

*National Association of
Worksite Health Centers Forum*



**Legal and ACA Issues
Impacting Onsite Clinics**

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Topics for Today

- Five Legal Considerations for Onsite Clinics
- Questions

HIPAA

COBRA

ACA



ERISA

HSA

Five Legal Considerations

- The basic issue is whether the clinic is considered an employer health plan
- Many employers think of clinics as just another provider
 - IRS and DOL see things differently
- Subtle differences in definition of health plan under different rules could mean different treatment for different purposes
- Bottom line: For most purposes, the more extensive the services available, the more likely the clinic is a health plan

Legal Consideration #1: Treatment under ERISA

- Clinic subject to ERISA if group health plan
- Group health plan is employee welfare benefit plan that provides medical benefits
- Exclusion for on-site facilities “for the treatment of minor injuries or illness or rendering first aid in case of accidents occurring during working hours”
 - Many clinics provide services clearly beyond treatment of workplace minor injury and illness
 - Clinic with services limited to “urgent care” for employees while working likely meets this exclusion

Legal Consideration #1: Treatment under ERISA

- Result of ERISA plan status for clinic:
 - Must comply with ERISA's reporting and disclosure requirements:
 - SPDs, SMMs, SBCs
 - SARs
 - 5500s
 - Claims and appeals procedure requirements apply (probably not many denials)

Legal Consideration #1: Treatment under ERISA

- Possible approaches:
 - Limit services to urgent care for employees during work hours only – exempt from ERISA
 - Limit availability to employees enrolled in major medical and tack on to major medical through “supplement” to SPD/plan document
 - Tack on to major medical, limit services for employees not enrolled in major medical to urgent care only
 - Offer full spectrum of services to all employees and/or dependents and undertake additional reporting and disclosure burden
- Risk of noncompliance includes penalty on audit, 5500 failure penalty

Legal Consideration #2: Application of COBRA

- COBRA regulations state that on-site clinics are groups health plan subject to COBRA unless ALL of the following are met:
 - The medical care consists primarily of first aid that is provided during the employee's working hours for treatment of a health condition, illness or injury that occurs during those working hours;
 - The medical care is available only to the employer's current employees; and
 - Employees are not charged for use of the clinic.

Legal Consideration #2: Application of COBRA

- Typical clinic does not meet the exception to COBRA
 - Services available outside of working hours
 - Wide array of services available
 - Some charge for use of clinic
- March, 2012 IRS COBRA audit guidance for its examiners recites rule described above and alerts auditors to look for on-site clinic COBRA compliance
- Compliance is difficult where:
 - Physical layout of clinic only allows access from inside company (no former employees on-site)
 - Clinic is available to all employees, not just those enrolled in major medical
 - Company has “no former employees” on site rule

Legal Consideration #2: Application of COBRA

- Possible approaches:
 - Limit access to only employees enrolled in major medical, include clinic in COBRA election for major medical
 - Create COBRA notice and determine premium for all employees
 - Automatically extend clinic availability for 18 (36?) months following termination of employment
- Risk of noncompliance includes:
 - Penalty of the lesser of 10% of the employer's cost for all group health plans during a year or \$500,000 for each year during which there were "inadvertent failures"
 - Former employee claims
 - Larger penalty for intentional (knowing) failures

Legal Consideration #3: Impact on HSA Eligibility

- IRS guidance says if Clinic provides "significant medical care" beyond worksite injury and preventive care before applying deductible, coverage is considered non-HDHP coverage and employees with access to clinic are not eligible to contribute to an HSA
- IRS example says the following clinic services will not jeopardize HSA eligibility:
 - Dental and vision services
 - Physicals and immunizations
 - Allergy shots
 - Providing nonprescription pain relief
 - Treatment of injuries caused by accidents at worksite

Legal Consideration #3: Impact on HSA Eligibility

- Possible approaches
 - Limit services to those on permitted list above
 - Could possibly add others if not “significant” (workplace illness?)
 - Integrate with major medical for employees in HDHP
 - Must charge FMV for all services not on permitted list above
 - No guidance on FMV for this purpose
 - Percentage of Medicare rate?
 - Percentage of health plan allowed cost?
 - Flat dollar fee for all services?
 - Based on general market data?

