



July 25, 2011

Submitted electronically via the Federal Rulemaking portal @ www.regulations.gov

Attention: RIN 1210–AB45
Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N–5653
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Sir or Madam,

Subject: Amendment to Interim Final Rules Relating to Internal Claims and Appeals and External Review Processes (RIN 1210-AB45)

Aon Hewitt welcomes the opportunity to submit for consideration by the Departments of Labor, Treasury, and Health and Human Services (the agencies) our comments relating to the amendment to the interim final rules implementing the internal claims and appeals and external review processes, which appeared in the *Federal Register* on June 24, 2011.

Who We Are

Aon Hewitt is the global leader in human resource consulting and outsourcing solutions. We partner with organizations to solve their most complex benefits, talent, and related financial challenges, and improve business performance. Aon Hewitt designs, implements, communicates, and administers a wide range of human capital, retirement, investment management, health care, compensation, and talent management strategies. As a market leader in benefits administration, Aon Hewitt delivers health care and retirement programs to more than 22 million participants and retirees, on behalf of more than 300 organizations worldwide. With more than 29,000 professionals in 90 countries, Aon Hewitt makes the world a better place to work for clients and their employees.

Comments

Aon Hewitt wants to thank the agencies for providing some much needed relief to group health plans with respect to the new internal claims and appeals and external review procedures. We appreciate the agencies' willingness to recognize and accommodate the myriad administrative issues that arise with the changes in the law that require time and flexibility to implement. Aon Hewitt has identified some additional issues and questions based on the amendment to the interim final rules. We hope the agencies can provide further guidance and clarification. Our comments are provided below.

Deemed Exhaustion of Internal Claims and Appeals Processes *Exception to Strict Compliance Standard*

Aon Hewitt appreciates that the agencies included an exception to the strict compliance standard that was set forth in the July 2010 interim final rules. However, Aon Hewitt believes that the standard for meeting this exception set forth in the amended rule is too high for plans and issuers to meet, and does not take into account inadvertent administrative errors. To meet the exception, the error has to be not only de minimis, but also attributable to good cause or matters beyond the plan's or issuer's control and in the context of an

ongoing good faith exchange of information. However, an inadvertent administrative error is just that—it is not intentional and does not impact the outcome of a claim.

In this type of situation, there is not necessarily a good cause because it was an accident and it may not happen in the context of an ongoing good faith exchange of information. Therefore, in Aon Hewitt's view, inadvertent administrative errors would not necessarily meet the new standards even though those errors would have no material impact on the substantive outcome of the claim. Therefore, Aon Hewitt requests that the agencies provide an exception for inadvertent administrative errors that do not materially impact outcomes.

De Novo Review

The preamble to the amended rule summarizes the strict compliance standard contained in the July 2010 interim final regulations. In that summary, the preamble to the amended rule states, “[t]he July 2010 regulations also clarified that, *in such circumstances*, the reviewing tribunal should not give special deference to the plan’s or issuer’s decision, but rather should resolve the dispute *de novo*” [emphasis added]. Aon Hewitt interprets this statement to mean that the *de novo* standard will be required only in circumstances where there has been a violation of the internal claims and appeals process that does not meet the exception created in the amended rule and the claimant is thus permitted to bypass the internal process and immediately seek external or judicial review. In the absence of such circumstances (i.e., in situations where the claimant exhausts the internal claims and appeals process before moving to external or judicial review), Aon Hewitt believes that the external reviewer should use a deferential standard as the appropriate standard of review.

In our comment letter dated September 21, 2010, Aon Hewitt requested that Technical Release 2010-01 be amended to remove the requirement that independent review organizations (IROs) must use a *de novo* standard to the extent the plan fiduciary has complied with the provisions of the internal claims and appeals process. Aon Hewitt requests that the agencies confirm in the regulatory text and the Technical Release that the *de novo* standard of review applies *only* when there has been a violation of the internal claims and appeals process that allows a claimant to immediately seek external or judicial review. However, in all other instances, the deferential standard of review continues to be appropriate.

