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Updates on Changes to the Summary of Benefits and Coverage

On October 19, 2011, we published a Benefits Alert ([click here to view alert](#)) that outlined the requirements set forth in proposed regulations for drafting and distributing a new kind of document called a Summary of Benefits and Coverage (SBC) mandated under the Affordable Care Act (ACA).

On February 9, 2012, the Department of Labor (DOL), the Department of the Treasury (IRS) and the Department of Health and Human Services (DHHS), the agencies charged with administering and enforcing the ACA (the Agencies) issued final regulations that made a variety of changes to those requirements. The most significant change, perhaps, is that compliance was extended for some six months.

The SBC, as modified by these final regulations, now must be distributed to participants and beneficiaries who enroll or re-enroll in a group health plan through an open enrollment period that begins on or after September 23, 2012. For calendar year plans, this would be the open enrollment period for the plan year beginning January 1, 2013.

For participants and beneficiaries who do not enroll during an open enrollment period (*e.g.*, newly hired employees and special enrollees), the regulations apply on the first day of the plan year beginning on or after September 23, 2012 (again, for calendar year plans that would be January 1, 2013).

As with the proposed regulations, the style and formatting of the SBCs are tightly regulated and must follow the form and formats of the templates provided by the Agencies (*e.g.*, 12 pt. type size and Times New Roman font), but though the templates are provided in color, the Agencies have indicated that reproducing them in black and white, or using gray tones, is acceptable. These templates and instructions can be obtained at either <http://cciio.cms.gov> or <http://www.dol.gov/ebsa/healthreform>. The documents available at these websites are: (i) an SBC template, (ii) a sample completed SBC template, (iii) a set of instructions for completing the template, (iv) a "Why This Matters" document in versions showing both "yes" and "no" responses (this provides language needed to complete a specific column in the template), (v) examples and cost projections for the required benefit scenarios, and (vi) a uniform glossary of terms that may not be modified.

Overview of the SBC's Revised Content Requirements

The ACA contained nine required content elements to be included in the SBC, and the proposed regulations added four others. These final regulations eliminated one of these four, and modified another. Dropped was a requirement

that the SBC include information about premium costs for insured plans or cost of coverage for self-funded plans. Also, certain terminology was changed to accommodate self-funded plans. If a plan's terms cannot reasonably be described in a manner consistent with the template, best efforts must be used to describe those terms in a manner consistent with the template's language and format. The current 12 required content elements are:

- Uniform definitions of standard coverage and medical terms
- Description of the coverage for each category of benefits
- Exceptions, reductions and limitations on coverage
- Description of cost sharing requirements, including deductibles, copayments and coinsurance
- Renewability and continuation provisions
- Examples of common benefit scenarios and related costs. The number of required scenarios was reduced from three to two. The two scenarios that must be included are (i) for normal delivery of a baby and (ii) managing type 2 diabetes. The breast cancer scenario is no longer required.
- Beginning January 1, 2014, a statement of whether the plan provides minimum essential benefits, and whether the employer's share of the plan's costs meets applicable requirements
- Statement that the SBC is only a summary and that the plan document, or insurance policy or certificate should be consulted to determine the actual terms of coverage
- A contact number to call with questions and an internet address where the document, policy or certificate can be reviewed or obtained
- An internet address for obtaining a list of network providers, if applicable
- An internet address for learning more about the prescription drug coverage and the prescription drug formulary, if applicable
- Information for obtaining copies of the uniform glossary, including an internet address, phone number for obtaining paper copies and a statement that paper copies are available

Overview of the Revised SBC Distribution Requirements

- The SBC need not be distributed as a stand alone document, but can be included in other summary materials (*e.g.*, an SPD) if the SBC information is kept intact and is prominently displayed at the beginning (*e.g.*, immediately after the table of contents).
- Sponsors of insured group health plans may arrange with the health insurer to provide a single SBC. Both the group health plan and the health insurer need not each provide a distinct SBC.
- SBCs are required to be provided automatically at open enrollment periods beyond the employee's initial open enrolment period only for the benefit packages in which the employee

is enrolled. If you do not have an open enrollment period, the SBC must be distributed at least 30 days before the first day of the next plan year.

