



# Employee Benefits Compliance Update

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BUSINESS INSURANCE | RISK SOLUTIONS | EMPLOYEE BENEFITS | WORKSITE WELL-BEING  
PERSONAL INSURANCE | GLOBAL SOLUTIONS



## | Health Cost Transparency Update

- | Gag Clause Attestation

## | Mental Health Parity Update

## | Legislative & Regulatory Update

- | Medicaid and CHIP Eligibility
- | Fixed Indemnity Plan Guidance
- | IRS Guidance on “Wellness Plan” Tax Schemes

## | Health Plan Affordability

- | Affordability % Change
  - Using IRS Safe-Harbors to set employer contributions
- | Family Health Plan Affordability

# Health Cost Transparency Update



## HEALTH CHECK-UP LIST

- ☐ Initial Blood and Urinalysis Examination
- ☐ Blood Test
- ☐ Complete Blood Count (CBC)
- ☐ Fasting Blood Sugar
- ☐ Lipid Profile
- ☐ Cholesterol

+Medical

## BILLING STATEMENT

: JJ Baker  
: August 14, 2016  
: August 17, 2016

PATIENT SERVICES		INSURANCE INFORMATION	
	\$ 564.00	Primary	
	\$ 654.00	Secondary	
	\$ 185.00	MEDICAL	ER may also pursue payment from a third party if permitted by State Law. If we do, adjustments may no longer be payable. We expect you to pay when allowed by State and
<b>TOTAL CHARGE</b>	<b>\$ 1,403.00</b>		

# Health Cost Transparency Timeline





## The Prohibition

- | Carriers and plans cannot enter into agreements with providers, TPAs, or other service providers that contain gag clauses
- | Effective 12/27/2020

## What is a Gag Clause?

Any contractual term that directly or indirectly restricts specific data and information that a plan or issuer can make available to another party

### | Examples

- Disclosures of provider-specific cost information to plan sponsor
- Sharing claims data with a plan's business associate



- | The Attestation - plans are required to attest to their compliance with the prohibition on gag clauses
- | Applicable to virtually all employer-sponsored health plans
  - | Including fully-insured, self-funded, and grandfathered plans regardless of employer/plan size
  - | Does not apply to HRAs, Health FSAs or excepted benefits such as dental and vision plans
- | Due 12/31/23 for plans in effect 12/27/2020 - 12/31/23
  - | Due annually by 12/31 each year

# Gag Clause Attestation



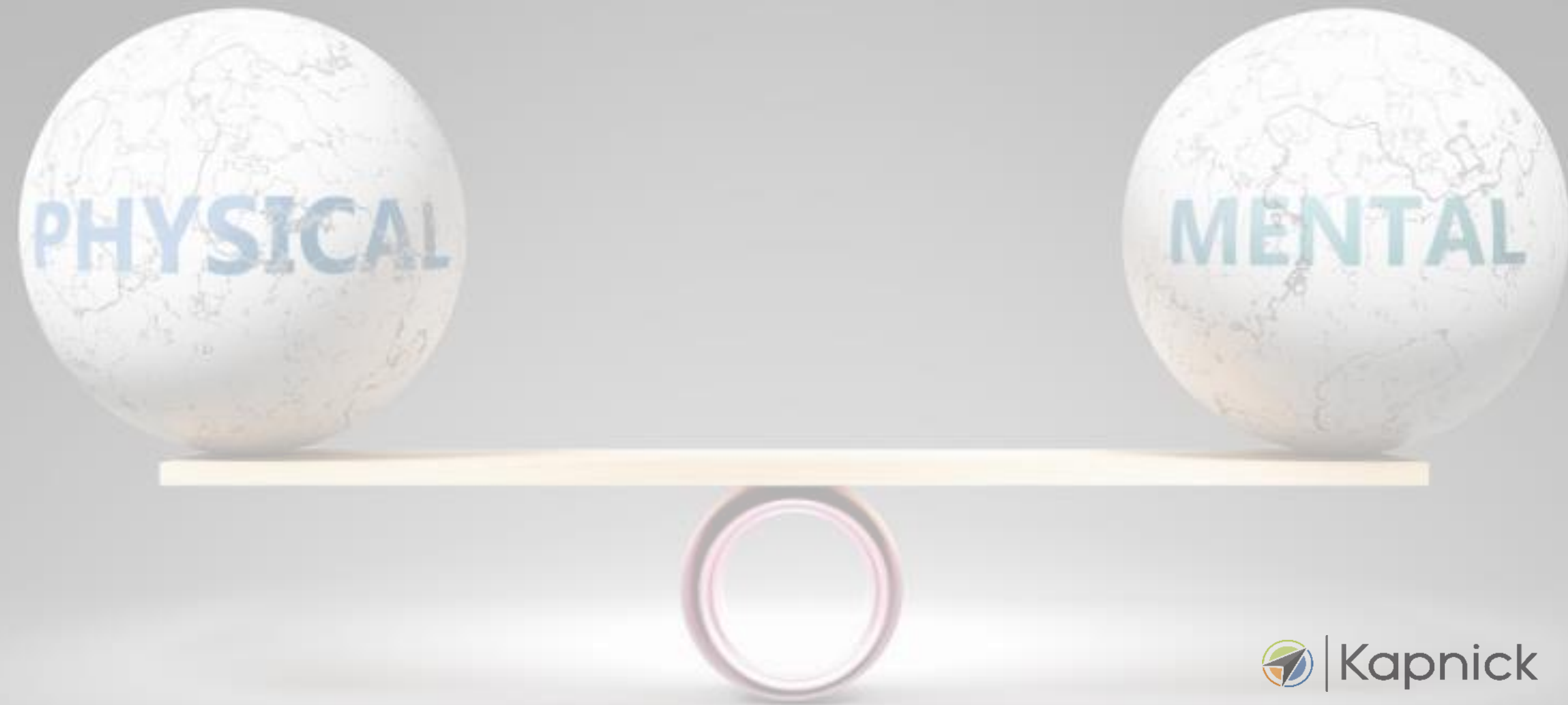
## Who is Going to Do It??

