

## DEPARTMENT OF LABOR

## Pension and Welfare Benefits Administration

## 29 CFR Part 2520

RIN 1210-AA55

## Interim Rule Amending Summary Plan Description Regulation

**AGENCY:** Pension and Welfare Benefits Administration, Department of Labor.

**ACTION:** Interim Rule with request for comments.

**SUMMARY:** This document contains an interim rule amending the information required to be contained in the Summary Plan Description (SPD) required to be furnished to employee benefit plan participants and beneficiaries under the Employee Retirement Income Security Act of 1974, as amended (ERISA). Specifically, this rule amends the information required to be disclosed in the SPD with respect to the Newborns' and Mothers' Health Protection Act of 1996. The amendment contained in this document will affect group health plan sponsors, administrators, fiduciaries, participants and beneficiaries.

**DATES:** *Effective date:* This amendment is effective November 9, 1998.

*Applicability date:* Administrators will be required to comply with this amendment no later than the date on which the first summary of material modification (or updated SPD) is required to be furnished participants and beneficiaries following the effective date of this amendment.

*Comments:* Written comments on this interim rule must be received by November 9, 1998.

**ADDRESSES:** Interested persons are invited to submit written comments (preferably three copies) concerning this amendment to: Office of Regulations and Interpretations, Room N-5669, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, ATTENTION: SPD Content Interim Rule. All submissions will be open to public inspection in the Public Disclosure Room, Pension and Welfare Benefits Administration, Room N-5638, 200 Constitution Avenue, N.W. Washington, D.C.

**FOR FURTHER INFORMATION CONTACT:** June Solonsky, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, (202) 219-8521. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:****A. Background**

The Newborns' and Mothers' Health Protection Act of 1996 (NMHPA) amended ERISA by adding a section 711.<sup>1</sup> ERISA section 711 establishes restrictions on the extent which group health plans and health insurance issuers may limit hospital lengths of stay for mothers and newborn children following childbirth. In an effort to ensure that participants and beneficiaries are apprised of the limitations established under NMHPA, paragraph (d) of section 711 provides that "[t]he imposition of the requirements of this section shall be treated as a material modification in the terms of the plan \* \* \* except that the summary description required to be provided \* \* \* with respect to such modification shall be provided by not later than 60 days after the first day of the first plan year in which such requirements apply."

On April 8, 1997, the Department published interim rules implementing the provisions of section 711(d) by amending the SPD content regulation, at 29 CFR 2520.102-3, to add a new paragraph (u).<sup>2</sup> Paragraph (u) requires that group health plan SPDs provide a statement indicating that "group health plans and health insurance issuers offering group insurance coverage generally may not, under Federal law, restrict benefits for any hospital length of stay in connection with childbirth for the mother or newborn child to less than 48 hours following a normal vaginal delivery, or less than 96 hours following a caesarean section, or require that a provider obtain authorization from the plan or insurance issuer for prescribing a length of stay not in excess of the above periods." In the preamble to the interim rule, the Department explained that the statement included in paragraph (u) may be used as sample language by plan administrators to satisfy the content requirement of paragraph (u) and section 711(d).

**B. Amendment to Interim Rule**

Since the publication of that interim rule, concerns have been raised whether the specific information delineated in paragraph (u) of § 2520.102-3 adequately informs participants and beneficiaries of the exception to the Federal law's general rule. In particular, concerns have been expressed about the absence of any indication that the 48 hour/96 hour minimum stay provisions do not apply in any case in which the decision to discharge the mother or

newborn prior to the minimum length of stay otherwise required is made by the attending provider in consultation with the mother. Given the significance of this exception, the Department has determined that these concerns have merit, that the current rule governing the disclosure of NMHPA provisions should be amended, and that such amendment should be effective on an interim basis, consistent with the current disclosure requirement. In this regard, the Department is amending the language in paragraph (u) of § 2520.102-3 to clarify that the attending provider, after consulting with the mother, may discharge the mother and newborn earlier than 48 hours following a vaginal delivery<sup>3</sup> or 96 hours following a cesarean section. It is the Department's view that this language is more consistent with the language in section 711(a) of ERISA.<sup>4</sup> The statement included in this amended paragraph (u) of the regulation may be used by administrators as sample language to satisfy the requirements of that paragraph.

