ABIS Employee Benefits

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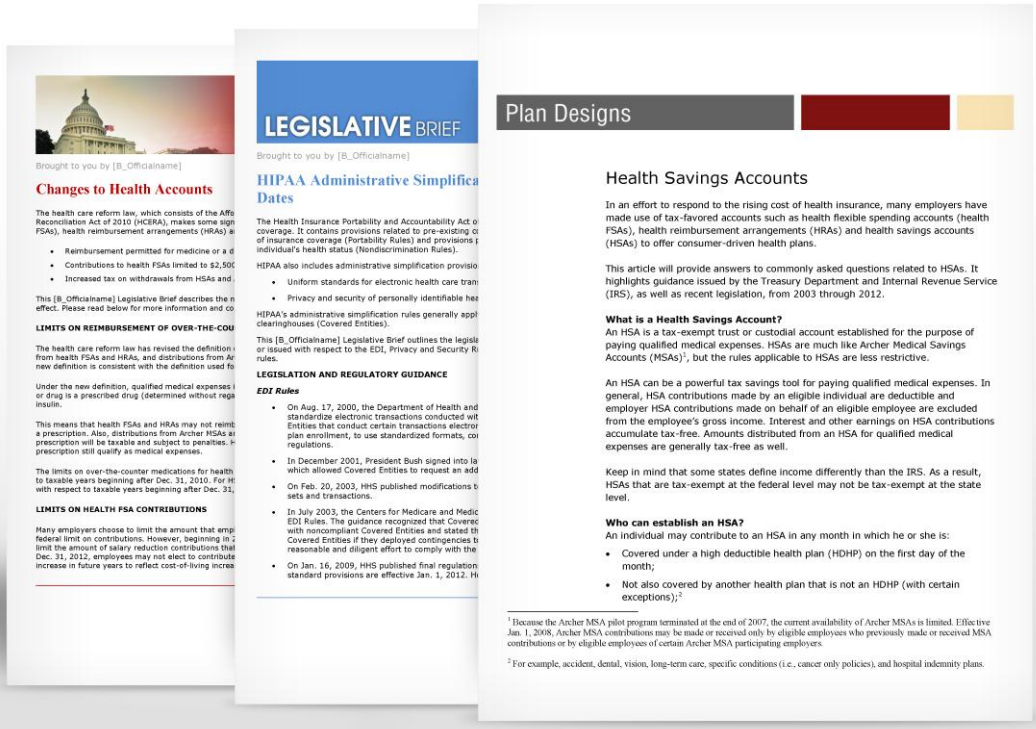

Are you compliant with all state and federal laws, rules and regulations?

There are countless rules and regulations governing employee benefit plans, many of which are complex. Our resources will help you meet your compliance obligations and keep you up to date on laws and regulations that affect your employee benefits program.

Do you have access to constantly updated legislative briefs and guides?

Our easy-to-read articles will help you find answers to your common COBRA, FMLA, health care reform, HIPAA, HIPAA Privacy, Medicare Part D and Section 125 questions.

Would you like community support?

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Table of Contents

Legislative Updates

Compliance Resources

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DOL Releases Final FMLA Regulations

On Feb. 6, 2013, the Department of Labor (DOL) marked the 20th anniversary of the signing of the Family and Medical Leave Act (FMLA) by releasing a set of **final FMLA regulations**. The final regulations, which become effective on **March 8, 2013**, implement two statutory expansions of FMLA leave protections. According to the DOL:

- The first expansion provides families of eligible veterans with the same job-protected FMLA leave currently available to families of military service members and it also enables more military families to take leave for activities that arise when a service member is deployed.
- The second expansion modifies existing rules so that airline personnel and flight crews are better able to make use of the FMLA's protections.

In connection with the final regulations, the DOL indicated that it has updated some of its model FMLA forms, including the model FMLA poster. The model FMLA forms are available on the DOL's FMLA webpage.

Prior to the regulations' effective date, employers covered by the FMLA (those with 50 or more employees) should review their FMLA policies and procedures to confirm that they are consistent with the final regulations. Employers should also begin using the DOL's updated model forms.