- | Fully-insured plans – usually the carrier
- | Self-insured plans – depends on the vendor
- | Employer specific arrangements (e.g. direct provider contracting) – Employer may need to attest

<https://www.cms.gov/ccio/programs-and-initiatives/other-insurance-protections/gag-clause-prohibition-compliance>

The screenshot shows a web application interface for submitting gag clause prohibition compliance attestations. The background image depicts a healthcare professional in a white coat and blue stethoscope, holding a pen over a document. The interface includes a dark blue header with a 'Home' button. The main content area has a white overlay with the title 'Access the Gag Clause Prohibition Compliance Attestation Submission'. Below the title are two input fields: 'Enter email address' and 'Enter the code that was sent via email'. At the bottom of the overlay are two buttons: a green 'Login to the system' button and a blue link 'Don't have a code or forgot yours?'.

# Mental Health Parity Update





# Mental Health Parity



Who is watching out for the mental health of human resource and employee benefit managers?





## Parity Requirements Review

- | Plans that offer mental health or substance use disorder benefits must provide coverage for those benefits “in parity” with medical/surgical benefits
  - Quantitative parity (e.g., deductibles, co-pays, etc.)
  - Non-quantitative parity (e.g., second opinion rules, pre-authorizations, provider access)
- | Notices when mental health or substance use disorder claims are denied
- | Comparative analysis performed on any non-quantitative treatment limitations (NQTLs)



