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Thank you for joining us.



# Hidden Intricacies of Benefit Notices

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*Presented by the Regulatory and  
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# Presentation Agenda

1

Notice Basics

2

Ten Common Benefit Notices



# Notice Basics



# Key Issues to Consider

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- There is not a one size fits all approach for complying with federal notice requirements
- Each notice has its own specific requirements, which will depend on factors such as the law imposing the requirement, the size of the plan, the nature of the plan (fully insured vs. self-insured), the benefits provided, etc.
- The answers to the following questions will help a plan sponsor assess compliance with a notice requirement:
  - » To what plans does the requirement apply?
  - » Who must distribute the notice?
  - » To whom must it be distributed?
  - » When must it be distributed?
  - » How must it be distributed?
  - » What information must be included?



# Key Terms and Concepts

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- Important to understand key terms used in federal law
  - » **Group Health Plan** - An employee welfare benefit plan to the extent that the plan provides medical care to employees or their dependents directly or through insurance, reimbursement or otherwise (ERISA §733)
  - » **Plan Administrator** - The person specifically designated by the terms of the plan document or, if an administrator is not so designated, the plan sponsor (ERISA §3)
  - » **Excepted benefit** (non-exhaustive list)
    - Many health FSAs
    - Certain limited-scope benefits (dental, vision, long-term care)
    - On-site medical clinics
    - EAPs that do not provide significant medical benefits
    - Accident, disability, etc.
    - Certain specified disease and fixed indemnity insurance
    - Certain supplemental benefits offered as a separate insurance policy



# Key Terms and Concepts

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## DOL Electronic Distribution Rules

- Two categories of individuals
  - » Individuals who have the ability to effectively access the electronic documents at any location where the participant is reasonably expected to perform their duties as an employee and who use the employer's electronic information system as an integral part of their jobs – no prior consent needed
  - » Others – Prior affirmative consent required (as specified in DOL regulations)
- Notice requirements each time a document is distributed electronically
  - » Must provide a notice (in electronic or non-electronic form) that apprises the individual of the significance of the document when it is not otherwise reasonably evident as transmitted and of the right to request and obtain a paper version of such document

## Delegation

- Third party can distribute notice on behalf of the party to whom statutory requirement applies

## Failure to Comply

- Some specific consequences are addressed below
- For ERISA plans, if plan administrator fails to provide a required notice → breach of fiduciary duty

# State Notices

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- Focus today is **federal** notice requirements
- Some state laws impose benefit-related notice requirements on employers
  - » e.g., Illinois EHB comparison disclosure, California FSA disclosure, notice requirements under state continuation coverage laws
- ERISA preemption?
  - » Unclear
  - » Regardless, the terms of the plan could indicate employer or plan administrator will provide a particular notification

# Ten Common Benefit Notices



# COBRA General Notice

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## To What Plans Does the Requirement Apply?

- Group health plans (medical, dental, vision, health FSA, EAP, HRA, on-site medical clinics, wellness, etc.)

## Who Must Provide the Notice?

- Plan Administrator

## To Whom?

- Covered employees and covered spouses
- Single mailed notice addressed to both at same address is sufficient if reside together

## How Is the Notice Provided?

- Mail, hand or electronic distribution
- DOL electronic distribution rules apply
- Typically included in SPD as well (SPDs must include COBRA information)

## When Must It Be Provided?

- Within 90 days of commencing coverage

## What Information Must the Notice Contain?

- Plan name and contact information
- General description of the continuation coverage under the plan
- Employee/qualified beneficiary notice requirements and procedures

*Model notice that contains this information is available*

## What Are the Consequences of Failure to Comply?

- Potential penalties under ERISA (\$110 per day) and excise taxes under IRC (\$100 per day, per individual)
- Potential inability to enforce notice deadlines on employees/qualified beneficiaries



# COBRA Election Notice

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## To What Plans Does the Requirement Apply?

- Group health plans (medical, dental, vision, health FSA, EAP, HRA, on-site medical clinics, wellness, etc.)

