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October 28<sup>th</sup>, 2021

# The Hidden Intricacies of Benefit Notices



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# **Benefit notices - Overview**

# Benefit Notices – Overview

## Factors impacting notice and disclosure requirements:

- Applicable federal and state laws
- Plan size
- Funding arrangement
- Plan offerings (e.g., wellness programs, ICHRAs, etc.)



**Identifying the plan and employer's characteristics is essential to understanding notice obligations**

# **Who is Responsible for Distributing Notices?**

# Who is Responsible for Distributing Notices?

**Parties with potential obligation to provide notices and disclosures:**

**1** Employer/plan sponsor

**2** Plan administrator

**3** Group health plan

**4** Insurance issuers

**5** Third-party administrators (TPA)

# Who is Responsible for Distributing Notices?



## Legal vs. Contractual Obligations

- Statutory responsibilities
  - Ex: ERISA responsibilities for plan administrators
- TPA agreements and outsourcing administration
  - Fiduciary duties for selecting and monitoring TPAs
- Group insurance policies



# Who is Responsible for Distributing Notices?

## Considerations:

- **Only plan administrator liable for statutory penalties under ERISA**
- **Do plan documents designate a third-party responsible for COBRA administration?**
  - If so, what specific services will COBRA TPA provide? E.g., will they provide only initial notices or will they provide notices for ongoing COBRA administration
- **Is plan subject to state continuation laws instead of federal COBRA?**
  - State continuation laws generally are preempted by ERISA if they impose obligations on the employer or its plan (they apply to the insurance carrier and the insurance policy)
  - Group insurance policy might impose obligations on policyholder (employer), such as the obligation to notify participants of state continuation rights

# Who is Responsible for Distributing Notices?

## Example: COBRA Notices

### 1) Initial/General Notice

- a) Plan administrator must provide to covered employees and covered spouses when employer first becomes subject to COBRA and within 90 days of gaining coverage under the group health plan.

### 2) Notice to Plan Administrator (Qualifying event notice)

- a) Employer responsible for notifying plan administrator of certain qualifying events
  - i. Are employer and plan administrator the same entity?

### 4) COBRA Election Notice

- a) Plan administrator must provide to qualified beneficiaries after being notified by employer or qualified beneficiary of COBRA qualifying event
  - i. Timeframe for notice depends on whether employer is also plan administrator
  - ii. Has the plan administrator contracted with TPA to administer COBRA?

### 5) Notice of Unavailability of COBRA

- a) Plan administrator has obligation to send to individuals not entitled to COBRA

# Who is Responsible for Distributing Notices?

## Example: HIPAA's Notice of Privacy Practices

- Applies only to covered entities: health plans, health care clearinghouses, and health care providers
- Analysis for determining notice obligation depends on the following:
  - Is the plan self-insured or fully insured?
    - Self-insured – group health plan has responsibility to maintain and distribute notice of privacy practices to health plan participants
    - Fully insured – will depend on whether the plan creates or receives PHI
  - Fully insured plan with access to PHI - Insurer has primary obligation to provide notice of privacy practices. Plan sponsor must also maintain a Privacy Notice and distribute notice upon request
  - Fully insured plan with no access to PHI - Plan sponsor not required to provide or maintain notice

## What about self-insured plans utilizing a TPA?

- Contractual vs. legal obligation to provide notices
  - Business associate may be **contractually** obligated to provide notice depending on agreement;
  - Group health plan can remain liable for any failures due to a covered entities' inability to delegate its liability to a business associate under HIPAA

# Who is Responsible for Distributing Notices?

## Example: ACA Exchange Notice

- ACA Exchange Notice obligation applies to employers who are subject to the Fair Labor Standards Act (FLSA)
- Employers subject to the FLSA include:
  - Employ one or more employees who are engaged in, or produce goods for, interstate commerce
  - Have gross annual volume of sales of \$500,000 or more
  - Hospitals and certain healthcare related entities, schools, and federal, state and local government agencies
- Employers responsible for providing notice but other entities may provide notice on employer's behalf.
  - Ex: issuers, multiemployer plan, or third-party administrators

# **Who Must Notices Be Sent To?**

# Who Must Notices Be Sent To?

## Possible recipients could include:

- Participants
- Beneficiaries (spouses and dependents)
- Employees/former employees
- Eligible Employees
- Retirees

## ERISA definition of “participant”

“any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.”

- Can include COBRA qualified beneficiaries, covered retirees, and former employees eligible for coverage under the plan
- Different than “covered participants”

Entity obligated to provide notice must ensure that the proper individuals are receiving the required notices.

