

HIPAA Portability Regulations Update

The Health Information Portability and Accountability Act (HIPAA) has been in place since 1997, giving credit to individuals maintaining health insurance coverage against the application of a pre-existing condition exclusion period when moving from one group health plan to another, from a group health plan to an individual policy, or from an individual policy to a group health plan. These rules, providing improved portability and continuity of health coverage, were interim regulations. These new “final” HIPAA portability rules clarify the existing law and were effective February 28, 2005 and apply to Plan years beginning on or after July 1, 2005.

Right to Change Benefit Options Clarified

The final regulations clarify that an employee and any dependents (including the employee’s spouse) are eligible for special enrollment in any plan if they meet the provisions of special enrollment rights as detailed below. This includes cases where an individual’s dependent has a special enrollment right because the dependent lost eligibility for other coverage. A group health plan, and an insurer offering health insurance in connection with a group plan, is required to permit current employees and their dependents to enroll for coverage under the terms of the plan when eligible for special enrollment.

Under the IRS Treasury Rules there are six permitted election changes outside of the enrollment period, one of which is a special enrollment right under HIPAA. Cafeteria plans may permit these changes but are not required to but under HIPAA the ability to change benefit plans due to a special enrollment right is not optional.

Special Enrollment

The “final” HIPAA regulations have expanded the special enrollment criteria for certain individuals (including the employees and their dependents) who lose coverage under a group health plan. Special enrollment in a group health plan is available if the individual:

- (1) Was covered under the other plan at the time coverage was previously offered to them, and
- (2) The individual stated at the time that coverage under the other benefit plan was the reason for declining enrollment.

In addition to the above requirements, the loss of coverage must be due to:

- Exhaustion of the COBRA continuation period;
- Loss of eligibility for that coverage including divorce, loss of dependent status, death of the employee, termination of employment, or reduction in the number of hours of employment;
- Termination of the other plan’s coverage by the insurer;

- A member no longer residing, living, or working in the service area of the plan (applies to individual coverage provided through an HMO or group coverage (HMO) if there is no other coverage under the Plan available to the individual).
- Termination of employer contributions toward the coverage;
- *Lifetime benefit maximum has been met or exceeded*; or
- Termination of benefits to the employee's class of individuals.

Application to HSAs and HDHPs

There is no provision in the "final" HIPAA regulations that excludes High Deductible Health Plans (HDHP) from the requirements for group health plans or individual health insurance coverage. Generally, employer sponsored HDHPs are employee welfare benefit plans and are subject to the portability requirements of HIPAA.

HSAs are generally not employee welfare benefit plans and the portability requirements under ERISA will not apply. Moreover, the HIPAA requirements are generally not relevant for purposes of HSAs. Due to the rules imposed by the Internal Revenue Code, employers or HSA trustees do not have discretion with respect to the coverage provided by an HSA (i.e., what expenses qualify for reimbursement or which individual's expenses are eligible). However, under statute, the rules for employer contributions generally require that all employees who are eligible for HSA contributions and participating in the employer's HDHP receive comparable HSA contributions. Therefore, the combination of the comparability rules and the application of the special enrollment rules to the HDHP with respect to employer HSA contributions will generally ensure compliance with respect to employer HSA contributions because once an employee is enrolled in an employer-provided HDHP due to the special enrollment the employer must make comparable contributions to the employee's HSA.