

REFORM *Update*

Issue Thirty-Nine

March 2012

March 7, 2012

The Department of Treasury, the Department of Health and Human Services and the Department of Labor (the Departments) recently released additional guidance on the Summary of Benefits and Coverage (SBC). The SBC is a four-page summary of coverage designed to educate members on plan provisions. Initial guidance on the SBC was released last year. The details were addressed in our *Reform Update* at http://www.mcwent.com/Reform_Update/2011/Reform_Update_31.pdf.

Many stakeholders had concerns regarding how employers should comply with the SBC rules. The lack of clarity prompted the government to delay the effective date until more guidance was issued.

The new guidance amends the effective date for the SBC. The effective date will be determined by the reason for its distribution. Employers will be required to provide SBCs as follows:

- **For participants or beneficiaries who enroll or re-enroll in the plan during annual enrollment:** As of the first day of the first annual enrollment period that begins on or after September 23, 2012.
- **For participants or beneficiaries who enroll in the plan for any reason other than annual enrollment:** As of the first day of the first plan year that begins on or after September 23, 2012.

A simple example will help. Assume an employer has a plan year that begins on January 1, 2013, with an annual enrollment period that runs from November 1 through November 14, 2012. SBCs should be distributed as follows:

- With the annual enrollment materials distributed by November 1, 2012. The employer must distribute SBCs for all future annual enrollment periods from this point forward.
- With the plan information, for new hires or special enrollees with coverage effective dates beginning on and after January 1, 2013.

The good news for employers is this latest guidance allows more leeway in the construction and distribution of the SBC. However, the government has indicated that some elements will likely change in the future. For example, some content requirements will have to be updated in order to accommodate the 2014 changes mandated by health care reform.

Overview

The new guidance provides more flexibility for employers.

The responsibility for creating the SBC for fully insured plans is placed on the insurance carrier. The plan administrator is liable for creating the SBC for a self-funded plan. The guidance refers to the

ERISA definition of administrator, which does not necessarily mean a third-party administrator (TPA). The “administrator” as defined by ERISA means:

- 1) The person specifically designated as such by the terms of the instrument under which the plan is operated;
- 2) The plan sponsor, if an administrator is not so designated; or
- 3) Such other person as the Secretary may by regulation prescribe, in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified.

For most plans, the administrator, for ERISA purposes, will be the employer. However, it is likely that your third-party administrator will assist in creating the SBC for your various plan options, although the guidance does not require them to do so.

With fully insured plans, the employer and insurance carrier share the responsibility for distributing the SBC to plan members. With self-funded plans, the employer will be solely responsible for distributing the SBC.

The SBC requirement applies to group health plans. Certain plans and benefits are excluded from this requirement:

- Any plan or policy that is considered an excepted benefit under HIPAA:
 - ▶ Stand-alone dental or vision coverage. This can mean a separate contract for these benefits, or independent elections where an additional premium contribution is required.
 - ▶ Most medical flexible spending accounts (FSAs). However, if your organization contributes to an employee’s medical FSA, it may not be considered excepted.
- Health savings accounts (HSAs), because these accounts are not considered group health plans.

A number of documents are provided to assist employers with creating and distributing SBCs:

- Final Regulations, available at <http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=25818&AgencyId=8&DocumentType=2>
- Additional Compliance Guidance, available at <http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=25819&AgencyId=8&DocumentType=2>
- Summary of Benefits and Coverage template, available at www.dol.gov/ebsa/pdf/SBCtemplate.pdf
- Sample completed SBC, available at www.dol.gov/ebsa/pdf/SBCSampleCompleted.pdf
- Instruction Guide for Group Coverage, available at www.dol.gov/ebsa/pdf/SBCInstructionsGroup.pdf

- Why This Matters language for "yes" answers, available at www.dol.gov/ebsa/pdf/SBCYesAnswers.pdf
- Why This Matters language for "no" answers, available at www.dol.gov/ebsa/pdf/SBCNoAnswers.pdf
- HHS information for simulating coverage examples, found under Instructions/Guidance at <http://cciio.cms.gov/resources/other/index.html#sbcug>
- Glossary of Coverage and Medical Terms, available at www.dol.gov/ebsa/pdf/SBCUniformGlossary.pdf

The new guidance also provides contact information for employers with questions. Employers can call the Employee Benefits Security Administration at (866) 444-3272 or visit the Department of Labor (DOL) website at www.dol.gov/ebsa.