## Who Must Provide the Notice?

- Plan Administrator

## To Whom?

- Qualified beneficiaries experiencing a qualifying event
- Single mailed notice addressed to all QBs at same address is sufficient if reside together

## When Must It Be Provided?

- Within 14 days after qualifying event notice to plan or 44 days following certain qualifying events

## How Is the Notice Provided?

- Mail, hand or electronic distribution
- DOL electronic distribution rules apply

## What Information Must the Notice Contain?

- 14 specific pieces of information

*Model notice that contains this information is available*

## What Are the Consequences of Failure to Comply?

- Potential penalties under ERISA (\$110 per day) and excise taxes under IRC (\$100 per day, per individual)
- Election period does not begin to run until the election notice is received by the qualified beneficiary

# HIPAA Notice of Privacy Practices

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## To What Plans Does the Requirement Apply?

- Plans that are covered entities under HIPAA
- Includes almost all group health plans (except some self-administered plans and on-site medical clinics)

## Who Must Provide the Notice?

- Self-insured plan → plan/plan sponsor
- Fully insured plan (hands-off) → carrier
- Fully insured plan (hands-on) → plan/plan sponsor

## To Whom?

- Covered individuals (single notice to family allowed if reside together)
- Anyone upon request

## When Must It Be Provided?

- Upon enrollment (and upon request)
- Notice of availability every three years

## How Is the Notice Provided?

- Posted on public website (if health plan has one)
- By mail or by e-mail, if the individual agrees to electronic notice and such agreement has not been withdrawn (no other details)

## What Information Must the Notice Contain?

- The uses and disclosures of PHI that may be made by the covered entity
- The individual's HIPAA privacy rights
- The covered entity's legal duties with respect to PHI

*Model notice that contains this information is available*

## What Are the Consequences of Failure to Comply?

- Potential civil monetary penalties

# HIPAA Special Enrollment Notice

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## To What Plans Does the Requirement Apply?

- Group health plans other than excepted benefits and plans covering fewer than two current employees
- Typically applies only to group medical plans but can apply to other plans

## Who Must Provide the Notice?

- Plan Administrator

## To Whom?

- All employees who are offered the opportunity to enroll in the plan

## When Must It Be Provided?

- At or before the time an employee is initially offered the opportunity to enroll in a group health plan

## How Is the Notice Provided?

- Included with enrollment materials
- Electronic distribution allowed in accordance with DOL rules
- Typically included in SPD as well

## What Information Must the Notice Contain?

- Information regarding special enrollment rights provided under HIPAA

*Model notice that contains this information is available*

## What Are the Consequences of Failure to Comply?

- Potential excise tax under IRC (\$100 per day, per individual)

# Medicare Part D Creditable/Non-Creditable Coverage Notice

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## To What Plans Does the Requirement Apply?

- Group health plans that provide Rx drug benefits
- Specific exemptions for health FSAs and HSAs

## Who Must Provide the Notice?

- Plan Sponsor (typically the employer)

## To Whom?

- Part D eligible individual (one who is enrolled in Medicare Part A or Part B and lives in the service area of a Part D plan) who is enrolled or seeking to enroll in a covered plan
- A single notice provided to the participant constitutes distribution to dependents if reside at same address
- Separate CMS disclosure requirement applies too

## When Must It Be Provided?

- Prior to commencement of the annual coordinated election period (ACEP) for Part D (Oct. 15)
- Prior to an individual's initial enrollment period (IEP) for Part D
  - » Can be satisfied via annual distribution of notice to all participants
- Prior to the effective date of coverage for any Part D eligible individual that enrolls in the group health plan;
- Whenever the employer no longer offers prescription drug coverage or changes it so that it is no longer creditable or becomes creditable; and
- Upon request by the Part D eligible individual



# Medicare Part D Creditable/Non-Creditable Coverage Notice

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## CONTINUED

### How Is the Notice Provided?

- By mail
- Via electronic distribution
  - » To participants who have the ability to access electronic documents at their regular place of work and who have access to the plan sponsor's electronic information system on a daily basis as part of their work duties
    - Must notify recipients of the significance of the document and right to a paper copy
    - Must inform participants it is their responsibility to share notice with Part D eligible dependents
  - » To Part D eligible individuals who indicate they have adequate access to electronic information and provide informed consent to receive information electronically
- Special rule if provided with other documents – must be called out on the first page (14 point font, reference to where to find it)
- Often included in SPD as well

