



For your information

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HHS Clarifies ACA Adverse Benefit Determination Notice Requirements for Non-Federal Governmental Plans

On August 17, 2012, HHS released technical guidance regarding the notices issued by non-federal governmental plans in connection with their internal appeals process. Generally, the Patient Protection and Affordable Care Act (ACA) requires that such plans, if non-grandfathered, comply with the ERISA claims regulations requirements. The technical guidance provides these plans limited relief from certain requirements provided in the regulations. Specifically, non-grandfathered, non-federal governmental plans do not have to include in a final adverse benefit determination a notice to participants and beneficiaries regarding the ERISA Section 502(a) right to sue. In addition, generally, these plans do not have to include certain federal and state agency contact information required by the regulations. The guidance makes clear that non-grandfathered, non-federal governmental plans must comply with all of the other requirements in the ERISA claims regulations.

Background

Section 2719 of the Public Health Service Act (PHSA), as added by the ACA, requires non-grandfathered health plans (generally, health plans modified or established after March 23, 2010) to implement an internal appeals process that satisfies both the requirements of the claims regulations under the Employee Retirement Income Security Act (ERISA) and any additional standards established by the Secretary of the Department of Labor. In July 2010, the Departments of Health and Human Services (HHS), the Treasury, and Labor (collectively, the Departments) released interim final regulations addressing the internal claims and appeals processes. (See our August 11, 2010 [For Your Information](#).)

Under the ERISA claims regulations, plans must make certain disclosures to participants and beneficiaries. For example, plans must provide a statement of a claimant's right under ERISA Section 502(a) to bring a civil action after an adverse benefit determination. In June 2011, the Departments provided model notices for adverse benefit determinations. Certain information must be included in the model notices, such as contact information for the Employee Benefits Security Administration (EBSA) or a state's department of insurance. A notice also must include contact information for a consumer assistance program if one is available in the applicable state.

Technical Guidance for Non-Federal Governmental Plans

On August 17, 2012, HHS released [technical guidance](#) regarding the required content of adverse benefit determinations and final internal adverse benefit determinations issued to participants and beneficiaries in non-federal governmental group health plans. The guidance explains that because the ERISA private right of action under Section 502(a) does not apply to participants and beneficiaries in non-federal governmental plans, HHS will not:

- Enforce the requirement to provide notice of the right to sue under ERISA
- Require non-federal governmental plans to include contact information for EBSA or a state's department of insurance.

HHS provided this safe harbor because it recognized that if non-federal governmental plans adhered to these notice requirements, they would provide inaccurate information to participants and beneficiaries if they used the model notice.

To avail themselves of the safe harbor, non-federal governmental plans must provide the contact information for member assistance provided by any third-party administrator or health insurance issuer that is under contract with or is hired by the plan sponsor and for any consumer assistance offered directly by the plan. In addition, in states without a consumer assistance program, to take advantage of the safe harbor, plans must include the contact information for the HHS Health Insurance Assistance Team (888-393-2789) in adverse benefit determination notices.

If a non-federal governmental plan purchases a fully insured health insurance policy for its participants and beneficiaries or if the applicable state department of insurance provides services to participants and beneficiaries of insured plans, HHS expects the participants and beneficiaries to receive contact information for the state department of insurance.

Insight

Insurance carriers are subject to state laws and are expected to provide the contact information, as required.

Conclusion

Notices of adverse benefit determinations for non-federal governmental plans no longer need to include right to sue information (in accordance with ERISA) or contact information for certain federal and state agencies. However, the guidance imposes other notice requirements on these plans and makes clear that the safe harbor available under the technical guidance is limited. Such plans will want to carefully review the ERISA claims regulations and the recent technical guidance to make sure that their notices comply.

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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