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United States | Human Capital | 28 June 2024

Rewards Policy Insider
2024-13

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HHS Updates HIPAA Privacy Rule to Address Issues Relating to Reproductive Health Care

Responding to concerns that law enforcement and others might attempt to use medical records to enforce abortion-related restrictions, the U.S. Department of Health and Human Services (HHS) has issued final regulations to modify the HIPAA privacy rule to prohibit the disclosure of protected health information (PHI) related to lawful reproductive healthcare in certain circumstances. The final rule is effective as of June 25, 2024, but compliance with most of the rule's requirements is not required until December 23, 2024. The final rule also requires an update to the HIPAA Notice of Privacy Practices (NPP), but compliance with the updated NPP is delayed until February 16, 2026.

Overview of Final Rule

In general, the final rule:

- Prohibits the use or disclosure of PHI when it is sought to investigate or impose liability on individuals, health care providers, or others who seek, obtain, provide, or facilitate reproductive health care that is lawful under the circumstances, or to identify persons for such activities.
- Requires a HIPAA covered entity, including health plans, or their business associates, to obtain a signed attestation that certain requests for PHI potentially related to reproductive health care are not for these prohibited purposes.
- Requires HIPAA covered entities to modify their Notice of Privacy Practices to support reproductive health care privacy.

In order for this prohibition on the use or disclosure of PHI to apply, the HIPAA covered entity must reasonably determine that at least one of the following conditions exists:

- The reproductive health care is lawful in the state in which such health care is provided under the circumstances in which it is provided (e.g., a resident of one state travels to a different state to obtain a legal abortion in that state).
- The reproductive health care is protected, required, or authorized by Federal law, including the U.S. Constitution, regardless of the state in which such health care is provided.
    - For example, if use of the reproductive health care, such as contraception, is protected by the Constitution.
- The reproductive health care was provided by a person other than the HIPAA covered entity that receives the request for PHI and a specific presumption applies. The presumption is that the reproductive health care provided by someone other than the covered entity that receives the request was lawful unless any one of certain specified conditions is met, such as the covered entity has actual knowledge the reproductive health care was not lawful under the circumstances.

Additionally, the final rule requires that when covered entities receive a request for PHI that is potentially related to reproductive health care, they must obtain a signed attestation that the use or disclosure is not for a prohibited purpose.

Next Steps for Covered Entities

As noted, compliance with most of the final rule's requirements – other than the updated NPP – will be required by December 23, 2024. That means health plans (including self-insured plans) and other covered entities should not wait to begin the process of becoming familiar with the new limitations on using and disclosing PHI related to reproductive health care, including the signed attestation requirement, and putting processes and procedures in place to ensure timely compliance.

PBGC Finalizes Changes to Defined Benefit Valuation Assumptions and Methods

The Pension Benefit Guaranty Corporation ("PBGC") released final rules updating the interest, mortality, and expense assumptions that are used to determine values that are relevant to both single-employer defined benefit ("DB") plans and multiemployer DB plans. The final rules' amendments to the valuation assumptions will apply to calculations where the valuation date is on or after July 31, 2024.

Overview of Final Rules

On June 6, 2024, the PBGC finalized updates to its rules on valuation assumptions and methods. In general, the rules modernize and update the actuarial assumptions that are used to determine the present value of a single-employer DB plan's benefits when it terminates in a distress or involuntary termination. These assumptions are also used to determine the present value of multiemployer plan benefits in certain withdrawal liability calculations and for other purposes. Overall, these changes have been welcomed by many because they update and simplify existing valuation assumptions.

The final rules are generally consistent with proposed rules that were issued in August 2023. Highlights of the final rules include:

- Yield Curve. The final rules confirm that the PBGC will begin using publicly available yield curves – which are used to determine interest rates over time – to value DB plans liabilities as of the valuation date, instead of a two-component interest rate approach that the agency had been using since the 1990s. Specifically, these yield curves will be incorporated into the methodology used to determine the interest assumption for determining the present value of future payments in a plan (often called the "4044 interest assumption"). In the final rules, the PBGC says that using publicly available yield curve data will increase transparency.

