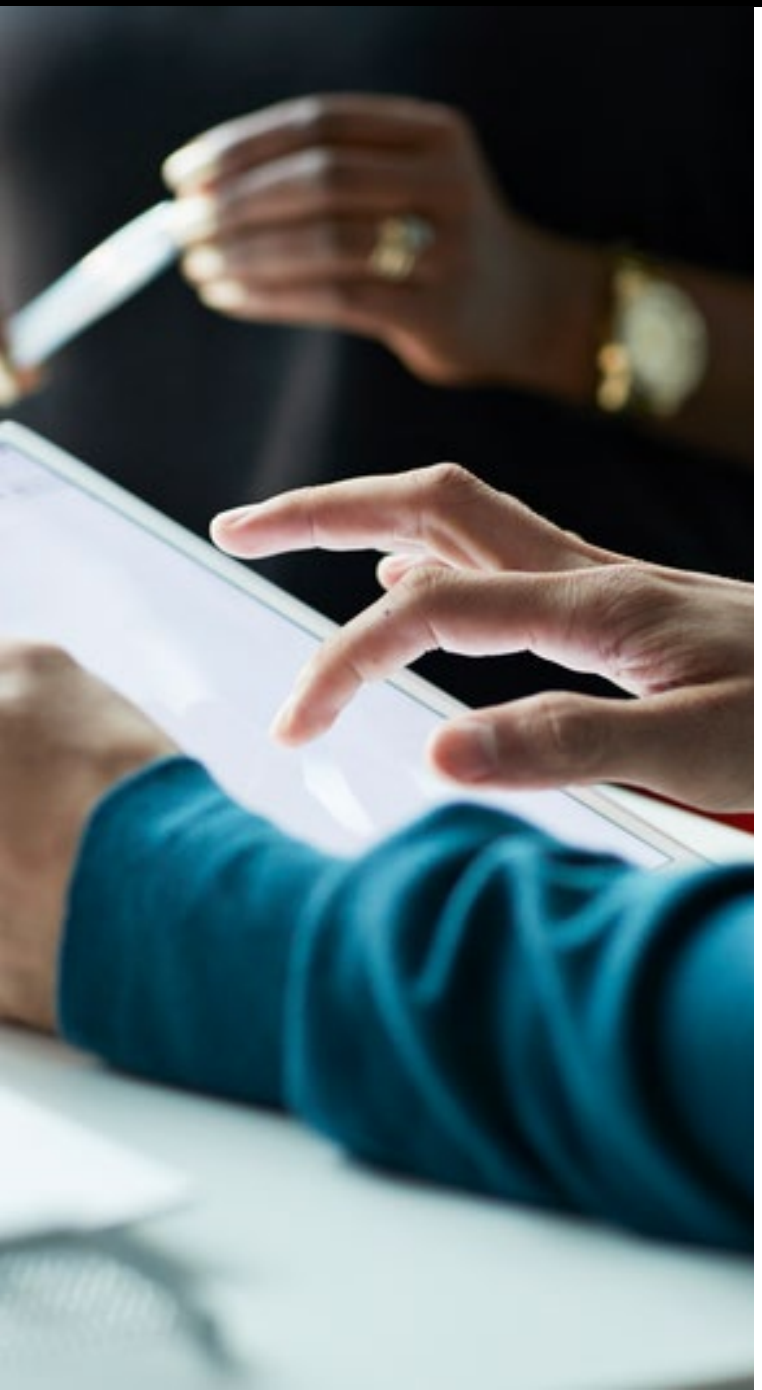
Agenda

- COVID-19
- Price transparency
- Mental health parity
- The ACA
- Notable court cases

COVID-19: The end is practically here!

Back to "normal"



This is where we leave you?

The Presidential National Emergency (NE) ended April 10, 2023 (not May 11, 2023).

