ALERT
Willis HRH Employee Benefits Practice

Willis HRH

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CHECKLIST: NOTICES TO INCLUDE IN HEALTH PLAN ANNUAL ENROLLMENT MATERIALS

Federal law requires health plans to send a variety of notices to participating employees and dependents, usually concerning their rights under the health plan. A few notices are required annually and employers generally can minimize the cost of sending these notices by including them with the health plan enrollment materials that they distribute each year. Although yearly distribution is not required for most federally mandated health plan notices, employers should consider including some of them with the enrollment materials anyway. Doing so may cure any previous failure to give the notice, and it demonstrates an employer's good faith effort to apprise plan participants of their rights.

ANNUAL DISCLOSURE REQUIREMENTS

ANNUAL WHCRA NOTICE

The Women's Health and Cancer Rights Act (WHCRA) requires annual distribution of a notice to all participants and beneficiaries in a group medical plan advising them of their rights to post-mastectomy breast reconstruction. The DOL has approved using an abbreviated notice such as the following to fulfill the annual notice requirement.

> Do you know that your plan, as required by the Women's Health and Cancer Rights Act of 1998, provides benefits for mastectomy-related services, including all stages of reconstruction and surgery to achieve symmetry between the breasts, prostheses and treatment for complications resulting from a mastectomy, including lymphedema? Call your plan administrator at [insert phone number] for more information.

Most employers do not use this short notice in their enrollment materials, however, because a more detailed WHCRA notice is required at enrollment and it is easier to use the same text for both notices. Here is a sample enrollment notice.

> The Women's Health and Cancer Rights Act of 1998 requires group health plans to make certain benefits available to participants who have undergone a mastectomy. In particular, a plan must offer mastectomy patients benefits for:
>
> - All stages of reconstruction of the breast on which the mastectomy was performed
> - Surgery and reconstruction of the other breast to produce a symmetrical appearance
> - Prostheses
> - Treatment of physical complications of the mastectomy, including lymphedema
>
> Our plan complies with these requirements. Benefits for these items generally are comparable to those provided under our plan for similar types of medical services and supplies. Of course, the extent to which any of these items is appropriate following mastectomy is a matter to be determined by the patient and her physician

Our plan neither imposes penalties (for example, reducing or limiting reimbursements) nor provides incentives to induce attending providers to provide care inconsistent with these requirements. If you would like more information about WHCRA required coverage, you can contact the plan administrator at [insert telephone number].

For additional details, see Chapter 15 of the Willis HRH Compliance Manual and Exhibit 15-05 (available online to Willis HRH clients).

MEDICARE PART D CREDITABLE (OR NON-CREDITABLE) COVERAGE NOTICE

Under the laws governing Medicare Part D, all employer-sponsored group medical plans covering prescription drugs must provide this notice annually as well as at several other times. The notice informs recipients if the employer-sponsored prescription drug coverage is creditable (i.e., it is at least the actuarial equivalent of Medicare's standard prescription drug benefit). The notice also explains the penalties (increased cost for coverage and delayed effective date) applied to certain individuals who delay Part D enrollment if they have a gap in creditable coverage of 63 days or more.

The prescription drug creditable coverage notice is required for Part D-eligible individuals who are "enrolled or seeking to enroll" in the employer's plan. A Part D-eligible individual may be any person covered under a plan, including a dependant, so determining exactly who is entitled to the notice presents several difficulties, and most employers distribute the annual notice to all plan participants. (Distribution to the employee that enrolled a dependant covers the requirement to provide the notice to the dependent, unless the employer knows that the dependent does not live with the employee.)

CMS has provided model forms that employers can use when making this annual distribution (available by clicking here). CMS has revised these forms several times, with the newest forms being issued for use after January 1, 2009. CMS's latest revisions consolidated three previous model notices into two. In the past, CMS provided the following three model notices:

- Creditable coverage
- Non-creditable coverage
- Personalized

As of January 1, 2009, the personalized notice form has been eliminated. The other two model notices have been revised, with optional information fields added for the information previously provided in the personalized notice. With the change, plan sponsors now have the option of completing fields in the creditable or non-creditable coverage notices that satisfy requests from plan participants for a personalized notice. Plan sponsors should use the new forms with the understanding that they will once again need to transfer customized information from their current notices onto the new forms.

