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Employers Should Take Notice Of HIPAA Portability Rules

By Constance Gilcrest

More than three years have passed since HIPAA's final portability rules were issued, but employers still sometimes stumble over the notices required by these rules. Depending on the design of your group health plan, as many as seven notices must be provided (see box).

Both the employer and the insurer, if the plan is insured, are responsible for providing these notices, and fines of up to \$100 per day, per violation can be imposed. The U.S. Department of Labor and the Internal Revenue Service share enforcement authority over private employers' group health plans (see ¶130 of the *Guide*).

1) General Notice of Pre-existing Condition Exclusion

A plan must provide this notice before it can impose a pre-existing condition exclusion (PCE). This notice must be provided as part of any written enrollment application distributed by the plan. If not, it must be provided on the earliest date following a request for enrollment, in a prompt and reasonable fashion. This notice must include the following:

- the PCE's existence and terms, including the length of the look-back period (at most, six months);
- the maximum exclusion period (at most, 12 months for new and special enrollees, 18 months for late enrollees);
- a statement that the exclusion period may be reduced by creditable coverage;
- the right of individuals to demonstrate creditable coverage;
- their right to request a certificate of creditable coverage from a prior plan or insurer;
- a statement that the current plan will assist in obtaining this certificate; and
- a contact person's name, address and phone number for obtaining the

information or assistance regarding the pre-existing condition.

To avoid contradictions, the PCE provision should also be included in the summary plan description. Obviously, plans without PCEs do not need to provide this notice. (See ¶200.)

Types of HIPAA Portability Notices

- General Notice of Pre-existing Condition Exclusion (PCE)
- Individual Notice of PCE
- Alternative Method PCE Disclosure
- Certificate of Creditable Coverage
- Instructions for Obtaining Certificate
- Special Enrollment Rights Notice
- Notice for Declining Coverage

2) Individual Notice of PCE Period

When the plan imposes a PCE on a particular participant's claim, this notice must be provided when the determination has been made. The notice must include:

- the length of PCE that remains after offsetting any prior creditable coverage;
- the basis for this determination and any information the plan relied upon;
- the individual's right to offer evidence of additional creditable coverage; and
- the appeal procedures.

This notice must be provided in reasonable and prompt fashion after the determination. Again, plans without PCEs do not need to provide this notice. (See ¶350.)

See *Portability Notices*, p. 9

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3) Alternative Method PCE Disclosure

In most cases, prior creditable coverage will reduce the PCE period for all benefits. HIPAA does allow employers to vary PCE periods for five categories of benefits under what is known as the “alternative method”: mental health, substance abuse treatment, prescription drugs, dental care and vision care.

You must count all prior coverage in each category, even if there is a significant break in coverage (at least 63 days). Thus, a new enrollee might have more than 12 months of prior creditable coverage that eliminates the PCE for the medical plan, but if he or she did not have creditable vision coverage, then a PCE for vision would still be in place.

Plans that use the alternative method must fully notify participants of its terms at enrollment. (See ¶222.)

4) Creditable Coverage Certificate

This notice is better known as the “model certificate.” HIPAA’s 2004 final portability rules include a template for this document, which gives the dates when coverage began, the waiting period and the coverage effective date. The following elements also are required for the certificate:

- the date it was issued;
- the name of the plan;
- the name of the participant(s);
- the plan administrator’s contact information;
- a notice of where to go for more information; and
- a HIPAA educational statement.

This certificate can be provided to the new employer to show how long the participant had creditable coverage to be applied toward the PCE period. (See ¶310.)

Time frames for sending the certificate are as follows:

- within the COBRA time frame for a qualifying event;
- within a “reasonable time period” for a non-COBRA event; and
- on request within 24 months after the loss of coverage. (See ¶330.)

5) Instructions for Obtaining Certificate

A plan or insurer must establish a written procedure for individuals to request and receive certificates. The written procedure must include all contact information necessary to request a certificate such as name and phone number or address.

While the HIPAA regulations do not specifically require that this document be distributed, the preamble to the rules indicates that its purpose is “to ensure that individuals are aware of their right to request a certificate and how to make the request.” (See ¶331.)

6) Special Enrollment Rights

This notifies all employees of their HIPAA rights to become covered under the plan due to loss of other coverage or to marriage, birth, adoption or a child being placed for adoption under the age of 18. As with the certificate of creditable coverage, the HIPAA rules include model language that may be used for this notice. The “plan” must furnish this to all employees at or before the time the employee is initially offered the opportunity to enroll. (See ¶440.)

7) Notice for Declining Coverage

If an employee is declining coverage due to other coverage and is required by the plan to decline in writing, the plan or insurer must provide a written statement of consequences for failure to do so:

- **If** the plan or insurer requires written declination of coverage and the declination is due to other coverage,
- **Then** the plan or insurer must provide a written statement to explain the consequences of not providing the written reason for declining.
- **Consequence:** If the employee fails to decline coverage in writing, he or she will not be granted special enrollment rights for himself or herself, or family members, if the other coverage is lost. (see ¶410.)

Don’t Take Chances

Employers should not take chances with HIPAA, given the possible penalties and the potential for employees to sue under ERISA to enforce their HIPAA rights. Instead, employers should ensure proper compliance with HIPAA’s portability requirements, which means providing all notices within the appropriate time frames. ⬆