Benefits Law Quarterly

A comprehensive employer's guide to recent developments in employee benefits law, including issues relating to HIPAA, COBRA, and ERISA compliance

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In This Issue

Page 1
Most Providers are Unprepared for Recently Announced HIPAA Audits

Supreme Court to Review PPACA Constituionality; Changes to Expect in 2012

Page 2
EBSA Creates Consumer Web Assistance Page for Health and Retirement Planning

Page 3
Final Rule to Improve Access to Quality Investment Advice Effective 12/27/11

Most Providers are Unprepared for Recently Announced HIPAA Audits

The American Recovery and Reinvestment Act of 2009, in Section 13411 of the HITECH Act, requires HHS to provide for periodic audits to ensure covered entities and Business Associates are complying with the HIPAA Privacy and Security Rules and Breach Notification standards. To implement this mandate, the Office for Civil Rights (OCR) is piloting a program to perform up to 150 audits of covered entities to assess privacy and security compliance. Audits conducted during the pilot phase began November 2011 and will conclude by December 2012.

Most healthcare organizations charged with HIPAA compliance are not fully prepared for a privacy and security audit by federal regulators. A November survey conducted by HCPro, Inc. reveals that only 17% of responding organizations said they are fully prepared for an OCR privacy and security compliance audit.

The audit program serves as a new part of OCR's health information privacy and security compliance program. OCR will use the audit program to assess HIPAA compliance efforts by a range of covered entities. Audits present a new opportunity to examine mechanisms for compliance, identify best practices and discover risks and vulnerabilities that may not have come to light through OCR's ongoing complaint investigations and compliance reviews. OCR will broadly share best practices gleaned through the audit process and guidance targeted to observed compliance challenges via this web site and other outreach portals.

Every covered entity and Business Associate is eligible for an audit. Selections in the initial round will be designed to provide a broad assessment of a complex and diverse health care industry. OCR is responsible for selection of the entities that will be audited. OCR will audit as wide a range of types and sizes of covered entities as possible; covered individual and organizational providers of health services, health plans of all sizes and functions, and health care clearinghouses may all be considered for an audit. Business Associates will be included in future audits.

The privacy and security performance audit process will include generally familiar audit mechanisms. Entities selected for an audit will be informed by OCR of their selection and asked to provide documentation of their privacy and security compliance efforts. In this pilot phase, every audit

(HIPAA Continued on p. 4)

Supreme Court to Review PPACA Constitutionality; Changes to Expect in 2012

The U.S. Supreme Court announced in November that it would take up the issue of the constitutionality of the 2010 Patient Protection and Affordable Care Act (PPACA), the federal health care reform legislation, with oral hearings in March and a potential ruling in June, just ahead of nationwide elections in the fall.

Two constitutional issues loom large: One is the individual mandate that all persons must buy health insurance if it is not provided for them otherwise; the other is the tax penalty PPACA imposes on those who refuse to purchase insurance.

The core issue is whether the

(PPACA Continued on p. 4)

EBSA Creates Consumer Web Assistance Page for Health and Retirement Planning

The U.S. Department of Labor's Employee Benefits Security Administration (EBSA) has created a new consumer assistance Web page that provides easy access to useful information, and allows users to submit questions and complaints about health and retirement plans electronically.

The Employee Benefits Security Administration (EBSA) is committed to educating and assisting the 150 million Americans covered by more than 718,000 private retirement plans, 2.6 million health plans, and similar numbers of other welfare benefit plans holding over $6.5 trillion in assets; as well as plan sponsors and members of the employee benefits community. EBSA balances proactive enforcement with compliance assistance and works diligently to provide quality assistance to plan participants and beneficiaries. It is the policy of EBSA to provide the highest quality of service to its customers.

While this information is primarily aimed at the consumer, or the employee who participates in a health or benefit plan, the many sections with their succinct, direct answers to common questions can also be useful to business owners and human resource professionals. Overall, though, the site is aimed at employees keeping their benefit plans' feet to the fire, so to speak, and it thus might benefit management personnel to familiarize themselves with the functions available.

"Helping retirement and health plan participants find answers to questions about their benefits and providing assistance when they believe their benefits have been improperly denied is one of our most important responsibilities," said EBSA Assistant Secretary Phyllis C. Borzi.

