



Date: August 17, 2012

Title: Technical Guidance for Non-Federal Governmental Plans

Subject: Content of Notices – Adverse benefit determinations and final internal adverse benefit determinations for beneficiaries in non-federal governmental health plans

I. Background:

Section 2719 of the Public Health Service Act (PHS Act) requires that non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage have an effective internal claims and appeals process.¹ Section 2719(a)(2)(A) requires that such plans and health insurance issuers in the group market provide an internal claims and appeals process that initially incorporates the procedures of 29 CFR 2560.503-1 (the Department of Labor claims procedure regulation) and update such procedures in accordance with any standards established by the Secretary of Labor for such plans and issuers.

The Department of Labor claims procedure regulation clarifies the manner and content of notification of benefit determinations, which include certain disclosures. Among these required disclosures is a statement of the claimant's right, under section 502(a) of the Employee Retirement Income Security Act (ERISA), to bring a civil action following review of an adverse benefit determination. 29 CFR 2560.503-1(g)(1)(iv).² Section 502(a) permits a plan participant or beneficiary to bring a civil action, among other purposes, "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

In addition, the Departments of the Treasury, Labor, and Health and Human Services have provided model notices for adverse benefit determinations. *See* Technical Release 2011-02.³ The model notices outline information that must be provided to claimants, including contact information for the Employee Benefits Security Administration (EBSA) or a State's Department of Insurance, as well as contact information for a Consumer Assistance Program established under PHS Act section 2793 if one is available in that State.

¹ For the definition of a grandfathered health plan, see 26 CFR 54.9815-1251T; 29 CFR 2590.715-1251; and 45 CFR 147.140.

² <http://www.dol.gov/ebsa/regs/fedreg/final/2000029766.pdf>

³ "Guidance on External Review for Group Health Plans and Health Insurance Issuers Offering Group and Individual Health Coverage, and Guidance for States on State External Review Processes," was originally published on June 22, 2011 and is available at: http://cciio.cms.gov/resources/files/appeals_srg_update.pdf.pdf.

II. Discussion:

The ERISA private right of action under section 502(a) is not available to participants or beneficiaries of non-federal governmental plans, and the EBSA does not provide services to these participants or beneficiaries. *See* ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1). In some cases, State Departments of Insurance do not provide services to these participants or beneficiaries. However, PHS Act § 2722(a) requires that non-federal governmental plans comply with the requirements found in the Department of Labor’s claims procedure regulation and the rules implementing section 2719 of the PHS Act, including providing information on the ERISA private right of action under section 502(a), and the information contained in the model notices.⁴ The Department of Health and Human Services (HHS) understands that complying with these requirements would place non-federal governmental plans in the difficult position of providing inaccurate information to participants or beneficiaries.

III. Conclusion:

This document sets forth an enforcement safe harbor with respect to the content of the adverse benefit determinations and final internal adverse benefit determinations issued to participants and beneficiaries in group health plans that are non-federal governmental plans (and health insurance coverage offered in connection with such plans).

For the reasons stated above, HHS will not enforce the requirement that non-federal governmental plans provide notice of the ERISA private right of action.⁵ Similarly, HHS will not enforce the requirement that non-federal governmental plans provide contact information for the EBSA or a State Department of Insurance. This safe harbor is applicable as long as such a plan provides contact information for member assistance provided by any third-party administrator or health insurance issuer that is hired by or contracts with the plan, and, if available, consumer assistance offered directly by the plan such as applicable member services, employee services, Human Relations or Fiscal or Personnel Department, or consumer support services, if applicable. In addition, in States that do not have a Consumer Assistance Program, non-federal governmental plans that seek to take advantage of this safe harbor must provide the contact information for the Department of Health and Human Services Health Insurance Assistance Team (HIAT). The contact information for HIAT is 888-393-2789.

This guidance does not provide non-federal governmental plans with relief from any other requirements of the PHS Act, including the requirement that they provide all other notices required by the Department of Labor claims procedure regulation. Furthermore, to the extent that a non-federal governmental plan purchases a fully-insured health insurance policy for its participants or beneficiaries, or to the extent that State Departments of Insurance provide services to these participants or beneficiaries, HHS expects that participants and beneficiaries will receive

⁴ *See generally* PHS Act § 2722(a): requirements of PHS Act title XXVII, subpart II, including section 2719, apply to non-federal governmental plans.

⁵ HHS is responsible for enforcing the requirements of title XXVII of the PHS Act against non-federal governmental plans. *See* PHS Act § 2723(b)(1)(B). HHS encourages states to enforce the requirements of section 2719(a) with respect to health insurance coverage sold in connection with a non-federal governmental plan consistent with this guidance. Furthermore, a state enforcement policy consistent with this guidance will not cause HHS to determine that the state has failed to enforce substantially the requirements of section 2719(a). *See* PHS Act § 2723(a)(2).

the required contact information for the State Department of Insurance (or any other applicable State department).