

# EMPLOYEE BENEFIT ADVISOR

Quarterly Newsletter

July 2009

## **In This Issue:**

### **News & Views:**

*EEOC Guidance, Page 1*

### **Legislative Insight:**

*Changes to HIPAA Rules, Page 2*

### **RX Corner:**

*Does Rx Education Impact Consumers? , Page 5*  
*First Time Generics, Page 5*

### **Blue Cross Updates & Changes:**

*Blue Alert, Page 6*  
*Blue Cross Bill Payment Address Change, Page 6*

### **Live Well, Work Well:**

*Count Calories, page 6*

### **Product:**

*SVS Vision, page 7*

*As always we welcome your comments and suggestions regarding this issue of Employee Benefit Advisor. For more information on this publication or on articles or information contained within this publication, please contact your Sales Representative, Account Manager or visit the Mourad Agency web site at [www.aemourad.com](http://www.aemourad.com).*

© 2008 A.E. Mourad Agency, Inc.

## **NEWS & VIEWS**

### **ADA: EEOC Guidance on Health Risk Assessments**

In March 2009, the Equal Employment Opportunity Commission (EEOC) issued an informal discussion letter regarding Health Risk Assessments. Specifically, the EEOC addressed the question of whether a requirement to participate in a Clinical Health Risk Assessment (CHRA) to qualify for participation in a health plan constituted a violation of the Americans with Disabilities Act (ADA). This Legislative Brief discusses the EEOC's guidance.

#### **Clinical Health Risk Assessments**

In the CHRA looked at by the EEOC, employees were required to agree to participate in the CHRA, which included answering a short health-related questionnaire, taking a blood pressure test, and providing blood for use in a blood panel screen. Information from the health risk assessment went "directly and exclusively" to the employee; the employer only received information in the aggregate. Employees who declined to participate in the program and members of their families became ineligible for coverage under the employer's health plan.

#### **ADA Requirements**

Title I of the ADA limits when an employer may obtain medical information from applicants and employees. Before a job offer is made, the ADA prohibits all disability-related inquiries (i.e., questions likely to elicit information about a disability) and medical examinations, even if they are related to the job. After a conditional offer is made, an employer may ask disability-related questions and require medical examinations as long as it does so for all entering employees in the same job category. Once employment begins, an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.<sup>1</sup>

#### **EEOC Informal Position**

<sup>1</sup> See 42 U.S.C. § 12112(d); 29 C.F.R. §§ 1630.13, 1630.14; EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA, 8 Fair Empl. Prac. Man. (BNA) 405:7701 ("Enforcement Guidance"). (This document is available on the EEOC Web site at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.)

# EMPLOYEE BENEFIT ADVISOR

Quarterly Newsletter

July 2009

Although the EEOC has not taken a formal position on the issue, requiring that all employees take a CHRA that includes disability-related inquiries and medical examinations as a prerequisite for obtaining health insurance coverage does not appear to be job-related and consistent with business necessity, and therefore would violate the ADA. A disability-related inquiry or medical examination of an employee may be job-related and consistent with business necessity when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition."<sup>2</sup> An employer may seek disability-related information or require a medical examination that follows up on a "request for reasonable accommodation when the disability or need for accommodation is not known or obvious,"<sup>3</sup> or where the examination or other monitoring is conducted under specific circumstances not applicable here (e.g., where periodic medical examinations are required of employees in positions affecting public safety).<sup>4</sup>

Disability-related inquiries and medical examinations are also permitted as part of a voluntary wellness program. A wellness program is voluntary if employees are neither required to participate nor penalized for non-participation.<sup>5</sup> In this instance, however, an employee's decision not to participate in the health risk assessment results in the loss of the opportunity to obtain health coverage through the employer's plan. Thus, even if the health risk assessment could be considered part of a wellness program, the program would not be voluntary, because individuals who do not participate in the assessment are denied a benefit (i.e., penalized for non-participation) as compared to employees who participate in the assessment.