- Mortality Table. In general, mortality tables show the probability of survival for individuals on a year-by-year basis, based on factors such as age and gender. They are used by DB plans to calculate the present

value of expected future benefit payments for purposes of determining the minimum funding requirements for the plan. The final rules adopt a more recent mortality table.

- Expense Assumption. In order to account for certain administrative expenses that are incurred by insurers in connection with the payment of benefits – such as establishing plan files, updating records, processing pension applications, and remitting benefit payments – the benefits valuation regulations for DB plans specify an "expense assumption," which is based on the total present value of plan benefits. The final rules simplify the expense assumption.

The new rules generally become effective on July 8, 2024. However, the new valuation assumption amendments apply to calculations where the valuation date is on July 31, 2024 or later.

Minnesota Amends Paid Family Leave and Earned Sick and Safe Time Laws

Following the enactment of a new paid family leave law and a new earned sick and safe time law in 2023, Minnesota recently enacted amendments to both laws, which generally clarify the rules under each statute and create new penalties for employers. The earned sick and safe time law is already in effect, and the paid family leave law will go into effect in 2026.

Paid Family Leave Law

In May 2023, Governor Tim Walz of Minnesota signed into law the Paid Family Leave Law. The law, which is scheduled to go into effect on January 1, 2026, provides paid family and medical leave in the state for up to 20 weeks per year. The law covers leave in two types of situations: (1) up to 12 weeks of paid leave per year for an employee that suffers a "serious health condition"; and (2) up to 12 weeks of paid leave per year for bonding, safety leave, family care, or a qualifying exigency – e.g., time spent with a newborn child, leave from work because of domestic abuse suffered by the employee or the employee's family member, and time off to allow for an employee to care for a sick family member. The law generally applies to all employers – regardless of size – in the state. The leave program will be funded through a payroll tax (split between employers and their employees).

The amendments enacted in 2024 make a series of modifications to the law, including a lengthy new appeals process for benefit determinations that are denied. In addition, the amendments provide details that the original law lacked regarding an employee's ability to apply for intermittent leave; the amendments state that the minimum leave increment an employee can take is at least one calendar day; intermittent leave must be taken in increments that are consistent with the employer's established policy. The amendments also make changes to the payroll tax structure – among those changes, certain small employers (30 or fewer employees) will be eligible for reduced contributions.

Earned Sick and Safe Time Law

Also in May 2023, Minnesota enacted its Earned Sick and Safe Time Law, which went into effect on January 1, 2024. The law requires covered employees to accrue 1 hour of paid sick and safe time for every 30 hours worked, up to a maximum of 48 hours of paid sick and safe time per year. Accrued earned sick and safe time may be used for an employee's mental or physical illness, to care for a family member, or to obtain preventive medical care, among other uses.

The amendments enacted in 2024 make a number of changes to the original law, most notably enacting a new penalty regime for noncompliant employers. If an employer fails to provide an employee with earned sick and safe time, the employer is liable to the employee for leave equal to all earned sick and safe time that should have been provided, plus an additional amount of liquidated damages. Among other changes, the amendments also modify the definition of "employee" to exclude certain firefighters, elected state officials, and temporary farm workers.

Other State Leave News

Minnesota is not the only state that has modified its leave laws in recent months. In April, Maine enacted a law that delays the effective date of the state's mandatory Family and Medical Leave Program. Now, the requirements for employers to make contributions to the state's family and medical leave insurance fund through payroll taxes will go into effect on July 1, 2025 (pushed back from October of this year), and employees will become eligible for benefits under the law on July 1, 2026 (pushed back from January 2026). While draft regulations regarding the details of how the program will operate were published in January 2024, many employers are anxious for final regulations and additional guidance given the fast-approaching – though slightly delayed – effective dates.

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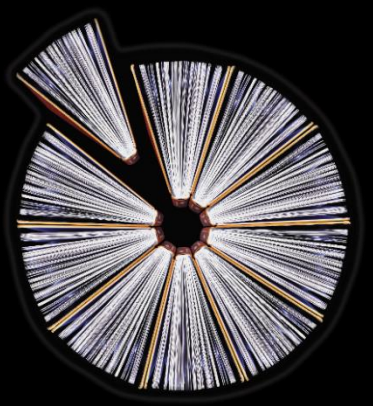

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