## Mental Health Parity – Current Structure

### Annual & Lifetime Limits

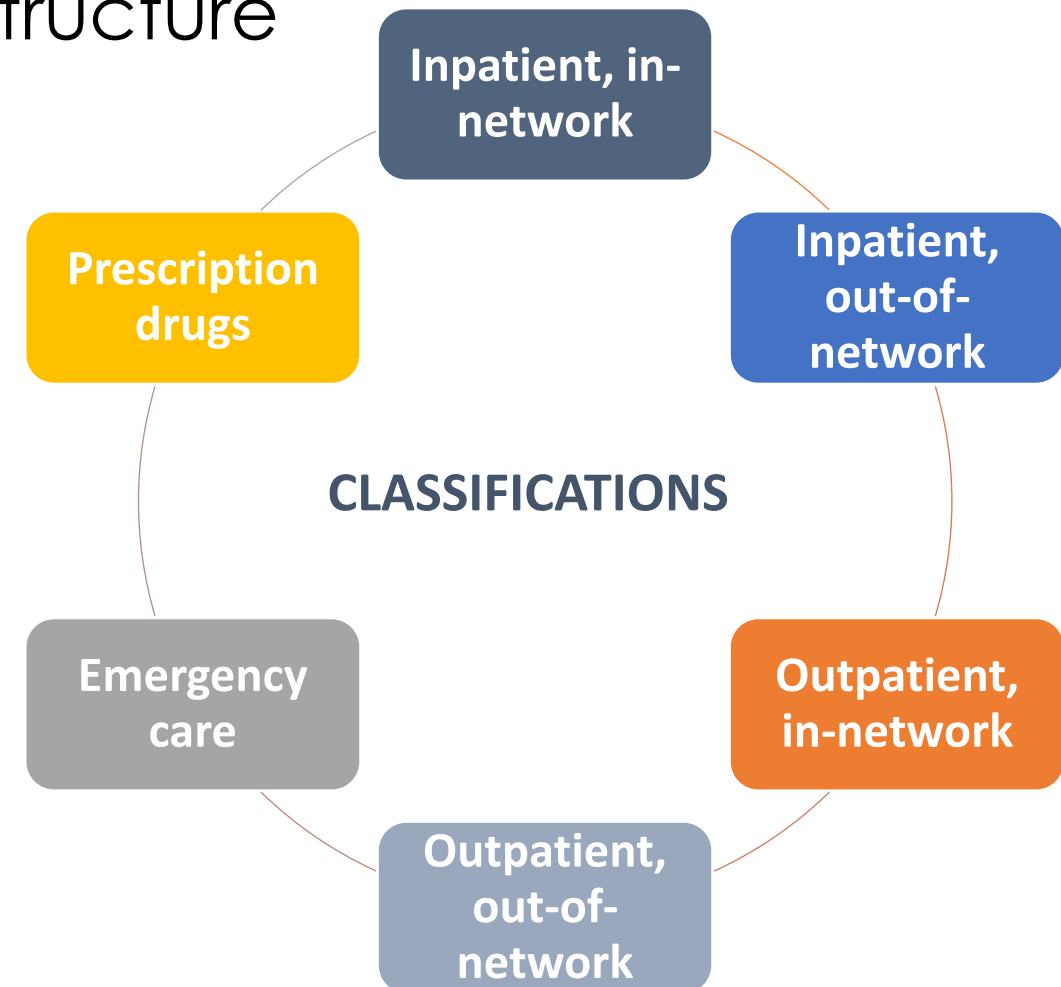
- Must be the same or more generous than for medical/surgical benefits

### Financial Requirements & Quantitative Treatment Limitations

- Cannot be more restrictive than the predominant requirements or limitations that apply for substantially all (2/3) medical/surgical benefits

### Non-Quantitative Treatment Limitations (NQTLs)

- Cannot impose processes, strategies, evidentiary standards or other factors that are more stringent than for medical/surgical benefits





## Mental Health Parity – Compliance Responsibilities

### • Fully-Insured Group Health Plans

- Carrier is directly responsible for compliance
- Carrier is required to complete a written comparative analysis

### • Self-Funded Group Health Plans

- Employer as plan sponsor is directly responsible for compliance
  - TPA, PBM and other service providers may be co-fiduciaries and therefore share joint liability



## Proposed Rules

- | Effective for plan years beginning in 2025

## 3-Part Test

- | No More Restrictive
  - NQTLs cannot be more restrictive than the predominant variation of the NQTL applied to substantially all medical/surgical benefits
- | Design and Application
  - Cannot impose processes, strategies, evidentiary standards or other factors that are more stringent than for medical/surgical benefits
- | Relevant Data Evaluation
  - Must collect and evaluate relevant outcomes data and address any material differences in access between mental health and substance use disorder benefits and medical/surgical benefits
  - Additional requirements for network composition



## Proposed Rules (continued)

### Comparative Analysis

- | Clarification of required content
- | Must include evaluation of relevant data and efforts to address material differences
- | Must be certified by one or more named plan fiduciaries
- | Must be available upon request
- | Not required to be prepared annually but should be re-done for changes in plan design or usage



## EBSA and CMS handle enforcement

- | 25% of EBSA staff focused on mental health parity enforcement
- | Performed about 150 audits in 2022
- | Includes review of comparative analysis

## Enforcement Priorities:

- | Prior authorization
- | Concurrent care review
- | Provider admission standards
- | Out-of-network reimbursement rates
- | Exclusions of key treatments
- | Provider network adequacy standards



# Legislative and Regulatory Update







## Background

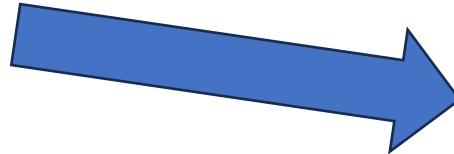
- | Annual determination of Medicaid and CHIP eligibility was paused during pandemic
- | Continuous enrollment expired March 31, 2023
- | DHHS projects approx. 3.8 million individuals who lose Medicaid will be eligible for employment-based coverage