The EEOC had earlier informally opined that a wellness program would be considered voluntary and any disability-related inquiries or medical examinations conducted in connection with it would not violate the ADA, as long as the inducement to participate in the program did not exceed twenty percent of the cost of employee only or employee and dependent coverage under the plan, consistent with regulations promulgated pursuant to the Health Insurance Portability and Accountability Act ("HIPAA"). The EEOC is continuing to examine what level, if any, of financial inducement to participate in a wellness program would be permissible under the ADA.

The EEOC reminds readers that this guidance is an informal discussion of the above issues and does not constitute an official opinion of the EEOC.

## LEGISLATIVE INSIGHT

### Changes to HIPAA Rules: DOL Guidance on Securing PHI for Breach Notification Requirements

On April 17, 2009, the Department of Health and Human Services (HHS) issued guidance (the "HHS Guidance") specifying the technologies and methodologies that render protected health information (PHI) unusable, unreadable, or indecipherable to unauthorized individuals, as required by the Health Information Technology for Economic and Clinical Health (HITECH) Act (the Act), which was passed as part of the American Recovery and Reinvestment Act of 2009 (ARRA) on February 17, 2009. This information relates to the security breach notification requirements of ARRA.

This issue of the Legislative Brief provides you with an overview of ARRA's security breach notification requirements and the related HHS guidance.

#### SECURITY BREACH NOTIFICATION REQUIREMENT

##### What is the Security Breach Notification Requirement?

Currently, the Health Insurance Portability and Accountability Act (HIPAA) does not require Covered Entities to report breaches of privacy or security of PHI. The HITECH Act will require Covered Entities to notify individuals whose "unsecured PHI" has been breached. If the breach involves PHI held by a Business Associate, the Business Associate must notify the Covered Entity.

The Act did not specify when PHI is considered to be "secure" or "unsecure." Instead, it directed HHS to issue guidance regarding which technologies and methodologies are considered secure by April 18, 2009. The guidance was to specify the technologies and methodologies that render PHI "unusable, unreadable or indecipherable to unauthorized individuals."

The notification requirement will not apply until 30 days after HHS issues interim final regulations governing the requirement. Those regulations are to be issued within 180 days of the Act's enactment.

##### What is a Security Breach?

<sup>2</sup> *Id.* Q&A 5, at 405:7708.

<sup>3</sup> *Id.* Q&A 7 & 10, at 405:7711, 7713.

<sup>4</sup> *Id.* Q&A 14-20, 405:7715-18.

<sup>5</sup> *Id.* Q&A 22, at 405:7718-19.

# EMPLOYEE BENEFIT ADVISOR

Quarterly Newsletter

July 2009

For purposes of the Act, a breach is the unauthorized acquisition, access, use or disclosure of PHI that compromises the security or privacy of the information, except where an unauthorized person to whom such information is disclosed would not reasonably have been able to retain such information.

There are exceptions to this definition for the following situations, if the information is not further acquired, accessed, used or disclosed:

- The unauthorized acquisition, access or use of PHI is unintentional and made by an employee or individual acting under authority of a Covered Entity or Business Associate if the acquisition, access or use was made in good faith and within the course and scope of the employment or other professional relationship; or
- An inadvertent disclosure occurs by an individual who is authorized to access PHI at a facility operated by a Covered Entity or Business Associate to another similarly situated individual at the same facility.

## When Must the Notification of a Security Breach be Provided?

Once the notification requirement is effective, notification must be made without unreasonable delay and no later than 60 days after the discovery of the breach. However, notification must be delayed if a law enforcement official determines that a notification would impede a criminal investigation or cause damage to national security.

## How Must the Notification of a Security Breach be Provided?

The Act specifies the following methods of providing the notice:

- Written notice by first-class mail (or by e-mail, if specified by the individual).
- If there is insufficient or out-of-date contact information, substitute notice, such as conspicuous posting on the Covered Entity's website or notice in major print or broadcast media.
- In urgent cases where there is a possibility of imminent misuse of the unsecured PHI, notice by telephone or other method (in addition to the above methods).
- Notice to "prominent media outlets" within the state or jurisdiction if the breach affects more than 500 individuals of that state or jurisdiction.
- Notice to HHS of all breaches. Notice must be provided immediately for breaches involving

more than 500 individuals and annually for all other breaches. HHS will post breaches involving more than 500 individuals on its website ([www.hhs.gov](http://www.hhs.gov)).