"The new consumer assistance Web page and electronic inquiry/complaint process will provide quick answers to the most frequently asked questions and connect workers to experienced benefits advisers if assistance is needed."

The page includes links to various tools and publications with information on benefit plans, as well as answers to questions about "hot topics." Users also have the option to submit a question, file a complaint or report a problem with their plan. Inquiries and complaints submitted are sent directly to EBSA benefits advisers, who will respond as soon as possible but no later than three business days. Additionally, the system automatically routes the requests to the appropriate EBSA regional office based on users' ZIP codes.

The main page is broken into three sections — Resources/Tools, Hot Topics, and Publications. The Hot Topics section is further broken down into tabs for Health and Retirement.

The new Web page is also available in Spanish. EBSA has a number of benefits advisers who are fluent in Spanish and a translation service is available for a variety of other languages. The page can be found by going to http://www.dol.gov/ebsa/ and then selecting "Request Assistance" or "Solicitud de Asistencia" at the top of the page.

EBSA says it receives thousands of calls each year on its toll-free consumer assistance line at (866) 444-3272. The agency also said it hopes that this new Web page and electronic inquiry system will provide more efficient service to individuals seeking assistance.

EBSA's benefits advisers assisted more than 230,000 consumers last year and obtained more than $478 million in benefits that had been wrongly denied to 173,000 participants through informal dispute resolution. EBSA also opened 900 formal investigations of retirement and health plans based on referrals from benefits advisers of complaints that could not be resolved informally.

Background on EBSA

The Employee Benefits Security Administration is responsible for administering and enforcing the fiduciary, reporting and disclosure provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). At the time of its name change in February 2003, EBSA was known as the Pension and Welfare Benefits Administration (PWBA). Prior to January 1986, PWBA was known as the Pension and Welfare Benefits Program. At the time of this name change, the agency was upgraded to a sub-cabinet position with the establishment of Assistant Secretary and Deputy Assistant Secretary positions.

The provisions of Title I of ERISA, which are administered by the Department of Labor, were enacted to address public concern that funds of private pension plans were being mismanaged and abused. ERISA was the culmination of a long line of legislation concerned with the labor and tax aspects of employee benefit plans. Since its enactment in 1974, ERISA has been amended to meet the changing retirement and health care needs of employees and their families. The role of EBSA has also evolved to meet these challenges.

The administration of ERISA is divided among the Department of Labor (DOL), the Internal Revenue Service of the Department of the Treasury (IRS), and the Pension Benefit Guaranty Corporation (PBGC). Title I, which contains rules for reporting and disclosure, vesting, participation, funding, fiduciary conduct, and civil enforcement, is administered by the DOL Title II of ERISA, which amended the Internal Revenue Code to parallel many of the Title I rules, is administered by the IRS. Title III is concerned with jurisdictional matters and with coordination of enforcement and regulatory activities by the U.S. Department of Labor and the IRS. Title IV covers the insurance of defined benefit pension plans and is administered by the PBGC.

Prior to a 1978 reorganization, there was overlapping responsibility for administration of the parallel provisions of Title I of ERISA and the tax code by Labor and the IRS, respectively. As a result of this reorganization, the Department of Labor has primary responsibility for reporting, disclosure and fiduciary requirements; and the IRS has primary responsibility for participation, vesting and funding issues. However, the U.S. Department of Labor may intervene in any matters that materially affect the rights of participants, regardless of primary responsibility. □

Final Rule to Improve Access to Quality Investment Advice Effective 12/27/11

The U.S. Department of Labor's Employee Benefits Security Administration issued a final regulation that will enhance retirement security by improving workers' access to quality fiduciary investment advice. The regulation implements a prohibited transaction exemption under an amendment to the Employee Retirement Income Security Act and the Internal Revenue Code that is part of the Pension Protection Act of 2006. The final rule became effective on December 27, 2011, and is applicable to transactions occurring on or after that date.

In 2010, approximately 48.6 million households owned some type of IRAs, with estimated total assets of approximately $4.7 trillion. "Given the rise in participation in 401(k)-type plans and IRAs, the retirement security of millions of America's workers increasingly depends on their investment decisions," said EBSA Assistant Secretary Phyllis C. Borzi. "This rule will make high-quality fiduciary investment advice more accessible, while providing important safeguards to minimize potential conflicts of interest."

