

Employers Must Provide Group Health Plan Participants with a New Summary of Benefits and Coverage

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The U.S. Treasury Department, Department of Labor, and Department of Health and Human Services issued final regulations under the Patient Protection and Affordable Care Act on February 9. They require administrators of group health plans (usually the employer) and insurers of group health plans to provide participants and beneficiaries with a Summary of Benefits and Coverage (SBC). An SBC must accurately describe the benefits and coverage of the plans/policy applicable to the participant or beneficiary in no more than four double-sided pages. The SBC requirement in itself does not supplant ERISA's existing requirement to furnish a summary plan description (SPD). However, if certain requirements are met, the SBC may be furnished as part of an SPD.

The final rules require compliance starting on September 23, 2012, and specifically target the 2012 open enrollment season. Employers that fail to satisfy this requirement are subject to penalties of \$1,000 per failure, per participant. Excise taxes of \$100 per day for each participant apply, and employers that provide inaccurate disclosures may be subject to fiduciary breach claims under ERISA.

Part I of this Client Alert highlights the action items employers should implement to address this new disclosure requirement. Part II summarizes the final regulation.

Part I: Action Items

- Coordinate with insurers/TPAs

Insurers are required to provide an SBC to the employer that sponsors the group health plan, and the insurer is jointly responsible with the plan's administrator (typically the employer) for furnishing the SBC to participants and beneficiaries. Accordingly, employers who sponsor fully insured health plans should coordinate with their carriers, to determine when the carrier will be providing SBCs and if the carrier will be furnishing them directly to participants and beneficiaries. On the other hand, employers who sponsor self-funded plans will need to coordinate with their third-party administrators to determine whether they will assist the employer in complying with the SBC requirement.

- Have legal counsel review the draft before it is finalized

As noted above, failure to comply with the SBC requirements can result in a daily penalty of up to \$1,000 per willful failure per participant and \$100 a day per participant in excise taxes. If the SBC is inaccurate, participants may sue under ERISA and allege that the administrator (usually the employer) breached its fiduciary duties by providing a disclosure that was materially misleading. A recent Supreme

Court opinion, *CIGNA v. Amara*, has expanded the types of remedies ERISA plaintiffs may receive for such claims.

- Check vendor agreements

Health plan vendor agreements should allocate responsibility for the production, coordination, and timing of the SBC and, if appropriate, provide indemnification for the employer.

- Review overall health plan disclosure strategy

With numerous disclosure requirements, employers should review where, how, and when they provide notices to employees, participants, or beneficiaries. While many employers are aware of the three main disclosure triggers, (1) new hire enrollment, (2) open enrollment/year end, and (3) termination, there are many more (e.g., those triggered by events and participant requests). Notice provided in an SPD or online does not always fully satisfy the employer's obligation, so it is recommended that employers work with ERISA counsel to create a strategy to consolidate and automate its notice obligations.

Part II: Summary of Final Regulations

Below is a high-level summary of the SBC requirements:

Who Provides the SBC?

- The SBC must be provided by plan administrators for self-insured health plans. For fully insured plans, plan administrators and insurers are jointly liable for this requirement. So if an insurer informs an employer that it intends to distribute an SBC to plan participants, the employer should have this commitment memorialized in a writing that includes a right to indemnification, should the insurer fail to timely perform.

Who Receives the SBC?

- The SBC must be provided to all applicants (at the time of application) and enrollees (at initial enrollment and annual enrollment). This includes beneficiaries.
- The final regulations provided three rules to reduce duplication:
 1. If the SBC is provided by one entity, it satisfies the requirements for all entities (insurer, employer, etc.)
 2. One SBC may be provided to a participant and any beneficiaries at the participant's last known address. If beneficiaries are known to reside elsewhere, though, the notice must be sent to multiple addresses.
 3. SBCs of benefit packages for which the participant is not enrolled are not required to be provided upon the participant's renewal, except upon request. (See below for more information.)