Required Content in the SBC

The content of the SBC has been modified by the latest guidance. First, the SBC is not required to include premium or cost of coverage information. This information is considered optional. The Departments believe premium information can be more effectively communicated by means other than the SBC.

The SBC must include:

- Uniform definitions of standard insurance and medical terms
- A description of the coverage and cost-sharing for each designated category of benefits
- Exceptions, reductions and limitations of coverage
- Cost-sharing provisions, including deductibles, coinsurance and any copays
- Renewability and continuation of coverage provisions
- Two coverage examples (specifically, for maternity and diabetes)
- A statement as to whether the plan provides minimal essential coverage and if it meets the applicable minimum value requirements **(this will apply in 2014)**
- A statement that the SBC is not the official plan document
- Contact information for whom to call with questions
- The internet address where a copy of the actual group certificate of coverage or individual policy can be obtained
- An internet address or contact information to obtain a list of network providers, if the plan maintains one or more provider networks
- An internet address or contact information to obtain formulary information, if the plan has a formulary associated with the prescription drug plan
- The internet address for obtaining the uniform glossary. In addition, a statement that the glossary is available in paper form and the contact information to obtain a paper copy.

One key clarification is that employers no longer need to automatically provide a paper copy of the glossary. It must be provided in hard copy only if the member requests it.

Despite many concerns, the Departments felt strongly about maintaining the coverage examples. However, they did limit these to two situations, a normal maternity and treatment for controlled diabetes. They also modified the services illustrated in the examples to better reflect normal medical protocols. Focus groups used by the National Association of Insurance Commissioners to test the SBCs indicated that they understood these were simply examples. Participants felt that the examples assisted in understanding the coverage.

The SBC remains in a table format with three basic columns. The first column is a question, the middle column is the answer, and the final column is titled “Why This Matters.” Although the content for this column is fixed, the Departments will permit some flexibility. They recognize that employers may have coverage terms that do not fit into the proposed structure. The goal should be to accurately describe relevant plan terms using best efforts consistent with the SBC template.

The preamble includes a number of situations where flexibility is necessary:

- Plans that vary benefit levels by facility. A plan may have different benefit levels for hospital inpatient compared with non-hospital inpatient situations.
- Plans that vary benefits based on participation in a wellness program or the achievement of a health factor.
- Plans that offer a health reimbursement arrangement (HRA).

The preamble provides more details on plans that offer HRAs. Generally, the HRA can be addressed in the SBC outlining the underlying health plan benefits. However, some employers offer stand-alone HRAs that are not connected to an underlying health plan. In such cases, an SBC must be distributed for the stand-alone HRA, unless it is considered an excepted benefit under HIPAA.

The new guidance also addresses how expatriate plans should be handled. Employers are only required to create SBCs for their U.S. benefit plans. For expatriate plans, employers need to provide participants with an internet address that will link to a description of the coverage provided by the expatriate plan.

Formatting and Culturally and Linguistically Appropriate Language

The Departments provides additional guidance to assist employers and health plans with completing an SBC. A link to these instructions is provided at the beginning of this Update. The SBC must be presented in a uniform format, so that individuals can use the SBC to easily compare various plan options.

The content cannot exceed four two-sided pages, but can be shorter, depending on the limitations, exceptions and coverage exclusions. The text must appear in at least a 12-point font. The new rules confirm that the SBC can be printed in color or gray scale, at the plan’s discretion.

The SBC must be considered culturally and linguistically appropriate. These rules mirror the same requirements in the claim determinations and appeals process. If a plan participant lives in a county where at least ten percent of the population is literate **only** in the same non-English language, then the plan must provide additional information in the SBC:

1. The plan must include a statement in the SBC, in that particular non-English language, advising that the SBC is available in the non-English language upon request.
2. A translated SBC must be provided upon request.
3. The plan must provide interpretive services in that language for these participants' questions.

