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## Economic Stimulus Measure Also Strengthens and Expands HIPAA's Privacy Requirements

specify methods of notice, including use of prominent media outlets if the breach is believed to involve more than 500 individuals. They also specify the information that should be included in a breach notification.

The regulations also define the technologies and methodologies that can be used to secure protected health information. Because the breach notification requirements apply only to unsecured protected health information, when health information is secured in the ways outlined in the regulations, the breach notification requirements do not come into play.

HITECH also directs that penalties collected in enforcement proceedings will be channeled back for additional enforcement efforts. Some commentators have noted that this may indicate more aggressive enforcement of HIPAA's privacy and security efforts down the road.

Employer health plans and other covered entities will need to review and amend their contracts with health

plan service providers to reflect these changes. HITECH specifically states that HIPAA requirements that relate to security and that are applicable to covered entities, in addition to now being applicable to business associates, "shall be incorporated into the business associate agreement between the business associate and the covered entity."

The Department of Health and Human Services has issued initial guidance on HITECH provisions, but more will be forthcoming. The timetable for implementation of HITECH provisions affecting the HIPAA privacy and security requirements varies. Given the complexity of these new rules, and their potential impact if not followed, companies with health plans subject to HIPAA should take steps now to ensure they are up to speed with compliance.



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## Employee Benefits Group

### New Hampshire

171 Londonderry Turnpike • Hooksett, NH 03106

Tel: (603) 622-4600 • Toll Free: (866) 841-4600 • Fax: (603) 622-4618

### Vermont

P.O. Box 6141 • Rutland, VT 05702

Toll Free: (866) 223-1140 • Fax: (866) 415-7807



# Employee Benefit News



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## Corporate Headquarters:

### New Hampshire

171 Londonderry Turnpike  
Hooksett, NH 03106

(603) 622-4600  
Toll Free: (866) 841-4600  
Fax: (603) 622-4618

### VERMONT

P.O. Box 6141  
Rutland, VT 05702

Toll Free: (866) 223-1140  
Fax: (866) 415-7807

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(800) 478-0788

## Economic Stimulus Measure Also Strengthens and Expands HIPAA's Privacy Requirements

*The economic stimulus package enacted earlier this year includes provisions that extend and strengthen the privacy requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). These changes significantly affect employer health plans, along with the various vendors and contractors that provide services to these plans.*

HIPAA regulates the use and disclosure of an individual's protected health information held by health care providers, health plans and health care clearinghouses (referred to under HIPAA as covered entities). Vendors and contractors to health plans—such as those providing legal services, account-

proach, the Health Information Technology for Economic and Clinical Health Act (HITECH), part of the American Recovery and Reinvestment Act of 2009 (ARRA), extends HIPAA's privacy and security provisions to business associates that provide services to health plans, thus making them directly

subject to these provisions in the same way that covered entities are, and also subject to the same direct government penalties as covered entities in the event of a breach.

In another significant change, HITECH specifies breach notification procedures that must be followed when there is an unauthorized disclosure of unsecured protected health information. Under regulations issued by the Department of Health and



ing services, consulting services, information technology and the like—are considered business associates and previously were not directly subject to the HIPAA privacy and security rules. (They did, however, sign business associate agreements to maintain the privacy and security of protected health information, so as to enable the covered entities they contracted with to comply with HIPAA.) In a significant change to this ap-

Human Services, these provisions require both the covered entity and business associate to directly notify each affected individual (including any individual whose unsecured protected health information "is reasonably believed" to have been compromised) of a breach "without unreasonable delay but in no case later than 60 calendar days after discovery of the breach." The regulations

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# What Employees Need to Know About the Real Cost of Healthcare

Everyone in America knows that the healthcare landscape is rapidly changing. Although the Obama administration is working to make sweeping changes in how healthcare is paid for, no one yet knows if and/or when the new plans will affect individuals and businesses. In the meantime, insurance premiums are growing by leaps and bounds, and employers and healthcare organizations everywhere are seeking innovative approaches to reduce, or at least stabilize, these costs. Most experts agree that any savings generated from managed care options has long since evaporated. These experts feel the greatest chance for improvement lies in consumer directed healthcare. The idea behind the movement towards consumer directed care is that patients will better understand expenditures and will share in the costs, making them more discerning consumers of health care.

To understand why the cost of healthcare is skyrocketing, there are several factors to consider. The list includes:

- New Medications being marketed aggressively
- New Medical Technologies
- An Aging Population
- Overuse of Medical Services
- Cost Insulation that isolates patients from the real cost of healthcare services, as well as the true cost of pharmaceuticals

But what can be done about any of these factors? Obviously, insurance carriers, employers and consumers have little control over medical advancements or the increasing age of the U.S. population. Additionally, to attract and retain valuable employees, employers need to continue offering comprehensive medical plans. Although employers may not be able to directly affect costs, they can play an active role in creating an informed healthcare consumer.

In our current healthcare system, consumers are sheltered from the true value of their healthcare. Many employees believe that the average prescription drug and doctor visit costs little more than their \$15 or \$20 co-pay. But health insurers and employers are keenly aware of what these services cost. Taken together, the lack of incentives for employees to use healthcare prudently, plus the ever-rising healthcare costs, lead us to the difficult spot we are in today.

