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Additional Guidance Issued on Appeals and External Review Processes

As a follow-up to recent regulations on the internal claims and appeals processes and external review processes applicable to non-grandfathered health plans, the government has released additional guidance for plan sponsors, including model notices.

Background

The three agencies responsible for health care reform recently released interim final regulations on the internal claims and appeals and external review requirements applicable to non-grandfathered plans. (See our August 11, 2010 *For Your Information*.) As promised, the agencies have now released additional, sub-regulatory guidance, which is generally effective for plan years beginning on or after September 23, 2010. In addition, DOL Technical Release 2010-01 provides details applicable to the appeals and external review processes for self-funded plans. For both insured and self-funded plans that follow the federal guidelines, the guidance notes the availability of several new model notices.

The agencies indicate that this new guidance is expected to be superseded by future standards to be released by July 1, 2011. The Department of Health and Human Services (HHS) will also provide guidance by that date as to which states it has determined meet the National Association of Insurance Commissioners Uniform Health Carrier External Review Model Act standards. Carriers in states that do not meet the NAIC standards will be required to follow federal standards until satisfactory state standards are in place.

External Review Processes for Self-Funded Plans

Technical Release 2010-01 provides an interim enforcement safe harbor for non-grandfathered group health plans not otherwise subject to a state external review process. The external review processes will apply from the first day of the first plan year on or after September 23, 2010 until such time as future guidance becomes effective. During this interim period, self-funded plans not otherwise subject to state law will have the choice to either comply with these interim federal rules, or voluntarily comply with a state external review process.

> ***BUCK COMMENT.*** *Because it will not be practical for most multi-state employers to comply with state external review processes, they will have to comply with the federal rules.*

The federal rules for external review will require health benefit plans to utilize the services of an Independent Review Organization (IRO) that is accredited by URAC or a similar nationally-recognized accrediting organization. When external review is requested by a claimant, the IRO will be required look at the claim "de novo," which means without giving any deference to the plan's internal appeals decision-making process.

Under the federal guidelines, plans will be required to –

- allow a claimant to file a request for external review for up to four months from the date of the adverse benefit determination
- within five days of receipt of a request for external review, complete a preliminary review to determine whether –
  - the claimant was covered by the plan on the date the services were requested/provided
  - the adverse benefit determination was made on eligibility grounds
  - the claimant has exhausted the plan's internal appeals process (where the claimant is otherwise required to do so by the rules)
  - the claimant has provided all the information and forms required to process an external review
- within one day after completing the preliminary review, issue a written notice to the participant describing –
  - the reasons for ineligibility if the request is not eligible for review
  - the information needed if the request is incomplete.

Once the preliminary review is complete, the plan will have to –

- assign an IRO to conduct the external review
- immediately provide coverage or payment if the IRO decides to reverse the plan's internal adverse benefit determination.

In order to ensure independence, the plan must contract with at least three accredited IROs and have a process to randomly assign claims among them.

> ***BUCK COMMENT.*** *While the TPA or carrier can assist the plan in indentifying IROs, it is important to note that the plan must directly contract with an IRO and will have to execute a business associate agreement with the IRO.*

The Technical Release sets out a number of provisions that must be included in the plan's contract with an IRO (e.g., timely written notification to claimant of eligibility and acceptance for external review).

BUCK COMMENT. *The federal rules do not include all of the standards currently included in the NAIC Model rules. For example, they do not include the special NAIC rules for claims related to experimental/investigational treatments or a requirement that a government agency certify the IRO.*

Model Notices

In accordance with the interim final regulations, and as currently required under ERISA rules, non-grandfathered plans (including those not subject to ERISA) generally will be required to notify participants whenever the plan denies a claim, in whole or in part. In practice, this means that a plan must send out notices meeting the claim denial rules even when a claim is not fully paid because of routine cost-sharing, such as coinsurance or a deductible.

The new guidance announces that three separate model notices to be used by non-grandfathered plans are available on the DOL website –

- Notice of Adverse Benefit Determination – This notice is to be used when a plan initially denies a claim. The model notice requires details about the claim and provides information about claimants' rights in a question and answer format. The notice includes a tear-off form that a participant can use to file an appeal of the claim denial.
- Notice of Final Internal Adverse Benefit Determination – This notice is similar to the above, but is to be used at the final stage of the internal appeals process. It requires the plan to list all documents and statements reviewed in making its determination and the reason(s) for its finding(s). Like the above notice, it includes a tear-off portion to facilitate a claimant's request for an external appeal.

BUCK COMMENT. *As currently drafted, this model notice does not adequately describe the type of claims that are not subject to external review (e.g., denials for eligibility reasons). This may cause claimants some confusion.*

- Notice of Final External Review Decision – This is the notice that the IRO would use to communicate its final decision regarding the claim. The IRO must list all documents and statements reviewed and provide the principal reason(s) for the decision, including the rationale and any evidence-based standards or coverage provisions relied on in making the decision.

Plans currently subject to state external review rules should use the notices required by the applicable state laws. Other non-grandfathered plans should either voluntarily subject themselves to state rules, or begin using these notices on the first day of the first plan year beginning on or after September 23, 2010 (January 1, 2011 for calendar year plans).

BUCK COMMENT. *Plan sponsors that have large populations of employees who are only literate in a non-English language should consider having the model notices translated into that language so they can meet their obligation to provide notices that are linguistically and culturally appropriate upon request.*

Updates to Summary Plan Descriptions

The new guidance indicates that DOL will be posting model language for inclusion in summary plan descriptions on its website.

Conclusion

Non-grandfathered health plan sponsors and their vendors will need to move quickly to implement the new procedures, including contracting with at least three IROs and developing appropriate notices if they do not use the model notices. Sponsors considering forfeiting grandfathered status should carefully review these requirements as they make their final decisions regarding the upcoming plan year. Buck's consultants would be pleased to review this latest guidance and the earlier regulations with you to determine how they may impact your plans.