

# Labor and Employment ALERT

## SPECIAL EDITION

If you have already hired or retained a lawyer in connection with benefits, please disregard this brochure.

## Plans That Missed GUST Deadline Given One More Chance To Comply

By Robert C. Schmidt

September 3, 2002 will mark the end of a window of correction period for 401(k) plans, pension plans, and other tax-qualified plans now facing loss of their tax-qualified status because they failed to adopt GUST amendments by the 12/31/01 deadline.

GUST is a partial acronym for a collection of federal laws requiring amendments to plan documents that set forth the terms of tax-qualified employee benefit plans. The legislation collectively known as GUST consists of the General Agreement on Tariffs and Trade, the Uniform Services Employment and Reemployment Rights Act (USERRA), the Small Business Job Protection Act of 1996, the Taxpayer Relief Act of 1987, the Internal Revenue Restructuring and Reform Act of 1998, and the Community Renewal Tax Relief Act of 2000.

The amendments—mostly technical—mandated by GUST address:

- credits to plan participants for military service;
- transportation fringe benefits;
- repeal of family aggregation rules and of Section 415(e) limits;
- the 401(k) discrimination testing rules;
- the age 70-1/2 minimum required distribution rules.

Plan sponsors should not assume that they can ignore GUST unless they receive an IRS audit notice, and then "correct" the problem by amending plan documents and backdating them. Under 18 U.S.C.1027, the backdating of ERISA plan documents may constitute a crime punishable by up to five years in prison.

The GUST window of correction period is described in an IRS procedure known as Rev. Proc. 2002-35. To use this procedure, a plan sponsor—generally the employer—must mail the IRS an application for a determination letter by September 3, 2002. The application must address all the requirements of GUST, and be accompanied by a check of \$1000 to \$10,000, with the charge depending on the number of plan participants. Plans with 100 participants or less pay \$1000, those with 101 to 1000 participants pay \$3000, and those with 1000 or more participants pay \$10,000.

Robert C. Schmidt is a partner in the Adams and Reese LLP Baton Rouge office. He holds an LLM in taxation from Georgetown University and has practiced in the area of ERISA for over 25 years. He has been listed in every edition of Best Lawyers in America since 1986. For further information about filing an application for a GUST determination letter by the September 3<sup>rd</sup> deadline, contact Bob Schmidt at (225) 336-5200.

## Employers Must Rewrite Summary Plan Descriptions

By JoAnne Ray

Employers face serious consequences, including loss of two key ERISA litigation defenses, if they fail to rewrite summary plan descriptions (SPDs) for all their employee benefit plans by January 1, 2003. These rewrites are mandated by revisions to two Department of Labor ("DOL") regulations, 29 C.F.R. §2520.102-3 (the SPD content regulation) and 29 C.F.R. §2560.503-1 (the claims processing regulation).

A Summary Plan Description, or SPD, is an employer-provided detailed description of the provisions of an employee benefit plan such as group health insurance, group life insurance, or a 401K. Under ERISA, employers must communicate with their employees by giving them SPDs for each employer-provided benefit plan. 29 U.S.C. §1022(a)(1).

The revised SPD content regulation is extremely broad, particularly as to health plans, so broad that employers will not be able to comply merely by adding a few paragraphs to

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# Employers Must Rewrite Summary Plan Descriptions

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their existing SPDs. While a complete re-write of existing SPDs may not be necessary, employers should realize that modification of their SPDs to meet the new SPD content regulation will be time consuming. While most changes mandated by the new SPD content regulation apply only to group health plans, some of the changes apply to all ERISA plans.

The revised claims processing regulation also applies to all types of ERISA plans, although its primary focus is on group health and disability plans. As to all types of ERISA plans, the revised regulation makes it more difficult for a plan to deny a benefit claim and, for the first time, requires that claims procedures contain safeguards designed to ensure that "where appropriate, the plan provisions have been applied consistently with respect to similarly situated claimants." 29 C.F.R. §2560.503-1(b)(5).

The revised claims processing regulation went into effect January 1, 2002, for all plans except group health plans and will take effect in the first plan year beginning after July 1, 2002, for group health plans. 29 C.F.R. §2520.102-3(s). In two separate sections, the revised claims procedure regulation explicitly requires SPD revision. First, the regulation states at (b)(2) that a plan's claims procedures will not be considered reasonable unless they are described in an SPD that complies with the new SPD content regulation discussed above. Second, the revised claims processing regulation restates the ERISA provision at 29

U.S.C. §1022 that SPDs for all ERISA plans must address claims procedure and that SPDs for health plans must additionally address remedies for claim denial. 29 C.F.R. §2520.102-3(s).

The revised claims processing regulation requires faster processing of health care claims and also requires an explanation of the scientific reasons or clinical judgments behind denial of coverage

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for experimental treatment. See 29 C.F.R. §2560.503-1(J)(5)(ii). Additionally, it requires that claim denial notices advise employees of their right to sue under ERISA.