BACKGROUND

The FMLA allows eligible employees to take job-protected leave for certain family and medical reasons. In 2008, the FMLA was expanded to provide for military family leave. Under the FMLA's military family leave provisions, an eligible employee may take:

- Up to 12 weeks of leave in a 12-month period for qualifying exigencies related to a family member's covered active military duty (**qualifying exigency leave**); and
- Up to 26 weeks of leave during a single 12-month period to care for a family member who is a covered servicemember with a serious injury or illness (**military caregiver leave**).

The National Defense Authorization Act for Fiscal Year 2010 (2010 Act) expanded the FMLA's military family leave provisions. Most of the Act's changes became effective on Oct. 28, 2009.

Qualifying exigency leave was expanded to include members of the Regular Armed Forces, in addition to members of the National Guard and Reserves. Also, a requirement was added that for all qualifying exigency leave, the military member must be deployed to a foreign country.

Military caregiver leave was extended to eligible employees whose family members are recent veterans with serious injuries or illnesses. The FMLA's definition of "serious injury or illness" was also broadened to include serious injuries or illnesses that result from preexisting conditions.

In addition, the Airline Flight Crew Technical Corrections Act (Flight Crew Act) established a special FMLA eligibility requirement based on hours of service for airline flight crew members. This special provision was added to take into account the unique scheduling requirements of the airline industry. The Flight Crew Act's FMLA changes became effective on Dec. 21, 2009.

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Final Rule Issued on HIPAA Privacy and Security Protections

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is a broad federal law regarding health coverage. It contains provisions related to administrative simplification, including:

Privacy and security of personally identifiable health information (Privacy and Security Rules);

Enforcement of HIPAA requirements, including investigations, hearings and penalties for violations (Enforcement Rule); and

Reporting requirements for breaches of unsecured protected health information (Breach Notification Rule).

HIPAA's administrative simplification rules generally apply to health care providers, health plans and health care clearinghouses (Covered Entities). In 2009, the Health Information Technology for Economic and Clinical Health Act (HITECH Act) was enacted as part of the American Recovery and Reinvestment Act of 2009. The HITECH Act strengthened the enforcement of HIPAA's administrative simplification provisions.

On Jan. 17, 2013, the U.S. Department of Health and Human Services (HHS) issued a **final rule** modifying the HIPAA Privacy, Security, Enforcement and Breach Notification Rules. The final rule is intended to enhance a patient's privacy protections, provide individuals new rights to their health information and strengthen the government's ability to enforce the law.

Covered entities and business associates must comply with the final rule by **Sept. 23, 2013**. However, the final rule includes up to a one-year extension for covered entities and business associates to revise their business associate agreements, if the agreements were entered into and compliant with HIPAA as of **Jan. 25, 2013**.

This ABIS Employee Benefits Legislative Brief provides a brief overview of the final rule.

OVERVIEW OF THE FINAL RULE

The final rule implements a number of changes to the HIPAA Rules, and is comprised of the following four final rules:

- Final modifications to the HIPAA Privacy, Security and Enforcement Rules mandated by the Health Information Technology for Economic and Clinical Health (HITECH) Act, and certain other modifications to improve the Rules, which were issued as a proposed rule on July 14, 2010. These modifications:
    - Make business associates of covered entities directly liable for compliance with certain HIPAA Privacy and Security Rules requirements;
    - Strengthen the limitations on the use and disclosure of protected health information for marketing and fundraising purposes, and prohibit the sale of protected health information without individual authorization;
    - Expand individuals' rights to receive electronic copies of their health information and to restrict disclosures to a health plan concerning treatment for which the individual has paid out of pocket in full;

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EEOC Issues Final Rule on GINA Recordkeeping

The Equal Employment Opportunity Commission (EEOC) issued a final rule that extends its existing recordkeeping requirements under Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA) to employers covered by Title II of the Genetic Information Nondiscrimination Act (GINA). The final rule was published on Feb. 3, 2012, and it takes effect on **April 3, 2012**.

This ABIS Employee Benefits Legislative Brief provides a summary of the EEOC's final recordkeeping rule under GINA.