When Must the SBC Be Distributed?

- At Initial Enrollment – An SBC for each benefit package for which the employee is eligible must be provided no later than the first day the participant is eligible to enroll. If there is a

change during this enrollment period, a new SBC must be provided no later than the first day of coverage.

- At Special Enrollment – Special enrollees must be provided the SBC no later than when a summary plan description is required to be provided (90 days from enrollment). However, a special enrollee may always request an SBC when making enrollment choices. Upon request, the employer must provide an SBC within seven business days.
- Open Enrollment – An SBC must be provided no later than the date renewal/enrollment materials are provided. If renewal is automatic (continuation of coverage), an SBC must be provided no later than 30 days prior to the first day of the new plan year. However, where the terms of fully insured coverage are finalized in less than 30 days prior to the new plan year, the SBC can be provided as soon as practicable but no later than seven business days after the issuance of the policy or receipt of the intent to renew (whichever is earlier).
- Upon Request – An SBC must be provided within seven business days of a request.

What about mid-year changes to the SBC?

- Employers must provide a notice regarding a material modification in the terms of the plan or coverage that is not reflected in the most recently provided SBC no later than 60 days in advance of when such a change will be effective. This notice is not required for changes in conjunction with a renewal or reissuance of coverage. A material modification means any changes to the plan (improvements or reductions) that would, in conjunction with any other contemporaneous changes, be considered an important change by an average person.

How Should the SBC be Distributed?

- The SBC may be provided as a stand-alone document or part of a summary plan description, as long as the SBC is prominently displayed.
- The SBC may be provided in hard copy or electronic form. If sent electronically, it must meet the Department of Labor safe harbor requirements for electronic disclosures of ERISA communications generally, and must be sent by means that are “reasonably calculated to result in actual receipt.” The electronic disclosure rules are currently under review by the Department of Labor with the hope that the safe harbor will be expanded.

What Must the SBC Contain?

- Uniform definitions of standard insurance terms and medical terms, so that consumers may compare health coverage and understand the terms of (or exceptions to) their coverage
- A description of the coverage, including cost sharing, for each category of benefits identified by the agencies
- The exceptions, reductions, and limitations on coverage
- The cost-sharing provisions of the coverage, including deductible, coinsurance, and copayment obligations
- The renewability and continuation of coverage provisions

- A coverage facts label that includes examples to illustrate common benefits scenarios and corresponding cost sharing based on recognized clinical practice guidelines (only pregnancy and diabetes are currently required)
- A statement about whether the plan provides minimum essential coverage as defined under section 5000A(f) of the Code, and whether the plan's or coverage's share of the total allowed costs of benefits provided meets applicable requirements (not required until January 1, 2014)
- A statement that the SBC is only a summary and that the plan document, policy, or certificate should be reviewed to determine the governing contractual provisions (to reduce the risk of misrepresentation claims for errors and omissions, this statement should be made as clear and conspicuous as possible)
- A contact number to call with questions and an Internet web address where a copy of the actual individual policy or group certificate of coverage can be reviewed and obtained
- For plans and issuers that maintain one or more networks of providers, an Internet address (or similar contact information) for obtaining a list of the network providers
- For plans and issuers that maintain a prescription drug formulary, an Internet address where an individual may find more information about the prescription drug coverage
- An Internet address where an individual may review and obtain the uniform glossary, a contact phone number to obtain a paper copy of the uniform glossary, and a disclosure that paper copies are available

To assist employers in the implementation of the final regulations, the Department of Labor published a final template SBC (including instructions), a model completed SBC, and a final glossary of key terms with standardized definitions in the SBC context. These items are available on the Department of Labor website at www.dol.gov/ebsa. The completion of the SBC templates for each applicable benefit package will take time, and implementation is only six months away. Employers are encouraged to begin an SBC compliance plan now to be adequately prepared for this open enrollment season.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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