ERISA has always required that benefit plans have reasonable claims procedures. 29 U.S.C. § 1133. The revised claims processing regulation puts some "teeth" in this requirement by stating that if an ERISA plan fails to establish and follow reasonable procedures, then the claimant shall be deemed to have exhausted his administrative remedies under the plan. 29 C.F.R. §2560.503-(l). If the claimant is deemed to have exhausted his administrative remedies even though he may never have even presented his claim to the plan, then the plan will not be able in any ensuing litigation to assert one of the most common defenses in ERISA litigation—that the

claimant failed to exhaust his administrative remedies under the plan and therefore judgment should be entered against him. Even worse, the DOL has taken the position that if a plan does not follow reasonable claims procedures, the following very serious consequences follow:

1. The plan loses one of its major advantages in ERISA litigations—that, assuming the plan has been properly drafted, the decision of its plan administrator will be upheld by the court as long as it was not "arbitrary and capricious." According to the DOL, if the plan has not established reasonable claims procedures (which, of course, includes incorporating those claims procedures into an SPD), then the decision of the plan administrator is entitled to no special deference, making it much easier for an ERISA plaintiff to prevail.

2. The DOL also asserts that failure to establish and maintain reasonable claims procedures is an ERISA violation, and furthermore that, in some circumstances, it may constitute a breach of duty by the plan fiduciary.

63 Federal Register 48,390, section 5, Consequences of Failure to Establish and Follow Reasonable Claims Procedures (September 9, 1998).

JoAnne Ray is a partner in the Adams and Reese LLP Houston office. She is board certified in labor and employment law. For more information about revision of SPDs, contact her at (713) 308-0149.

# Employers Should Address HIPAA Privacy Rule Compliance Now

By Gregory D. Frost and JoAnne Ray

The amendments to the HIPAA Privacy Rule issued by the Bush Administration on August 14, 2002, reduced the compliance burden on health care providers, but did little to diminish the burden faced by employers who sponsor group health plans.

The Privacy Rule is a Clinton Administration regulation that restricts third party access to a patient's medical information. The compliance deadline for larger health plans is April 14, 2003. Smaller health plans—defined as those with gross receipts of less than \$5 million—have until April 14, 2004, to comply. A copy of the Privacy Rule, including the August 14 modifications, is available at the Department of Health and

Human Services' web site at [www.hhs.gov/ocr/hipaa/](http://www.hhs.gov/ocr/hipaa/).

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***...Complying with these complex regulations can be tedious and time consuming. Employers should strongly consider starting this process immediately.***

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The Privacy Rule will not cover all group health plans. Self-administered, self-funded group health plans with fewer than 50 participants are exempt, but only if they do not use a Third Party Administrator. Fully insured health plans sponsored by employers that do not receive protected

health information (PHI) are also exempt from most of the requirements. However, applying this latter exemption can be complicated, and no employer should rely on it without careful legal analysis.

Gregory D. Frost is a partner in the Adams and Reese LLP Baton Rouge Office. He concentrates his practice in the area of health information and health care law. He is the organizer of the HIPAA Privacy WorkGroups and the editor of Louisiana Medical Records Law, a textbook currently used at two Louisiana colleges. He served for eight years as Vice President of Legal and Governmental Affairs of the Louisiana Hospital Association. For further information about the HIPAA Privacy Rule, contact Greg Frost at (225) 336-5200.

***Below are some of the key tasks that an employer/plan sponsor must complete within the next eight months if it is covered by the HIPAA Privacy Rule:***

- ◆ Designate a HIPAA Privacy Officer, who must develop and implement privacy policies and procedures.
- ◆ Amend health plan documents to add required provisions restricting use and disclosure of PHI.
- ◆ Identify Business Associates, as defined by HIPAA, review all Business Associate contracts, and modify as necessary to address privacy requirements, unless transition rule allows an extra year for compliance.
- ◆ Modify or establish policies and procedures to:
  - satisfy minimum necessary disclosure requirement, including claims and appeals procedures.
  - provide appropriate administrative, technical, and physical safeguards to protect privacy of PHI.
  - receive privacy-related complaints and document any action taken on them.
  - sanction employees who fail to comply with privacy policies and procedures.
  - track and account for specific disclosures of PHI.
  - accept and act on requests for additional protection for PHI.
- ◆ Arrange to provide required Notices of Privacy Practices as to individuals' privacy rights.
- ◆ Designate contact person or office responsible for receiving complaints and providing further information.
- ◆ Conduct privacy training for all employees.
- ◆ Consider conditioning enrollment in health plan on requirement that employee sign authorization allowing the plan to use his or her PHI for underwriting purposes.

FREE BACKGROUND INFORMATION AVAILABLE UPON REQUEST. Not certified by the Texas Board of Legal Specialization except as noted.

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