## Employer Considerations

- | Loss of Medicaid or CHIP is a HIPAA special enrollment event
- | Minimum 60-day special enrollment opportunity from the loss of coverage



## July 20th CMS Letter



- | Announced a temporary special enrollment period on HealthCare.gov for anyone who loses Medicaid or CHIP coverage between 03/31/23 – 07/31/24
- | State-based exchanges may adopt similar rules

| Encourages employers to adopt extended special enrollment periods

*We encourage employers...to match the steps taken by HealthCare.gov. Employers...amend their group health plans to extend the period for special enrollment under their plans beyond the minimum 60-day period...for individuals losing Medicaid and CHIP.*

*Individuals losing Medicaid and CHIP should instead be able to enroll anytime during this annual redetermination process...*

# Proposed Guidance for Fixed Indemnity Plans



| IRS, DOL, and HHS have released new proposed guidance

- | 60-day comments period - final regulations expected later this year
  - Hospital and fixed indemnity policies as excepted benefits
  - Taxation of hospital and fixed indemnity policies

| Hospital and Fixed Indemnity Plan Background

- | Plans pay a fixed amount for a particular event and do not coordinate with other coverage
- | Typically qualify as an “excepted benefit”



## Proposed Rules

### 1. Plan must pay on a "fixed period" basis

Not allowed to pay on a per service basis

Addresses plans being sold as excepted benefit indemnity plans but contain a significant list of "per service" payments making it look more like comprehensive fee-for-service health insurance

### 2. Tighten the "no coordination" rule

Cannot be offered in a conjunction with another plan that makes indemnity plan payments contingent on the participant having other coverage

Targeting "preventive only MEC + indemnity coverage" plans that are being marketed as an alternative to comprehensive group health coverage



## New Notice Requirement

### Notice to Consumers About Fixed Indemnity Insurance

**IMPORTANT:** This is fixed indemnity insurance. **This isn't comprehensive health insurance** and **doesn't** have to include most Federal consumer protections for health insurance.

Visit [HealthCare.gov](https://www.healthcare.gov) online or call 1-800-318-2596 (TTY: 1-855-889-4325) to review your options for comprehensive health insurance. If you're eligible for coverage through your employer or a family member's employer, contact the employer for more information. Contact your State department of insurance if you have questions or complaints about this policy.

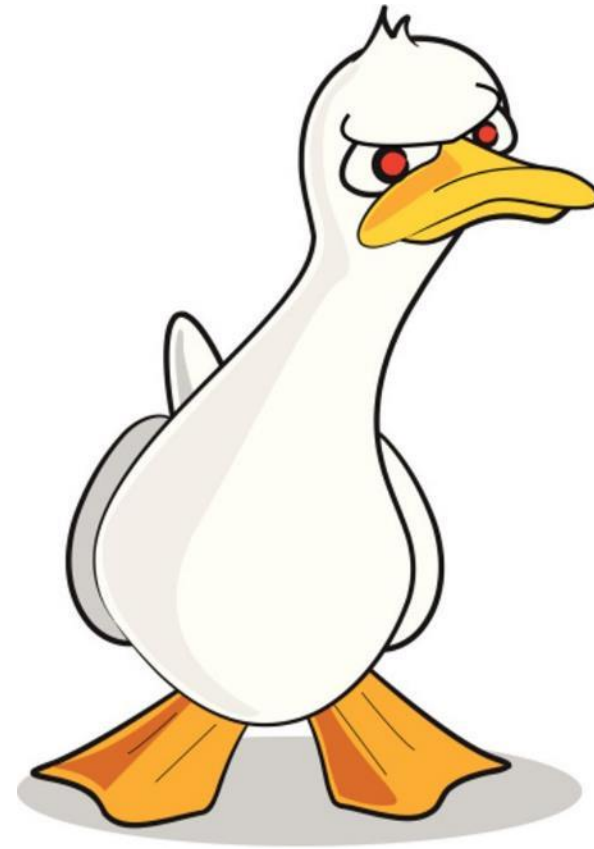
## Effective Date

- | New plans offered after publication of final rules
- | Existing group plans sold before publication of final rules - Plan years beginning January 1, 2027!
  - Except notice requirement goes into effect after publication of final rules

# Taxation of Hospital and Fixed Indemnity Plans



- | IRS proposing to amend regulations to reflect IRS existing interpretation of the tax treatment of hospital and fixed indemnity plans
- | Benefits paid by plan must be treated as taxable compensation if:
  - | Employee pays for the coverage using pre-tax deductions from pay through the employer's Section 125 plan or Employer pays and does not treat payments as taxable income
  - | Payments made by the fixed indemnity plan are made without regard for an actual 213(d) medical expenses incurred by the employee
- | Effective Date
  - | Later of publication of final regulations or 01/01/24







