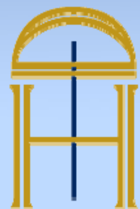
American Benefits Council

PPACA Compliance Call

New Rules on Rescissions and Preexisting Condition Exclusions

June 29, 2010

Seth T. Perretta



DAVIS & HARMAN LLP

© Davis & Harman LLP

Preexisting Condition Exclusions

- Statutory language
  - **PPACA adds new PHSA section 2704**
    - Corresponding ERISA and IRC additions
  - **General statutory prohibition:**

> *A group health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion with respect to such plan or coverage*

© Davis & Harman LLP

Preexisting Condition Exclusions

- Statutory language
  - **Expands on existing HIPAA rules**
    - PRE-PPACA –
      - **Under HIPAA, certain limited preexisting condition exclusions were permitted**
        - *E.g.*, where lapse in creditable coverage (such as 63+ day period with no coverage and had treatment for manifested condition in last 6 months prior to enrollment)
      - **Also, only applied to group health plans versus individual insurance policies**
    - POST-PPACA –
      - **Now, NO preexisting condition exclusions are permitted**
      - **Now, rules apply to both group health plans and individual insurance coverage**

© Davis & Harman LLP

Preexisting Condition Exclusions

- Effective Dates:
  - **Generally effective for plan years beginning on or after January 1, 2014**
    - BUT, applies for plan years beginning on or after September 23, 2010 (*i.e.*, January 1, 2011 for calendar year plans) with respect to "enrollees" and "applicants for enrollment" under the age of 19
      - **Does this essentially create guaranteed issue requirement?**

**** Provisions apply at same time and in same manner to grandfather plans ****

© Davis & Harman LLP

Preexisting Condition Exclusions

- Effective Dates:
  - **Example:**

Individual F commences employment at a cocoa factory and enrolls F's 16-year-old child E, in group health plan (Plan) coverage maintained by F's employer. The first day of coverage for F and E is October 1, 2010. The Plan is a calendar year plan. E had a significant break in coverage lasting more than 63 days without creditable coverage immediately prior to becoming enrolled as F's dependent in the Plan. E was treated for asthma within six months prior to enrollment in the Plan, and the Plan has a rule providing for a 12-month preexisting condition exclusion for the coverage of asthma.

Conclusion: Plan can continue to impose the preexisting condition exclusion with respect to E through the close of the 2010 plan year. Beginning with the 2011 plan year, Plan can no longer impose the preexisting condition exclusion with respect to E.

© Davis & Harman LLP

Preexisting Condition Exclusions

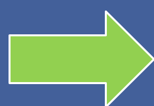
- What is a "Preexisting Condition Exclusion"?
  - **Defined in the June 22, 2010 Interim Final Regulations ("IFR") to mean:**
    - A limit or exclusion of benefits (including a denial of coverage) based on the fact that the condition was present before the effective date of coverage (or if coverage is denied, the date of the denial), regardless of whether any medical advice, diagnosis, care, or treatment was recommended or received before that day

➡ Includes any limit or exclusion of benefits applicable to an individual as a result of information relating to an individual's health status obtained before the individual's effective date of coverage (or if coverage is denied, the date of the denial), such as a condition identified as a result of a pre-enrollment questionnaire or physical examination, or a review of medical records relating to the pre-enrollment period

© Davis & Harman LLP

Preexisting Condition Exclusion

- What is a "Preexisting Condition Exclusion"?
  - **THEREFORE:**
    - CANNOT deny enrollment in group health plan or policy altogether based on information of manifested condition with respect to enrollees and "applicants for enrollment"
    - CANNOT limit and/or exclude coverage post-enrollment regarding a manifested condition



BUT, the preamble to the IFR makes clear that the guidance does not modify the existing rule that a coverage exclusion is NOT a preexisting condition exclusion if it applies regardless of when the covered individual's condition arose

© Davis & Harman LLP

Preexisting Condition Exclusions

- Example –

An employer sponsors a fully insured group health plan. Under the terms of the policy, benefits for oral surgery required as a result of traumatic injury are excluded if the injury occurred before the effective date of coverage under the policy.

Conclusion: Have impermissible preexisting condition exclusion because rule operates to deny coverage based on a condition that was present prior to the effective date of coverage.

© Davis & Harman LLP

Rescission

- Statutory language
  - **PPACA adds new PHSA section 2712**
    - Corresponding ERISA and IRC additions
  - **General statutory prohibition:**

    ''A group health plan and a health insurance issuer offering group or individual health insurance coverage shall not rescind such plan or coverage with respect to an enrollee once the enrollee is covered under such plan or coverage involved...''