One of the times that this notice must be distributed is during the 12 months before every November 15 (the start date of Medicare's Part D Annual Coordinated Election Period). In addition, an employer must provide this notice during the 12 months before an individual's Medicare Part B Initial Enrollment Period. An employer that has distributed the notice since November 15, 2008 has met the annual distribution requirement for the 2009 Annual Coordinated Election Period. If that distribution also was no more than 12 months after the last annual distribution, the requirement for distribution before the Initial Enrollment Period also is satisfied currently.

The notice may be included with other information, as long as it is "prominent and conspicuous." This means that the notice itself or a reference to the notice must appear on the first page of the information with which the notice is included. If a reference is used, it must be in a separate box, bolded or otherwise offset, and in at least 14-point type. CMS provides this sample reference:

If you have Medicare or will become eligible for Medicare in the next 12 months, a new federal law gives you more choices about your prescription drug coverage, starting in 2006. Please see page xx for more details.

SUMMARY ANNUAL REPORT (SAR)

Most health plans must file an annual report on Form 5500 with the DOL. In turn, most of the health plans that file Form 5500 must provide a summary annual report (SAR) to plan participants. The SAR generally must be sent within nine months after the close of each plan year. However, if the plan obtains an extended deadline for filing Form 5500, the SAR deadline is also extended, and the SAR is then due two months after the extended Form 5500 due date. See Chapter 1 of the Compliance Manual and Exhibit 1-06.

NOTICE OF OPT-OUT BY SELF-FUNDED, NON-FEDERAL GOVERNMENTAL PLAN

Each plan year, a self-funded, non-federal governmental plan can opt out of most HIPAA portability, nondiscrimination and renewability requirements, as well as the requirements of the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and WHCRA. The plan opts out by filing a form with the Centers for Medicare & Medicaid Services (CMS) before the beginning of the plan year. For the opt-out to remain in effect, the plan must file a new election before the beginning of each plan year. In addition, a plan that opts out must notify participants annually that it has done so. It is likely (but not entirely clear) that the plan must provide this notice before the beginning of the plan year.

Starting with plan years that begin after May 21, 2009, there is an important exception to this opt-out. The Genetic Information Nondiscrimination Act (GINA) makes the opt-out ineffective to the extent that it would prevent applying the HIPAA portability and nondiscrimination requirements to genetic information. In addition, the opt-out does not apply to GINA's restrictions on requesting, requiring, collecting and using genetic information. While not specifically required by GINA, this exception probably should be noted in the plan's opt-out materials.

See Chapter 9 of the Compliance Manual and Exhibit 9-01.

NEW NOTICE REQUIREMENT UNDER MICHELLE'S LAW

Under Michelle's Law, a group health plan cannot terminate a child's coverage for loss of full-time student status if the change in student status is due to a "medically necessary leave of absence." The plan may be required to allow such a child to remain covered as an employee's dependent for up to a year after the leave of absence begins. The law also includes a notice requirement that is not strictly annual but is likely to work out to be a required item for many employers' annual enrollment packets. Whenever an employer provides a notice that certification of student status is required to maintain certain dependents' eligibility under the plan, that notice must include a description of the continued coverage that is available under Michelle's Law "in language that is understandable to the typical plan participant."

Michelle's Law applies to plan years beginning on or after October 9, 2009 and to medically necessary leaves of absence that begin during those plan years. The law is effective January 1, 2010 for calendar year plans, so this year's enrollment materials probably should include the required disclosure.

Willis HRH is preparing a sample notice that will be provided as an exhibit to Chapter 15 of the Compliance Manual.