**C. Effective Date**

The interim rule contained in this document is effective November 9, 1998. Administrators will be required to comply with this amendment no later than the date on which the first summary of material modification (or updated SPD) is required to be furnished participants and beneficiaries following the effective date of this amendment.

Consistent with the implementation of the NMHPA amendments through the adoption of interim rules,<sup>5</sup> the Department has determined that there is need to ensure that participants and beneficiaries are, consistent with Congressional intent,<sup>6</sup> apprised of the NMHPA provision as soon as practical, and that the current language governing the disclosure of such provisions, at paragraph (u) of § 2520.102-3, does not, in the Department's view, adequately accomplish the statutory mandate for such disclosure. Given the nature of the amendment and the need to ensure that participants and beneficiaries are adequately apprised of the NMHPA

<sup>3</sup> A separate interim rule being issued by the Department addressing the substantive requirements under the NMHPA makes clear that the reference to "normal" vaginal delivery is merely intended to distinguish vaginal deliveries from cesarean section deliveries. All vaginal deliveries, whether with complications or without complications, are subject to the 48-hour length-of-stay requirement.

<sup>4</sup> The amendment also reflects editorial changes intended to improve the clarity of the statement.

<sup>5</sup> *Id.* at 16982-83.

<sup>6</sup> See ERISA section 711(d).

<sup>1</sup> Pub. L. 104-204, enacted on September 26, 1996.

<sup>2</sup> 62 FR 16979, April 8, 1997.

provisions, the Department believes that issuance of a notice of proposed rulemaking with a period for comments prior to issuing a final rule would unnecessarily delay the implementation of this essential guidance. In this regard, the Department notes that pursuant to ERISA section 734, the Department has the authority to promulgate any interim rules the Secretary deems are appropriate to carry out this part. For the reasons discussed herein, the Department is adopting this amendment on an interim basis.

#### D. Request for Comments

While the amendment contained herein is being adopted on an interim basis, the Department is inviting interested persons to submit written comments on the amendment for consideration in the development of a final rule. Written comments (preferably three copies) must be submitted to: the Office of Regulations and Interpretations, Room N-5669, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, ATTENTION: SPD Content Interim Rule. All submissions will be open to public inspection in the Public Disclosure Room, Pension and Welfare Benefits Administration, Room N-5638, 200 Constitution Avenue, N.W. Washington, D.C. Written comments on this interim rule must be received by November 9, 1998.

#### E. Other Amendments to the SPD Content Requirements

In addition to the amendment contained herein, the Department is publishing in the "proposed rules" section of today's **Federal Register** a number of proposed amendments to the regulations governing the content of SPDs. These amendments, upon adoption, will clarify the information required to be disclosed by group health plans and update other information required to be set forth in employee benefit plan SPDs.

#### Economic Analysis Under Executive Order 12866

Under Executive Order 12866, the Department must determine whether the regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a "significant regulatory action" as an action that is likely to result in a rule: (1) Having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy,

productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order, it has been determined that this action is consistent with the President's priorities with respect to ensuring that all participants in group health plans receive understandable information about their plans, as described in the Consumer Bill of Rights and Responsibilities issued by the President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry. Therefore, this notice is "significant" and subject to OMB review under section 3(f)(4) of the Executive Order.

The cost of compliance with this interim rule is expected to total \$250,949 in 1999, and \$387,708 in the year 2000. These costs are expected to be incurred in connection with other changes to the required content of SPDs. A detailed discussion of the basis for these cost estimates, as well as the nature and costs of other changes being proposed, may be found in the Notice of Proposed Rulemaking with respect to Proposed Amendments to Summary Plan Description Regulations, which is also published in today's **Federal Register**.

Although the effective date of this interim rule differs from the effective date that may apply for the proposed rulemaking with respect to SPDs, the Department believes that a meaningful economic analysis should contemplate as a whole the nature and timing of all changes to existing SPDs expected to be made by plan administrators due to regulatory amendments. As a result, the economic analysis of the Proposed Amendments to Summary Plan Description Regulations addresses the impact of this interim rule, as well as the changes proposed in the separate rulemaking action.

To avoid unnecessary duplication of economic analysis, or of public comment thereon, comments received on the methodology and assumptions used in estimating the consolidated economic impact of both the proposed rule and this interim rule, and on the

resulting estimates, will be treated as comments on this interim rule.