Insurance carriers and TPAs are likely to assist employers with this requirement. The federal government will publish an annual list of the U.S. counties where at least ten percent of the population is literate only in the same non-English language. The good news for Michigan employers is that, currently, no county in Michigan would be on this list.

Delivery Requirements

The guidance provides more latitude regarding the delivery requirements of the SBCs, which are addressed from two perspectives:

1. Insurance carriers' requirement to provide an SBC to the employer
2. Health plan requirement to provide SBCs to participants and eligible participants

Requirement for Carriers to Provide SBCs to Employers

Insurance carriers are required to provide SBCs to employers, at no extra charge, for each benefit package offered. They are permitted to deliver the SBC in an electronic format.

The insurer must provide the SBCs within specific timeframes at the following events:

- **Upon application for group coverage:** The SBC must be provided as soon as practical, but no later than seven business days following receipt of application.
- **By the first day of coverage (if any provision is changed from application):** If there is any change in information required on an SBC, a new, updated SBC must be provided to the employer no later than the first day of coverage.
- **Upon renewal:**
 - ▶ If written application (either in a paper or electronic form) is required for renewal, the SBC must be provided no later than the date when the written application materials are distributed.
 - ▶ If the renewal is automatic, the SBC must be provided no later than 30 days prior to the first day of the new policy year. If the contract has not been renewed before the 30-day period, then the carrier must provide the SBC no

later than seven business days following the issuance of a new policy or confirmation of the intent to renew.

- **Upon request:** If an employer requests an SBC, it must be provided within seven business days following receipt of the request.

Requirement for Plans to Provide SBCs to Participants

For insured plans, the insurance carrier and the employer share the obligation to provide the SBC. If the carrier provides the SBC, the requirement is met for the employer, and vice versa. For self-funded plans, the employer retains the responsibility to distribute the SBC.

An SBC must be provided to participants or eligible participants for the following events occurring after the revised effective date:

- **Upon application (when a participant is initially eligible for coverage):** Must be distributed with the application materials for all plan options for which the participant is eligible. If the plan does not distribute application materials, then the SBC must be delivered no later than the first day the participant is eligible to enroll.
- **By the first day of coverage (if there are changes):** Distributed only if there is any change to the information on the SBC provided when the participant was initially eligible. If there is a change, an updated SBC must be provided no later than the first day of coverage.
- **When an event triggers HIPAA special enrollment rights:** Provided within 90 days of enrollment. Plans may wish to provide the SBC with plan information materials to assist the enrollee in making coverage decisions.
- **At annual enrollment:** The regulations refer to this as upon renewal. If a plan requires a positive enrollment, the SBC must be distributed with the annual enrollment materials. If enrollment is passive, the SBC must be provided 30 days prior to the effective date. If renewal decisions are not made within 30 days, the SBC must be provided as soon as practical, but no less than seven business days before the effective date. During annual enrollment, participants need to be provided with an SBC only for the plan option in which they are enrolled.
- **Upon request:** Within seven business days of the receipt of a request.

Employers with insured plans may want to consider distributing the SBC. The triggers for SBC distribution are employer-managed events. However, you and your carrier should discuss their plans for distribution, to determine which entity should ultimately handle this requirement.

The new rules also confirm that the SBC can be distributed with other materials, including the annual enrollment materials. In addition, plans can include the SBC with the summary plan description. This might not be the best approach, because you still need to meet all the timing and distribution requirements of the SBC. If the SBC will be included with other documents, the only stipulation is that the SBC information be intact and prominently displayed at the beginning of the materials.

The new guidance provides flexibility for the distribution of SBCs. These regulations retain the rules applicable to paper distribution. A plan can send one paper copy of the SBC to the participant's home address, thus meeting the distribution requirements for any plan participants living at that same address. But if the plan is **aware** of a plan participant living at a different address, a copy of the SBC should be sent to the participant at that address.