## Overview

- | An arrangement that claimed significant tax savings and “free” benefits to employees through a “wellness plan” payment arrangement was not legitimate

## What is a Chief Counsel Memorandum?

- | Office of Chief Counsel memoranda are issued to provide legal opinions on certain matters to internal IRS staff
  - Cannot be used or cited as precedent; they represent the Service’s interpretation regarding the specific legal issues addressed in the memo





## Basics of Plan Addressed by Memo

- | Employees paid \$1,200/mo. for a fixed-indemnity health insurance policy pre-tax salary through a § 125 cafeteria plan
- | The policy provided a “wellness benefit” payment of \$1,000 per month if an employee participates in certain health or wellness activities
  - The fixed-indemnity policy provides wellness counseling, nutrition counseling, and telehealth benefits at no additional cost to employee
  - Use of preventive care under a health plan qualified the employee for the payment even though the care was covered by the employee’s health plan
- | The “plan” also included per day hospital indemnity benefit



# Office of the Chief Counsel Memorandum #202323006



KAPNICK INSURANCE

CO. FILE DEPT. CLOCK NUMBER		ABC 126543 123456 12345 00000000 1	
ACME SUPPLIES CORP. 475 KNAPP AVENUE ANYTOWN, USA 10101		Period ending: 3/1/2020 Pay date: 3/31/2020	
Social Security Number: 999-99-9999 Taxable Marital Status: Single Exemptions/Allowances: Federal: 1 Additional Tax State: 3% Local:		JANE HARPER 101 MAIN STREET ANYTOWN, USA 12345	
<b>Earnings Statement</b>		<b>Earnings Statement</b>	
<b>Earnings</b>	rate hours this period	Other Benefits Information	Amount of taxable income this pay period
Regular			
Overtime			
Holiday			
Tuition			
Gross Pay \$ 5000.00		Vac Hrs Sick Hrs Title	
<b>Deductions</b>		Operator	
Statutory		Important Note	
Federal Income Tax -605.07			
Social Security Tax -310.00			
Medicare Tax -72.50			
State & Local Tax -139.88			
Other			
Indemnity Claim Payment -00.00			
Adjustment			
Net Pay -3872.55			
*Excluded from federal taxable wages			
Payroll check number: 0000000000 Pay date: 3/31/2020 Social Security No. 999-99-9999		Take home pay WITHOUT Indemnity	
Pay to the order of: JANE HARPER This amount: THREE THOUSAND EIGHT HUNDRED AND SEVENTY TWO DOLLARS AND 55/100		\$3872.55	
SAMPLE NON-NEGOTIABLE VOID VOID VOID AUTHORIZED SIGNATURE VOID AFTER 90 DAYS			

CO. FILE DEPT. CLOCK NUMBER		ABC 126543 123456 12345 00000000 1	
ACME SUPPLIES CORP. 475 KNAPP AVENUE ANYTOWN, USA 10101		Period ending: 3/1/2020 Pay date: 3/31/2020	
Social Security Number: 999-99-9999 Taxable Marital Status: Single Exemptions/Allowances: Federal: 1 Additional Tax State: 3% Local:		JANE HARPER 101 MAIN STREET ANYTOWN, USA 12345	
<b>Earnings Statement</b>		<b>Earnings Statement</b>	
<b>Earnings</b>	rate hours this period	Other Benefits Information	Amount of taxable income this pay period
Regular			
Overtime			
Holiday			
Tuition			
Gross Pay \$ 5000.00		Vac Hrs Sick Hrs Title	
<b>Deductions</b>		Operator	
Statutory		Important Note	
Federal Income Tax -370.04			
Social Security Tax -240.25			
Medicare Tax -56.19			
State & Local Tax -106.13			
Other			
Indemnity Claim Payment -1,125.00			
Adjustment			
Net Pay \$4,092.39			
*Excluded from federal taxable wages			
Payroll check number: 0000000000 Pay date: 3/31/2020 Social Security No. 999-99-9999		Take home pay WITH Indemnity	
Pay to the order of: JANE HARPER This amount: FOUR THOUSAND AND NINETY TWO DOLLARS AND 39/100		\$4,092.39	
SAMPLE NON-NEGOTIABLE VOID VOID VOID AUTHORIZED SIGNATURE VOID AFTER 90 DAYS			

**Net Gain of \$219.84**

Notice: This paycheck illustration is for illustrative and educational purposes only and should not be construed as financial or tax advice. The results are only estimates and may not apply to your specific situation. Please consult a qualified professional regarding financial decisions.