NE- Presidentially-declared national emergency began in March 2020 and marked the start of the COVID-19 pandemic. Then, everything changed including employee benefits

- Plan impact: "Outbreak Period" guidance issued by the Tri-agencies required plans to suspend certain deadlines for COBRA, certain life events, and ERISA claims

- **HHS Public Health Emergency (PHE) ended May 11, 2023.**

PHE– Department of Health and Human Services declared public health emergency that has been renewed in 90-day increments since 2020

- Plan impact: Benefit mandates, including COVID-19 testing coverage by plan at 100%
  - Plans can choose to continue to cover testing at 100%, and, if HDHP plan, will not impact HSA eligibility

DOL Outbreak Guidance

- The NE requires certain benefit related deadlines during the "outbreak period" until the July 10, 2023.
  - DOL FAQ guidance
- Employer plan sponsors need to be ready to revert to "normal deadlines"
  - Plan amendments, communication?
  - Educate employees and work with partners to ensure you are ready!

Which deadlines are suspended?

- HIPAA special enrollment requests
- Certain COBRA deadlines
- Claims submissions, claims appeals and requests for external review

End of PHE: COVID-19 Vaccination Programs

COVID PHE Mandate:

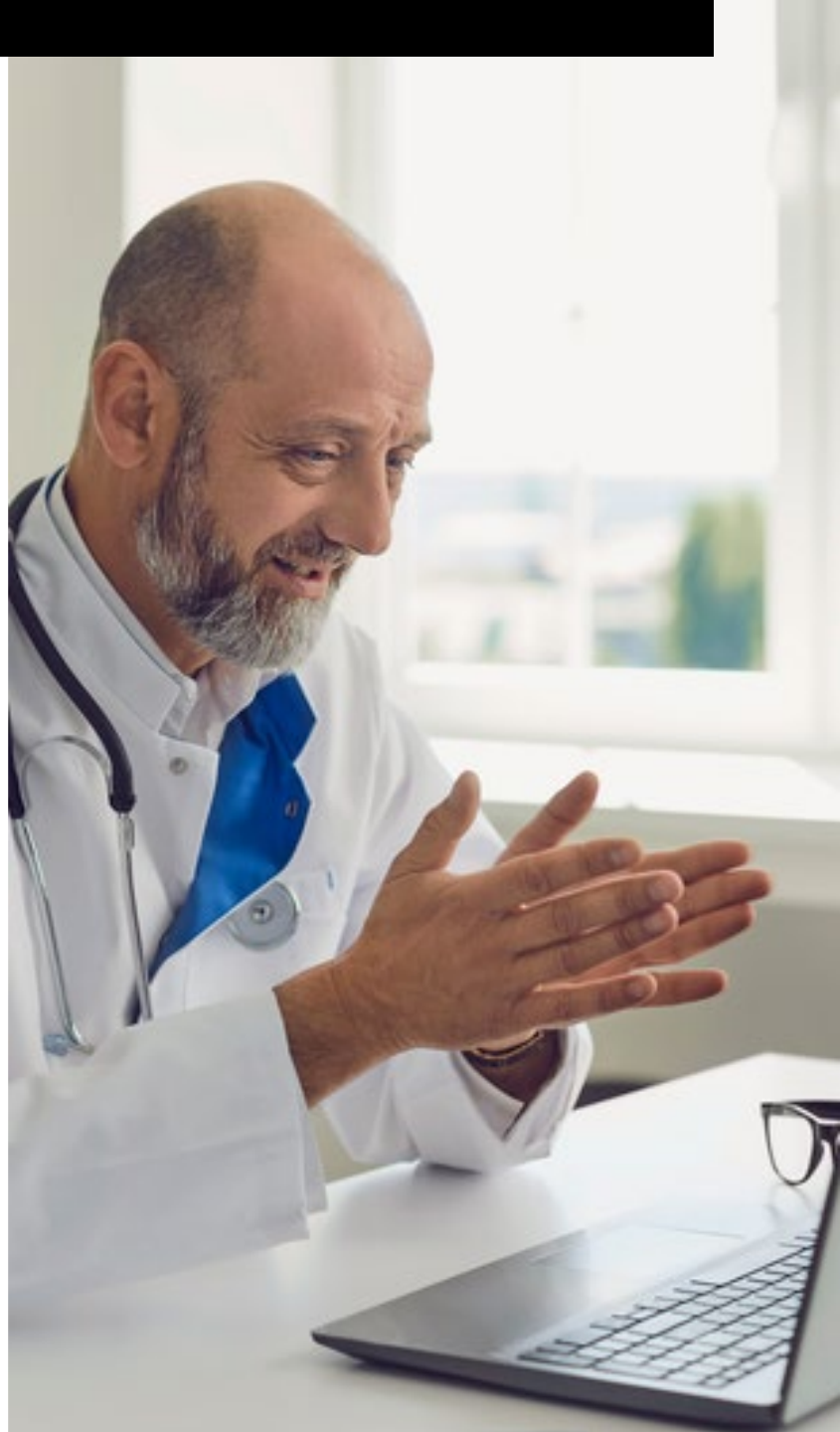
Non-grandfathered plans must cover, without cost sharing, coronavirus-related preventive care (e.g., a vaccine) designated as such by the U.S. Preventive Services Task Force or upon approval by the Centers for Disease Control (CDC).

