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**Participant Notices Required to
Administer Employer Health Plans**

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General Categories of Notices

- ▶ Before the PPACA
 - Annual Notices
 - COBRA Notices
 - Other Event-Based Notices

- ▶ Added by the PPACA
 - More Annual Notices
 - More Event-Based Notices
 - Transitional Notices

Which Plans Must Disclose?

- ▶ ERISA versus Non-ERISA Plans
 - ERISA status more important for pre-PPACA notices
 - Governmental employers have greater disclosure obligations under PPACA (although already subject to COBRA)
- ▶ HIPAA “Excepted Benefits”
 - Exempt from most PPACA requirements
 - No exemption from COBRA

Who Must Disclose?

- ▶ Under ERISA, the “plan administrator” is generally responsible for disclosures
 - “Plan administrator” is the person or committee specifically designated by the terms of the plan
 - Absent a specific designation, the sponsoring employer is the plan administrator
- ▶ Under PPACA, responsibility may depend on whether plan is insured or self-funded
 - Insurer is generally responsible for PPACA notices
 - But employer may be liable if insurer fails to comply

Permissible Methods of Disclosure

- ▶ In-hand delivery
- ▶ Mailing to last-known address
- ▶ Electronic distribution -- subject to stringent rules described below
- ▶ Posting on bulletin board or making available on request is **not** sufficient

Electronic Distribution

- ▶ DOL regulations provide a safe harbor for electronic distribution
 - Format requirement
 - Disclosure requirement
 - Consent and notice requirements
- ▶ Must provide “heads up” notice re:
 - Significance of document, and
 - Right to request free, paper copy

Electronic Distribution

▶ On-site Access

- Acceptable for participants who can effectively access electronic documents at any location where they are reasonably expected to perform their work duties and for whom access to the employer's electronic information system is an integral part of those duties
- Access to a kiosk is not sufficient

Electronic Distribution

- ▶ Distribution beyond the workplace
 - Must obtain affirmative consent, which must not have been withdrawn
 - Consent must be provided electronically, in a manner that reasonably demonstrates the participant's ability to access documents in the form in which they are being furnished (unless distributed via CD or DVD)
 - Participant must have provided an address for electronic receipt

Electronic Distribution – Website

- ▶ Homepage must contain prominent link
- ▶ Website must include instructions on how to obtain replacement for lost or forgotten password
- ▶ Documents must remain on website for reasonable period of time after participants are notified of their availability

Foreign Languages

- ▶ Must be “linguistically appropriate”
 - If < 100 employees with > 25% literate only in same non-English language, or
 - If > 100 employees with lesser of 500 employees or 10% literate only in same non-English language, then:
 - Must include prominent notice, in non-English language, offering assistance
 - Assistance need not be in writing

Summary Annual Report



- ▶ Summarizes information on Form 5500
- ▶ Due within 9 months after end of plan year (or 2 months after 5500 due date, if extended)
- ▶ DOL regulations provide line-by-line key to Form 5500

Women's Health and Cancer Rights Act

- ▶ Notice regarding availability of benefits for breast reconstruction following mastectomy
- ▶ Must be provided at initial enrollment and each year thereafter
- ▶ Practice tip: Provide with annual open enrollment materials

Michelle's Law

- ▶ Notice of availability of continued coverage for students who would otherwise lose coverage due to medically necessary leave of absence
 - Must be included in any materials relating to certification of student status
 - Timing will depend upon when plan typically requests certification
- ▶ May not be needed following PPACA's mandate of coverage for older children

Children's Health Insurance Program

- ▶ Must be provided to all employees living in any state offering premium assistance under Children's Health Insurance Program
 - DOL model notice provides contact information for all relevant states
 - Employers may supplement model with information relevant to their state(s)
- ▶ Annual notice; first due for first plan year beginning after 2-4-10

Summary of Material Modifications

- ▶ Required if “material modification” to plan or if information in SPD has changed
 - Explain in manner expected to be understood by average participant
 - Provide within 210 days after end of plan year in which amendment adopted
 - SMM should accompany SPD when provided to new participants
 - Not required for terminated participants or beneficiaries if change does not affect them
- ▶ But note faster deadline for benefit **reductions**

Summary of Material Reduction

- ▶ Applicable to group health plans
 - Due within **60** days after date of adoption
 - Material reduction = any modification to the plan or change in the information required to be included in SPD that, independently or in conjunction with other contemporaneous modifications or changes, would be considered by the average plan participant to be an important reduction in covered services
- ▶ Superseded by PPACA's **advance** notice rule (below)

COBRA – General Notice

- ▶ Timing: 90 days from the coverage effective date or the deadline for providing election notice, if earlier
- ▶ Can use SPD for this notice, but:
 - Must be sent to covered employee and spouse, and
 - Must be sent within time frame for providing general notice
- ▶ Model notice contained in regulations

COBRA – Election Notice

- ▶ Timing:
 - 14 days after notice of qualifying event received, or
 - If employer is COBRA administrator, 44 days after occurrence of qualifying event
- ▶ Must be furnished to each qualified beneficiary
- ▶ May use single notice, addressed to covered employee and spouse, if all reside at same location
- ▶ Model notice contained in regulations

COBRA -- Notice of Unavailability

- ▶ If administrator receives notice of divorce, legal separation or child's loss of dependent status – but individual is not entitled to COBRA coverage – administrator must provide notice explaining why not
- ▶ Timing – same period as would be required for providing election notice

COBRA -- Notice of Early Termination

- ▶ Timing: As soon as practicable
- ▶ Contents:
 - Reason for early termination
 - Effective date of coverage termination
 - Alternative coverage options (e.g., conversion)
- ▶ May be combined with certificate of creditable coverage