Time to Provide Explanation of Violation and Notice of Opportunity to Resubmit Claim for Internal Appeal

Under the amended rule, upon the request of a claimant, a plan or issuer has ten days to provide an explanation of an alleged violation of the internal claims and appeals process and to state whether or not the alleged violation meets the exception. Further, if an external reviewer or a court rejects the claimant’s request for immediate review because the plan or issuer met the standards for the exception, the plan must provide the claimant with notice of the opportunity to resubmit the claim for internal appeal within a reasonable time, but not to exceed ten days. Aon Hewitt believes that a ten-day turnaround time for these notices is impracticable, and requests that the agencies allow 15 days to provide such notices.

Once a claimant requests an explanation of an alleged violation of the internal claims and appeals process, the plan or its third-party administrator will need time to conduct research on the alleged violation and determine whether the violation meets the exception. Further, once an external reviewer or court rejects a request to bypass the internal process, the plan using a third-party administrator must then turn around and notify it, at which point, the third-party administrator will then become responsible for sending out the Notice of Opportunity to Resubmit. Providing additional time to convey these notices to the claimant would be

helpful to the plan and, in the case of the Notice of Opportunity to Resubmit, would not harm the claimant since the time period for refiling the claim begins only upon the claimant's receipt of the notice.

Scope of the Federal External Review Process

Aon Hewitt appreciates the agencies' decision to narrow the scope of claims that are subject to external review in order to allow time for the market to adjust to providing external review. However, Aon Hewitt has identified some critical questions and concerns with this provision.

Eligibility Decisions

The amended rule suspended the general rule set forth in the July 2010 interim final rules and narrowed the scope of claims eligible for external review to those that involve: 1) medical judgment (excluding those that involve only contractual or legal interpretation without any use of medical judgment), as determined by the external reviewer; or 2) rescissions. The general rule in the July 2010 interim final rules specifically excluded claims involving a denial, reduction, termination, or a failure to provide payment for a benefit based on a determination that a participant or beneficiary fails to meet the requirements for eligibility under the terms of a group health plan (i.e., worker classification and similar issues). The amended rule deleted this language from the general rule. However, because the preamble states that the amended rule is narrower than the general rule, we believe that the eligibility exception contained in the general rule should continue to apply. Aon Hewitt requests the agencies re-insert the exclusion language of the general rule so that it is clear that all eligibility claims are not within the scope of the external review process under the amended rule. It is appropriate to exclude eligibility claims because they are determined under contractual and legal rules, not medical judgment. In addition, Aon Hewitt requests that the temporary scope of claims eligible for external review be limited only to claims involving medical judgment, as that is an IRO's area of expertise.

IROs Should Be Considered a Fiduciary and Should Abide by Terms of the Plan

Aon Hewitt requests that the agencies provide clarification as to the fiduciary status of an IRO. As the rules now stand, an IRO has the power to apply discretionary judgment regarding a claim, and an IRO's decision is binding on the plan, absent a later judicial decision to the contrary. Thus, Aon Hewitt believes that an IRO would meet the definition of a fiduciary under current ERISA law. It is possible to be a fiduciary for only a limited task or function, and Aon Hewitt believes an IRO's powers should be so limited. Since the adoption of a plan is voluntary, the ability to alter a plan for an employer's population should not reside with an IRO, which is an outside entity. Whether or not an IRO is considered to be a fiduciary by the agencies, the agencies should still require IROs to follow the terms of a plan, as designed by and adopted by the plan sponsor, in order to ensure that the scope of a plan's coverage is not altered.

Closing

Aon Hewitt would like to reiterate our appreciation to the agencies for their continued responsiveness to our concerns and willingness to provide flexibility in implementation of the new law. If you have any questions or comments, please contact the undersigned at the telephone number or email address provided below.

Sincerely,

Aon Hewitt

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