# Medicare Part D Creditable/Non-Creditable Coverage Notice

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## CONTINUED

### What Information Must the Notice Contain?

- Differs depending on the plan's status
- Creditable coverage
  - » Employer has determined that the Rx drug coverage is creditable
  - » Meaning of creditable coverage
  - » Why creditable coverage is important, etc.
- Non-creditable coverage notice requirements similar

### What Are the Consequences of Failure to Comply?

- No specific penalties
- Potential adverse impact on employees and former employees



# Exchange Notice

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## To What Plans Does the Requirement Apply?

- This notice is not tied to any plan or plans
- It applies to all employers subject to the FLSA regardless of whether they offer health coverage

## Who Must Provide the Notice?

- All employers subject to the FLSA

## To Whom?

- All new employees regardless of whether they are benefit eligible

## When Must It Be Provided?

- Within 14 days following an employee's start date

## How Is the Notice Provided?

- First class mail
- Electronically in compliance with DOL electronic distribution rules

## What Information Must the Notice Contain?

- Various pieces of information regarding the ability to obtain coverage via the Exchange/Marketplace

*Model notice that contains this information is available*

## What Are the Consequences of Failure to Comply?

- No monetary penalties

# Summary of Benefits and Coverage (SBC)

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## To What Plans Does the Requirement Apply?

- Group health plans other than excepted benefits and plans covering fewer than two current employees

## Who Must Provide the Notice?

- Self-insured plan → Plan Administrator
- Fully insured plan → Plan Administrator and issuer
  - » If one provides the SBC, obligation of other is satisfied
- Special rules for contracting with a third party

## To Whom?

- Applicants and enrollees
- A single SBC provided to the participant constitutes distribution to dependents if reside at same address

## When Must It Be Provided?

- At open enrollment (with enrollment materials) or, if enrollment is automatic, no later than 30 days prior to the first day of the new plan year (limited exception for certain fully insured plans)
- At initial enrollment (with any application materials) or, if no application, no later than the first date the participant is eligible to enroll in coverage
- Within 90 days after enrollment pursuant to a special enrollment right
- Upon request
- Notice of material modification must be provided at least 60 days prior to the date on which a material modification will become effective if it is not reflected in the most recent SBC provided and occurs mid-plan year



# Summary of Benefits and Coverage (SBC)

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## How Is the Notice Provided?

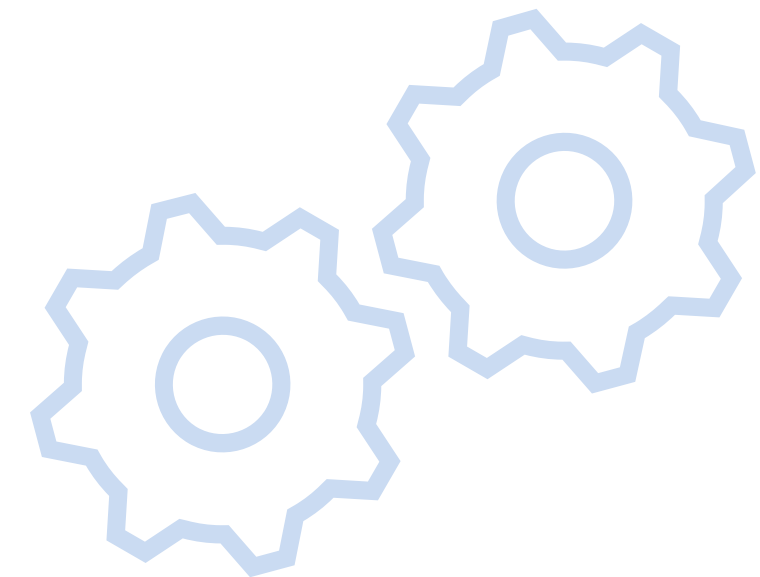
- Paper (e.g., mail)
- Electronic
  - » In connection with a participant's online enrollment or renewal of coverage
  - » To participants and beneficiaries who request an SBC online
  - » To participants covered under the plan in accordance with the DOL electronic disclosure requirements
  - » To participants who are eligible but not enrolled in the plan so long as the format is readily accessible, and a paper form is provided free of charge upon request
    - Via internet posting if the participants are notified in paper form or via email that the documents are available on the internet