  - **Limited exception for cases of fraud or material misrepresentation of fact**

    "... except that this section shall not apply to a covered individual who has performed an act or practice that constitutes fraud or makes an intentional misrepresentation of material fact as prohibited by the terms of the plan or coverage."

© Davis & Harman LLP

Rescission

- Essentially builds on already-existing provisions in PHSA regarding cancellations of coverage
  - **Existing provisions generally provide that a health insurer or group health plan cannot cancel, or fail to renew, coverage for an individual or group for any reason other than certain limited reasons as set forth in the PHSA –**
    - Nonpayment of premiums
    - Fraud
    - Intentional misrepresentation of material fact
    - Withdrawal of a product or withdrawal of an issuer from the market
    - Movement of an individual or employer outside of the service area
    - Cessation of association membership w/r/t association coverage
- Also builds on existing HIPAA nondiscrimination provisions
  - **Existing provisions generally provide that health insurer or group health plan may not set eligibility rules based on factors of health status and evidence of insurability**

© Davis & Harman LLP

Rescission

- Effective Date:
  - **Generally effective for plan years beginning on or after September 23, 2010 (*i.e.*, January 1, 2011 for calendar year plans)**

** **Provisions apply at same time and in same manner to grandfathered plans** **

© Davis & Harman LLP

Rescission

- What is a "rescission"?
  - **IFR states that a "rescission" is a "cancellation or discontinuance of coverage *that has a retroactive effect*" (emphasis added)**
    - IFR includes some examples of rescissions:
      - **A cancellation that treats a policy as void from some date in the past**
      - **A cancellation that voids benefits paid for X period prior to cancellation**

- What is <u>NOT</u> a "rescission"?
  - **Where cancellation or discontinuance of coverage has only a *prospective effect*; OR**
  - **Where cancellation or discontinuance of coverage is effective retroactively to the extent attributable to a failure to pay premiums/contributions for coverage**

© Davis & Harman LLP

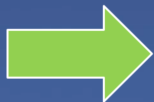
Rescission

- When can a plan or issuer undertake a "rescission"?
  - **Where individual (or a person seeking coverage on behalf of the individual)**
    - performs an act, practice, or omission that constitutes fraud, OR
    - makes an intentional misrepresentation of material fact as prohibited by the terms of the plan or coverage
      - **Related issues**
        - What is "material"?
        - How to show intent?
  - **The preamble to the IFR makes clear that inadvertent omission or unintended misrepresentation of a material fact does not give rise to a permissible rescission**
    - For example, where individual unintentionally errs in completing an enrollment form and the plan or issuer later discovers the error, the individual's coverage cannot be retroactively rescinded

© Davis & Harman LLP

Rescission

- When can a plan or issuer undertake a “rescission”?
  - **Where plan sponsor commits fraud**
    - NOTE: Not clear whether intentional misrepresentation by plan sponsor that does not rise to the level of fraud is sufficient basis for recession
      - **IFR only expressly references fraud w/r/t plan sponsors, but preamble includes broader language encompassing intentional misrepresentation**



In order to execute permissible rescission, MUST provide compliant 30-day advance notice

- Advance notice required, but can rescind coverage retroactively

- **The preamble to the IFR states that if the Departments become aware of attempts to subvert the rule, additional guidance may be issued to ensure that individuals do not lose health coverage unjustly or without due process**

© Davis & Harman LLP

Rescission

- Example –

  Individual seeks enrollment in insured group health plan (Plan). The plan terms permit rescission of coverage if an individual engages in fraud or makes an intentional misrepresentation of a material fact. As part of enrollment, Individual A must complete a questionnaire regarding A's prior medical history, which is used by the issuer for purposes of setting the group rates. In response to the question, "Is there anything else relevant to your health that we should know?", A inadvertently fails to mention that A visited a psychiatrist on two occasions, 6 years previously. A is later diagnosed with breast cancer and seeks benefits under the Plan. At about the same time, the issuer learns of A's visits to the psychiatrist and seeks to rescind coverage.

  Conclusion: The issuer CANNOT rescind coverage because, according to IFR, was inadvertent error on part of A. What about because immaterial? If immaterial, then regardless of intention, no rescission would be permitted unless rises to level of fraud.

© Davis & Harman LLP

Questions?

Seth Perretta
stperretta@davis-harman.com

Davis & Harman LLP
202.347.2230

IRS CIRCULAR 230 NOTICE: Any tax advice contained in this document was not intended or written to be used, and cannot be used by the recipient or any other person, for the purpose of avoiding any Internal Revenue Code penalties that may be imposed on such person. Recipients of this document should seek advice based on their particular circumstances from an independent tax advisor.

© Davis & Harman LLP