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On October 29, 2020, the Departments of Labor, Health and Human Services, and the Treasury (collectively, “the Departments”) finalized proposed rules regarding transparency requirements for non-grandfathered group health plans. The Transparency in Coverage (“TiC”) rules initially required disclosures of pricing and cost-sharing under plans to first take effect beginning January 1, 2022. On August 20, 2021, the Departments issued an FAQ that delayed the TiC requirement to publish certain machine-readable files (“MRFs”) on a public website.

Briefly, the TiC rules require public disclosure, via MRFs, of the following information:

1. In-network provider rates for covered items and services; and
2. Out-of-network allowed amounts and billed charges for covered items and services.

A third required MRF disclosing negotiated rates and historical net prices for covered prescription drugs is currently delayed pending future guidance.

Employers sponsoring non-grandfathered insured and self-funded plans should be prepared to comply with the MRF disclosure requirements, as follows:

- For plan years that begin between January 1, 2022, and July 1, 2022, the files must be posted by July 1, 2022.
- For plan years that begin after July 1, 2022, the information must be posted in the month the plan year begins.
- Going forward, the information must be updated monthly and clearly indicate the date the files were most recently updated.

Who is Responsible for Compliance?

Employers sponsoring a fully insured arrangement can rely on the carrier to post this information when there is an agreement between the plan and the carrier. If the carrier fails to provide full or timely information, the carrier (not the plan/employer) is liable.

Similar relief is not available to self-funded group health plans. While a self-funded health plan may contract with a third party (like the third-party administrator or “TPA”) to provide the required disclosure, the plan is ultimately responsible.

Good Faith Compliance – Safe Harbor

A plan or carrier will not fail to comply with these requirements when, acting in good faith and with reasonable diligence:

- an error or omission in the required disclosure is made, provided the information is corrected as soon as practicable.
- the internet website hosting the MRF files is temporarily inaccessible, provided that the plan or carrier makes the information available as soon as practicable.

Further, when information must be obtained from a third party, the plan or carrier will not fail to comply with this requirement because it relied in good faith on the information provided by the third party, unless it is known (or reasonably should have known) the information is incomplete or inaccurate.

What is the Disclosure Requirement?

MRFs will typically contain vast amounts of data such that they will be quite large. They will be in a machine-readable language such that the data will not be easy to interpret or search, and few, if any, plan sponsors will be able to meet the disclosure requirements on their own. Thus, carriers and TPAs are assisting plan sponsors in complying with these requirements by hosting the files and posting them on public servers or websites they will maintain.

This disclosure requirement is unique in that it must be made to the public as opposed to most disclosure requirements that are limited to plan participants. As such, posting the information or a link to the information on a company’s intranet or behind a password protected page will not be sufficient disclosure.

A conservative reading of the requirements suggests a plan sponsor should post a link to the MRFs on its public-facing website even if the carrier or TPA is doing the same on behalf of the plan.

Example. ABC Company sponsors a self-funded medical plan. Green TPA provides ABC Company with a Uniform Resource Locator (“URL,” briefly, a website

address) where MRFs for the plan will be posted publicly and updated. ABC Company adds the URL link to their public-facing company website.

If a plan has multiple carriers or TPAs, multiple links may be necessary.

Several carriers and TPAs are taking this position, though further guidance would be welcome. For example, UnitedHealthcare takes the following position: “The regulation requires self-funded customers accessing the UnitedHealthcare public MRF website to add the URL to their own public website.” See Transparency in Coverage – External Frequently Asked Questions (May 5, 2022), page 15.

Direct Provider Contracting and Alternative Payment Models

For certain self-funded plans, one approach to controlling the cost of care involves plan sponsors directly contracting with providers or facilities to provide services to plan participants for discounted amounts. This is often in addition to the more prevalent commercial approach whereby a plan rents an established network from an insurance carrier or TPA. If the plan’s TPA is not adjudicating claims for these unique agreements, the TPA may not have access to the required information to meet the TiC MRFs requirements. Plans should be proactive in coordinating with all applicable vendors and service providers to ensure accurate data is posted by the applicable deadline.

Further, the Departments recently issued FAQ 53 that addresses the compliance challenge for plans that have an alternative payment model and may not always provide a certain dollar amount for services and items before they are provided. Specifically, the plan may have negotiated rates with providers based upon a “percentage of billed charges” which would only ensure an accurate dollar amount after the services or item has been provided. As the rule’s purpose is to provide transparency in advance of the cost of these services, this alternative payment arrangement posed compliance challenges.

In response, the Departments have provided a safe harbor for arrangements that do not permit plans to accurately determine dollar amounts for contracted items and services in advance of their provision. The safe harbor allows plans to:

- report a percentage number instead of a dollar amount for contractual arrangements where the plan or carrier

pay the in-network provider a percentage of billed charges; and

- disclose an open text field for outlining formulas, variable methods, or other information necessary to understand the arrangement when a percentage or dollar amount is not possible.

The Departments caveated that the safe harbor does not exist for arrangements where it still is possible to sufficiently disclose a dollar amount.

Employer Action

Employers sponsoring non-grandfathered fully insured group health plans should obtain written assurances that the carrier will be responsible for posting the MRFs. Employers with fully insured plans may post a link to the MRFs from the carrier on their public website. Coordinate with IT resources to ensure that a link to the MRFs is posted timely.

Employers sponsoring self-funded non-grandfathered group health plans should:

- Reach out to TPAs (or other vendors) to ensure that they will assist in creating and posting the MRFs on behalf of the plan. It appears that most national carriers acting as TPAs on self-funded business have indicated they will support creating and posting this information.
- Add a link to the MRF URL to the employer's public-facing website. Coordinate with IT resources to ensure that a link to the MRFs is posted timely.