- SBCs for other available benefit packages in which a participant is not enrolled must be provided upon request within seven business days. The time frame under the proposed regulations was seven calendar days, and this shift from calendar to business days applies to all seven-day response periods.
- SBCs must be provided with the enrollment materials provided to new enrollees. SBCs must be provided to special enrollees within 90 days of their enrollment date.
- A single SBC can be provided to an employee and all his or her covered dependents living at the same address, but if the employer or insurer knows of a covered member of that family who lives at a separate address, then an SBC must be provided to that person at their own address.
- SBCs do not need to be provided for plans that are “excepted benefits” under HIPAA (*e.g.*, stand alone dental or vision plans, and most health care FSAs). SBCs need not be provided to HSA holders, but coverage under a high deductible health plan would require an SBC, as would coverage under a health reimbursement arrangement (HRA).
- SBCs may be distributed electronically in accordance with the DOL’s rules for electronic distribution of plan materials, though paper copies must always be available upon request and participants must be told this. Eligible individuals who are not yet enrolled may also receive the SBC electronically, if feasible.
- In addition to providing SBCs with enrollment materials, they must be provided within seven days of a request by a participant or beneficiary.
- Material mid-year changes (*i.e.*, those not made in connection with a renewal or reissuance of coverage) must be disclosed at least 60 days prior to their effective date.
- Where 10% or more of a county’s population speaks a non-English language, the SBC must be made available in that language. There are 255 such counties and the DOL keeps an updated list, along with the required languages for each, on its website and is committed to keeping the list updated.

Future Guidance

The Agencies have indicated that future guidance will be issued addressing:

- The DOL will issue separate regulations for assessment of civil fines under ERISA, which incorporates the \$1,000 per willful failure penalty under the Public Health Service Act (PHSA), and the PHSA. The excise tax imposed under IRC § 4980D is \$100 per day per individual for failure to provide an SBC, and this must be self-reported on Form 8928. The IRS may mitigate non-willful failures if corrected within 30 days. Until further guidance is issued, plans subject to chapter 100 of the Internal Revenue Code should report the § 4980D excise

taxes on Form 8928 with respect to any ERISA and PHSA failures. States may enforce the penalties against insurers, but if a state fails to do so, the DHHS may.

- Additional coverage examples may be developed for SBCs provided after the first year the SBC requirement applies.
- Content requirements regarding minimum essential benefits and value statements relating to the insurance exchanges to be established in 2014 will be developed.
- Sample templates and glossaries in Spanish, Tagalog, Chinese and Navajo will be drafted, as these are currently the only non-English languages that are spoken by more than 10% of the population of any U.S. county, thus requiring distribution of SBC materials in those languages.

Action Steps

In most cases, as the SBCs will likely have to be provided, during open enrollment periods this fall and winter, plan sponsors should begin to review their current health care benefit offerings to determine which benefit packages will require SBCs this spring or summer. If the benefits are insured, plan sponsors should contact their insurer to determine if it will be providing the SBCs, and, if so, enter into a written agreement for them to do so. If the benefits are self-funded, plan sponsors should contact the plan's TPA about contracting with them to provide the SBCs. If neither the insurer nor the TPA, as applicable, is willing to undertake this obligation, the plan sponsor should download the template materials package and begin completing them for each benefit package in its plan.

If the plan sponsor does business in any of the 255 counties noted in the regulations as having a population group that is not literate in English and that comprises 10% or more of the county's population, it should find out in which languages it will have to provide SBCs. Note that under the ACA these same non-English language requirements apply to the provision of claim adjudication notices, as well as SBCs.

If you have any questions about these new SBC requirements, any other aspect of complying with the ACA, or any other issue with respect to providing benefits to your employees, please contact any of the Honigman attorneys listed in this Health Care Reform Alert.