Don’t Let Vendor Solutions Lead to Compliance Problems

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Please note that the following is intended to be used for general guidance purposes only — it is not intended to constitute tax or legal advice. Any question of application of the law should be addressed to legal or tax counsel. The information is current as of February 21, 2024.
Agenda

- Overview of Vendor “Point” Solutions
- ERISA, COBRA, HIPAA, and the ACA
- Practical Solutions for Federal Law Application
- Impact on HSA Eligibility
- Taxation
- Reporting Requirements
Overview of Vendor “Point” Solutions
Don’t Let Vendor Solutions Lead to Compliance Problems

Overview: What are vendor “point” solutions?

Point solution programs – specific vendor solutions that add value to an employer’s major medical plan – are a recent and popular trend in employee benefit offerings

- Benefit plan enhancements range from specific condition management to digital solutions and apps to overall benefit program simplification
- Generally provided through third-party vendors
- Premium generally paid by employer (but could be paid by pre-tax by employee through the section 125 plan if benefit constitutes “medical care”)

Also known as a “Vendor Solution”
Examples of Vendor Point Solutions

Point solutions come in all shapes and sizes and address many different health conditions and concerns:

- Fertility
- Musculoskeletal
- Developmental disability
- Weight management
- Mental and behavioral health
- And others!
Overview: Vendor Point Solution Compliance Considerations

Compliance Considerations

How to design and administer a compliant point solution?

- Mitigation of Risk
- ACA
- Taxation
- Leased Network Agreement Limitations
- Health Savings Account (HSA) Implications

- ERISA
- COBRA
- Plan Documents
- Member Communication
- Stop-Loss
Don’t Let Vendor Solutions Lead to Compliance Problems

Overview: Vendor Point Solutions

Common Themes

- Eligibility: All employees versus medical plan participants only?
- Because most point solution benefits are considered medical care, integration with medical plan is key to compliance
- Point solution vendor generally doesn’t consider their solution as an insured product (no Schedule A)
- Seek assistance from outside counsel

Seek assistance from outside counsel.
ERISA, COBRA, HIPAA, and the ACA
Point Solutions: Federal Law Applicability

Application of ERISA, COBRA, HIPAA, and the ACA

• What is “Medical Care”?

Definitions Matter:
At a high level, for purposes of these laws, “medical care” is broadly defined to include amounts paid for the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body.

• Are point solution benefits considered “Medical Care”?

If ‘Yes’
ERISA, COBRA, HIPAA and the ACA apply
Point Solutions: Federal Law Applicability

Application of ERISA, COBRA, HIPAA, and the ACA

“Medical Care” – Other considerations

Licensed physician providing:
- Diagnoses;
- Treatment; and/or
- Prescriptions

To an employee’s specific condition

(1) Whether the physician/therapist is a trained a licensed medical professional

(2) Whether the physician/therapist is actually making a diagnosis (or just responding to someone who has self-diagnosed).

(3) Whether the advice/direction offered through the program is specific/individualized to the employee (or broadly related to the general condition the employee is seeking to address).

(4) Whether there is any specific direction or prescription specific to the individual employee (or just general suggestions/prescription that broadly pertain to the condition itself).
Example 1:

A program, accessed through a mobile phone app, asks John to verify whether he has a specific condition (e.g., Type 2 diabetes), and John verifies that he has Type 2 diabetes. As a response to John’s affirmation of diabetes, the program gives John general coaching services about diet, exercise and sleep habits that will be beneficial to reducing the risk of progression of the disease.

This type of **general coaching** would not generally be enough to be considered ‘**medical care**’.
Example 2:
Same facts as Example 1, except that after reviewing John’s eating habits, the physician or therapist provides specific advice (such as, “You should consume less soda, eat less sugar, eat more greens and take a particular prescription drug”). That type of specific advice would be a treatment or prescription for John’s particular condition and would therefore likely constitute medical care.

This type of specific coaching would generally be enough to be considered ‘medical care’.
Example 3:
The program vendor sends a kit to the employee’s home to collect a blood sample via a finger prick. The sample is then sent to a lab where it is tested for food and other allergies and sensitivities. The employee receives the results (via regular mail or email) and is given specific recommendations based on those results.

This type of individualized diagnosis and treatment would generally be enough to be considered ‘medical care’.
Point Solution Programs by design address specific diseases which require individualized diagnosis, treatment or prescriptions services—that’s “medical care”.

It becomes difficult to argue that most Point Solution Programs are not within the purview of ERISA, COBRA, HIPAA and the ACA.