## IRS Conclusion

- | Payments (including those described as “wellness payments”) under a fixed-indemnity insurance policy, where the premium is paid by employee pre-tax salary reduction through a cafeteria plan should be treated as taxable income to the employee...
- | Employer cannot provide tax free benefits payments to employees:
  - When the taxpayer would be entitled to receive the payment irrespective of whether expenses for medical care are actually incurred
  - When the employee has no unreimbursed medical expense (either because the activity that triggers the payment does not cost the employee anything or because the cost of the activity is reimbursed by other coverage)



IRS has issued opinions on similar issues before...

| Chief Counsel Memoranda 201622031 (05/27/2016) & 20170313 (01/20/2017)

- *An employer may not exclude from an employee's gross income reimbursements of premiums for participating in a wellness program if the premiums for the wellness program were originally made by salary reduction through a section 125 cafeteria plan.*

| 201719025 (05/12/2017)

- *We understand that promoters...are selling self-funded health plans (often referred to by promoters as fixed indemnity health plans) and wellness plans to employers. The plans are promoted as a way to provide certain benefits to employees at no or little cost to the employer (&) employees... The promoters claim the benefits do not constitute income or wages and thereby reduce the employer and employee share of employment taxes with respect to employee remuneration.*
- IRS memo even included a chart that looked much like what promoters often have in their marketing material...



## Risk to Employer

- | Employers could be subject to back taxes, penalties, and interest on unpaid payroll taxes
- | Employer could face penalties based on the employer's incorrect W-2 filing
- | Employer could also be required to restate these payments as taxable compensation to employees, subjecting them to additional tax liability

# Taxation of Hospital and Fixed Indemnity Plans



...sold an item  
...h as a car,  
...jewelry, or  
...capital gain.  
...0). You can

...you held for  
...ullion, coins,  
...capital gain  
...ital loss.

...on an online  
...ght the paint-  
...ago. Report  
...dule D (Form

...have to use the prizes for educational purposes.  
You must include these amounts in your income  
on Form 1040, line 21, whether or not you use  
the amounts for educational purposes.

**Stolen property.** If you steal property, you  
must report its fair market value in your income  
in the year you steal it unless in the same year,  
you return it to its rightful owner.

**Transporting school children.** Do not in-  
clude in your income a school board mileage  
allowance for taking children to and from school  
if you are not in the business of taking children to  
school. You cannot deduct expenses for provid-  
ing this transportation.

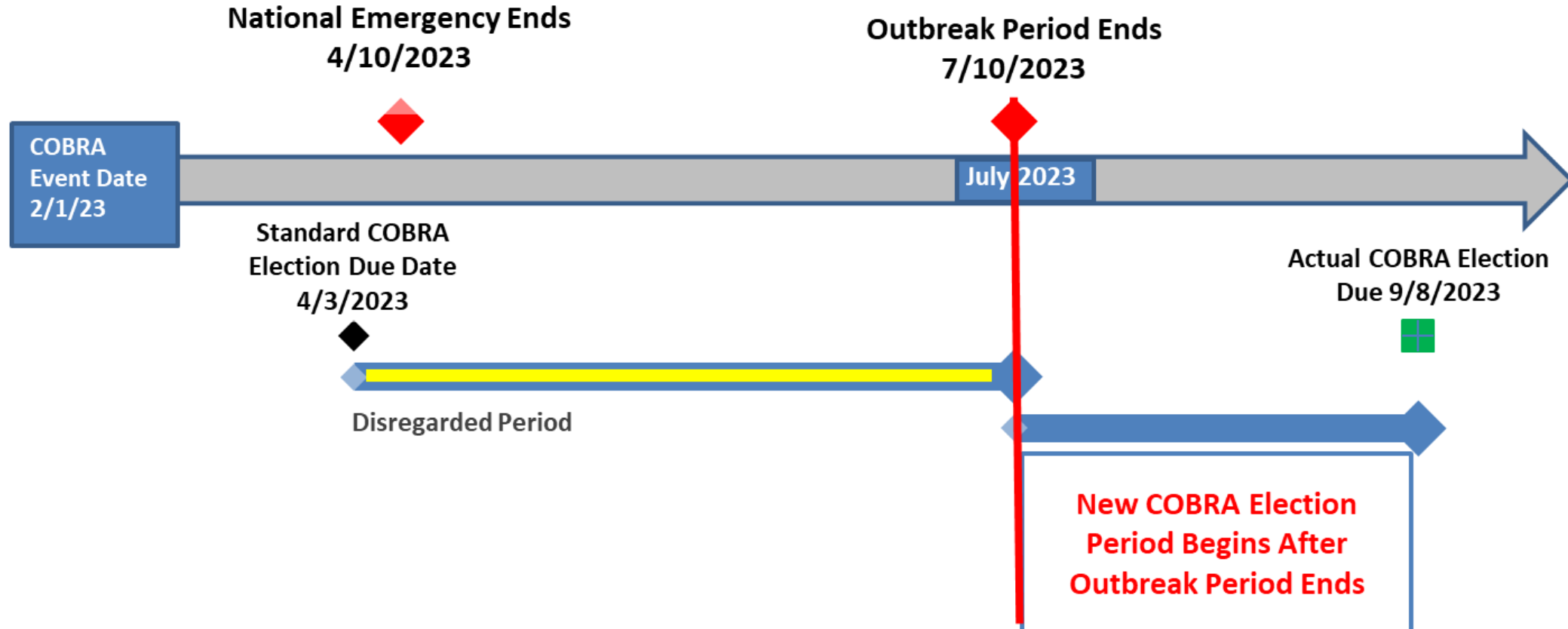
**Union benefits and dues.** Amounts deducted