## What Information Must the Notification Include?

The Act requires the notice to include the following information:

- A description of the breach, including the date of the breach and date of discovery;
- The type of PHI involved (such as full name, Social Security number, date of birth, home address or account number);
- Steps individuals should take to protect themselves from potential harm resulting from the breach;
- Steps the Covered Entity is taking to investigate the breach, mitigate losses and protect against future breaches; and
- Contact procedures for individuals to ask questions or learn additional information, including a toll-free telephone number, e-mail address, website or postal address.

## HHS GUIDANCE REGARDING UNSECURED PHI

### What Does the HHS Guidance Say About Unsecured PHI?

The HHS Guidance states that, if PHI is rendered unusable, unreadable, or indecipherable to unauthorized individuals by one or more of the methods identified in the HHS Guidance, then that information is not "unsecured" PHI. Because the breach notification requirements apply only to breaches of unsecured PHI, the HHS Guidance provides information for Covered Entities and Business Associates to use to determine whether the notification obligations apply to a particular breach.

### What Methods are Identified in the HHS Guidance for Securing PHI?

The new HHS Guidance states that HHS has identified two methods for rendering PHI in paper or electronic form unusable, unreadable or indecipherable to unauthorized individuals: **encryption and destruction**. These technologies and methodologies are intended to be exhaustive and not merely illustrative. However, HHS may issue guidance regarding additional technologies and methodologies in the future.

#### Encryption

# EMPLOYEE BENEFIT ADVISOR

Quarterly Newsletter

July 2009

Under the HHS Guidance, electronic PHI has been rendered unusable, unreadable or indecipherable to unauthorized individuals if it is encrypted by “the use of an algorithmic process to transform data into a form in which there is a low probability of assigning meaning without use of a confidential process or key” and the confidential process or key has not been breached.

The following encryption processes meet this standard:

- Valid encryption processes for data at rest are those that are consistent with the National Institute of Standards and Technology (NIST) Special Publication 800-111, *Guide to Storage Encryption Technologies for End User Devices* (available at [www.csrc.nist.gov](http://www.csrc.nist.gov)); and
- Valid encryption processes for data in motion are those that comply with the requirements of Federal Information Processing Standards (FIPS) 140-2.<sup>6</sup>

## Destruction

If PHI is destroyed prior to disposal in accordance with the HHS Guidance, no breach notification is required following access to the disposes hard copy or electronic media by unauthorized persons.

PHI is considered destroyed in accordance with the HHS Guidance if the media on which the PHI is stored or recorded has been destroyed in one of the following ways:

- Paper, film or other hard copy media have been shredded or destroyed such that the PHI cannot be read or otherwise cannot be reconstructed; or
- Electronic media have been cleared, purged, or destroyed consistent with NIST Special Publication 800-88, *Guidelines for Media Sanitation*, such that the PHI cannot be retrieved.

## **Are Covered Entities Required to Follow the HHS Guidance?**

No, Covered Entities and Business Associates are not required to follow the HHS Guidance. However, the security breach notification rules apply only to unsecured PHI. Therefore, if Covered Entities and Business Associates use the specified technologies and

methodologies to secure PHI, they do not have to provide notification if there is a security breach involving that PHI.

## **Does the HHS Guidance Apply to De-Identified Information?**

No, the HHS Guidance does not address the use of de-identified information as a way to render PHI unusable, unreadable or indecipherable to unauthorized individuals. Once PHI has been de-identified in accordance with the HIPAA Privacy Rule, it is no longer PHI and no longer subject to the HIPAA Privacy and Security Rules.

However, HHS specifically states that nothing in the HHS Guidance should be construed as discouraging Covered Entities and Business Associates from using de-identified information to the maximum extent practicable.

## **Does the HHS Guidance Address How to Protect PHI?**

No, the HHS Guidance is not intended to inform Covered Entities and Business Associates how to prevent breaches involving PHI. Covered Entities must comply with the HIPAA Privacy and Security Rules by conducting risk analyses and implementing physical, administrative and technical safeguards that are reasonable and appropriate.

