

**END-OF-YEAR
HEALTH AND WELFARE PLAN ISSUES**

As the end of the year rapidly approaches, employers should review their health and welfare plans to ensure compliance with regulatory changes that become effective January 1, 2010 or later. This update is designed to briefly highlight provisions that may require the attention of your health and welfare plan's administrator and can serve as an abbreviated compliance checklist. For more information, contact your Brown Rudnick attorney or any of the individual attorneys listed at the end of this update.

HHS Issues Interim Final Regulations Regarding Breach Notification and Encryption Guidance:

The U.S. Department of Health and Human Services (HHS) issued new regulations, effective September 23, 2009, requiring health care providers, health plans, and other entities covered by the Health Insurance Portability and Accountability Act (HIPAA) to notify individuals when their health information is "improperly disclosed" or security has been breached.

These "breach notification" regulations implement provisions of the Health Information Technology for Economic and Clinical Health Act ("HITECH Act"), passed as part of American Recovery and Reinvestment Act of 2009. The regulations, developed by the HHS Office for Civil Rights, require health care providers and other HIPAA covered entities to promptly notify affected individuals of a breach, as well as the HHS Secretary and the media in cases where a breach affects more than 500 individuals. Breaches affecting fewer than 500 individuals will be reported to the HHS Secretary on an annual basis. The regulations also require business associates of covered entities to notify the covered entity of breaches at or by the business associate.

However, a "harm" provision in the HITECH Act does not require such notification in cases where an entity determines no harm was done to individuals whose health





information was affected by a breach. For example, “secure” information subject to a breach does not result in harm to the affected individuals. HHS has specified encryption and destruction as the technologies and methodologies that render protected health information “secure”; in other words, unusable, unreadable, or indecipherable to unauthorized individuals. Therefore, entities subject to these regulations that secure health information as specified by the guidance through encryption or destruction are relieved from having to notify in the event of a breach of such information.

The so-called “harm” provision has been met with opposition. In a letter to HHS Secretary Kathleen Sebelius, Energy and Commerce Committee Chairman Henry A. Waxman and Ways and Means Committee Chairman Charles B. Rangel said the rules were inconsistent with congressional intent by exempting data breaches that did not cause harm to individuals. The letter specifically calls for HHS to “revise or repeal” the “harm” provision.

Although the rules are already in effect, HHS has reported that it would not enforce the requirements until 180 days after the effective date, or February 16, 2010.

Mental Health Parity Act:

The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (the “Mental Health Parity Act”) generally prohibits health and welfare plans from providing for unequal treatment limits or separate financial rules for mental health insurance compared with those for medical and surgical insurance. We anticipate that shortly the DOL and HHS will issue guidance clarifying for employers difficult questions regarding compliance.

Genetic Nondiscrimination Act of 2008:

Effective January 1, 2010, in accordance with the Genetic Information Nondiscrimination Act of 2008 (GINA), health benefit plans and health insurance issuers will be prohibited from (i) increasing the group premium or contribution amounts based on genetic information; (ii) requesting or requiring an individual or family member to undergo a genetic test; and (iii) requesting, requiring, or purchasing genetic information prior to or in connection with enrollment, or at any time for underwriting purposes.

Under GINA, genetic information means “with respect to any individual, information about: (i) such individual’s genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the

manifestation of a disease or disorder in family members of such individual. In addition, the term genetic information includes any request for, or receipt of, genetic services, or participation in clinical research which includes genetic services, by such individual or any family member of such individual. Genetic information also includes any genetic information of a fetus or embryo carried or held by an individual. An individual's age and gender are excluded from the definition of genetic information.

While many employers currently require health risk assessments as part of companywide wellness programs, after January 1, 2010 employers will be prohibited generally from requesting information about an individual's family medical history. Because GINA defines genetic information to include family medical history, wellness programs that provide rewards to individuals who complete health risk assessments that request family medical history will be in violation of the law, even if the rewards are not based on the outcome of the health risk assessments.

There is some discrepancy between terms as they are defined under GINA and HIPAA. Consequently, HHS has proposed five key changes to the HIPAA privacy regulations: (i) explicitly provide that genetic information is health information; (ii) prohibit health plans from using or disclosing protected health information that is genetic information for underwriting purposes; (iii) revise the provisions relating to the Notice of Privacy Practices for health plans that perform underwriting; (iv) make a number of conforming modifications to definitions and other provisions; and (v) make technical corrections to update the definition of "health plan." We will keep you informed of the status of these and other modifications to HIPAA that require attention.

Michelle's Law:

For plan years starting on or after October 9, 2009, Michelle's Law prohibits a group health plan from terminating a college student's health coverage on the basis of the child taking a medically necessary leave of absence from school or changing to a part-time status. The leave of absence or reduction in hours must be medically necessary and must commence while the eligible student is suffering from a serious illness or injury and would otherwise lose coverage under the plan. Group health plans must provide notice of the requirements of the law along with any notice regarding a requirement for certifying student status for coverage under the plan.

Certain critical questions are yet to have answers. For example, the law does not specify who is responsible for paying the cost of coverage extended via Michelle's Law. Also, the law does not specifically describe how it will integrate with COBRA coverage. Again, we will keep you informed of any guidelines interpreting the Law.

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