GROOM LAW GROUP

DOL, TREASURY & HHS ISSUE FINAL HIPAA NONDISCRIMINATION RULES

by Christy Tinnes & Heather Meade
Groom Law Group

On December 13, 2006, the Departments of Labor, Treasury, and Health and Human Services (the "Departments") issued final HIPAA nondiscrimination and wellness program regulations. 71 Fed. Reg. 75014. The Departments had issued interim final nondiscrimination rules and proposed bona fide wellness program rules in 2001. 66 Fed. Reg. 1378 (Jan. 8, 2001) (nondiscrimination); 66 Fed. Reg. 1421 (Jan. 8, 2001) (wellness). The new rules apply to "group health plans" under HIPAA and are applicable to plan years beginning on or after July 1, 2007 (January 1, 2008 for calendar year plans).

The final nondiscrimination rules generally restate the interim final rules, but clarify questions that plans had asked regarding source-of injury exclusions, carryovers under health reimbursement arrangements (HRAs), the interaction of state extension of benefits laws with HIPAA's nonconfinement rule, and the interaction of HIPAA's rules with other federal laws, such as the ADA. The Departments also finalized the proposed wellness program rules and added new requirements for wellness programs to be permissible under the HIPAA nondiscrimination rules. (The new wellness program rules are discussed in more detail in our accompanying article.)

A. General Rules

The final regulations generally provide that a group health plan may not establish rules for eligibility or benefits based on a health factor, including: (1) health status, (2) medical condition, (3) claims experience, (4) receipt of health care, (5) medical history, (6) genetic information, (7) evidence of insurability, or (8) disability. "Rules for eligibility" include rules related to enrollment, effective date of coverage, waiting periods, late or special enrollment, benefits, and termination. "Rules for benefits" include specific benefits covered under the plan, limitations, coinsurance, deductibles, and maximums.

The rules do allow a plan to distinguish among "similarly situated individuals" (discussed further below), as long as the distinction is not based on a health factor. The rules also provide that a plan may impose restrictions that apply uniformly to a group of similarly situated individuals, but may not impose a rule that is directed at an individual based on a health factor.

Final Rule

The final rules did not substantively change the requirements in the interim rule, but the final rules do:

- Clarify that arrangements that are permissible under the regulations are not necessarily permissible under other law. In the Preamble to the rules, the Departments note that the EEOC specifically asked the Departments to clarify that certain plan practices permitted under the HIPAA rules may violate the ADA or Title VII of the Civil Rights Act and specifically said that limitations applied to AIDs or prescriptive contraceptives may violate these laws.

- Provide an additional example related to HRAs. In the example, an employer contributes an equal amount to all employees' HRAs and allows employees to carry over HRA contributions. This means that employees with less claims experience could carry over greater contributions to later years. The final rules clarify that the carryforward of unused employer-provided medical care reimbursement amounts to later years would not violate the nondiscrimination rules.

B. Source-of-Injury Restrictions

The final rules also provide that a plan may not exclude *eligibility* altogether to an individual who engages in a risky activities, such as bungee jumping or motorcycling, but may exclude *benefits* for injuries incurred as a result of these activities. The rules also provide that a plan may not deny benefits if the injury results from domestic violence or a physical or mental condition.

Final Rule

The final rules clarify that the requirement that the plan not deny benefits if an injury results from a medical condition applies even if the condition is not diagnosed before the injury. For example, if a plan excludes benefits for self-inflicted injuries, it may not deny these benefits if the injury is related to a medical condition, such as depression, even if not diagnosed until after the injury.

C. Similarly Situated Individuals

The final rules provide that a plan may discriminate between or among groups of similarly situated individuals, as long as the distinction is based on a "bona fide employment-based classification" that is consistent with the employer's usual businesses practice. Under the regulations, whether a classification is "bona fide" is based on all relevant facts and circumstances, including whether the employer uses this classification for other purposes. Examples provided in the regulations include full-time versus part-time status, different geographic locations, length of service, and different occupations. The regulations further provide that a classification based on a health factor would not be "bona fide" if it is

created to single out an individual based on a health factor (for example, after they have filed an expensive claim).

Final Rule

The final rules did not substantively change the requirements in the interim rules.

D. Discrimination in Premiums or Contributions

The final rules prohibit a plan from requiring an individual to pay a premium that is greater than the premium for a "similarly situated individual" enrolled in the plan on the basis of a health-status factor. In addition, a plan may not "list bill," or charge a different premium for different individuals, even if the employer does not pass on these different rates to the individual. However, a plan may consider individual claims experience to underwrite the group as a whole.

Final Rule

The final rules did not substantively change the requirements in the interim rules.

E. Actively-At-Work Requirements

The final rules prohibit plans from imposing "actively-at-work clauses" that condition an individual's initial coverage eligibility upon the individual being actively at work. However, such clauses are permissible if employees who are absent due to health conditions are treated, for purposes of health coverage, as if they were actively at work. In addition, plans may require an individual to have begun employment before coverage may become effective.

Final Rule

The final rules did not substantively change the requirements in the interim rules. However, the Departments did note that plans may wish to clarify in writing how employees on various types of leave are treated for purposes of interpreting service requirements under the plan. The Departments said that, without clear plan rules, plans might slip into inconsistent application of the rules, which could lead to violations of the actively-at-work provisions.

F. Nonconfinement Clauses

The final rules also prohibit "nonconfinement clauses" that restrict coverage, eligibility, or benefits based upon hospital confinement. For example, when a hospitalized individual switches coverage during their hospital stay, the succeeding plan or carrier may not deny eligibility to that individual until the individual is released.

Final Rule

The final rules retain this requirement, but clarify how HIPAA's nonconfinement rule would interact with a state's extension of benefits law. Some state insurance laws require the prior carrier in the above situation to continue coverage throughout the hospital stay. Under the HIPAA rules, the successor carrier also is required to cover the individual. The final rules clarify that state law cannot change the legal obligation of the succeeding carrier under HIPAA, but any state law designed to prevent more than 100% reimbursement, such as state coordination of benefits laws, continue to apply.

G. More Favorable Rules

The final rules provide that a plan may establish a rule that is more favorable to individuals with an adverse health status. For example, many plans allow disabled children to continue as dependents after they have reached the plan's dependent age limit. While this type of provision discriminates based on the disabled child's health status, an example in the final rules say this distinction is permissible since it is more favorable to the disabled individual. In addition, the final rules state that a plan may charge a higher premium or contribution to an individual with an adverse health status if they otherwise would not be eligible for coverage (*e.g.*, under a COBRA disability extension).

Final Rule

The final rules did not substantively change the requirements in the interim rules.

H. Wellness Programs

The final rules address a number of wellness program issues and provide more clarification on wellness program requirements (including some additional requirements). Generally, to be permissible under HIPAA, a wellness program must:

- Limit any rewards/penalties under the wellness program, along with other wellness programs offered by the plan, to 20% of the cost of employee coverage.
- Be reasonably designed to promote health or prevent disease;
- Offer participants the opportunity to qualify for the reward at least once per year;
- Provide a reasonable alternative to individuals who medically cannot meet the required standard; and
- Disclose the availability of the alternative standard.

The Departments also provide more guidance on the types of programs that are subject to these requirements. (We discuss the final wellness program rules in more detail in our accompanying article.)

* * *

Please contact Christy Tinnes or Heather Meade at 202-857-0620 if you have any questions.