# End of National Emergency and Outbreak Period



## Outbreak Period Ended July 10<sup>th</sup>

Timelines for HIPAA Special Enrolment, COBRA Notices, and





# Health Plan Affordability



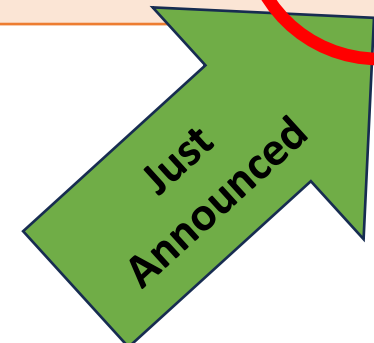


IRS decreased §4980H affordability percentage from 9.12% (2023) to 8.39% (2024)

Affordability matters for two reasons:

1. Premium tax credit eligibility for coverage through the public Marketplace
2. Applicable large employer (50 or more FTEs) compliance with §4980H(b)

Affordability Percentages	2016	2017	2018	2019	2020	2021	2022	2023	2024
	9.66%	9.69%	9.56%	9.86%	9.78%	9.83%	9.61%	9.12%	8.39%







## Federal Poverty Level (FPL) Safe Harbor

- Employee's monthly cost does not exceed 9.12% (2023) or 8.39% (2024) of FPL

## Rate of Pay Safe Harbor

- Hourly - Employee's mo. cost does not exceed 8.39% (2024) of hourly rate x 130
- Salaried - Employee's mo. cost does not exceed 8.39% (2024) of monthly salary

## Form W-2 Safe Harbor

- Employee's annual cost does not exceed 8.39% (2024) of Box 1 wages



## Federal Poverty Level (FPL) Safe Harbor (2023)

### Calendar year plans:

- 2023= \$103.28/month or less ( $\$13,590 \times 9.12\% / 12$ )
- 2024 = \$95.17/month or less ( $\$13,590 \times 8.39\% / 12$ )

### Non-calendar year plans:

- 2023 - \$110.80/month or less ( $\$14,580 \times 9.12\% / 12$ )
- 2024 – TBD (2024 FPL as not been released yet)

*\*\*\*Guidance indicates employers should use FPL amounts in effect within six months before the first day of the plan year. HHS typically updates the FPL amounts in late January*

# Rate of Pay Safe Harbor



## Hourly Employee

- | Hourly rate x 130 x affordability %
- | Use hourly rate as of the first day of the coverage period, unless pay is reduced during the year; if pay is reduced, use the lower amount

## Salaried Employee

- | Monthly salary x affordability %
- | Use monthly salary as of first day of the coverage period; if pay is reduced, safe harbor is not available

Employee Wages	2023 Rate of Pay	2024 Rate of Pay
	<i>Amount that is affordable</i>	
HOURLY		
\$8	\$94.85	\$87.26
\$10	\$118.56	\$109.07
\$12	\$142.27	\$130.88
\$14	\$165.98	\$152.70
\$16	\$189.70	\$174.51
\$18	\$213.41	\$196.33
\$20	\$237.12	\$218.14
SALARIED		
\$1,500	\$136.80	\$125.85
\$2,000	\$182.40	\$167.80
\$2,500	\$228.00	\$209.75
\$3,000	\$273.60	\$251.70



