HIPAA-Excepted Benefits

Agencies issue proposed rules to use through 2014

This past December, the Departments of Labor (DOL) and Health and Human Services (HHS), as well as the Internal Revenue Service (IRS), issued a proposed rulemaking to expand the list of benefits that are "excepted benefits" under the HIPAA [Health Insurance Portability and Accountability Act of 1996] portability rules and Patient Protection and Affordable Care Act (ACA) insurance market reforms (78 Fed. Reg. 77632).

The agencies say plans may rely on these proposed rules until the final rulemaking, at least through this year, except where otherwise noted. Comments were due by February 24.

We summarize the laws from which HIPAA benefits are exempt, the new excepted benefits and how those new exceptions apply under the ACA.

From which laws are HIPAA-excepted benefits exempt?

HIPAA-excepted benefits are exempt from the pre-ACA HIPAA portability rules, such as requirements for pre-existing conditions, special enrollment and, most notably, nondiscrimination and wellness, including the new HIPAA wellness rules. These benefits also are exempt from Title I of the Genetic Information Nondiscrimination Act (GINA), the Mental Health Parity and Addiction Equity Act, the Women's Health and Cancer Rights Act and the Newborns' and Mothers' Health Protection Act.

The ACA's insurance market reforms adopted the same HIPAA-excepted benefits rules. Importantly, not all laws incorporate those rules. The Employee Retirement Income Security Act (ERISA), Consolidated Omnibus Budget Reconciliation Act (COBRA), Americans with Disabilities Act (ADA) and Title II of GINA (applicable to employers) still apply to HIPAA-excepted benefits. In addition, the HIPAA privacy and security rules apply to most HIPAA-excepted benefits.

What are the new HIPAA-excepted benefits?

The proposed rules include three major changes from the existing rules:

- **Dental and vision benefits.** Under the existing rules, dental and vision benefits are excepted only if they are offered either under a separate insurance policy or if there is a separate election and contribution required. For self-funded plans, this has meant that the plan must have a separate election and premium

contribution, so benefits that are automatic or "no cost" could not qualify for the exception.

The proposed rule removes the requirement that there be a separate contribution amount. So, plans may now offer no-cost dental and vision coverage and still meet the exception as long as there is a separate election (or opt out) for dental and vision coverage, or if the coverage is offered under a separate insurance policy.

• **Employee assistance programs (EAPs).** The proposed rules add a new category of excepted benefits for certain EAPs that do not provide "significant benefits in the nature of medical care." In addition to restricting the "medical care" that may be provided to meet the exception: 1) no contributions or cost-sharing may be required for the EAP coverage; 2) the EAP cannot be coordinated with other group health plan coverage; 3) participants may not be required to exhaust benefits under the EAP before being eligible for the group health plan; 4) participation in the EAP must not be dependent on coverage under another group health plan; and 5) benefits under the EAP cannot be financed by another group health plan.

Many employers offer EAPs that have some limited benefits that could qualify as medical care. These benefits were never intended to be stand-alone medical coverage. However, there was no exception under the ACA, so it appeared that all of the ACA requirements applied. The ACA's exchange rules require that, to qualify for a subsidy, individuals not be enrolled in other coverage. Since most employers automatically cover employees in their EAPs, these employees could be precluded from qualifying for a premium subsidy under the exchange even if they qualified based on income or other factors.

By allowing some EAPs to continue as HIPAA-excepted benefits, the proposed rules provide relief from the ACA requirements for many employers that offer traditional, limited EAPs, as well as close the loophole that would have precluded some individuals from earning a premium subsidy on the exchange.

• **Wraparound coverage.** The proposed rules add another new category of excepted benefits for coverage that is specifically designed to "wrap around" individual insurance coverage, such as that offered through the federal exchange. The preamble says that this category would be effective for plan years starting in 2015.

The wraparound coverage must supply coverage for nonessential benefits or out-of-network providers, or both, and may include benefits for cost-sharing—costs that may not be covered under the individual policy. To meet the exception, the employer that sponsors the wraparound coverage also must provide a "primary" plan that meets the ACA affordability and minimum value test, and the cost of coverage in the wraparound plan may not exceed 15% of the cost of coverage in the primary plan.

There is some question as to what type of coverage this new exception is intended to exempt. The preamble says that some employers who offer minimum value/affordable coverage may have employees who still want to enroll in the exchange coverage to obtain a premium subsidy. These employers may want to provide some additional wraparound coverage for this group and, under the exception, would be able to do so without having to comply with the other requirements of the ACA or HIPAA portability rules. In addition, this wraparound coverage would not disqualify an individual from eligibility for the premium tax credit. Plans should be on the lookout for further guidance on this exception.

How do the HIPAA-excepted benefits apply under the ACA?

Both the existing and new HIPAA-excepted benefits are exempt from the insurance market reforms under the ACA. For other ACA provisions, plans will need to review the specific provision. Some provisions, such as the Patient-Centered Outcomes Research Institute (PCORI) and reinsurance fees, incorporate the excepted benefits rule. Others, such as the W-2 requirement, incorporate some, but not all, of the exceptions.

For both employers and insurers, it will be important to know whether a particular benefit is a HIPAA-"excepted benefit" and, if so, from which specific laws the benefit is exempt.

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Got a health care reform question? You can ask *your* health care reform legislation question online at http://surveymonkey.com/s/second_opinions.

These Q-and-A's first appeared on plansponsor.com in January. As health care law is evolving rapidly, there may have been further developments since the initial publication.