# Who Must Notices Be Sent To?

## Example: COBRA Notices

- Initial/General Notice provided to covered employees **and** their covered spouses
- Spouse has independent right to receive the notice
  - Single notice addressed to employee and covered spouse typically is sufficient
  - Can raise issues if residing at different addresses or with electronic delivery (covered later)

## Example: ACA Exchange Notice

- Furnished to all new hires (and current employees at time law became effective)
- “Employee” means any individual employed by an employer
  - Exceptions: individuals employed by employer engaged in agriculture, certain volunteer situations, and public agencies

## Example: HIPAA Special Enrollment Notice

- Furnished to all eligible employees (at time of initial enrollment opportunity)

**What Notices are  
Required?**



# What Notices are Required?

## Considerations when determining required notices:

- Federal and state laws applicable to plan and/or plan sponsor
- Plan size
- Funding arrangement (fully insured or self-insured)
- Plan offerings
- Terms of group insurance policies and/or plan
- Plan design
- Characteristics of plan participants
- Notices triggered by certain specific events

**Caution:** There is not a one-size fits all list that applies.

# What Notices are Required?

## Common notices that apply to group health plans:

### ACA

- Statement of grandfathered status
- Notice of Rescission
- Notice of Patient Protections
- Summary of Benefits and Coverage (SBC)
- Exchange Notice

### ERISA

- Summary Plan Description (SPD)
- Summary of Material Modification (SMM)
- Summary Annual report (SAR)
- Notice of Adverse Benefit Determination
- CHIPRA
- Annual Employer CHIP Notice

### Medicare Part D

- Disclosure Notices for Creditable or Non-Creditable Coverage
- Disclosure to CMS

### Michelle's Law Notice

### Newborns' and Mothers' Health Protection Act Notice (NMHPA)

### USERRA Notice

### QSEHRA Notice

### FMLA

- General Notice
- Notice of Eligibility and Rights

**This list is not to be considered exhaustive**

# What Notices are Required?

## COBRA

- Initial/General Notice
- Notice to Plan Administrator
- COBRA Election Notice
- Notice of unavailability of COBRA
- Notice of early termination of COBRA coverage
- Notice of insufficient payment

## HIPAA

- Notice of Alternative Standard (wellness programs)
- Notice of Privacy Practices
- Notice of Breach of Unsecured PHI
- Notice of Special Enrollment Rights

## ADA Wellness Notice

## Qualified Medical Child Support Orders

- Medical child support order notice
- National Medical Support Notice

## GINA

- Notice of Research Exception

## Mental Health Parity and Addiction Equity ACT (MHPAEA)

- Notice of cost exemption
- Notice of Criteria for Medical Necessary Determination

## Women's Health and Cancer Rights Act Notice

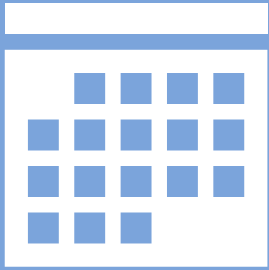
## No Surprises Act

- Statement of rights regarding surprise billing

**This list is not to be  
considered exhaustive**

# **When Must Notices be Provided?**

# When Must Notices be Provided?



- The timeframe in which the responsible party must distribute a notice will depend on the specific notice requirement.
- Notices may be required to be provided following a specific event, annually, when coverage begins or ends, upon request, or at multiple different times.

# When Must Notices be Provided?

## Notices required when enrollment opportunity is offered:

- Summary of benefits and coverage (SBC) – with the initial enrollment materials
- HIPAA special enrollment rights notice

## Notices required due to enrollment in the plan:

- Summary of benefits and coverage (SBC) – within 90 days of a special enrollment
- COBRA initial/general notice – within 90 days of coverage beginning
- HIPAA notice of privacy practices
- Summary Plan Description (SPD) within 90 days of becoming covered
- Women’s Health and Cancer Rights Act notice (WHCRA)
- Medicare Part D creditable coverage notice (if enrollee is Medicare-eligible)

**This list is not to be  
considered exhaustive**

# When Must Notices be Provided?

## Notices required upon the occurrence of a specified event:

- **Coverage terminating:**
  - COBRA election notice
  - Notice of early termination of COBRA coverage
- **When plan becomes subject to certain law**
  - SPD – 120 days after plan becoming subject to ERISA
  - COBRA initial/general notice after becoming subject to COBRA
- **When the plan is modified**
  - Summary of Material Modification (SMM) - timing will depend on the specific modification
  - Notice of Material Modification regarding SBC – typically advance notice required
- **When an enrollee becomes eligible for Medicare**
  - Medicare Part D creditable coverage notice (requirement met if annual notice provided to all enrollees)
- **When plan offers health-contingent wellness program**
  - HIPAA notice of alternative standard
- **When a claim is not paid in full**
  - Notice of adverse benefit determination

**This list is not to be  
considered exhaustive**

# When Must Notices be Provided?

## Notices required to be provided annually:

- Summary annual report (SAR) – within 9 months after end of plan year or 2 months following due date for Form 5500
- CHIP – plans that cover residents in state that provides premium subsidy
- Medicare Part D creditable coverage notice – prior to Medicare Part D annual election period
  - Disclosure to CMS 60 days after beginning of plan year
- Women’s Health and Cancer Rights Act notice (WHCRA)
- Summary of benefits and coverage (SBC) – with the annual enrollment materials