## Form W-2, Box 1 Wages

- | Include all annual wages/salary, including bonuses, but reduced by pre-tax contributions toward benefits
- | Use Box 1 wages for the year coverage is offered (e.g., 2023 Box 1 wages for affordability of coverage during 2023)
  - Must use a guesstimate at the beginning of the year to set affordable contributions

Employee Wages	2023 Form W-2	2024 Form W-2
	<i>Amount that is affordable</i>	
Box 1 Wages		
\$20,000	\$152.00	\$139.83
\$30,000	\$228.00	\$209.75
\$40,000	\$304.00	\$279.67
\$50,000	\$380.00	\$349.58
\$60,000	\$456.00	\$419.50



## **The Big Picture**

The change in affordability rules for family members, combined with the increased Federal subsidies available for individual coverage, will create a situation where it is better to choose individual health insurance for the employee's family members instead of having them participate in the employer's plan.

# Change to Family Affordability Definition



IRS has changed the definition of affordability for the purpose of qualification for premium tax credits when purchasing individual coverage through the public Exchange

## Old Rule:

- | Deemed affordable for employee **and all eligible family members if single coverage is affordable** (the Family Glitch)

## New Rule effective 01/01/2023

- | Affordability for employee is still based on employee contribution for single coverage
- | **Affordability for family members based on employee contribution for family coverage**

# Family Affordability Example



Household Income = \$120,000 (\$10,000/mo.)

Affordable

- | 2023 = \$912 mo. (9.12% of \$10,000 = \$912)
- | 2024 = \$839 mo. (8.39% of \$10,000 = \$839)

**2023**

**Monthly EE Contribution**

Single = \$250, Family = \$850

**Old Rule** - Affordable for employee & family

**New Rule** - Affordable for employee & family

- \$850 is less than \$912

**2024**

**Monthly EE Contribution**

Single = \$250, Family = \$850

**Old Rule** - Affordable for employee & family

**New Rule** - Affordable for employee, **but not affordable for family members**

- \$850 is greater than \$839

# Important!

- Employers do not have to offer affordable family coverage
- No employer penalty if family coverage is unaffordable





# Subsidies for Individual Insurance



## Significant Increase in Subsidies Extended Through 2025

Income (% of poverty)	Affordable Care Act (before legislative change)	COVID-19 Relief (current law 2021-2022)
Under 100%	Not eligible for subsidies*	Not eligible for subsidies**
100% – 138%	2.07%	0.0%
138% – 150%	3.10% – 4.14%	0.0%
150% – 200%	4.14% – 6.52%	0.0% – 2.0%
200% – 250%	6.52% – 8.33%	2.0% – 4.0%
250% – 300%	8.33% – 9.83%	4.0% – 6.0%
300% – 400%	9.83%	6.0% – 8.5%
Over 400%	Not eligible for subsidies	8.5%

Inflation Reduction Act  
Increased Subsidies  
Through 2025

# Subsidies for Individual Insurance



Annual Household Income	Family Size	% FPL	Average "Retail" Monthly Prem.	Subsidized Silver Plan Mo. Prem.
\$20,000	1	157%	\$353	\$5
\$20,000	4	76%	Medicaid	Medicaid
\$40,000	1	313%	\$353	\$211
\$40,000	4	153%	\$1,245	<b>\$4</b>
\$60,000	1	470%	\$353	\$353
\$60,000	4	229%	\$1,245	<b>\$158</b>
\$80,000	4	305%	\$1,245	<b>\$409</b>
\$125,000	4	477%	\$1,245	<b>\$885</b>

Silver Plan Cost (approx. \$3,000 deductible plan - OOP reduced for lower income)

# Change to Family Affordability Definition



## When is Family Contribution Unaffordable?

Family Coverage Affordability			
Monthly Employee Contribution for Family Coverage	\$500.00	\$750.00	\$1,000.00
Unaffordable for Household Incomes Using 9.12% (2023)	\$65,789.47	\$98,684.21	\$131,578.95
Unaffordable for Household Incomes Using 8.39% (2024)	\$71,513.71	\$107,270.56	\$143,027.41

## Open Enrollment Season - When Might This Matter Most?

- | Many employers have fall open enrollment for a 12/1 or 1/1 plan year
- | Healthcare.gov 2023 open enrollment 11/1/23 – 1/15/24
  - Some state-run Exchanges may have different dates

# THANK YOU!



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