The prohibited transaction rules in ERISA and the IRC generally prevent a fiduciary investment adviser from recommending plan investment options if the adviser receives additional fees from the investment providers. Although these rules protect participants from conflicts of interest, ERISA provides exemptions from the rules in appropriate circumstances and permits the department to grant exemptions that have participant-protective conditions. The new regulation implements an exemption that Congress enacted as part of the Pension Protection Act of 2006 to improve participant access to fiduciary investment advice, which contains certain safeguards and conditions to prevent investment advisers from providing biased advice that is not in a participant's best interest.

To qualify for the exemption in the final regulation, investment advice must be given through the use of a computer model that is certified as unbiased by an independent expert or through an adviser compensated on a "level-fee" basis, meaning that the fees do not vary based on investments selected. Both types of arrangements must also satisfy several other conditions, including the disclosure of the adviser's fees and an annual audit of the arrangement for compliance with the regulation.

The regulation also shows advisers how to comply with other conditions and safeguards in the statutory exemption, including:

- Requiring that a plan fiduciary (independent of the investment adviser or its affiliates) authorize the advice arrangement.
- Imposing recordkeeping requirements for investment advisers relying on the exemption.
- Requiring that computer models must be certified in advance as unbiased and meeting the exemption's requirements by an independent expert.
- Establishing qualifications and a selection process for the investment expert who must perform the above certification.
- Clarifying that the level-fee requirement does not permit investment advisers (including their employees) to receive compensation from any party (including affiliates) that vary on the basis of the investments participants select.
- Establishing an annual audit of both computer model and level-fee advice arrangements, including the requirement that the auditor be independent from the investment advice provider.
- Requiring disclosures by advisers to plan participants.

The final rule does not affect the applicability of the Department's prior guidance on the application of the prohibited transaction rules and existing prohibited transaction exemptions to investment advice arrangements.

The Department estimates that approximately 134,000 defined contribution plans covering 17 million participants and beneficiaries will offer investment advice pursuant to the statutory exemption and that approximately 3.5 million of these participants and beneficiaries will seek advice from investment advisory firms servicing their employer-sponsored retirement investment plan. The Department also estimates that 17 million IRA beneficiaries will seek investment advice pursuant to the statutory exemption.

The goal of the final regulation is that it will provide important benefits to society by extending quality, expert investment advice to more participants, leading them to make fewer investment mistakes. The Department believes that participants, after having received advice covered by the exemption, may pay lower fees and expenses, engage in less excessive or poorly timed trading, more adequately diversify their portfolios and thereby assume less uncompensated risk, achieve a more optimal level of compensated risk, and/or pay less excess taxes.

This regulation is separate from and does not affect the Labor Department's proposed rule on the definition of fiduciary investment advice, which the department recently announced that it will re-propose. Consistent with the final rule to improve access to quality investment advice, the re-proposal is designed to inform judgments, ensure an open exchange of views and protect consumers while avoiding unjustified costs and burdens. When finalized, this important consumer protection initiative will safeguard workers who are saving for retirement as well as the businesses that provide retirement plans to America's working men and women. The decision to re-propose is in part a response to requests from the public, including members of Congress, that the agency allow an opportunity for more input on the rule.

Specifically, the agency anticipates revising provisions of the rule including, but not restricted to, clarifying that fiduciary advice is limited to individualized advice directed to specific parties, responding to concerns about the application of the regulation to routine appraisals and clarifying the limits of the rule's application to arm's length commercial transactions, such as swap transactions.

(Advice Continued on p. 4)

Benefits Law Quarterly newsletters are intended to provide you with additional guidance on HIPAA, COBRA & ERISA regulations to keep you informed and help you stay in compliance with benefit laws. If you have any employment related topics that you would like to see covered in future newsletters articles, please send your ideas to answers@personnelconcepts.com.
While all submissions will be taken into consideration, we will publish those that are most applicable to the majority of our client base and employers in general.