Post-COVID Mandate:

- Non-grandfathered plans must **continue** to cover, without cost sharing, coronavirus-related preventive care (e.g., a vaccine) designated as such by the U.S. Preventive Services Task Force or CDC. Specifically:
  - In-network COVID-19 vaccines still required
  - Out-of-network provider COVID-19 vaccine requirement lapses (unless there's no in-network provider, in which OON vaccine must be provided without cost sharing)
    - No OON vaccine need be offered
    - If offered, can impose cost-sharing
- Lockton's actuaries estimate the increased cost of vaccine and booster shots to cost plans between **0.5% and 0.75%** of current healthcare costs.

Telehealth benefits and HSA

- Telehealth treatment can be provided at no cost, or low cost, below the HDHP deductible without impacting a participant's HSA eligibility through the end of 2024
  - Note: The allowance was effective April 1-Dec. 31
- Will it be extended?
  - Not entirely clear, but odds are good
  - Legislative action needed



Gag clause prohibition & Attestation

The new transparency frontier

Prohibition on Gag Clause – Overview

- The CAA prohibits plans and issuers from entering into contracts and/or agreements that
  - restrict access to certain information related to plan benefit costs, quality of care, or certain claims information
  - prohibit sharing that type of information with business associates
- Group health plans and issuers must attest they comply each year
  - Through a CMS portal
  - By Dec. 31 of the applicable year
- The first attestation *due Dec. 31, 2023*
  - For plan years beginning on or after Dec. 27, 2020 (and through Dec. 31, 2023)
- Third party may submit on behalf of group health plan; but written agreement needed for self-insured group health plans

- Applicable to:
  - Fully insured and self-funded group health plans, including grandfathered and non-grandfathered plans, state and local government plans, and church plans
  - Health insurance carriers offering group or individual health coverage, including student health insurance coverage and individual health insurance coverage through an association
- Not applicable to:
  - Account based plans & excepted benefits

