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The Tag-along Rule: Where HIPAA and §125 Collide

By Rich Glass, J.D.

HIPAA affords employees several opportunities to enroll in group health plans beyond the initial and open enrollment periods. One tricky area involves an employee who wants to add a newborn or newly adopted child to group health plan coverage, invoking what is commonly known as the “tag-along rule.”

To review, HIPAA special enrollment rights apply in two circumstances: a loss of other group health plan coverage and the addition of a dependent (see Tab 400 of the *Guide*). (Congress recently added a third right regarding Medicaid or State Children’s Health Insurance Program coverage — see related story, p. 3.)

Under the cafeteria plan election change rules, the same rights exist in the same two circumstances (26 C.F.R. §1.125-4(b)). HIPAA’s special enrollment rules require employer plans to allow an employee at least 30 days to notify the plan of the event. Coverage is retroactive to the date of the event for birth or adoption. Otherwise, coverage must begin no later than the first of the next month after the plan receives the notice.

So where is the conflict? It exists in the nature of each rule. The HIPAA rules are mandates for all group health plans while the cafeteria plan rules are permissive, allowing plans to carve out exceptions to the general rule that elections cannot be changed during a plan year. In other words, group health plans have the right to exclude some of the allowable election changes by plan design.

Example

Al and Betty are married with one child, Clara, when Al goes to work for his new employer, Hipaaco. Betty has coverage already for all three through her employer, Cafeco. Al declines Hipaaco coverage when it is first offered to him as a new hire. Later, Betty gives birth to a second child, Don. Al now wants to bring his entire family onto

Hipaaco coverage. Who must Hipaaco allow to become covered?

The HIPAA rules would require Hipaaco to accept any of six coverage combinations:

- Al alone
- Al and Betty
- Al and Don
- Al, Betty and Don
- Betty alone, if Al were already covered by Hipaaco
- Don alone, if Al were already covered by Hipaaco

Missing from the HIPAA special enrollment party is Clara. The HIPAA rules do not require Hipaaco to bring Clara on outside of open enrollment. This is likely an unintended result of the HIPAA rules, but based on how the regulations are written, it is a necessary result.

However, all is not lost for our hypothetical Clara because what the HIPAA rules do not require, the cafeteria plan rules allow. These rules specifically allow a plan like the one sponsored by Hipaaco to cover any and all dependents when a HIPAA special enrollment event occurs. Come one, come all.

The catch is that the plan must specifically allow that type of election change. As a practical matter, many group health plans simply adopt all the scenarios (for example, change in status) to the maximum extent allowed by law. In our example, if Hipaaco’s plan does allow this, Clara may come on the plan immediately without having to wait for open enrollment.

Let’s change the example for a moment. What if Al, Betty and Clara had no coverage at the time that Don was born? Could they still come onto Hipaaco’s plan as special

See *Tag-along Rule*, p. 5

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Tag-along Rule (continued from p. 4)

enrollees? The answer is yes. The special enrollment right for birth or adoption does not require other health plan coverage.

Getting back to the original example, even if Hipaaco does not allow Clara on coverage because of Don's birth, a second factor may require Hipaaco to reverse its decision. If Betty and Clara lose their eligibility for coverage under Cafeco's plan, all dependents — including Clara — must be given special enrollment rights under Hipaaco's plan as long as they were already covered when Al first declined coverage at Hipaaco.

Betty and Clara could lose Cafeco coverage in a variety of ways. Perhaps, Betty reduces her work hours after the second child is born and as a result no longer meets the eligibility requirements for Cafeco's plan. Or perhaps she quits her job altogether. However, the loss of eligibility could not be a result of a Betty's failure to pay premiums or for cause under the plan (such as fraud).

Understanding the crux of this dilemma is important. Some employers may want to review their plan documents and summary plan descriptions to ensure that their plans are clear on what election changes are permitted and what election changes are required. 

Interaction of HIPAA Special Enrollment and Cafeteria Plan Rules

Al is currently married to Betty with one child, Clara. All of them are covered under Betty's plan when Betty has a second child, Don.

| Item | HIPAA | Cafeteria Plan |
|--------------------------------------|--|--|
| Legal source | 26 C.F.R. §54.9801-6(b)(2) and corresponding DOL and HHS rules | 26 C.F.R. §1.125-4(b); see specifically Example 1 in -4(b)(2) |
| Nature of rule | What plans are required to do | What plans are permitted to do |
| Description | special enrollment rights | permitted election changes (a.k.a. the tag-along rule) |
| What special enrollment rights exist | The plan must offer special enrollment to any or all of the following (if applicable): Al only (§54.9801-6(b)(2)(i)) Betty only, if Al is already enrolled (ii) Al & Betty (iii) Don only, if Al is already enrolled (iv) Al & Don (v) Al, Betty and Don (vi) | A plan may offer special enrollment to any or all of the following (if applicable): Al, Betty, Clara and/or Don, as long as Al elects coverage |

Congress Corrects MHPAEA Deadline

Jan. 1, 2010, is the earliest deadline for collectively bargained group health plans to comply with the new mental health parity law, Congress clarified in a subsequent amendment.

Under a “technical correction” bill (S. 3712) signed Dec. 23 by then-President Bush (Pub. L. 110-460), collectively bargained plans must comply with the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) in plan years beginning on or after Jan. 1, 2010, or the end date of the longest-running collective bargaining agreement ratified by Oct. 3, 2008, whichever is later. The original MHPAEA text could have required collectively bargained

plans to comply as soon as Jan. 1, 2009 — almost a year before any other group health plans.

MHPAEA, enacted Oct. 3, 2008, as part of the financial bailout law, requires a much greater degree of parity between mental health and substance abuse benefits on the one hand, and medical/surgical coverage on the other, than did the original 1996 Mental Health Parity Act. (See ¶920 of the *Guide*.)

Non-collectively bargained group health plans were not affected by the technical correction law; they still must comply in plan years beginning on or after Oct. 3, 2009. Thus, calendar-year plans must comply by Jan. 1, 2010. 

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