## **Does the HHS Guidance Apply to Other Breach Notification Rules?**

Yes, the Act imposes a temporary breach notification requirement on vendors of personal health records (“PHR”) and other non-HIPAA Covered Entities that relates to unsecured PHR identifiable health information. The HHS Guidance is to be used to determine whether that information is unsecured.

Specifically, PHR vendors must notify any individual who is a citizen or resident of the United States whose unsecured PHR identifiable health information was acquired by an unauthorized person as a result of a breach of security. PHR vendors must also notify the Federal Trade Commission (“FTC”), which will in turn notify HHS. Any third party service provider that provides services to a PHR vendor and discovers a breach must notify the vendor.

Violations of this requirement will be treated as unfair and deceptive acts or practices in violation of the Federal Trade Commission Act. This requirement will apply 30 days after the FTC issues interim final regulations. Those regulations must be issued within 6 months of the Act’s enactment.

## **What is the Effective Date of the HHS Guidance?**

<sup>6</sup> These include, as appropriate, standards described in NIST Special Publications 800-52, *Guidelines for the Selection and Use of Transport Layer Security (TLS) Implementations*, 800-77, *Guide to IPsec VPNs*; or 800-113, *Guide to SSL VPNs*, and may include others that are FIPS 140-2 validated.

# EMPLOYEE BENEFIT ADVISOR

Quarterly Newsletter

July 2009

The HHS guidance is effective April 17, 2009. However, HHS and the FTC are required to issue interim final regulations governing the notification requirements within 180 days of enactment of the Act. The notification requirement and the HHS guidance will apply to breaches discovered on or after the date that is 30 days after the regulations are issued.

willing to receive, trust and be influenced by suggestions regarding improving the health and value of their prescription-drug benefit. But, with the switch to generics still relatively low among members filling other branded bisphosphonates at retail pharmacies – according to the study – the work of refining consumer education is not finished.

## RX CORNER

### Does Targeted Patient Rx Education Impact Consumer Behavior?

Conventional wisdom says that informing prescription-drug plan members of lower-cost options, such as generics, would have an impact on moving them to those options. In the past, pharmacy benefit managers have focused on educating members about chemically equivalent generics. Recently, however, two studies on education about new therapeutic alternatives put conventional wisdom to the test through the discipline of Consumerology. Researchers combined proven consumer marketing strategies, with insights learned from behavioral economics, to develop more effective ways to communicate about pharmacy plan benefits.

The patent expirations of Fosamax® (alendronate sodium) and Ambien® (zolpidem) created two separate opportunities to test the influence of letter-based programs on convincing members to switch from their brand-name drug to a new therapeutic generic alternative. These two patent expirations represented the first generics in these therapy classes.

In the Ambien study, the results were clear. Among patients filling brand hypnotic prescriptions through a retail pharmacy, the odds of members in the group receiving education letters switching to generic zolpidem were 54% greater when compared to the group who did not receive letters. This resulted in an estimated switching increase of 5.3 percentage points for those who received targeted patient education. Results of a letter-based education program were even greater for members filling their prescriptions through Home Delivery. Those members were twice as likely to switch to the generic alternative. The greater success in Home Delivery is consistent with other findings around mail campaigns encouraging use of lower-cost alternatives.

Results of the Fosamax study showed that in retail, members with education were two times more inclined to switch to generic, compared to those receiving no education. However, just as in the Ambien study, those members filling prescriptions through Home Delivery were almost four times more inclined to switch to a generic when presented with information of its existence. This suggests that, once a relationship is established with plan members through Home Delivery, members are more

### First-Time Generics

Generic Name	Brand Name	Approval Date	Uses
Alprazolam Oral Tablets	Niravam Tablets	1/9/09	Anxiety, panic attacks
Levetiracetam Oral Solution	Keppra Oral Solution	1/15/09	Certain types of seizures
Divalproex Sodium Capsules	Depakote Capsules	1/23/09	Prevent seizures caused by some forms of epilepsy
Risperidone Oral Solution	Risperdal Oral Solution	1/30/09	Schizophrenia, bipolar disorder, symptoms of autism
Galantamine	Razadyne	1/30/09	Mild and moderate dementia caused by Alzheimer's disease
Minocycline Hydrochloride Tablets	Solodyn Tablets	2/3/09	Severe acne
Sumatriptan Succinate Injection	Imitrex	2/6/09	Migraines
Sumatriptan Succinate Tablets	Imitrex Tablets	2/9/09	Migraines
Risperidone Disintegrating Tablets	Risperdal Tablet	2/24/09	Schizophrenia, bipolar disorder, symptoms of autism

