

March 2005

HIPAA Portability Revisited

On December 30, 2004, the Departments of Treasury, Labor and Health and Human Services (collectively "Departments") issued both final and proposed regulations relating to the portability requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). While the new final regulations do not present any significant changes to the interim final regulations issued April 8, 1997, they do provide useful guidance and clarification on a number of issues. The proposed regulations present some interesting potential changes to the portability requirements if finalized.

The final regulations apply to health plans on the first day of the plan year beginning on or after July 1, 2005, which is January 1, 2006, for calendar year plans. The Departments are accepting written comments on the proposed regulations through March 30, 2005. This Management Alert summarizes some of the more important changes presented in these new final and proposed regulations.

Final Regulations

Clarification of Special Enrollment Rights. The final regulations describe four circumstances that trigger an individual's special enrollment rights providing a broader interpretation of when these rights are triggered. An individual has a special enrollment right in your group health plan:

- ♦ when that individual loses coverage under another group health plan, even if that individual chose not to enroll in your health plan previously (whether or not that individual had coverage at the time he or she chose not to enroll).
- ♦ if that individual reaches a lifetime limit for all benefits under another group health plan or one option, but not all options under your group health plan.
- ♦ if the individual no longer resides in his or her HMO's service area and does not have access to other coverage from the HMO.

- ♦ entitling the individual to change to another benefit option if the individual's dependent has a special enrollment right because the dependent lost other health coverage.

Two New Types of Creditable Coverage. The new final regulations add two additional types of health coverage that qualify as creditable coverage, which now includes coverage under a state children's health insurance plan (SCHIP) and coverage under a foreign national health plan.

New Model Certificate of Creditable Coverage. The final regulations include a new model certificate of creditable coverage. This model certificate includes a newly required educational statement informing individuals of their rights under HIPAA. Employers should add this to their compliance agenda for year-end compliance. A copy of the form of notice can be found on the Department of Labor's website.¹

Broader Interpretation of Excepted Dental and Vision Benefits. Limited scope dental and vision benefits are not subject to the portability requirements if they are not an integral part of a group health plan. Under the interim regulations, if a separate dental or vision benefit provided "medical services," then the benefit was subject to the portability requirements. The final regulations do not refer to medical services. If the dental or vision benefit provides benefits "substantially all of which are for treatment of" the mouth or eye, respectively, then the benefit will not be subject to the portability requirements.

Retirees Qualify for HIPAA Protection. Under the final regulations, retirees who are included in an active group health plan with more than two current employee participants are protected by HIPAA and, therefore, afforded special enrollment rights. On the other hand, former employees included in a retiree-only health plan are not protected by HIPAA and would not, for example, have special enrollment rights.

¹<http://www.dol.gov/ebsa/hipaamodelnotice.doc>

Proposed Regulations

Verbal Special Enrollment Permissible. The Departments have proposed a rule that would permit a participant to exercise his or her special enrollment rights verbally within the 30-day special enrollment period. This new rule would, however, permit a plan sponsor to establish a deadline following the close of the 30-day period during which the written enrollment materials must be completed.

Late Certificates Toll Break-in-Coverage. The proposed regulations contemplate a tolling of the 63-day break in coverage period until the employer issues a certificate of creditable coverage, but not later than 44 days after the coverage ceases. Plans imposing pre-existing conditions would thus need to count the break in coverage in the alternatives to determine if creditable coverage would be recognized.

Clarification Regarding HIPAA's Interaction with FMLA. In a further effort to streamline group health plan administration, the Departments proposed a number of changes intended to synchronize HIPAA's interaction with FMLA. These changes include:

- ◆ A Plan would not be required to issue a certificate of creditable coverage to an individual who loses coverage while on FMLA leave until the leave has ended.
- ◆ If an individual on FMLA leave loses coverage while on leave, the break-in-coverage period would not begin until the earlier of the issuance of a certificate of creditable coverage or 44 days after the end of the FMLA leave.

Clarification Regarding Group Health Plan Alternative Benefits. Moving from one benefit to another benefit offered by the same employer would not trigger a certificate of creditable coverage requirement unless the benefits are offered under and operated as separate benefit packages and have separate plan documents.

If you have any questions concerning HIPAA portability, please contact the Seyfarth Shaw LLP Employee Benefits Group attorney with whom you work or any Employee Benefits attorney on the website at www.seyfarth.com.

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