(HIPAA Continued from p. 1)

will include a site visit and result in an audit report. During site visits, auditors will interview key personnel and observe processes and operations to help determine compliance. Following the site visit, auditors will develop and share with the entity a draft report; audit reports generally describe how the audit was conducted, what the findings were and what actions the covered entity is taking in response to those findings. Prior to finalizing the report, the covered entity will have the opportunity to discuss concerns and describe corrective actions implemented to address concerns identified. The final report submitted to OCR will incorporate the steps the entity has taken to resolve any compliance issues identified by the audit, as well as describe any best practices of the entity.

To date, the HHS/OCR has investigated and resolved over 14,925 cases by requiring changes in privacy practices and other corrective actions by the covered entities. From the compliance date to the present, the compliance issues investigated most are, compiled cumulatively, in order of frequency:

1. Impermissible uses and disclosures of protected health information;
2. Lack of safeguards of protected health information;
3. Lack of patient access to their protected health information;
4. Uses or disclosures of more than the minimum necessary protected health information; and
5. Complaints to the covered entity.

Noting that OCR has announced several high-profile HIPAA enforcement actions in recent months, Leon Rodriguez, the new director of the Department of Health and Human Services' Office for Civil Rights, says he "absolutely" plans to continue the office's ongoing efforts to ramp up enforcement of HIPAA with resolution agreements, civil monetary penalties and other enforcement actions.

"It's always going to be a high priority to focus on those cases that involve the most egregious conduct - the most serious violations - and also the cases that have the most deterrent value," he stresses. □

(PPACA Continued from p. 1)

Commerce Clause of the Constitution gives Congress the power to order people to purchase anything, which in this case is health insurance.

By agreeing also to review the tax penalty provision, however, the Supreme Court justices could choose to skirt the entire issue by saying the tax penalty cannot be challenged until someone has actually paid it and sought a refund. This is essentially what the Fourth U.S. Circuit Court of Appeals did, invoking the Anti-Injunction Act, which requires a new tax to be paid before it can be challenged legally.

If the Supreme Court chooses the Fourth Circuit's avoidance route, PPACA would take full effect in January 2014, but no one would have to pay the tax until the next year, so judgment day could be way, way off.

Meanwhile, regardless of what the Supreme Court does, several provisions of PPACA will kick in beginning on Jan. 1, 2012. On New Year's Day, the pharmaceutical industry will be hit with a new excise tax that is expected to raise $2.3 billion annually. Then on March 23, the insurance industry will be required to provide uniform summaries of benefits and coverage to plan participants (upon the start of the next plan year, effectively Jan. 1, 2013). The goal is simplified, easy-to-understand language.

Other provisions that commence Jan. 1 include an adjustment in payments for Medicare Advantage programs and the creation of Accountable Care Organizations (ACOs) that bundle together hospitals and other providers to streamline care and save costs.

Meanwhile, 2012 is the last full year in which the states will be able to set up their own locally run insurance exchanges, which are part and parcel of PPACA. The exchanges will allow health insurers to pitch their products to individuals and small group plans in a central venue. If a state does not set up its own exchange before the end of 2012, the federal government will assume operations in 2013. All states except Alaska have already accepted federal money to set up exchanges, even though 26 of the states are involved in a lawsuit to overturn PPACA. To date, 28 states have begun establishing their exchanges, even some involved in the lawsuit. □

(Advice Continued from p. 1)

Also anticipated are exemptions addressing concerns about the impact of the new regulation on the current fee practices of brokers and advisers, and clarifying the continued applicability of exemptions that have long been in existence that allow brokers to receive commissions in connection with mutual funds, stocks and insurance products. The agency will carefully craft new or amended exemptions that can best preserve beneficial fee practices, while at the same time protecting plan participants and individual retirement account owners from abusive practices and conflicted advice.

The agency is seeking to amend a 1975 regulation, which defines when a person providing investment advice becomes a fiduciary under the Employee Retirement Income Security Act, in order to adapt the rule to the current retirement marketplace. The goal of both the proposal to redefine fiduciary as well as the final rule on access to quality investment advice is to ensure that potential conflicts of interest among advisers are not allowed to compromise the quality of investment advice that millions of American workers rely on, so they can retire with the dignity that they have worked hard to achieve. □

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