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HHS Posts HIPAA Opt-Out Procedures and Requirements for Self-Funded Nonfederal Governmental Plans

PPACA limited the ability of self-funded nonfederal governmental plans to opt out of the requirements of HIPAA and related health laws. HHS has posted HIPAA opt-out forms that reflect the changes made by PPACA. The HHS materials include a model notice for opt-out elections and a model notice to plan enrollees.

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 (in 2008 also) Michelle's Law. Sponsors of self-funded nonfederal governmental plans were permitted to opt out of complying with some or all of 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.”

The Patient Protection and Affordable Care Act (PPACA) retained the HIPAA opt-out but narrowed the provisions to which it applies. On September 21, 2010, the Department of Health and Human Services (HHS) issued a memorandum that clarified that effective for plan years beginning on and after September 23, 2010, sponsors of self-funded nonfederal governmental plans would still be permitted to opt out of the following requirements:

- 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);
- Required coverage for reconstructive surgery following mastectomies; and
- Coverage of dependent students on a medically necessary leave of absence.

Self-funded nonfederal governmental plans would no longer be able to opt out of the HIPAA portability rules. (See our October 7, 2010 [For Your Information](#).)

HHS Guidance

HHS has posted the [procedures and requirements](#) that a self-funded nonfederal governmental plan must follow when electing to opt out of a HIPAA requirement.

Opt-Out Not Automatic. The HHS guidance emphasizes that the exemption from the requirements of Title XXVII is not automatic and that sponsors of self-funded nonfederal governmental plans that want to opt out of any of the requirements of Title XXVII must notify CMS in writing via either U.S. mail or facsimile. HHS has posted a model [HIPAA Exemption Election/Election Renewal document](#) that the sponsor can submit on its letterhead. While the model document is only recommended, any submitted opt-out election must include all of the information requested on the model document.

Length of Exemption. Generally, an opt-out election only applies for a single specified plan year. However, with respect to a plan established pursuant to a collective bargaining agreement, the election applies to all plan years encompassed in the agreement.

Opt-Out Renewals. A plan sponsor may renew an opt-out election for subsequent plan years by contacting CMS in writing.

Notice to Enrollees. A plan sponsor making an opt-out election must provide a notice to each enrollee on an annual basis and at the time of initial enrollment in the plan. The notice must discuss the facts and consequences of the opt-out election. A sponsor must attach a copy of the notice to the initial opt-out election letter that it submits to CMS. HHS has posted a model [Notice to Enrollees](#) that it recommends, but does not require, plan sponsors to use.

Plan sponsors must provide enrollees notice of an initial opt-out election before the plan year begins.

BUCK COMMENT. *The HIPAA opt-out procedures are the same as the procedures in place before PPACA. However, the model opt-out election form and notice to enrollees list only those requirements that self-funded nonfederal governmental plans may opt out of after PPACA.*

Conclusion

This opt-out election is not available to private plans, nor is it available to governmental plans that are not self-funded. Federal plans are also excluded from opting out. The model notice and enrollee notice are straightforward and most state and local governments will have no reason not to use the models if they wish to make opt-out elections.

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.