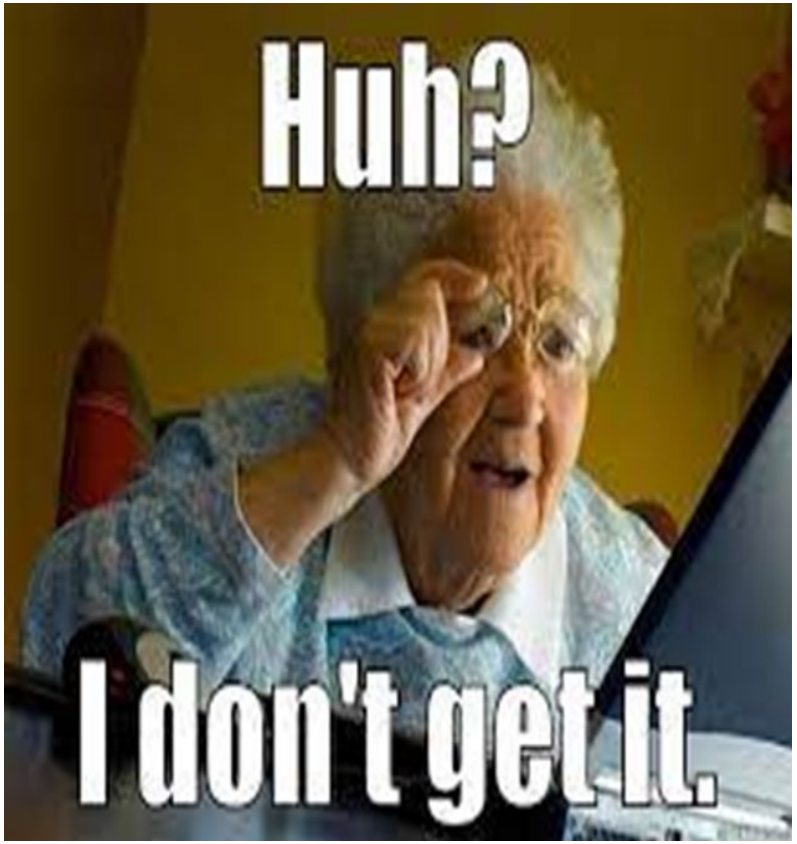
Examples of impermissible gag clauses

- A contract between a group health plan and a TPA that outlines payment to network providers at a certain rate and then
  - prohibits the plan from providing details about said contracted network rates to plan participants and beneficiaries claiming those *network rates are proprietary*
- A contract between a TPA and a group health plan that
  - only allows the plan access to information related to network provider rates and/or details related to the provider's quality of care at the discretion of the TPA
- Any provision that indirectly restricts access to benefit costs, quality of care, or certain claims information (i.e., a provision that operates in a manner that does in fact restrict access to the information or the ability to disclose information)

Mental health parity

Continues to be a focus

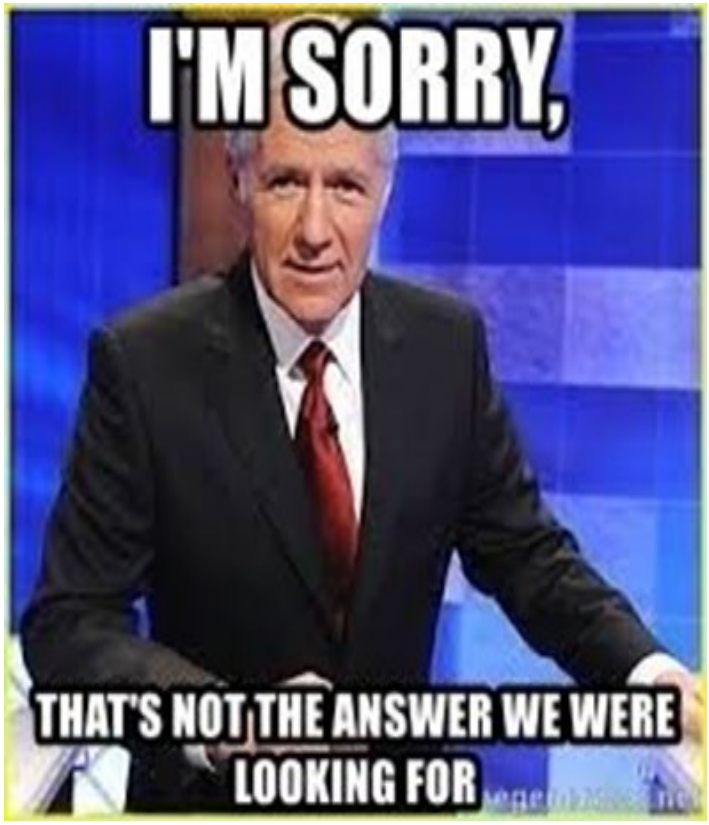
Mental health continues to be a focus



- The Mental Health Parity and Addiction Equity (MHPAEA) has been around for awhile, requiring plans that offer medical/surgical and mental health/substance use disorder benefits to ensure the benefits are treated relatively the same
- CAA mandates that plans proactively *conduct a comparative analysis of the NQTLs* to demonstrate parity in written provisions and operations
- The problem with the NQTL analysis:
  - The analysis is relatively subjective
  - Most plan sponsors adopt the carrier or TPA's policies, standards and procedures when is comes to plan administration, and don't have extensive (or any) knowledge of how the carrier is doing things

