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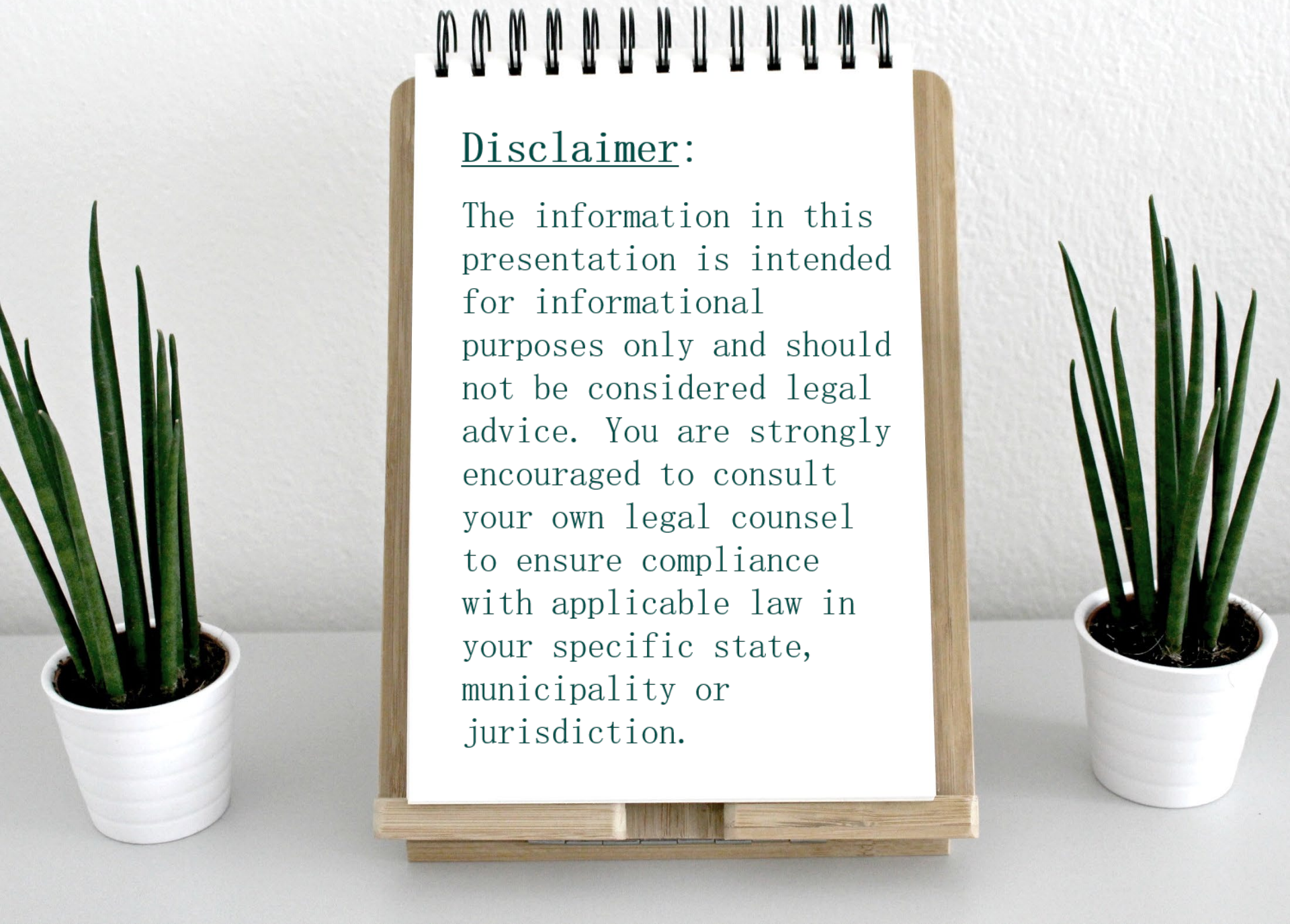
A Guide to Dependent Eligibility Verification Audits

March 17, 2022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The information in this presentation is intended for informational purposes only and should not be considered legal advice. You are strongly encouraged to consult your own legal counsel to ensure compliance with applicable law in your specific state, municipality or jurisdiction.

Today's Presenters:

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Today's Agenda:

- ✓ Spouse and Dependent Child Eligibility
- ✓ First Step-Planning Your Audit
- ✓ Second Step-Employee Communication and Verification
- ✓ Third Step-Final Results
- ✓ Employer Action Steps After Audit

Spouse and Dependent Child Eligibility

Overview

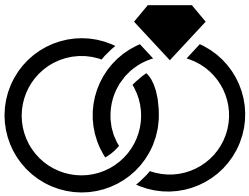
In general, ERISA does not require the plan sponsor of an ERISA group health plan to cover the spouses and children of employees, however, most plans do.

