MY BENEFIT ADVISOR

Build Back Better Legislation Includes Benefit Provisions

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During the last week of October 2021, the Biden administration announced a new framework for the budget reconciliation package, known as the Build Back Better Act (H.R. 5376). Subsequently, the U.S. House of Representatives released the legislative text and a section-by-section summary of the new framework. The legislation is still being negotiated, and the timing for when a vote is expected is uncertain.

If the proposed legislation is enacted into law in its current form, the following provisions would have notable impacts on employer-sponsored health and welfare benefit programs.

Increased employer contributions to avoid penalties under the ACA employer mandate

The 9.61% affordability percentage for 2022 would be reduced to **8.5%** (with no inflation adjustment) for 2022 to 2025, to determine whether employer-sponsored coverage is affordable under the Affordable Care Act's employer mandate. The lower affordability percentage means that for coverage to remain affordable, employee contributions toward self-only coverage in the lowest cost plan option offered by the employer would be reduced. This change would apply directly to all of the safe harbor calculations (W-2, Rate of Pay, and Federal Poverty Level ("FPL")) that employers generally use to avoid penalties under the ACA employer mandate.

For example, if enacted "as is," the FPL safe harbor for the lower 48 states for a plan year that begins January 1, 2022 would be $91.23 instead of $103.14 (which is based off of 9.61%, the announced threshold for 2022).

After 2025, the affordability percentage would revert to 9.5%, without any inflation adjustment thereafter.

Increased penalties under the Mental Health Parity and Addiction Equity Act

The legislation would authorize the U.S. Department of Labor to assess civil monetary penalties against plan sponsors and plan administrators for violations of the Mental Health Parity and Addiction Equity Act ("MHPAEA") in an amount equal to the civil monetary penalties currently imposed under the Genetic Information Nondiscrimination Act ("GINA"). These changes would be effective one year after the date of enactment.

Reinstated and expanded bicycle commuting benefits

The exclusion for qualified bicycle commuting benefits would be reinstated, and the maximum benefit would increase from $20/month to 30% of the qualified parking benefit (i.e., $81/month, based on the 2021 qualified parking benefit of $270/month). In addition, the definition of qualified bicycle benefits would expand to include certain electric bicycles and the lease or rental of a bicycle (including a bikeshare). These changes would be effective for taxable years beginning after December 31, 2021.

Extended Marketplace subsidies

The legislation would extend the higher premium tax credits available in the Marketplace under the American Rescue Plan Act of 2021 ("ARPA") through 2025. In addition, the legislation would go further than ARPA by permitting employees with incomes below 138% of the Federal Poverty Level to obtain premium tax credits from 2022 to 2025 to purchase coverage in the Marketplace even if they have access to affordable healthcare coverage from their employer. The legislation appears to provide employers with relief from ACA penalties in this scenario, although the terms of that relief are uncertain.

In addition, the legislation allocates $195 million to the U.S. Department of Labor for enforcement activities relating to employer-sponsored benefit plans.

Notably, the legislation omits key priorities that were included in earlier versions of the bill, including:

- 12 weeks of federal paid family and medical leave.
- Negotiation of prescription drug prices by the federal government.
- Permanent increase in benefits limits under a dependent care flexible spending arrangement to $10,500.

Employer Action

Employers should continue to monitor the progress of the "Build Back Better" legislation.

Importantly, applicable large employers (i.e., those subject to the ACA employer mandate) should review their group health plan's contribution strategy to determine whether they will have budgetary problems in the event the 8.5% affordability threshold becomes law. They may be required to adjust the dollar amount of their employer premium contributions to preserve affordability and avoid potential exposure to ACA penalties. USI can assist in this analysis. On October 15, 2021, the Secretary of Health and Human Services ("HHS") renewed the COVID-19 pandemic Public Health Emergency, effective October 18, 2021. This will once again extend the Public Health Emergency period for an additional 90 days and as a result, numerous temporary benefit plan changes will remain in effect.