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HHS Provides Guidance on the HIPAA Opt-Out for Self-Funded Nonfederal Governmental Plans

The Patient Protection and Affordable Care Act (PPACA) made a number of changes to the Public Health Service Act, including limiting the extent to which self-funded nonfederal governmental plans may elect to opt out of certain HIPAA requirements. The Department of Health and Human Services (HHS) recently issued guidance on when and how these changes will affect opt-out elections.

Background

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) added Title XXVII to the Public Health Service Act (PHSA). Title XXVII initially contained the "HIPAA portability rules" but was subsequently amended by the Newborns' and Mothers' Health Protection Act of 1996, the Mental Health Parity Act of 1996, the Women's Health and Cancer Rights Act of 1998, the Genetic Information Nondiscrimination Act of 2008 (GINA), the Mental Health Parity and Addiction Equity Act of 2008 and Michelle's Law (2008). Prior to the enactment of health care reform, PHSA Section 2721(b)(2) permitted sponsors of self-funded nonfederal governmental plans to opt out of complying with these laws (with the exception of requirements related to disclosures of creditable coverage and GINA) by filing an election with the Centers for Medicare and Medicaid Services (CMS). This is commonly referred to as the "HIPAA opt-out."

PHSA Section 2721(b) was amended (and renumbered) by PPACA to eliminate the ability of self-funded nonfederal governmental plans to opt out of some of the provisions in Title XXVII. However, the statutory language was unclear regarding which provisions were affected by the change. On September 21, 2010, HHS issued a memorandum that provides needed guidance for plan sponsors on the availability of the HIPAA opt-out after these statutory changes.

HHS Memorandum on the HIPAA Opt-Out

The memorandum clarifies that effective for plan years beginning on and after September 23, 2010, sponsors of self-funded nonfederal governmental plans will only be permitted to opt out of –

- standards relating to benefits for newborns and mothers
- parity in the application of certain limits to mental health and substance use disorder benefits (including requirements of the Mental Health Parity and Addiction Equity Act of 2008)

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- required coverage for reconstructive surgery following mastectomies
- coverage of dependent students on a medically necessary leave of absence.

They will no longer be able to opt out of the "HIPAA portability rules," which consist of –

- limitations on preexisting condition exclusion periods
- requirements for special enrollment periods
- prohibitions against discriminating against individual participants and beneficiaries based on health status.

HHS notes that the changes to the HIPAA opt-out election apply to both grandfathered and nongrandfathered plans.

Collectively Bargained Plans

Prior to enactment of health care reform, PHSA Section 2721(b) provided that an opt-out election made pursuant to a collective bargaining agreement remained in effect "for the term of such agreement." This provision remains unchanged. Therefore, a plan maintained pursuant to a collective bargaining agreement that was ratified before March 23, 2010 and had been exempted from one or more of the HIPAA portability rules through an opt-out election will not have to comply with those requirements until the beginning of the first plan year following the expiration of the last plan year governed by the collective bargaining agreement.

> ***BUCK COMMENT.*** *Thus, it could be a few years before some collectively bargained plans will have to comply with the HIPAA portability rules.*

Non-Collectively Bargained Plans

Non-collectively bargained plans will have to comply with the HIPAA portability rules for plan years beginning on or after September 23, 2010. However, plan sponsors may still elect to opt out of the other requirements described above.

Transition Period

The guidance states that HHS will not take any enforcement action with respect to opt-out elections for plan years beginning before April 1, 2011 that involve the HIPAA portability rules described above.

> ***BUCK COMMENT.*** *It appears that HHS recognizes that the timing of this guidance does not give plans sufficient time to properly communicate any rule changes, particularly when many have already printed and mailed annual enrollment materials. However, the fact that HHS will delay taking enforcement action does not protect a plan from a claim by a participant that it is not in compliance. Thus, plans should develop and implement the necessary rules and procedures as soon as is reasonably possible.*

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Conclusion

The federal agencies responsible for issuing regulations implementing provisions of the PPACA are frequently providing further guidance in memoranda such as the one detailed here. Buck's consultants are available to assist you in determining the impact of this guidance on your plans, and in preparing an opt-out filing for the coming plan year.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.

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