## What Information Must the Notice Contain?

- Specific information contained in mandatory SBC template

## What Are the Consequences of Failure to Comply?

- Potential penalty of \$1,362 per failure in 2023 (indexed)
- Potential excise tax under IRC (\$100 per day, per individual)



# CHIP Notice

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## To What Plans Does the Requirement Apply?

- Group health plans (fully and self-insured) providing medical benefits

## Who Must Provide the Notice?

- Each employer that maintains a group health plan in a state in which a Medicaid or CHIP plan provides a premium assistance subsidy

## To Whom?

- All employees (regardless of enrollment status) residing in each premium assistance subsidy state

## When Must It Be Provided?

- Annually

## How Is the Notice Provided?

- First-class mail or electronically in accordance with the DOL's electronic distribution requirements
- Notice can be included with open enrollment materials or SPD

## What Information Must the Notice Contain?

- Information regarding potential opportunities available in the state in which an employee resides for premium assistance under Medicaid/CHIP for health coverage for employees/dependents

*Model notice that contains this information is available*

## What Are the Consequences of Failure to Comply?

- Potential penalties of \$137 (indexed) per day, per employee

# Summary Annual Report (SAR)

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## To What Plans Does the Requirement Apply?

- Employee benefit plans subject to Form 5500 filings
  - » Unfunded, self-insured plans exempt even if subject to Form 5500 filing

## Who Must Provide the Notice?

- Plan administrator

## To Whom?

- Participants and beneficiaries receiving benefits (including former employees)

## When Must It Be Provided?

- Furnished within nine (9) months after the end of the plan year or two (2) months after the due date for filing Form 5500 (including any extensions)

## How Is the Notice Provided?

- May be distributed by any method permissible for SPDs (e.g., via mail or electronic delivery)

## What Information Must the Notice Contain?

- Narrative summary of the important financial information contained in the plan's Form 5500 and a statement of the rights of individuals to receive a full copy of the plan's annual report

## What Are the Consequences of Failure to Comply?

- No specific penalty for failure to distribute SARs
  - » May lead to participant/beneficiary lawsuit enforcing the ERISA provision
- Failure to provide within 30 days of a request could lead to potential penalties of \$110 per day
- Criminal penalties for willful violation of ERISA

# WHCRA Notice

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## To What Plans Does the Requirement Apply?

- Group health plans that provide medical and surgical benefits for mastectomy (requires them to also provide benefits for reconstructive surgery)
- Not applicable to excepted benefits and plans covering fewer than two current employees

## Who Must Provide the Notice?

- Plan administrator or health insurer (for fully insured plans)

## To Whom?

- Participants and beneficiaries under the group health plan
- Single notice if reside at same address

## When Must It Be Provided?

- Provided upon enrollment in group health plan and on an annual basis thereafter

## How Is the Notice Provided?

- By hand, first class mail or electronically (if DOL safe harbor requirements are satisfied)



# WHCRA Notice

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## CONTINUED

### What Information Must the Notice Contain?

- Enrollment notice must include:
  - » Information regarding the plan's coverage for reconstructive surgery and certain procedures following a mastectomy
  - » Description of any deductible and coinsurance limitations applicable to such coverage
- Annual notice requirement may be satisfied by providing notice with the same content as enrollment notice; or,
  - » Providing a shorter notice describing the coverage required under WHCRA and information on how to obtain a more detailed description of the mastectomy-related benefits

### What Are the Consequences of Failure to Comply?

- Potential excise tax under IRC (\$100 per day, per individual)

# Model Notices



# Agency-Provided Model Notices

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- [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](#)
- [CHIP](#)
- [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](#)



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