CONCLUSION: ERISA, COBRA, HIPAA, and the ACA ALL LIKELY APPLY!!
Point Solutions: Federal Law Applicability

Potential Exception from the ACA

To do so, it must satisfy the following six conditions:

(1) The program must not provide significant benefits in the nature of medical care, taking into account the amount, scope and duration of covered services;

(2) The program must not coordinate with benefits under another group health plan;

(3) Participants cannot be required to exhaust benefits under the program before being eligible for benefits under another plan (*i.e.*, the program may not be a gatekeeper to obtain benefits from the underlying medical plan);

(4) Participation in the program may not be dependent on participation in another group health plan;

(5) No employee premiums or contributions may be charged for the program (*i.e.*, the program must be fully employer-paid); and

(6) There may be no cost sharing under the program.
ERISA, COBRA, HIPAA, and the ACA all likely apply to vendor point solution programs!
Practical Solutions for Federal Law Application
**Best Practice**: Integration of the Point Solution Program
- With major medical plan
- As a component of combined (or “wrap”) plan
- With other plan/plans
Practical Solutions for Federal Law Application

• **ERISA**
  - Limit point solution program participation only to those enrolled in employer plan
  - Add point solution program to plan docs/wraps/SPDs
  - Add point solution benefits to Form 5500

• **COBRA**
  - Limit point solution program participation only to those enrolled in employer plan
  - Include program as part of COBRA package
  - Work w/ program vendor regarding post-employment participation rules
  - Work w/ COBRA administrator to include the point program in COBRA election packets/notices
  - Special COBRA challenges:
    - Determining COBRA rates for point solutions
    - Some COBRA vendors can’t or won’t administer COBRA for point solution programs (may have to handle in-house)
Practical Solutions for Federal Law Application

- **HIPAA**
  - Review HIPAA privacy/security obligations and run a risk analysis (PHI might be shared through the program)

- **ACA**
  - Integrate the point solution program with the employer’s major medical plan
  - Integration yields ACA compliance by virtue of medical plan compliance
  - Integration achieved by adding point solution program to plan docs/wraps/SPDs

- **MHPAEA Considerations**
Practical Solutions for Federal Law Application

- **Challenges with Non-Integration**
  - Point solution is its own group health plan, and therefore must have its own plan docs/SPDs/5500
  - Potential violations of ACA annual dollar limit prohibitions and preventive services requirements
  - HIPAA compliance challenges
  - COBRA challenges if offered to non-medical population (nonalignment of coverage)
  - General administrative/HR inefficiencies: The “one-off” problem
Impact on HSA Eligibility
Impact on HSA Eligibility

- Enrollment in a point solution program potentially affects Health Savings Account (HSA) eligibility because it may provide “impermissible coverage”

- This is a different analysis than before:
  - For ERISA, COBRA, ACA, etc.: Is the point solution program a plan/health plan/group health plan subject to any, some, or all of these?
  - For HSAs: Is the point solution program “impermissible coverage” under the HSA eligibility rules?

- Coverage is “impermissible coverage” if it provides significant benefits in the nature of medical care or treatment before the statutory minimum HDHP deductible is met by the employee
  - Example: A point solution program providing a significant medical benefit free and/or at “no-cost” to an employee would be impermissible coverage
  - What is “significant”? → A “facts-and-circumstances” determination

- Note: IRS has clarified that non-HDHP “carve-out” coverage is also impermissible coverage
• **General Exceptions**

• **Preventive Care**: Preventive care falling within the IRS safe harbor definition of preventive care will not adversely affect HSA eligibility. This includes but is not limited to:
  - Periodic health evaluations (e.g., annual physicals, including related tests and diagnostic procedures)
  - Routine prenatal and well-childcare;
  - Immunizations for adults and children;
  - Tobacco cessation and obesity weight-loss programs; and
  - Certain screening services

• **Permitted Coverage**: Permitted coverage such as coverage for accidents, disability, dental care, vision care, or long-term care (whether provided through insurance or otherwise) will not adversely affect HSA eligibility

• **Telehealth Exception**: Through plan years beginning before January 1, 2025, employers may rely on the telehealth exception to preserve HSA eligibility:
  - **All** program benefits must be received via telehealth (phone apps, video conference visits, etc.)
  - A product of the COVID-19 pandemic. Remains a temporary measure based upon all information presently available.
Impact on HSA Eligibility

• **Possible Approaches**

  • **Siloed Approach** (more cautious): Offer program participation only to those employees enrolled in non-HDHPs or non-HSA-qualified HDHPs (will require eligibility provision amendment in related plan docs/SPDs)

