Brown & Brown

EMPLOYEE BENEFITS

Health Plan Transparency Requirements: Public Disclosures Required Soon

In October of 2020, the DOL, IRS and CMS issued final regulations (referred to in this article as the "Health Plan Transparency Regulations" or the "Regulations") implementing two significant health plan pricing transparency initiatives. After a delay in the effective dates of the regulations, one requirement (the requirement to make certain information available to the public) will be effective for most plans in the near future. This article provides a refresher on the requirements of the Regulations and highlights some recent developments related to compliance.

By what date must health plans comply with the new requirements?

According to FAQs issued by the regulatory agencies in August 2021, the portion of the regulations requiring group health plans and health insurance issuers to make certain pricing information available to the public becomes effective on the *later* of July 1, 2022, or the first day of the 2022 plan year. As a result, for plans with plan years beginning between January 1 and July 1, 2022, the information must be made available on or before July 1, 2022. For plans with plan years beginning after July 1, 2022, but before January 1, 2023, the information must be made available by the first day of the 2022 plan year.

Who must comply with the Regulations?

The Regulations apply to both group health plans (including employer-sponsored plans, multi-employer (Taft-Hartley) plans and MEWAs) and health insurance issuers providing coverage in the group and individual insurance markets.[1] While the term "group health plan" is a very broad term, it is generally limited to medical plans for purposes of the Regulations. The Regulations indicate that group health plans that are HIPAA excepted benefits (e.g., most dental and vision plans, on-site medical clinics, etc.) and account-based health plans (e.g., health FSAs, HRAs, ICHRAs, etc.) are not subject to the requirements. Furthermore, the Regulations do not apply to grandfathered health plans (i.e., plans that have not made changes to plan design or premium sharing since March 23, 2010, in excess of permitted amounts as described in the Final Rules for Grandfathered Plans, which were published in the Federal Register on November 18, 2015).

[1] As discussed below, even in the fully-insured context, the Regulations apply to the group health plan, not solely the insurance carrier, unless a contractual agreement is in place.

What information must be made available to the public under the Regulations as of the effective date?

The Regulations require plans and issuers to disclose certain pricing information to the public. This information must be made available in two separate machine-readable files.[2] The data files must be displayed in a standardized format specified in the Regulations. Plans and issuers must provide updates to the files monthly.

Each machine-readable file must include a specific set of data.

- One file must include the rates negotiated between the plan/issuer and in-network providers for all covered items and services.
- Another file must include data showing the historical payments to and billed charges from out-of-network providers.

How must the files be made available?

The files must be made available on a public website. Under the Regulations, both fully-insured and self-insured group health plans may fulfill their responsibilities under the Regulations by having a third party (e.g., insurance carrier, TPA, etc.) post the files on the third party's public website.

- For fully-insured plans, the group health plan may satisfy the law's requirements "if the plan requires the health insurance issuer offering the coverage to provide the information pursuant to a written agreement. Accordingly, if a health insurance issuer and a group health plan sponsor enter into a written agreement under which the issuer agrees to provide the information required [by the law], and the issuer fails to do so, then the issuer, but not the plan, violates the transparency disclosure requirements . . ."
- For self-insured plans, the group health plan may satisfy the law's requirements by entering into a written agreement under which another party (e.g., the plan's TPA) agrees to make the files available in accordance with the regulations. However, in this case, if the party with which the plan contracts to make the files available fails to provide the information in compliance with regulations, the plan violates the transparency disclosure requirements.

All plan sponsors should confirm that the insurance carrier or TPA has agreed to make the files available on a public website regardless of whether their plans are fully-insured or self-insured. In the absence of such an agreement, the group health plan (and the employer sponsoring it) will be responsible for posting the files on a public website. Furthermore, sponsors of self-insured plans should take the extra step of closely monitoring the TPA's performance. If the TPA does not perform, the group health plan has violated the requirement and may be held responsible for the consequences.

Assuming a plan sponsor enters an agreement with the insurance carrier or TPA to have the carrier or TPA make the files available, there may be an additional step the plan sponsor must take. While the relevant provisions of the Regulations are not entirely clear on this issue, it could be argued that the Regulations require the plan sponsor to provide a link to the location on the carrier's or TPA's website where the files are located. In discussing one of the two machine-readable files, the Regulations state: "However, if a plan . . . chooses not to also host the file separately on its own website, it must provide a link on its own public website to the location where the file is made publicly available."

[2] The Regulations require a third file to be made available containing data reflecting the in-network negotiated rates and historical net prices for all covered prescription drugs by plan or issuer at the pharmacy location level. The effective date of that requirement has been postponed indefinitely.

A conservative approach to consider is for plan sponsors to follow this portion of the Regulations and provide a link. However, it is not clear how a plan sponsor should do so. The Regulations refer to the group health plan's "own public website." Given that most group health plans do not have a public website, it is unclear what the regulatory agencies envisioned. There are several approaches that we have seen being taken to address this issue:

- Add the link to the employer's public business website;
- Build a public website for the employer's business for the sole purpose of hosting the link to the carrier's or TPA's website; or
- Build a public website for the employer's group health plan for the sole purpose of hosting the link to the carrier's or TPA's website.

Note: It appears that adding a link to the plan sponsor's internal website (intranet) that may be accessed only by employees likely would not be compliant to the extent the plan or plan sponsor is required to provide a link. The Regulations expressly refer to a public website, and the intranet is generally not considered a public website.

In light of the fact that the Regulations are unclear regarding the necessity to have a link to the carrier's or TPA's website and where such a link should be located, we suggest that plan sponsors discuss these issues with their legal counsel for specific legal advice.

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.

Brown & Brown

Any solicitation or invitation to discuss insurance sales or servicing is being provided at the request of

Brown & Brown Benefit Advisors, Inc.,

an owned subsidiary of Brown & Brown, Inc.

Brown & Brown Benefit Advisors, Inc.

only provides insurance related solicitations or services to insureds or insured risks in jurisdictions where it and its individual insurance professionals are properly licensed.

Brown & Brown Benefit Advisors, Inc.
24 Arnett Avenue - Lambertville, NJ 08530 | BBrown.com | (609) 397-3088