Health Underwriting

Legal Restrictions

Tess J. Ferrera, Esq.

Managing healthcare risk in these times of rising medical and prescription drug costs is a concern for most businesses. PEOs, with their ability to evaluate clients, have the opportunity to manage their risk in ways that traditional single-employer sponsored health and welfare plans do not. The Health Insurance Portability and Accountability Act of 1996 (HIPAA), however, places limits on underwriting activity that involves the use of health factors to discriminate against individual plan participants with health issues. This article will address questions that often arise concerning the legal limits of HIPAA s anti-discrimination provisions on the use of health information a PEO may acquire during its due diligence phase of a client about that employer s employees health. Some of those questions include:

- Can a PEO screen potential clients by requesting individual health information?
- Can a PEO charge clients higher or lower premiums to participate in its health plan based on health information?
- Can a PEO limit the health plan options made available to a client because of adverse health conditions?
- Can a PEO exclude clients from participating in its health plan because of adverse health conditions?

As discussed below, the underwriting of an entire client or group and decisions related to a specific individual are significantly different. The general rule of thumb is you may not discriminate against an individual based on health. You may have some greater latitude in underwriting an entire group.

HIPAA Underwriting Concerns

Before HIPAA was enacted, there was little or no guidance on these types of questions, because, in general, with the possible exception of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), the Employee Retirement Income Security Act of 1974 (ERISA) lacked substantive provisions that governed health plans. HIPAA amended ERISA by, among other things, adding provisions that forbid a plan from discriminating against individuals based on health factors. Under HIPAA, a group health plan may not discriminate against an individual on matters relating to eligibility, premiums, or contributions based on any of the following health factors: health status; medical condition, including mental illness; claims experience; receipt of healthcare; medical history; genetic information; evidence of insurability; or disability. See 29 U.S.C. § 1172(a)(1). With respect to premiums, ERISA § 702(b)(1), 29 U.S.C. § 1172(b)(1) provides:

> In general. A group health plan may not require any individual (as a condition of enrollment or continued enrollment under the plan) to pay a premium or contribution which is greater than such premium or contribution for a *similarly situated individual* enrolled in the plan on the basis of any factor described in subsection (a)(1) in relation to the individual or to an individual enrolled under the plan as a dependent of the individual.

(Emphasis added). However, HIPAA also provides that nothing in ERISA § 702(b)(1) shall be construed to restrict the amount that an employer may be charged for coverage under a group health plan. See ERISA § 702(b)(2)(A), 29 U.S.C. § 1172(b)(2)(A).

These prohibitions notwithstanding, employers are still able to establish limits or restrictions on the amount, level, extent, or nature of the benefits or coverage for *similarly situated individuals* enrolled in the plan. 29 C.F.R. § 2590.702(d)(1) (emphasis added). Provided, that the group characteristics that classify the group as similarly situated are not based on health factors. Examples of permissible classifications include: full-time versus part-time employees; employees located within different locations; union versus non-union employees; different dates of hire; length of service; current versus former employees; or different occupations.

Although health factors cannot be used to discriminate adversely against similarly situated individuals, nothing prohibits an employer from using health factors to provide more favorable treatment to individuals with adverse conditions. HIPAA also does not prohibit the use of health questionnaires to underwrite a group, provided that the information collected is not used in a manner that violates HIPAA s non-discrimination provisions. For example, if the information collected in a questionnaire were to be used to exclude individuals from participating in a health plan (or from participation in a health plan option), or to charge sick individuals higher premiums, then the use of the questionnaire for these purposes would violate HIPAA.

Legal Limits: Single Employer versus MEWA

HIPAA's non-discrimination rules, however, are differently applied depending on whether a single employer sponsors the plan or the plan is a multiple welfare employer arrangement (MEWA). Although a number of PEO welfare arrangements are still structured as single-employer plans, the United States Department of Labor (DOL) has consistently refused to accept the PEOs' view of themselves and in 2006, issued two Information Letters confirming its view. See Information Letter to George J. Chanos, Attorney General, Nevada Department of Justice, May 8, 2006, and Information Letter to Mike Kreidler Washington State Insurance Commissioner March 1, 2006. In general, the states have taken similar positions, except that some states have enacted legislation allowing a PEO to be the sponsoring employer of its plan, at least for state law purposes.[1] Because some PEOs still maintain that their arrangement can

Reproduced with permission of the
National Association of Professional Employer Organizations

be structured as a single-employer plan, this article will address the application of HIPAA's non-discrimination provisions in the context of both.