The benefits of this interim rule, as yet unquantified, will arise as participants and beneficiaries receive clearer and more accurate communications concerning their group health plan benefits. The Department is publishing this interim rule, in part, to address public concerns about existing disclosures with respect to exceptions to the minimum hospital stay provisions of NMHPA.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. If an agency determines that a proposed rule is likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions.

Because these rules are issued as interim final rules, and not as a notice of proposed rulemaking, a formal regulatory flexibility analysis has not been prepared. Nonetheless, in its analysis of economic impact of both this interim rule and the Notice of Proposed Rulemaking with respect to Proposed Amendments to Summary Plan Description Regulations, which is also published in today's **Federal Register**, the Department presents an analysis addressing many of the same issues otherwise required to be addressed under the RFA.

The Department invites interested persons to submit comments regarding its preliminary discussion of potential impacts on small entities. The Department also requests comments from small entities regarding what, if any, special problems they might encounter under these interim rules, or if the separate proposal concerning amendments to the SPD content rules were to be adopted as final, and what changes, if any, could be made to minimize those problems.

### *Paperwork Reduction Act*

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Pension and Welfare Benefits Administration is soliciting comments concerning the revision of the information collection request (ICR) included in this Interim Rule Amending Summary Plan Description Regulation. A copy of the existing ICR may be obtained by contacting the office listed in the addressee section of this notice.

The Department of Labor (Department) has submitted a copy of the existing information collection, as revised by both the Interim Rule Amending Summary Plan Description Regulation and the Proposed Amendments to Summary Plan Description Regulations, to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collection provisions. The Department has requested emergency clearance for that portion of the ICR that is changed by this interim rule, specifically, the SPD disclosure provision concerning hospital lengths of stay in connection with childbirth for the mother or newborn child, by November 9, 1998.

The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other

technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Comments should be sent to the individual identified in the Addressee section of this notice, and to Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, D.C. 20503; Attention: Desk Officer for the Pension and Welfare Benefits Administration. Although comments may be submitted through November 9, 1998, in light of the request for emergency clearance by November 9, 1998, submission of comments within the first 30 days is encouraged to ensure their consideration.

**ADDRESSES (PRA 95):** Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Pension and Welfare Benefits Administration, 200 Constitution Avenue, NW, Room N-5647, Washington, D.C. 20210. Telephone: (202) 219-4782; Fax: (202) 219-4745. These are not toll-free numbers.

### **I. Background**

Pursuant to ERISA section 101(a)(1), the administrator of an employee benefit plan is required to furnish an SPD to each participant covered under the plan and each beneficiary who is receiving benefits under the plan. The SPD is required to be written in a manner calculated to be understood by the average plan participant and must be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan. To the extent that there is a material modification in the terms of the plan or a change in the information required to be included in the SPD, ERISA requires that the administrator furnish participants covered under the plan and beneficiaries receiving benefits with a summary of such changes.

ERISA section 102(b) describes the types of information specifically required to be included in the plan description and SPD. The Department has previously issued guidance concerning the required contents of SPDs in regulations published at 29 CFR 2520.102-3.

### **II. Current Actions**

As described in this preamble, the interim rule amending § 2520.102-3 modifies the required content of group health plan SPDs to clarify the applicability of minimum hospital lengths of stay for mothers and newborn children following childbirth under NMHPA. This modification to

disclosure requirements implemented by the previous publication of the Interim Rules Amending ERISA Disclosure Requirements for Group Health Plans (62 FR 16979, April 8, 1997) is intended to clarify that the attending provider, after consulting with the mother, may discharge the mother or newborn child earlier than 48 hours following a vaginal delivery or 96 hours following a cesarean section.

The total additional hour burden estimated to result from this interim rule is 821 hours in 1999 and 2,219 hours in 2000. This interim rule is expected to result in operating and maintenance cost increases of \$209,907 in 1999 and \$276,741 in 2000. These estimates are based upon the Department's assumptions concerning the number of affected plans and participants, the time required to make the modification, and the percentage of plans that perform the required tasks in-house as compared with those that purchase services from outside parties. This accounting for the purchase of services in burden estimates results in the differences in costs developed for purposes of PRA 95 and those developed for purposes of Executive Order 12866.

