

HIPAA Privacy and Section 125 Medical FSAs

By Bob Radecki
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As I was traveling the country doing HIPAA seminars for agents last fall, the same issue kept coming up over and over. What about employers who sponsor only fully insured health and dental plans, but also offer a Section 125 Health Flexible Spending Account (FSA). As you probably know a Section 125 FSA is considered a self-funded plan for HIPAA purposes.

If you read my earlier columns, you remember that if an employer sponsors a fully insured plan but only receives summary claims data, and shares only enrollment data with the carrier, the employer can avoid most of the HIPAA Privacy requirements. Unfortunately, many of those same employers sponsor an FSA.

An Important Rule

Group health plans with less than 50 participants are exempt from HIPAA, but only if they are SELF-ADMINISTERED. If an employer uses a TPA or insurance company to administer the FSA, the plan is subject to the HIPAA rules no matter how few people participate.

Could this be a reason for small groups to choose to do their own FSA administration? I don't think that is a good idea. It is fairly straightforward and manageable to get an FSA in compliance with HIPAA. The FSA HIPAA compliance kit I wrote is made up of 5 steps and a few documents that need to be completed. I think it is a lot easier to comply with HIPAA than to tackle self-administration of an FSA. Self-administering an FSA just to avoid HIPAA is replacing a small compliance problem with a larger one!

Rumors of Relief

When asked about an FSA, my advice to employers last fall was to wait. There had been rumors that the Department of Health and Human Services (DHHS) was considering a "simplified" set of privacy rules for FSA plans. It is now less than 3 months from the compliance deadline and DHHS has not changed anything. In fact, in an answer posed on the DHHS website, the department confirms that if an FSA meets the ERISA definition of a group health plan (it does), then it is subject to the HIPAA Privacy Rule.

What should a TPA, Broker or Agent do now?

We all know that most smaller employers have no idea that they may be the sponsor of a plan with significant HIPAA privacy requirements. We also know that if a client finds out later that the rules apply to them, they will blame their TPA or broker for not helping them! Maybe most importantly we know that smaller employers are not going to spend a lot of money to solve a compliance problem like this.

At a minimum, you should warn all of your clients who sponsor an FSA about the HIPAA Privacy Rule. Can you do any more? You probably don't want to serve as their HIPAA consultant. An executive at one large TPA told me, "There is hardly enough revenue in a small flex client to do the admin, much less try to provide individualized compliance advice!"

You may want to consider offering a compliance tool to these clients. There are many out there, some more complete than others, with costs all over the map. I wrote a HIPAA guide specifically for Section 125 plans that retails for less than \$50, but it is by no means your only option.

By offering a solution to your clients, you are erasing the possibility of them accusing you of not assisting them. If they don't do anything with whatever solution you offer...well...you can only lead a horse to water...

A few sales minded brokers and TPAs that I work with are using HIPAA tools to attract new business. I am sure all of us can use one more good reason to call on a prospect. With the HIPAA deadline approaching in April, now is a great time to use the HIPAA arrow in your prospecting quiver!

Summary

Yes, HIPAA is for real. No, HIPAA is not going to go away. Yes, I have personal experience with agents who have lost a client because someone else came in and solved the employers HIPAA problems first.

I know many of you are tired of HIPAA seminars and reading about HIPAA, but I am afraid the fun is just starting. Small to mid-sized employers have for the most part, ignored HIPAA so far. The bad news (or good news in my case!) is that my phone has been ringing off the hook lately with employers looking for help, and I expect it will get worse before it gets better.

Almost all of you have smaller clients with flex plans. My advice is to help them now...before someone else does.

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