## Notices required for new hires:

- ACA exchange notice

**This list is not to be  
considered exhaustive**



**Where Should  
Notices be Included?**

# Where Should Notices be Included?

- **Certain disclosures are expressly required to be included within other material. Other notices and disclosures can be grouped together for administrative simplification. Some disclosures must be posted on a website (e.g., HIPAA privacy notice, surprise billing notice, etc.).**
- **Employers must ensure compliance with each individual notice requirement in terms of timing, necessary recipients, and content.**

## Example: Summary plan descriptions (SPD)

- **Required disclosures:**
  - COBRA continuation coverage rights
  - Newborns' and Mothers' Health Protection Act (NMHPA)
  - Qualified Medical Child Support Orders (QMCSOs)
  - Health Care Reform disclosures (when applicable)
- **General rule: SPD must inform participants of their rights and obligations under the plan**
  - HIPAA portability and nondiscrimination
  - USERRA rights
  - Michelle's Law
  - Women's Health and Cancer Rights Act (WHCRA)
  - Genetic Information Nondiscrimination Act (GINA)
  - Mental Health Parity Act (MHPA) and Mental Health Parity and Addiction Equity Act (MHPAEA)

# Where Should Notices and Disclosures be Included?

## Can we include the notices in open enrollment materials?

- Will depend on whether the specific notice or disclosure is required to be included in other material such as the SPD
- May depend on notice recipient
- Must consider formatting requirements (e.g., Medicare Part D Notice)
- Providing certain notices only during open enrollment may not satisfy the notice/disclosure's timing requirements

## What about fully insured plans with a benefits booklet?

- A certificate or booklet provided by the insurance carrier may not satisfy all applicable notice and disclosure requirements.
- Example: Plans subject to ERISA should consider utilizing a wrap document to ensure all ERISA required content is provided to participants

# How Should Notices be Distributed?

# How Should Notices be Distributed?

## General distribution requirements:

- Distribution measures must be “reasonably calculated to ensure actual receipt of the material” and “must be sent by a method or methods of delivery likely to result in full distribution.”
- Documenting notice and disclosures were sent
  - Courts have ruled burden of proof on plan administrator in certain circumstances

## Permissible delivery methods:

- First-class mail,
- Second- or third-class mail
  - acceptable only if return and forwarding postage is guaranteed and address correction is requested
- Hand delivery
  - Breakroom or common area not acceptable

## Examples that may result in compliance issues:

- Posting notices only on company website or intranet
- Mailing single flyer with links to notices

# How Should Notices be Distributed?



## Electronic Delivery

- DOL electronic disclosure safe harbor for ERISA-required documents
  - Work-related computer access
  - Affirmative consent requirement
- Does not impact other ERISA disclosure rules regarding timing, recipients or format
- Special electronic distribution rules apply to certain types of notices/documents
  - E.g., HIPAA privacy notice, Medicare Part D notices, SBCs

# How Should Notices be Distributed?



## **Example: COBRA Initial/General Notice**

- Must be sent to covered employee and covered spouse
- Electronic notice appropriate?
  - Unlikely spouse has work-related access to computer
  - Affirmative consent may be required
- Can one notice be sent if addressed to both covered employee and spouse? What if spouse lives at separate residence?

## **Example: WHCRA annual notice**

- Must be distributed to participants, including COBRA participants
- Electronic notice appropriate?
  - Unlikely COBRA participants have work-related access to computer
  - Affirmative consent may be required

# How Should Notices be Distributed?

## Foreign Language Requirements

- Is foreign language translation required?
- Foreign language assistance is required in some circumstances depending on the size of the plan and relative numbers of participants

## Example: ERISA requirement for SPD and SMM:

- Fewer than 100 participants—
  - language assistance required if 25% or more of all plan participants are literate only in same non-English language
- 100 or more participants—
  - language assistance required if lesser of (a) 500 or more participants, or (b) 10% of all participants are literate only in same non-English language

If above threshold is met, SPD/SMM must include statement in applicable non-English language offering language assistance to participants





# **Agency Model Notices**

# Agency Model Notices

- [Exchange Notice](#)
- [Grandfathered Status](#)
- [Patient Protection Disclosure – Non- Grandfathered Health Plans Only](#)
- [COBRA Notices](#)
- [HIPAA Notice of Special Enrollment Rights](#)
- [HIPAA Notice of Privacy Practices](#)
- [CHIPRA](#)
- [Newborns' and Mothers' Health Protection Act](#)
- [Women's health and Cancer Rights Act \(WHCRA\) Notices](#)
- [Medicare Part D Notice of Creditable \(or Non-Creditable\) Coverage](#)
- [EEOC Wellness notice](#)
- [Surprise Billing Rights Notice](#)

**Wrap Up**

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