Notice of Special Enrollment Rights

- ▶ Must be provided at or before the time an employee is offered the opportunity to enroll
- ▶ Notice should be updated to comply with CHIPRA (60 days vs. 30 days to enroll)
- ▶ Inclusion in SPD is insufficient

General Notice of Pre-existing Condition Limitations

- ▶ Cannot impose pre-existing condition limitation until notice has been provided
- ▶ Must be provided as part of any written application materials or by the earliest date following a request for enrollment that the plan or issuer, acting in a reasonable and prompt fashion, can provide it
- ▶ Stand-alone notice recommended

HIPAA Notice of Privacy Practices



- ▶ Initial notice upon enrollment
- ▶ Reminder regarding availability of the notice and how to obtain it at least once every three years
- ▶ Reminder can be included with other plan communications (e.g., SMM)
- ▶ Updated notice within 60 days of material change

Notice of Privacy Breach



- ▶ Required when disclosure of unsecured PHI compromises security or privacy of PHI
- ▶ Notice to affected individuals within 60 days after discovery of breach
- ▶ Breach must also be reported to HHS
- ▶ Different rules apply to breaches affecting > 500 individuals versus those affecting < 500 individuals

Medicare Part D Notice

- ▶ Must be provided to “Part D-eligible” individuals
- ▶ Timing:
 - Prior to each Medicare Part D annual election period (beginning November 15 of each year)
 - Prior to the effective date of coverage for any Medicare-eligible individual who joins the plan (may be included in new hire package)
 - Whenever there is a change in creditable coverage status
 - Upon request (personalized notice may be used)

PPACA – Annual Notices

- ▶ Notice of grandfathered status
- ▶ Patient protection notice
 - Right to select primary care provider (or pediatrician)
 - Right to see OP-GYN without referral from PCP

Notice of Grandfathered Status

- ▶ Must include statement in all plan materials provided to participants describing benefits that the plan believes it is a grandfathered health plan
- ▶ Must provide contact information for questions and complaints
- ▶ Model notice available
- ▶ Plan must retain records demonstrating terms of plan that were in effect on March 23, 2010

Patient Protection Notice

- ▶ Non-grandfathered plans must offer the following patient protections:
 - Choice of any participating and available primary care provider (including pediatrician)
 - May not require pre-authorization or referral for female to visit OB-GYN
 - Must also be included in SPD
 - Model notices available

PPACA – Event-Driven Notices

- ▶ Notice of rescission of coverage
- ▶ Notices of claim or appeal denial
- ▶ Notice of material modification of coverage

Notice of Rescission of Coverage

- ▶ Must provide at least 30 calendar-day advance notice of rescission
- ▶ Rescission is termination of coverage that has retroactive effect
- ▶ Does not apply to failure to pay premium

Notice of Claim or Appeal Denial

- ▶ Notices for non-grandfathered plans must include additional content:
 - Information sufficient to identify the claim involved, including
 - the date of the service,
 - the health care provider,
 - the claim amount (if applicable),
 - the diagnosis code and its corresponding meaning, and
 - the treatment code and its corresponding meaning

Notice of Claim or Appeal Denial

- The reason or reasons for an adverse benefit determination or final internal adverse benefit determination, including
 - the denial code and its corresponding meaning, and
 - a description of the plan's or issuer's standard, if any, that was used in denying the claim
- A description of available internal appeals and external review processes, including information regarding how to initiate an appeal

Notice of Claim or Appeal Denial

- The availability of, and contact information for, an applicable office of health insurance consumer assistance ombudsman established under the PHSA
- ▶ Failure to strictly adhere to requirements will result in “deemed” exhaustion of internal appeals process
- ▶ Enforcement grace period until July 1, 2011
- ▶ Model notices are available

Notice of Material Modification

- ▶ Must be provided 60 days prior to effective date of modification
- ▶ Effective date unclear, but likely 2012 when summary of benefits and coverage must be provided

PPACA – Transitional Notices

- ▶ Notice of removal of lifetime limit
- ▶ Notice regarding adult children
- ▶ Notice of participation in Early Retiree Reimbursement Program

Notice of Removal of Lifetime Limit

- ▶ Any individual who previously reached lifetime limit must be notified that lifetime limit no longer applies (if otherwise still eligible)
- ▶ Must include opportunity to re-enroll in any benefit package
- ▶ Model notice available

Notice Regarding Adult Children

- ▶ Plan must provide written notice of the opportunity to enroll an eligible “child” (i.e., a child under age 26 who had previously reached the plan’s limiting age)
 - This notice must be “prominent”
 - However, it may be
 - given either by the plan or by an insurer,
 - given to the employee on behalf of the child, and
 - included with other enrollment materials

Notice Regarding Adult Children

- The enrollment right must offer all benefit packages available to similarly situated children under 26
- Parents may switch to (or enroll in) any benefit package option for which a child is eligible
- Model notice available

Early Retiree Reimbursement Program Notice

- ▶ Sponsors participating in the Early Retiree Reinsurance Program (“ERRP”) must provide a form notice to plan participants informing them that the sponsor is participating in the ERRP with respect to the plan
 - Notice must be delivered to all individuals who are plan participants (including enrolled spouses, surviving spouses, and dependents), and not just early retirees

Early Retiree Reimbursement Program Notice

- Must be delivered within a reasonable time after the sponsor receives its first ERRP reimbursement, but may be delivered before first ERRP reimbursement
- May be included with other plan materials delivered to plan participants and may be delivered by U.S. mail or by courier service to each plan participant's last-known address
- One notice per family is okay, so long as the notice is addressed to all plan participants who are family members



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