Legal Consideration #3: Impact on HSA Eligibility

- Risk of noncompliance:
 - HSAs not employer plan, so employer should not be responsible for employee contributions outside of payroll
 - Payroll tax/withholding failure if employer permits pre-tax employee HSA contributions through payroll or makes employer HSA contributions
 - Employee could seek recovery from company for bad tax consequences based on misleading communications (“enroll in the HDHP and you can contribute to an HSA”) or reliance on company for information

Legal Consideration #4: Application of HIPAA

- HIPAA portability rules (preexisting condition, special enrollment, nondiscrimination) apply to “group health plans” other than group health plans that are excepted benefits
 - Excepted benefits include a group health plan “in relation to its provision of . . . coverage for on-site medical clinics”
 - “in relation to” language suggests being part of a larger plan should not matter (e.g., if integrated with major medical)
- HIPAA “administrative simplification” rules – privacy and security rules – apply to “group health plans” as defined under ERISA
 - If subject to ERISA, subject to HIPAA privacy and security requirements

Legal Consideration #4: Application of HIPAA

- Possible approaches
 - Pull clinics into existing HIPAA privacy and security compliance program
 - Review privacy and security of PHI generated through clinics
 - Provider staffing clinic also likely subject to HIPAA
 - Limit clinic services so that it is not an ERISA plan
- Risks of noncompliance include DHHS penalty assessment, especially if breach/PHI misuse

Legal Consideration #5: ACA Compliance

- ACA employer mandates under ERISA, the Internal Revenue Code and the Public Health Service Act (government employers) apply to “group health plans”
- Mandates include 100% coverage of preventive care, application of MOOP, coverage of adult children, among others
- IRS, DOL and HHS have confirmed via the preamble to the grandfathered plan regulations and an FAQ that the HIPAA portability excepted benefits rules apply for purposes of determining application of ACA employer mandates
- As discussed above, HIPAA portability rule say coverage for on-site clinic is an excepted benefit

Legal Consideration #5: ACA Compliance

- Again, excepted benefit rules apply to a group health plan “in relation to” its provision of on-site clinic benefits
- That language suggests that it should not matter if clinic is integrated with major medical
- December, 2013 proposed regulations on excepted benefits did not address on-site clinics (and did not change rules)
- Note that Cadillac excise tax on high cost coverage explicitly includes clinic coverage

Compliance Example 1

- Generous Co. offers clinic that provides primary care, some preventive care, PT, lab testing, prescriptions and minor surgery to all employees.
- Generous Co. also offers an HDHP and PPO as health plan options.
 - Generous Co. charges 100% of Medicare rate for all services other than preventive care and worksite injury and applies deductible to non-preventive care services for employees in HDHP
 - Generous Co. offers all employees COBRA for clinic upon termination of employment

Compliance Example 1 (con't)

- Generous Co. includes clinic in health plan HIPAA privacy and security umbrella
- Generous Co. distributes SPD/plan document, other ERISA-required communications for clinic and counts all employees in 5500 participant counts
- **RESULT:** Clinic complies with ERISA, COBRA, HIPAA, ACA, employees in HDHP can contribute to HSAs

Compliance Example 2

- To avoid application of COBRA and ERISA, Generous Co. offers clinic that provides only injury treatment and “urgent care” illness treatment to employees during regular working hours, at no cost
- Generous Co. also offers an HDHP and PPO as health plan options.
 - Generous Co. does not charge employees anything for services (to avoid application of COBRA)
 - Generous Co. includes clinic in health plan HIPAA privacy and security umbrella

Compliance Example 2 (Con't)

- RESULT: Clinic complies with ERISA, COBRA, HIPAA, ACA, but employees in HDHP may not be eligible to contribute to HSAs
 - Issue is whether services are “significant services” outside of dental, vision, preventive care, worksite injury
 - Aggressive employer might decide not significant, sell employees on HDHP enrollment and HSA opportunity

Questions?



Thank you for attending!

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