GINA OVERVIEW

Title II of GINA covers employers with **15 or more employees**, employment agencies, labor unions and joint labor-management training programs, as well as federal sector employers. (Title VII and the ADA also apply to employers with 15 or more employees.)

Under Title II of GINA, it is illegal for employers to discriminate against employees or applicants because of genetic information. Title II of GINA:

- Prohibits the use of genetic information in making employment decisions;
- Restricts employers and other entities covered by Title II (employment agencies, labor organizations and joint labor-management training programs) from requesting, requiring or purchasing genetic information; and
- Strictly limits the disclosure of genetic information.

Title II of GINA became effective on Nov. 21, 2009. The EEOC issued final regulations to implement GINA's employment provisions in 2010.

FINAL RECORDKEEPING RULE

The final rule extends the same record retention requirements that currently apply under Title VII and the ADA to employers covered by Title II of GINA. These recordkeeping requirements are described below.

Personnel and Employment Records

Employers must retain all personnel and employment records made or used in the course of their business for **one year** from the date the record was made or from the date the personnel action was taken, whichever is later. Employers must retain all personnel and employment records for an involuntarily terminated employee for **one year** from the date of termination.

These types of documents include, for example:

- Requests for reasonable accommodation;
- Application forms;
- Records dealing with hiring, promotion, demotion, transfer, lay-off or termination; and

Courtesy of ABIS Employee Benefits

Q **What notices must employers provide to employees regarding the FMLA?**

A Employers must provide employees with the following notices regarding the FMLA: General Notice, Eligibility Notice, Rights and Responsibilities Notice, and a Designation Notice. The notices are explained briefly in the following paragraphs.

General Notice

Employers covered by the FMLA must prominently post a general FMLA notice where it can be readily seen by employees and applicants for employment. The general notice explains an employee's rights and responsibilities under the FMLA. The Department of Labor (DOL) has developed a model general notice for employers to use.

Covered employers must post this general notice even if no employees are eligible for FMLA leave. Covered employers that have any eligible employees must provide this notice to each employee by including it in any written guidance to employees or distributing a copy of the general notice to each new employee upon hiring.

Eligibility Notice

When an employee requests FMLA leave, or when the employer learns that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of his or her eligibility to take FMLA leave within **five business days**, absent extenuating circumstances. The DOL has provided a sample eligibility notice for employers to use.

Rights and Responsibilities Notice

Each time the eligibility notice is provided, employers must provide a written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The DOL has provided a sample rights and responsibilities notice for employers to use. This notice is often combined with the eligibility notice.

If the information provided by the rights and responsibilities notice changes, the employer must notify the employee of the change.

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Genetic Nondiscrimination Rules for Employers

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and health plans from improperly collecting, using and disclosing individuals' genetic information.

- GINA's health plan provisions (Title I), which went into effect for plan years beginning after May 21, 2009, are designed to protect individuals from genetic discrimination with respect to their health coverage.
- The employment provisions of GINA (Title II), which became effective on Nov. 21, 2009, are designed to protect job applicants, current and former employees, labor union members, apprentices and trainees from genetic discrimination in employment.

The Equal Employment Opportunity Commission (EEOC) issued a **final rule** in November 2010 to implement GINA's employment provisions. The final rule became effective on Jan. 10, 2011.

This ABIS Employee Benefits Legislative Brief provides an overview of GINA's nondiscrimination rules for employers.

OVERVIEW

Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. In general, GINA:

- Prohibits the use of genetic information in making employment decisions;
- Restricts employers and other entities covered by Title II (employment agencies, labor organizations and joint labor-management training and apprenticeship programs) from requesting, requiring or purchasing genetic information; and
- Strictly limits the disclosure of genetic information.

COVERED ENTITIES

GINA's employment provisions apply to **"Covered Entities."** A Covered Entity is an employer, employing office, employment agency, labor organization or joint labor-management committee.

To be covered by GINA, an employer must have **15 or more employees** for each working day in each of 20 or more calendar weeks in the current or preceding year. Indian tribes and bona fide, tax-exempt private clubs (other than a labor organization) are not considered employers.