DISCLOSURE REQUIREMENTS FULFILLED (IN PART) BY ANNUAL NOTICES

INITIAL COBRA NOTICE

COBRA requires that each participant (and his or her covered spouse) be notified of COBRA rights when coverage under a plan begins (this is referred to as the initial COBRA notice). Aside from being required, providing the initial notice can prevent certain COBRA administration problems. For example, COBRA allows a plan to require participants (or others) to provide timely notices of certain events, such as a divorce. DOL regulations stipulate, however, that plans cannot deny COBRA rights based on failure to provide notice of an event if the participant and his or her covered spouse have not received an explanation of this notice requirement in the notice required when coverage begins or in the summary plan description. In many cases, employers do not know (or do not have documentation showing) whether an individual received this explanation as required. To remedy those situations and to be certain that participants and spouses have the latest information on the conditions they must meet to obtain COBRA coverage, some employers send the initial COBRA notice to all participants (and their covered spouses) every year. See Chapter 2 of the Compliance Manual and Exhibits 2-01, 2-02, 2-03, and 2-04.

Many employers have asked whether they should include information on the COBRA subsidy in their initial COBRA notices. For any initial notice included in an enrollment packet for 2010, the answer is no because the subsidy does not apply to anyone who loses coverage after December 31, 2009.

HIPAA NOTICE OF PRIVACY PRACTICES

HIPAA privacy rules require that health plans or their insurers distribute a notice to participants of their privacy rights. HIPAA requires that plans give the notice to new participants and redistribute the notice if it is revised. In addition, HIPAA requires plans to send a reminder to participants every three years that a detailed description of their privacy rights is available and how to get it. Sending either the notice of privacy practices or the reminder notice annually more than fulfills the requirement and might be easier than remembering to send it every three years. See Chapter 10 of the Compliance Manual and Exhibit 10-26. For an example of the reminder notice, see *Employee Benefits Alert*, Issue #96.

SUMMARY PLAN DESCRIPTION (SPD)/SUMMARY OF MATERIAL MODIFICATIONS (SMM)

ERISA requires an SPD to be sent to each plan participant within 90 days of enrollment and again every five years (assuming changes have been made to the plan in the interim). The five-year SPD must incorporate all the amendments or changes made to the plan in the intervening years. If there are significant changes in the meantime, an SMM must be sent notifying participants within 210 days after the change becomes effective or within 60 days after the adoption of any change that is a material reduction in covered health benefits or services. Sending a new SPD every year will certainly cover the requirement that the SPD be sent every five years and, depending on the timing, it may also obviate the need to send an SMM. See Chapter 1 of the Compliance Manual and Exhibits 1-04 and 1-05.

This year's enrollment packet will include information on plan changes needed to comply with several new laws that become effective for calendar year plans on January 1, 2010. (For plans that operate on a non-calendar plan year, the compliance deadline may be earlier or later.) The new requirements include:

- Mental Health Parity Requirements Expanded and Extended to Substance Abuse
- Genetic Information Nondiscrimination Act (GINA)
- Michelle's Law

In addition, employers will want to include information on the expanded special enrollment rights in connection with Medicaid and CHIP programs that became effective on April 1, 2009 regardless of plan year. HIPAA requires employers to provide notice of special enrollment rights at or before the time health plan enrollment is offered, so most employers include the special enrollment notice in their enrollment materials. Employers who have not already done so should revise their special enrollment notice to include the Medicaid- and CHIP-related special enrollments. Willis HRH has prepared a sample notice that will be provided as an exhibit to Chapter 9 of the Compliance Manual shortly.

WHAT MEANS OF DELIVERY IS REQUIRED?

The notices discussed here have a variety of deadlines and recipients. The requirements that these notices are meant to fulfill, however, can all be met by using the same means of delivery: first class U.S. Mail with proof of mailing. Other means of distribution, such as in-hand distribution or certified mail, will also satisfy the requirements, but we think that regular first class mail with proof of mailing is preferable.

This is a bit counter-intuitive for employers accustomed to sending notices by certified mail or getting employees to sign receipts for items distributed at work. After all, those methods of delivery not only show that an item was sent – they may also show that the individual received it. But what happens if someone does not provide the requested acknowledgement? For those individuals, a procedure that relies on acknowledgement of receipt effectively creates a record of non-receipt.

It is usually not necessary to show that an individual received a particular notice. Most notice obligations are fulfilled if the plan makes a good-faith effort to send the notice by reliable means. Courts generally will presume that an individual received an item if there is proof that an item was mailed to the individual's last-known address with adequate postage.