Ironically, while PEOs may find certain advantages to maintaining a plan under a single-employer plan theory, there is often more flexibility in how the ERISA rules apply in the MEWA context. In either context, HIPAA will prohibit the use of health information to discriminate against an individual. In other words, HIPAA prohibits a single employer from charging an individual a higher premium due to a health-based factor or excluding the individual from its health plan or a health plan option. Similarly, in the MEWA context, HIPAA would preclude the MEWA from charging an individual a higher rate based on health factors. In either context, rates could vary among properly classified similarly situated individuals. In the MEWA context, however, HIPAA, would not prohibit a MEWA from individually underwriting a worksite employer group, provided the entire group was charged a higher rate and that no individual in the group was singled out for different treatment, just like an insurance company might collect health experience from a group prior to setting the rate it might charge.

For more information, see NAPEO Legal Review,TM "HIPAA Privacy in the Workplace: A Primer for PEOs, Parts I and II," available to NAPEO members at *www.napeo.org/members/legal_reviews.cfm?%20*. Also see the *PEO Insider* article library at *www.napeo.org*, specifically, "HIPAA Compliance and Prospective and Existing Clients," by Bob Christenson, September 2003.

Applying these concepts to the questions posed at the start of this article, the following conclusions can be made. In response to the first two questions, PEOs can screen potential clients by requesting individual health information, but a single-employer structured PEO would not be able to use that information to separately underwrite the worksite employer group, while a PEO structured as a MEWA would be permitted to charge each worksite employer group a different rate based on risk factors, subject to any state law restrictions, i.e., the small group community rating requirement. In the fully insured MEWA context, however, raising or lowering the rate on a worksite employer from the rate that an insurance company quoted the PEO implicates other ERISA provisions and should not be done without the advice of counsel.

In response to the third question, a single-employer structured PEO plan would not be able to limit an individual's options in its health plan due to health-based factors. A PEO-sponsored MEWA might be able to limit the plan options it offers a worksite employer, assuming more than one plan design option, i.e., self-funded versus a fully insured plan, or the HMO versus the PPO option.

The last question raises complicated questions that go beyond ERISA concerns. Obviously, a PEO may decide it does not want to do business with a prospect for any reason. An argument could be made that a PEO plan structured as a single-employer plan that decides not to do business with a prospect based on individual health information acquired during the PEO's due diligence stage may be running afoul of the Americans with Disabilities Act (ADA) and/or the Age Discrimination in Employment Act (ADEA). In the MEWA context, the PEO may also be running afoul of state guarantee issue laws. Because there are too many possible fact situations in the context of this last question, it is not possible to provide any specific guidance. It is enough merely to point out that refusing to contract with a prospect primarily or solely based on health factors may raise any number of difficult legal questions and a PEO should seek legal counsel on these matters.

Before concluding, it is worth noting that the collection and maintenance of individual health information also raises concerns under HIPAA's privacy rules. The following section touches upon those concerns.

HIPAA's Privacy Rules

HIPAA's privacy rules regulate the maintenance and use of individually identifiable health information, or so-called protected health information (PHI.) PHI generally encompasses all "individually identifiable health information." The privacy rules apply only to "covered entities." Covered entities include health plans, healthcare providers, and healthcare clearinghouses. The term health plan is broadly defined and covers employer-sponsored plans, including medical plans, stand-alone dental and vision plans, employee assistance plans (EAP), and medical flexible spending account plans. A full discussion of HIPAA's privacy rules is beyond the scope of this article. In general, however, the privacy rules prohibit covered entities from using or disclosing individual PHI, unless authorized by the individual or otherwise allowed under the privacy rules. Therefore, if a PEO is collecting information from a prospect prior to executing a client service agreement and/or routinely collecting or maintaining PHI, it should make sure it is complying with HIPAA's privacy rules. The failure to comply with HIPAA's privacy rules carries stiff civil and criminal penalties.

Conclusion

HIPAA's non-discrimination rules and privacy rules are cumbersome and complicated. Like the application of many other laws in the PEO context, there are even greater complications and opportunities to inadvertently run afoul of the laws. In addition, both non-discrimination rules and privacy concerns implicate state law issues that have not been addressed in this article. Counsel informed on ERISA and state laws can provide much needed guidance when maneuvering through the maze of laws.

Tess J. Ferrera, Esq., is a partner with Thompson Hine LLP, Washington, D.C.

1 These state laws have recently been challenged as preempted by ERISA. See *Employers Resource Management Company v. Department of Insurance, State of Idaho*, 2006 Opinion No. 56 (Idaho S.Ct., May 9, 2006)(holding that the definition of a MEWA is governed by ERISA), U.S. Department of Labor Information Letter to George J. Chanos, Attorney General, Nevada Department of Justice, May 8, 2006) (stating that the definition of a MEWA is governed by ERISA).

Reproduced with permission of the National Association of Professional Employer Organizations