# EMPLOYEE BENEFIT ADVISOR

Quarterly Newsletter

July 2009

## BLUE CROSS UPDATES & CHANGES

### Blue Alert – Blues expand hospice benefits

BCBSM is expanding their original hospice benefit for non-Medicare members.

The change is effective July 1, 2009.

The enhanced hospice benefit includes:

- An increase in patient eligibility from six months to 12 months prior to the estimated time of death for hospice services
- Continuation of curative treatment during a transition period when hospice services are also offered until the patient is ready to forgo curative care (the patient will continue with full medical-surgical benefits until enrolled in original hospice care)

BCBSM will implement that transition period as a so-called "Phase I" hospice benefit. During Phase I, patients and their families or significant others can receive hospice care and services at an earlier stage.

The Phase I level of hospice care will consist of evaluation, support services and consultation and education and may be used prior to patients electing original hospice coverage. Ideally, patients who participate in the Phase I hospice care will subsequently accept traditional hospice services in a timelier and more clinically appropriate point of their illness.

Phase I services aren't expected to entail daily patient contact and are less intensive than original hospice services received in the initial care and stabilization or final phases of illness. When the patient and physician together decide to forgo curative treatment for the terminal illness, the patient may proceed with his or her original hospice benefits.

This benefit expansion was assessed as non-rated for area- and experience-rated groups. It also applies to all self-funded and ASC groups unless they specifically opt out. The Blues expect the potential savings from increased acceptance of hospice to exceed the costs.

NOTE: This benefit expansion does not apply to automotive and Federal Employee Program group subscribers.

### Blue Cross Billing Payment Address Change

In April 2009, Bank of America, the bank that was receiving payments for BCBSM's group-billed customers was relocated from Livonia to Dallas.

The relocation has not affected the credit of payment to a group's BCBSM account. Groups should continue to include their payment coupons with their premium payments and pay as billed.

Please make note of the addresses below, to ensure the correct payment address.

#### Payment with coupon:

Blue Cross Blue Shield of Michigan  
P O Box 660820  
Dallas, TX 75266-0820

#### Express-mail payments:

Bank of America  
C/O BCBSM #660820  
1950 N. Stemmons Freeway, Suite 6020  
Dallas, TX 75207

**Please note that this change does not impact individual-billed customers.** Your payment coupon address and express-mail payment locations remain as:

#### Individual Product payments with coupon:

Blue Cross Blue Shield of Michigan  
P O Box 64773  
Detroit, MI 48264-0773

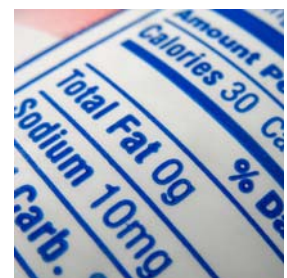
#### Individual Product Express-mail payments:

Lock Box 64773  
Blue Cross Blue Shield of Michigan  
39200 Six Mile Road  
Livonia, MI 48152-2689

## LIVE WELL, WORK WELL

### Count calories to drop pounds

Losing weight may be the greatest battle that you fight in your lifetime, unless you have teenagers. Experts speculate that a wide variety of issues affect how people gain and lose weight, yet gauging how to tip your energy balance is a great way to move the scale in your favor.



# EMPLOYEE BENEFIT ADVISOR

Quarterly Newsletter

July 2009

The first step in losing unwanted pounds is to determine how many calories you must consume each day to maintain your current weight, so you can decrease that amount and hopefully lose. To do so, multiply your current weight by 15 (roughly the number of calories per pound per body weight needed to maintain your weight, if you are moderately active). Being moderately active means engaging in 30 minutes of physical exercise daily, such as

Avoid drinking regular soda, fruit juices and alcohol that are all high in calories. Opt for water, skim milk or diet soda instead.