- **Fully-insured plans**
  - State laws may impose a definition of spouse or dependent child
  - Some states, require coverage for children up to age 30
- **Self-insured plans**
  - Greater flexibility with determining who will be provided benefits
- **Design choice considerations**
  - 4980H penalty exposure (ALEs), cost to plan, employee expectations
- **Plan language should clearly define eligibility**

Spouse and Dependent Child Eligibility

Spouse Eligibility

- **Definition of Spouse**
  - If "spouse" is not defined in plan language, must look to whether an individual is recognized as the spouse under state law
- **Common-Law Spouses**
  - Specific requirements to establish a common-law marriage vary by jurisdiction
  - Few plans exclude common-law marriage altogether but do require proof consistent with applicable state law
    - May require an affidavit
  - No jurisdiction recognizes common-law divorce
- **Same-Sex Spouses**
  - State insurance laws generally require equal coverage of opposite-sex and same-sex spouses for employers with fully insured health plans that provide coverage for spouses
    - If employer is not required by state insurance law to offer coverage to same-sex spouses (for example, because the employer has a self-funded plan), the employer has potential risk for discrimination lawsuits if only offers coverage to opposite-sex spouses



Spouse and Dependent Child Eligibility

Domestic Partner Eligibility

- Unlike spouses, a domestic partnership is **not a relationship recognized by federal law**, so no single definition exists.
- Definition should be based on clear criteria: Sharing a residence, and/ or maintaining a relationship for a duration of time
- Should be applied consistently to all employees regardless of sex or gender
- Some states and localities may require that employers offer coverage to domestic partners
- Employers should determine whether coverage mandate applies to them and if the mandate defines eligible domestic partner
- Employers should also be mindful of any restrictions imposed by carrier regarding domestic partner definition

Spouse and Dependent Child Eligibility

Child Eligibility

- Plan should include a clear definition of "child"
- If benefits are through insurance, the plan will generally be subject to the insurance policy's definition of child
- If plan provides coverage to children, it's subject to the following requirements:
  - Must provide coverage to children placed for adoption, whether the adoption becomes final
  - **ACA age 26 mandate:** Plans (subject to the mandate) must make coverage available for children until age 26
  - Prohibits the use of age-related factors (such as residency, income, marital status, tax filing status and age) to define child
  - Applies to children as defined in tax definition (IRC Code 152)
    - Children, stepchildren, legally adopted children, children placed for adoption, and eligible foster children
    - Does not include grandchildren, nieces or nephews so mandate doesn't apply
  - **Other laws that may require plan to offer coverage**
    - Michelle's Law-mostly irrelevant but could apply in some cases
    - Qualified Medical Child Support Orders (QMSCOs)

First Step-Planning Your Audit

What is a Dependent Eligibility Audit?

An employer-initiated review of group health plan's eligibility provisions that identified enrolled dependents who are ineligible for the plan**.**

Examples of ineligible dependents:

- Former spouses of employees who lost plan coverage through divorce or legal separation
- Dependents of employees who lost plan coverage who have "aged out" of the plan
- Grandchildren, relatives or friends

Why Should an Employer Conduct an Audit?

Two main objectives regarding group health plan's eligibility provisions:

1) Drafting clear plans and policies to reflect intended eligibility rules
2) Administering and monitoring these eligibility provisions consistently

First Step-Planning Your Audit

Why Should an Employer Conduct an Audit? (cont'd)

- **Cost Savings for employers (fully or self-insured), especially if-**
  - There have been recent changes in eligibility rules
  - Eligibility rules have not been communicated clearly
  - Several plans or options with different eligibility rules
  - Recent change in business structure
- **ERISA fiduciary duty considerations**
  - Audit may help plan fiduciaries meet their obligations to follow the terms of the plan and act in the sole interest of the plan participants and beneficiaries
  - For a plan with plan assets, an audit enhances compliance with ERISA's "exclusive benefit" rule
- **Promotes honesty and fairness in the workplace**

First Step-Planning Your Audit

Initial Decisions Regarding the Audit

- **Have we coordinated the audit with insurance carrier or stop-loss carrier?**
  - May help the employer determine potential cost savings
  - Decide proactively how to handle terminations of ineligible dependents
- **Have we reviewed the plan's eligibility language?**
  - Employers should review the eligibility rules in their plan document and their summary plan description (SPD)
    - Check for missing definitions, ambiguous language, and inconsistencies between the plan documents, employee communications and policies
  - Review procedures for checking initial eligibility and monitoring continued eligibility
  - Evaluate employee communications regarding eligibility
  - Make sure policies and SPD are compliant with various laws, including certain tax laws, state insurance laws and the Affordable Care Act (ACA)

Initial Decisions Regarding the Audit (cont'd)