Over recent years, defined contribution healthcare plans have garnered much attention to the need for consumer education. With a "consumer-directed" model of health coverage, consumers bear a significant amount of responsibility for financial decision-making. And although employees still have coverage for disastrous events, they may only have a certain set dollar amount to use toward day-to-day expenses, generally excluding preventative care. Therefore, when a consumer-directed approach is being considered, communication is vital, and a strategy for educating employees is a must.

How can employers help? The answer depends on the size and the resources of the company. Large companies, which are often self-funded, have a greater stake in the outcome of an educational effort. These companies might have the resources to hire third party providers to

develop and implement programs for employee education. However, even many larger businesses may not have the extra time or resources to commit to a full-scale education effort.

Despite this fact, most employers have free access to education resources directly through their health insurer. In particular, pharmacy education is often integrated within a specific medical plan. For example, some insurance companies give their members cost comparison information of brand name versus generic drugs. Insurers have also created tiered pharmacy plans, which use lower co-pays to encourage members to use generic drugs whenever possible. Since an increasing proportion of health dollars is spent on developing and marketing pharmaceuticals, the situation would only worsen if not for these early education efforts.

Many insurance carriers in the U.S. now offer searchable online databases for their members where they can research the approximate cost of certain procedures. Employees considering a "routine" MRI are able to view the cost of this procedure and their out-of-pocket cost potential. While this information may not affect everyone's decision, some will consider foregoing the procedure if they feel it is not really necessary.

Another idea is for insurance carrier representatives to host health seminars and workshops for businesses and employees. Topics could range from healthy diets to disease management, as well as the value of preventative care. Employers should show commitment to these programs by making such meetings mandatory.

Repetition is the key to making health education work. Employees should have easy access to healthcare alternatives. Communication at annual enrollment time is not enough. The message needs to be communicated more often, using multi-media with clear and clever delivery.

Undoubtedly, employers will benefit from lower premiums in the future by educating employees today. When employees utilize healthcare resources more efficiently, everyone wins. Over the long haul, cost-effective healthcare choices can produce savings that not only flow directly back to the employer, but to the consumer as well. And, in these tough economic times, who can argue with that?

# Today's Economy Calls for a 401(k) Plan Review



A sputtering economy and declining stock market have been taking a huge toll on investors' portfolios, including employees' 401(k) accounts. According to Fidelity Investments' annual **State of the 401(k)** update, drops in the stock market resulted in the average workplace 401(k) account balance falling 27% in 2008. This drop occurred despite participant contribution levels that continued at slightly higher rates than in 2007.

Such losses can be frightening to any investor, but are likely to be particularly so to employees. For many 401(k) participants, their plan account represents their largest single asset outside their home and a primary expected source of retirement income, but also their only experience in stock market investing. Such high stakes, coupled with fear and inexperience, can be fodder for lawsuits, as employees look to recover losses. Although ERISA Sec. 404(c) can protect plan fiduciaries from liability for the consequences of participants' investment decisions—if the provisions of that section are followed—fiduciaries continue to have the duty to act prudently and solely in the interest of plan participants when selecting the investment options offered by the plan and when selecting investment managers. Furthermore, both investment offerings and investment managers must be monitored to ensure that they con-



tinue to be prudent choices. With the 2008 U.S. Supreme Court case of **LaRue v. DeWolff, Boberg & Associates** permitting a plan participant to sue plan fiduciaries to recover individual losses alleged to be caused by a breach of fiduciary duty, an increasing number of lawsuits may be forthcoming, to test the extent of the ruling in that case.

Clearly, present-day circumstances should provide ample motivation for 401(k) plan sponsors to take steps to make sure they have adequately protected themselves in the event of a lawsuit by a plan participant. Never was there a more important time to review the administrative processes and fiduciary procedures associated with your plan, including those related to investment managers, investment line-up, fees, etc. The following are among the issues to consider in conducting such a review:

- **Investments.** Review your plan's investment line-up to determine whether the selection available to participants is appropriate. Does the line-up offer choices along the risk and return spectrum to all ages of participants? Are any pre-mixed funds based on age or expected retirement date appropriate for your employee population? If the plan includes a default investment for participants who have failed to direct the investment of contributions, review this option to ensure that it continues to be an appropriate choice. If your plan currently does not have a written investment policy in place, or does not use an independent outside consultant to assist in selecting and monitoring investments, take steps to incorporate these into your investment procedures.
- **Fees.** Determine the amount of current participant fees associated with your plan's investments, and benchmark them against industry standards.
- **Investment managers.** Review—or create if you don't already have them—the written processes you have in place for the selection and monitoring of investment managers.
- **Administrator.** The plan administrator is the face of the plan to employees. Solicit and monitor participant feedback on the administrator so that you know of any problems before they grow into headaches for you, or worse. Further, have criteria in place to assess the plan administrator's performance on an ongoing basis and to benchmark performance against industry standards.
- **Compliance.** Are your plan's administrative procedures in compliance with current regulations? If you intend your plan to be a participant-directed individual account plan, are all the provisions of ERISA Sec. 404(c) being followed?
- **Communications.** With the market changing so much over the past year, and the effect this will have had on participant accounts, it's likely that communications that were appropriate during times of surging account values may not be so appropriate today. Revisit your plan communications materials and assess them accordingly. Saving for retirement remains vital to employees' future financial security, but different messages may be needed to convey this, given today's uncertain economy.