Complying with mental health parity laws

- What the DOL is wanting to see in this analysis is still not entirely clear.
  - 2022 DOL report to Congress showed *ZERO* of the 156 comparative analysis reviewed were sufficient.
  - Suspect the next DOL report to Congress will show similar findings but have not released yet.
- We suspect we will get more clarity as the DOL gets more clarity through the investigative process- because they promised they would.
- Until then- prudence not perfection



Be prepared, Do your best

- Plan sponsors must have a NQTL analysis on plan and provide to the DOL upon request
  - Practical reality, for most plans, this stuff is being handled at the carrier and TPA level, so the carrier and/or TPA will need to help . . . a lot!
- Plan sponsor will still want to review the information provided and ask questions about analysis
  - Fiduciary obligations
- Review claims data to identify potential operational red flags

ACA issues

New twists and turns

More ACA litigation

- *Braidwood Management v. Becerra* - United States District Court of the Northern District of Texas ruled certain aspects of the ACA preventive care mandate violate the Constitution and religious freedom.
  - Two-part decision:
    - The preventive care recommendations made by the USPSTF, which become binding under the ACA as covered preventive care, violates the Constitution because the USPTF is not appointed by the president or confirmed by the Senate, but is a volunteer panel.
    - Pre-exposure prophylaxis (PrEP), an HIV drug regimen which is deemed an ACA preventive service and thus must be covered by group health plans at 100%, violates the religious freedom of the plaintiff.
- Note, case upheld other parts of the ACA preventive mandate with regards to recommendations related to vaccines and HRSA.
  - Some overlap, so proceed with caution

More ACA litigation

- In April Justice O'Connor issued an injunction with regards to ACA preventive mandate as it related to coverage of recommendations made by the USPSTF and PrEP.
- May 15, 2023 5th Circuit Court of Appeals granted an administrative stay…meaning you should keep covering the USPSTF recommendations as required.

ACA family glitch

- Prior rules: if employee is offered single, minimum value (60% AV) coverage that is affordable (9.12% of household income for 2023), spouse and children locked out of getting tax credits for marketplace coverage.
  - Regulations provide three employer safe harbors: FPL, rate of pay and W-2
- Effective 2023: if coverage cost for employee's spouse and kids exceeds affordability threshold times EE's household income, those family members are not locked out of exchange tax credits.
  - Even if single coverage is affordable

ACA family glitch, cont.

- **No change** to employer mandate requirements (still pegged to single coverage)
- **No change** to ACA reporting on Forms 1095-C
- Employers can amend Section 125 plans to allow employee to drop to single coverage if family members qualify for exchange subsidies.
  - Revised IRS guidance allow for both CY and non-CY plans
  - Model amendment to be available from Lockton account teams