- **Who is going to conduct the audit?**
  - Can be conducted in-house or with assistance from a third-party
    - Employers should weigh the advantages and disadvantages of both options to decide the right choice for their audit
    - If audit conducted by a third-party auditor, the employer will need to negotiate the terms of the agreement, clearly understand the role of the third party and decide if a HIPAA business associate agreement is needed
- **What verification method will we use?**
  - Sign-off method
  - Documentation method
    - If employer chooses the documentation method, they will need to determine what evidence of eligibility will be acceptable

First Step-Planning Your Audit

Initial Decisions Regarding the Audit (cont'd)

- **Will our audit process include an amnesty period?**
  - An amnesty period is typically a 30-to-90-day time period where employees can voluntarily remove ineligible dependents, typically without facing penalties
  - Must clearly communicate the terms of the amnesty period to employees
- **Due to the ACA rescission rule**, any coverage termination (other than termination for nonpayment of premium) for an ineligible individual **must be prospective only, unless there was fraud or intentional misrepresentation by the participant**
  - In the event of fraud or intentional misrepresentation, coverage can be terminated retroactively, but only after 30 days' advance notice is provided
  - Employer's can avoid ACA's restrictions on rescission by canceling coverage on a prospective basis
  - Failure to notify of divorce example of when retroactive termination may be permitted (based on failure to pay COBRA premium, not rescission)
- **Timing of Audit**

Second Step-Employee Communication and Verification

Employee Communication

- Before communication, it is important to involve senior management, HR and managers of upcoming audit. In general, **the communication should provide the following language:**
  - Who is eligible to participate in the plan
  - Explanation of amnesty period and second phase of the audit
  - What documents must be submitted for dependents who remain covered after the amnesty period is over
    - Typically, a chart or a list is provided with the required documents for each category of eligible dependents
  - If a third-party is conducting the audit, the communication should advise employees to look for communications from this third-party
  - The timeframes staff or third-party audit firm is available for phone calls
  - The purpose of the audit

Second Step-Employee Communication and Verification

Verification after Amnesty Period

- For all remaining dependents after the initial amnesty period, employers should require employees to provide documentation to verify dependent status/relationship
- Documents must establish both a dependent relationship and that the relationship still exists
- Examples of documents may include:
  - Marriage certificates
  - Domestic partner affidavits
  - Legal documents that establish custody, guardianship or foster care
  - Birth certificates
  - Tax Forms
  - Adoption papers
- Establish the right to ask follow-up questions regarding proof that is sent
- Prepare for possible backlash and a lot of questions!

Third Step-Final Results

Removing the Ineligible Dependents

- Once an employer confirms that an employee has an ineligible dependent enrolled in the plan, they should notify the employee of that determination with information about removal and consequences
- Employers should decide whether they want to pursue any further action against the employee, such as recovering insurance premiums paid on behalf of the ineligible dependent
- Take into account ACA's prohibition against rescission from group health plans and any other relevant laws
- Provide opportunity for participants to appeal the ineligibility determination in accordance with the plan's claims procedures
- Notify TPAs, insurers and claims administrators

Compliance Considerations

Should COBRA be offered?

- In general, terminating an ineligible dependent's coverage is not a COBRA qualifying event
- However, a dependent may be eligible for COBRA if he or she became ineligible for COBRA due to a COBRA qualifying event (for example, divorce or loss of dependent child status) **and his or her 60-day period for providing notice to the plan has not expired**
  - If timely notice is not provided, the plan is not required to provide COBRA election materials
  - **Caution**: COVID-19 deadline extension for COBRA elections still ongoing
- **What if ineligible dependents already have COBRA coverage and they were never eligible for group health plan coverage?**
  - Plan should terminate COBRA coverage as soon as they become aware of the qualified beneficiary's eligibility

Third Step-Final Results

Compliance Considerations

- **Application of HIPAA Privacy and Security Rules**
  - Determine at outset that employer is conducting eligibility audit in its capacity as an employer
  - Enrollment or disenrollment information is PHI when held by the plan
  - If the employer gathers enrollment information it is capacity as an employer, it is not PHI
- **Tax Consequences for Ineligible Dependents**
  - Generally, employers may provide tax-free health coverage for employees, spouses, dependents, and children who will not have attained age 27 by the end of the tax year
  - Limited guidance from the IRS about the federal tax consequences of a group health plan covering ineligible individuals
    - Income may need to be imputed to employees
    - Complications can arise if previous taxable years are involved

Employer Action Steps after Audit

Employer Next Steps

- Decide if the eligibility audit will be ongoing, annual or a one-time process
- Identify eligibility provisions that are ambiguous or misunderstood by employees and revise the eligibility language in the plan(s), along with the SPD
- Clarify language in the open enrollment materials and improving employee communication;
- Consider establishing system to avoid reenrollment of identified ineligibles
- Communicate results to employees
    - Emphasize savings to the plan which employee will see reflected in the amount they pay for benefits

Thank You for Attending

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