The initial regulations permitted electronic distribution as long as the plan followed the ERISA rules for electronic delivery. However, the latest guidance refers to different electronic delivery rules for the SBC, which are less cumbersome than the ERISA rules. The SBC may be provided electronically if the requirements of 29 CFR 2520.104-b1 are met. These rules apply to the various disclosures required of employers and retirement plans, which are as follows:

- The administrator must take appropriate measures to reasonably ensure that the document is received.
 - ▶ An administrator can use return-receipt or a notice of undelivered electronic mail. The administrator can periodically survey to confirm that information is being received.
 - ▶ The system must protect the confidentiality of any personal information transmitted (which should not be an issue with SBCs).
 - ▶ The document is prepared and furnished in a manner consistent with the style, format and content requirements.
 - ▶ Notice is provided to each beneficiary or participant in an electronic or non-electronic format at the time the document is furnished electronically. This notice apprises the individual of the importance of the document and the right to request a paper copy.
 - ▶ A paper copy must be furnished upon request.
- A “safe harbor” is provided, allowing employers to deliver documents electronically if the employee can effectively access documents at the work location where he or she performs his or her duties. Employees must have access the employer’s electronic information system as part of their duties.
- For employees without access at work, the employer can secure their affirmative consent to deliver the documents electronically. The consent form must include:
 - ▶ The types of documents to which consent applies
 - ▶ A statement that consent can be withdrawn at any time
 - ▶ How to withdraw consent
 - ▶ The right to obtain a paper copy, free of charge
 - ▶ The hardware or software requirements needed to access documents

The new guidance also provides rules for participants who are eligible but not yet enrolled. It allows plans to provide the SBC electronically to these participants if:

1. The format is readily accessible.
2. The SBC is provided free of charge upon request.
3. If the electronic format is an internet posting, the plan timely notifies the individual in a paper form, such as a post card, that the documents are available on the internet. The notification must provide the internet address and indicate that a paper copy is available upon request.

Modifications and Changes to the SBC

The statute language included a requirement that if a modification was made to any information covered by the SBC, then 60-day prospective notice was required. Fortunately, the next round of guidance limited the 60-day prospective notice only to changes made outside the plan's renewal. Typically, employers make plan changes only during renewal.

The latest guidance maintains the approach that the 60-day prospective notice is required **only** for changes made outside the plan's renewal date.

Penalties for Non-Compliance

There are substantial penalties for failing to provide an SBC. An insurer or group health plan that willfully fails to provide an SBC will be subject to a fine of up to \$1,000 for each plan participant who is not provided with the SBC.

All the Departments issuing guidance will have regulatory enforcement responsibilities.

Action Steps

Employers now have sufficient details to begin planning for SBC distribution:

- **Determine your plan's effective date for distribution.** Different dates apply for newly eligible individuals and employees during annual enrollment. Will you stagger the dates when you launch the SBC? Or does it make more sense to simply distribute from the point when you are required to send the SBC with your annual enrollment materials?
- **Talk with your vendors.**
 - ▶ If your plan is fully insured, what is the carrier's process for distributing the SBC? Can you rely on this process? How will you notify the carrier when an SBC needs to be sent? If you are not comfortable with the carrier's process, plan to distribute the SBC on your own. Create a process that will allow the SBC to be issued at the point of any event requiring distribution.

- ▶ If your plan is self-funded, contact your TPA. Will the TPA create the SBC on behalf of your plan? Will they charge an extra fee for that service? Create a process that will allow the SBC to be issued at the point of any event that requires distribution.
- **Review the possibility of electronic distribution.** The SBC requirement will create additional paper in an already paper-intensive process (i.e. the enrollment and communication of health benefits). Can you set up an SBC distribution process that meets the electronic delivery requirements?

Vendors may not yet have established their approach to SBCs. It makes sense to contact them in late April or early May, to learn how they will address SBCs. Once the vendor approach has been determined, your organization can create the distribution process.

Don't wait until annual enrollment to address the SBC requirement. This is one of the most stressful times of year in the human resources department. Finalize your approach to the SBC before the stress hits!

Copyright McGraw Wentworth, Inc.

Our publications are written and produced by McGraw Wentworth staff and are intended to inform our clients and friends on general information relating to employee benefit plans and related topics. They are based on general information at the time they are prepared. They should not be relied upon to provide either legal or tax advice. Before making a decision on whether or not to implement or participate in implementing any welfare, pension benefit, or other program, employers and others must consult with their benefits, tax and/or legal advisor for advice that is appropriate to their specific circumstances. This information cannot be used by any taxpayer to avoid tax penalties.