  • **Inclusive Approach** (more aggressive): Build program benefits into overall plan and charge HDHP participants fair market value (FMV) for these benefits.
    • Note: IRS has not expressly approved of this approach
    • What is FMV?
      • Retail cost?
      • Contracted rate?
      • Other?
    • Consult with counsel when considering the blended approach

• **Bottom Line**: Employers with High Deductible Health Plans (HDHPs) should review impermissible coverage rules when considering point solution programs
Taxation
• Can only exclude benefits from an employee’s gross income if it’s for medical care
  • This is a bigger issue for fertility-related point solution programs

• **Challenges**
  • While temporary egg storage expenses could be considered medical care if to treat infertility and not elective, long-term storage (typically greater than one year) is not considered medical care (See IRS Publication 502)
  • Employer may not know which employees are receiving the benefit
  • Employers are generally the responsible party in reporting employees’ gross income via IRS Form W-2 (even if they engage a payroll provider to help administer payroll)

• **Potential Solutions**
  • Program vendor to communicate the benefits back to the employer, and then the employer reports it on the Form W-2 (through their payroll provider)
  • Vendor issues a 1099 directly to the employee
Reporting Requirements
Reporting Requirements

• ACA Form W-2 Reporting
  - Regardless of whether point solution program is medical care (non-taxable) or non-medical care (taxable), the fair market value of the benefits/services must be included in “aggregate reportable cost” under ACA’s Form W-2 cost of coverage reporting

• ACA PCOR Fee
  - If program provides medical care, enrolled employees must be included in the covered life headcount for annual PCOR fee reporting
  - Fully insured plans take note: Point solutions that are structured as a reimbursement are similar to an HRA, which is considered a self-insured plan for which a PCOR fee is due

• ERISA Form 5500
  - If point solution program provides medical care but is not integrated into major medical plan, employer must file separate Form 5500 (vendors probably won’t provide Schedule A, though; special Form 5500 instructions for filing without Schedule A)
Reporting Requirements

• RxDc Reporting

  • RxDc reporting applies to insured and self-insured group health plans that include Rx drug coverage
    • Specific exceptions for HRAs and FSAs, EAPs, hospital/fixed indemnity insurance, disease-specific insurance, and stand-alone dental/vision plans.

  • If point solution program offers Rx drug coverage, then the employer must consider how to complete the RxDc reporting—employer has responsibility as the plan sponsor (unless vendor agrees to complete it on their behalf).

  • See CMS RxDc Reporting Instructions (next slide screenshot)
Reporting Requirements

- RxDc Reporting
  - RxDc Instructions include a “Carve-Out Benefit” description.

Carve-Out Description

Location: P2 Column C | Max length: 2,048 characters
This field is required when a reporting entity is submitting data for a carved-out benefit and a different reporting entity (or entities) will report on the majority of the plan’s other benefits. A carve-out benefit is a benefit administered, offered, or insured by an entity that is different than the entity that administers, offers, or insures the majority of the plan’s other benefits.

Enter one of the following:

- Pharmacy only
- Medical only
- Behavioral health only
- Fertility only
- Specialty drugs only
- Hospital only
- Other
Summary

• **Key Takeaways**

  • Confirm employee eligibility (e.g., all employees versus only medical plan participants)

  • Integrate with medical plan to achieve compliance

  • Consider impact on HSA eligibility, PCOR fee obligations and employee taxation

  • Work closely with vendors regarding COBRA, W-2 reporting, Form 5500, and other administrative details

  • Seek assistance from your NFP consultant and outside counsel
POINT SOLUTION PROGRAMS: A GUIDE FOR EMPLOYERS

A recent popular trend in employee benefit offerings relates to “point solution” programs, which are typically designed as specific services that add value to an employer’s major medical plan or benefits program. Point solution programs are generally provided through third-party vendors. They often target benefit plan enhancements that range from specific condition management to digital solutions and apps to overall benefit program simplification.

While point solution programs are helpful supplements to an employer’s group health plan offerings, several significant (and potentially problematic) compliance issues arise from these types of add-on programs. This publication outlines several types of point solution programs and discusses the compliance issues that can arise in connection with their implementation. Those include the application of major benefits compliance laws (e.g., ERISA, COBRA, HIPAA, and the ACA), interaction with HSA eligibility, plan documentation and administration, and taxation and reporting.

TYPES OF POINT SOLUTIONS

Point solutions come in various shapes and sizes and address many different health conditions and concerns. Some common examples of services provided through point solution programs include fertility, musculoskeletal, developmental disability, weight management, and mental and behavioral health. Depending on an employer’s workforce composition, point solutions may be offered to all employees, only to employees in certain classifications, only to employees enrolled in the group health plan, and/or to an
Thank you for joining us!
Please let us know if you have any questions.