The Covered Entities that are subject to Title II of GINA should not be confused with those covered by the HIPAA Privacy and Security Rules, such as health plans and health insurance issuers. While the terminology is the same, the definitions are different.

IMPORTANT DEFINITIONS

Genetic Information

Genetic information means information about:

- The genetic tests of an individual or the individual's family members;

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2013 Open Enrollment Checklist

To prepare for open enrollment, health plan sponsors should become familiar with the legal changes affecting their plans for the 2013 plan year. These changes are primarily due to the federal health care reform law, the Affordable Care Act (ACA). Plan sponsors should review their plan documents to confirm that they include these required changes. In addition, any changes to a health plan's benefits for the 2013 plan year should be communicated to plan participants.

Health plan sponsors should also confirm that their open enrollment materials contain certain required participant notices. The most significant notice requirement for this year is the **summary of benefits and coverage** under ACA, which must be provided for open enrollment periods that begin on or after Sept. 23, 2012.

There are also some participant notices that must be provided annually or upon initial enrollment. To minimize cost and streamline administration, employers should consider also including these notices in their open enrollment materials. In addition, employers that will include the cost of health coverage on their employees' 2012 Forms W-2 may want to describe this reporting change to their employees and remind them that it does not affect the taxation of their employee benefits.

HEALTH PLAN CHANGES

☐ ***Grandfathered Plan Status***

A grandfathered plan is one that was in existence when health care reform was enacted on March 23, 2010. If you make certain changes to your plan that go beyond permitted guidelines, your plan is no longer grandfathered. Contact your ABIS Employee Benefits representative if you have questions about changes you have made, or are considering making, to your plan.

- If you **have a grandfathered plan**, determine whether it will maintain its grandfathered status for the 2013 plan year. Grandfathered plans are exempt from some of the health care reform requirements. A grandfathered plan's status will affect its compliance obligations from year-to-year.
- If you **move to a non-grandfathered plan**, confirm that the plan has all of the additional patient rights and benefits required by ACA. This includes, for example, coverage of preventive care without cost-sharing requirements.

☐ ***Annual Limits on Essential Health Benefits***

Effective for plan years Jan. 1, 2014, health plans will be prohibited from placing annual limits on essential health benefits. Until then, however, restricted annual limits are permitted.

Unless your plan received an annual limit waiver, its annual limit on essential health benefits for the 2013 plan year cannot be less than **$2 million**. (This limit applies to plan years beginning on or after Sept. 23, 2012, but before Jan. 1, 2014

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NLRB Guidelines for Acceptable Social Media Policies

The adoption of social media as a communication forum has greatly enabled organizations to reach end users and establish an online presence in our communities. However, maintaining a reputable presence is not an easy task in cyber space, especially due to employee participation in social media, which has attracted the attention of employers and governmental organizations.

On one hand, employers are concerned about how their employees' comments may affect their reputation and morale at the workplace. On the other hand, governmental organizations—such as the National Labor Relations Board (NLRB) and the Federal Communications Commission (FCC)—and state legislatures have been paying close attention to identify possible violations of employee privacy and protected activity rights.

CURRENT SOCIAL MEDIA LAWS

For some time now, employers have been screening applicants' social media involvement to assess their character and fitness for employment. However, recent news coverage has alerted the public of employers that have gone as far as requesting an applicant's username and password to logon to a social media profile. This practice has been condemned by many, and has even led companies like Facebook and Google to threaten lawsuits against those who request username and password disclosures. State legislatures have also reacted to this phenomenon by passing and proposing legislation to prohibit this practice.

Despite the recent attention, there are still not that many laws or court decisions that address employers' attempts to monitor and manage its employees' participation in social media forums. However, the NLRB has recently published a set of guidelines to help employers develop policies that protect employee rights under the National Labor Relations Act (NLRA). These guidelines are the result of an analysis of specific social media employer policies reviewed by the NLRB.

PROTECTED CONCERTED ACTIVITIES

Employee participation in social media may be protected under section seven of the NLRA, even for non-unionized employees. Section seven of the NLRA gives employees the right to form unions and to engage in **protected concerted activities**. Employees engage in protected concerted activities when they act for their mutual aid and protection regarding their terms and conditions of employment.