On the horizon: Prescription weight loss drugs

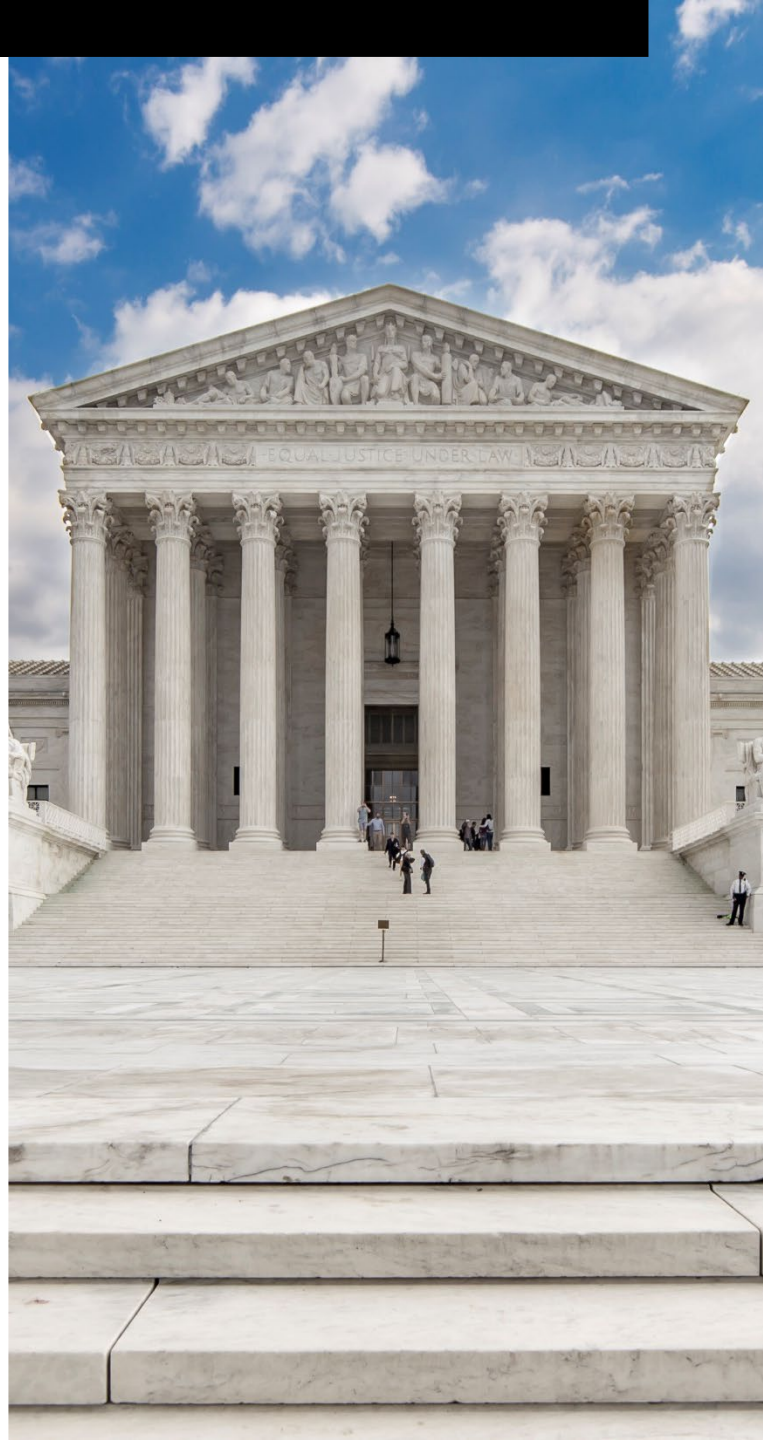
- *Certain diabetes drugs received FDA approval to be used for weight loss, meaning doctors can prescribe drugs for treatment of obesity.*
- Potential ACA issues:
  - ACA essential health benefit designation
  - ACA preventive care mandate

Cases of note impacting 2023 planning

What are we seeing in the courts

Dobbs v. Jackson Women's Health Organization

- In a 6-3 decision, the Supreme Court overturned *Roe v. Wade* and *Planned Parenthood v. Casey*, providing states broader abilities to regulate abortions within the state.
- Impact on employer sponsored benefit plans:
  - Multistate employer caught in the crosshairs
  - The power of ERISA preemption
  - Travel benefits



Discrimination based on sexual orientation or gender identity

- U.S. Supreme Court rules Title VII of civil rights law prohibits workplace discrimination based on sexual orientation or gender identity.
  - Benefits-related implications?
- ACA Section 1557
  - Prohibits discrimination on the basis of race, color, national origin, sex (including sexual orientation and gender identity), age, or disability in covered health programs or activities.
- State action, legislative and regulatory, impacting plan?
  - Travel costs?

Questions?

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