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## Employee Benefits

A Littler Mendelson Health and Welfare Alert

### HIPAA Safe Harbor for Supplemental Health Insurance

By Michelle I. Pretlow

On December 7, 2007, the U.S. Department of Labor in conjunction with the Department of Treasury and the Department of Health and Human Services issued Field Assistance Bulletin No. 2007-04. This Bulletin provides a safe harbor for supplemental health insurance plans and exempts certain plans from the portability provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

Generally, the portability provisions of HIPAA require group health plans to issue certificates of creditable coverage, limit exclusions on preexisting conditions, provide special enrollment rights and prohibit discrimination on the basis of health factors. Supplemental health insurance plans (sometimes called "excepted benefits") are not obliged to comply with the HIPAA requirements. Supplemental health insurance plans include any plan or policy that is provided under a separate insurance policy or contract to provide Medicare supplemental health insurance, TRICARE supplemental coverage or other similar coverage. These plans are designed to fill a gap in the participant's primary coverage and may provide coverage for payments of deductibles and coinsurance.

The DOL issued the safe harbor to specify exactly what types of supplemental health insurance plans will qualify for exemption from the HIPAA requirements. The DOL was concerned that there are a number of plans that are called supplemental health plans that provide more than just supplemental coverage while avoiding HIPAA's portability requirements. These new rules clarify that if a supplemental health plan does not meet

the safe harbor, then the plan is required to satisfy the HIPAA portability provisions.

The safe harbor has four requirements. The DOL will treat a supplemental health insurance plan as such and exempt it from the HIPAA guidelines if the coverage satisfies each of the following:

- Must be provided by a separate policy, certificate, or contract of insurance;
- Must be specifically designed to fill gaps in primary coverage and may not include a provision that it becomes secondary only in cases of a coordination of benefits;
- Cost of the coverage may not exceed 15% of the cost of the primary coverage; and
- May not provide different eligibility provisions, benefits or premiums based on a health factor of the participant and/or dependent.

Employers who sponsor supplemental health insurance plans should review the plan procedures to ensure that the policies either meet the safe harbor or the HIPAA portability provisions. If the plan does not meet either, then the employer should determine whether it prefers to satisfy the safe harbor or the HIPAA provisions and immediately take action to do so.

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