## Did you know...?

"Fat-free" or "low-fat" does not necessarily mean better! These food versions often have more calories per serving because they contain extra sugar to make up for flavor lost by cutting out fat. Also, if you eat these foods in large quantities, you will likely consume just as much or *more* calories than when eating a sensible amount of the full-fat versions.

a brisk walk, using an elliptical machine or climbing stairs.

Here's an example: A woman who is 5 feet 4 inches tall and weighs 155 pounds must lose 15 pounds to be within a healthy weight range. Multiplying 155 by 15 yields 2,325 calories per day; that is the number of calories that the woman must eat to maintain her weight. If she wants to lose one to two pounds per week, she should eat 500 to 1,000 calories less (1,325 to 1,825). If she is not active, she should incorporate exercise into her routine.

## Counting Calories Made Simple

Counting calories to hit your target consumption goal does not need to be difficult. Here are some ways to do so:

- Add up the number of calories per serving of all foods that you consume and then plan your meals around your target calorie total. To do so, read food and drink labels and pay close attention to serving sizes. Also ask for the caloric totals for your favorite foods while eating out.
- Eat meals that are low in calories at regular eating schedules. Plan your meals and snacks for specific times of day and stick with this game plan.
- Substitute lean cuts of meat for fattier ones.
- Avoid high-fat packaged foods and snacks.
- Eliminate fat-rich products (butter and partially hydrogenated oils) from your diet completely.
- Choose foods that are filling, yet low in calories, such as whole grains, fruits and vegetables.
- Avoid eating fried foods – instead cook in nonstick pans lightly coated with cooking spray or braise foods with wine or broth. Baking, broiling or roasting are also sensible methods for cooking foods that add no fat to the meal.
- Eat low-fat or fat-free dairy products, as they are good sources of protein and calcium without the fat.
- Avoid fast foods that are high in calories and are portioned larger than what an average adult needs to consume for one meal.

## PRODUCT



For over 35 years SVS Vision, headquartered in Mt. Clemens, Michigan, has been a premier provider of trusted eye care, vision insurance and safety eyewear plans and administration for hundreds of companies. They offer a managed care approach to vision care which has effectively demonstrated that high quality does not have to be more expensive. The experience of SVS Vision in the organized delivery of vision care is unsurpassed, providing an opportunity to reduce health care cost without reducing quality or member satisfaction.

Offering fully insured managed care plans, safety eyewear and group discount programs, SVS Vision is your best choice for a *single vision solution*.

Whether your company employs five or thousands, SVS Vision will tailor a program to service your company's needs. SVS provides:

- ◆ **A cost effective** administration and fulfillment program.
  - Their Member Services team tracks and verifies your employees' eligibility, provides authorization, and completes billing, saving you time and paperwork.
  - Because they own their manufacturing lab and service hundreds of businesses, they are able to control costs and pass those savings on to you.
- ◆ **Customizable, comprehensive vision insurance and safety eyewear solutions** for your organization.
  - Fully funded or employee contribution insurance plans available.
  - Benefit allowance, co-pay and billing options are customized for your needs.
- ◆ **A nationwide provider network** which can be customized for any group's needs. This enhanced network, which includes more than 50 SVS owned locations, each provides:

According to the Prevent Blindness organization, there are nearly 700,000 work related eye injuries each year and 90% of those could be prevented with the use of OSHA approved safety eyewear. **SVS Vision is dedicated to reducing those injuries. Let SVS Vision take the hassle out of administering and supplying your Company with an OSHA approved Safety Eyewear program.**

# EMPLOYEE BENEFIT *ADVISOR*

Quarterly Newsletter

July 2009

- Doctors of Optometry on site to provide eye exams to your employees.
  - A large selection of frames, lenses, lens options, contact lenses and safety glasses at affordable costs.
  - ◆ A **dedicated service representative** assigned to your group. Their representatives understand the “ins and outs” of your vision plan and member requirements and will work with you to ensure great customer service.
- Dress Eyewear • Manufacturing • Medical • Scientific  
• Industrial • Construction • Electrical •

For further information please contact your Sales Executive or Account Manager.