Proof of mailing is important because it shows how, when and to whom the plan sent an item. For most employers, a certificate of mailing will be the best proof that an item was mailed. (The certificate is a postmarked form that is obtained from the Post Office when an item is mailed.) Some employers prefer to rely on their internal procedures to supply proof of mailing. In order to do this, an employer will need evidence of consistent business practices for mailing notices coupled with some proof that the process was followed for a particular notice. For many employers, however, it is difficult to prove the required high level of consistency in preparing and mailing notices.

Many employers are also interested in making HR functions more efficient by using electronic delivery. The rules for providing notices electronically are complex, however, and it is difficult to meet the requirements for individuals other than active employees who use a computer in performing their jobs.

KEY CONTACTS

US BENEFITS OFFICE LOCATIONS

NEW ENGLAND

Auburn, ME
207 783 2211

Bangor, ME
207 942 4671

Boston, MA
617 557 7517

Hartford, CT
860 756 7365

Manchester, NH
603 627 9583

Portland, ME
207 553 2131

Shelton, CT
203 924 2994

NORTHEAST

Buffalo, NY
716 856 1100

Cranford, NJ
908 931 3005

Florham Park, NJ
973 410 4622

Morristown, NJ
973 829 6374
973 829 6465

New York, NY
212 915 8802

Norwalk, CT
203 523 0501

Philadelphia, PA
610 260 4351

Radnor, PA
610 254 7289

Wilmington, DE
302 397 0171

ATLANTIC

Baltimore, MD
410 584 7528

Bethesda, MD
301 581 4261

Knoxville, TN
865 588 8101

Memphis, TN
901 248 3103

Nashville, TN
615 872 3716

Norfolk, VA
757 628 2303

Reston, VA
703 435 7078

Richmond, VA
804 527 2343

Rockville, MD
301 692 3025

SOUTHEAST

Atlanta, GA
404 224 5000

Birmingham, AL
205 871 3300

Charlotte, NC
704 344 4856

Gainesville, FL
352 378 2511

Greenville, SC
704 344 4856

Jacksonville, FL
904 355 4600

Marietta, GA
770 425 6700

Miami, FL
305 421 6208

Mobile, AL
251 544 0212

Orlando, FL
352 378 2511

Raleigh, NC
704 344 4856

Savannah, GA
912 239 9047

Tallahassee, FL
850 385 3636

Tampa, FL
813 490 6808
813 289 7996

Vero Beach, FL
772 469 2842

MIDWEST

Appleton, WI
414 259 8837

Chicago, IL
312 527 6482
312 621 4843
312 621 4704

Cleveland, OH
216 357 5921

Columbus, OH
614 326 4788

East Lansing, MI
517 349 3226

Grand Rapids, MI
248 735 7249

Green Bay, WI
414 259 8837

Milwaukee, WI
414 203 5248
414 259 8837

Minneapolis, MN
763 302 7131
763 302 7209

Moline, IL
309 764 9666

Pittsburgh, PA
412 645 8537
412 586 3524

Schaumburg, IL
847 517 3469

SOUTH CENTRAL

Amarillo, TX
806 376 4761

Austin, TX
512 651 1660

Dallas, TX
972 715 2194
972 715 6272

Denver, CO
303 765 1564
303 773 1373

Houston, TX
281 584 1672
281 584 1676
713 625 1017

McAllen, TX
956 682 9423

Mills, WY
307 266 6568

New Orleans, LA
504 581 6151

Oklahoma City, OK
405 232 0651

Overland Park, KS
913 498 4423
913 339 0800, ext. 108

San Antonio, TX
210 979 7470

Wichita, KS
316 263 3211

WESTERN

Aliso Viejo, CA
949 461 3996

Fresno, CA
559 256 6212

Las Vegas, NV
602 787 6235
602 787 6078

Los Angeles, CA
213 607 6300

Novato, CA
415 493 5210

Phoenix, AZ
602 787 6235
602 787 6078

Portland, OR
503 274 6224

Rancho/Irvine, CA
562 435 2259

San Diego, CA
858 535 1800
858 678 2130

San Francisco, CA
415 291 1567

San Jose, CA
408 436 7000

Seattle, WA
800 456 1415

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