These burden estimates also rely on assumptions made about the distribution of other disclosure materials required as a result of proposed regulatory changes. This is because it is assumed that plans will prepare and distribute revised disclosure materials in the most cost-efficient way, which would likely involve incorporating as many changes as possible in a single distribution. A detailed discussion of the basis for these estimates, as well as the nature and burden associated with the other changes being proposed to the content of SPDs, may be found in the Notice of Proposed Rulemaking with respect to Proposed Amendments to Summary Plan Description Regulations, which is also published in today's **Federal Register**.

Because this single ICR is currently the subject of two separate regulatory actions, the Department believes that a meaningful burden analysis should contemplate as a whole the nature and timing of all changes to existing SPDs expected to be made by plan administrators due to regulatory amendments. As a result, the burden analysis included in the Proposed Amendments to Summary Plan Description Regulations addresses the impact of this interim rule, as well as the changes proposed in the separate rulemaking action. Both the total burden of the ICR and the burden specifically

associated with this interim rule are displayed in this notice.

To avoid unnecessary duplication of analysis, or of public comment thereon, comments received on the methodology and assumptions used in estimating the consolidated cost and hour burden of the proposed rule and this interim rule, and on the resulting burden estimates, will be treated as comments on this interim rule.

*Type of Review:* Revision of a currently approved collection.

*Agency:* Pension and Welfare Benefits Administration.

*Title:* Regulations Regarding Required Contents of Summary Plan Descriptions for Employee Benefit Plans (Interim Rule Amending Summary Plan Description Regulation).

*OMB Number:* 1210-0039.

*Affected Public:* Individuals or households; business or other for-profit; not-for-profit institutions.

*Frequency of Response:* On occasion.

*Total Respondents:* 2,027,293 (1998); 888,393 (1999); 2,641,818 (2000).

*Total Responses:* 83,332,000 (1998); 52,115,000 (1999); 160,703,000 (2000).

*Estimated Burden Hours:* 842,586 (1998); 815,850 total, including 821 for this Interim Rule (1999); 2,101,624 total, including 2,219 for this Interim Rule (2000).

*Estimated Annual Costs (Operating and Maintenance):* \$95,265,366 (1998); \$101,465,306 total, including \$209,907 for this Interim Rule (1999); \$218,395,191 total, including \$276,741 for this Interim Rule (2000).

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection request; they will also become a matter of public record.

**Unfunded Mandates Reform Act**

These rules are not subject to the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) because they are interim rules. However, for purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this interim rule does not include any Federal mandate that may result in expenditures

by State, local, or tribal governments, or the private sector, of \$100 million or more. The basis for this statement is described in the analysis of costs for purposes of Executive Order 12866 and the Regulatory Flexibility Act.

**Small Business Regulatory Enforcement Fairness Act**

This interim rule is subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) (SBREFA), and has been transmitted to Congress and the Comptroller General for review. The Department has determined that this is not a "major rule" as that term is defined in 5 U.S.C. 804, because it is not likely to result in: (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

**Statutory Authority**

This interim regulation is adopted pursuant to authority contained in section 505 of ERISA (Pub. L. 93-406, 88 Stat. 894, 29 U.S.C. 1135) and sections 104(b) and 734 of ERISA, as amended, (Pub. L. 104-191, 110 Stat. 1936 and Pub. L. 104-204, 110 Stat. 2935, 29 U.S.C. 1024 and 1191c) and under Secretary of Labor's Order No. 1-87, 52 FR 13139, April 21, 1987.

**List of Subjects in 29 CFR Part 2520**

Employee benefit plans, Employee Retirement Income Security Act, Group health plans, Pension plans, Welfare benefit plans.

For the reasons set forth above, Part 2520 of Title 29 of the Code of Federal Regulations is amended as follows:

**PART 2520—[AMENDED]**

1. The authority for Part 2520 continues to read as follows:

**Authority:** Secs. 101, 102, 103, 104, 105, 109, 110, 111(b)(2), 111(c), and 505, Pub. L. 93-406, 88 Stat. 840-52 and 894 (29 U.S.C. 1021-1025, 1029-31, and 1135); Secretary of Labor's Order No. 27-74, 13-76, 1-87, and Labor Management Services Administration Order 2-6.

Sections 2520.102-3, 2520.104b-1 and 2520.104b-3 also are issued under section 101(a) of Pub. L. 104-191, 110 Stat. 1936 and 1939, sec. 603 of Pub. L. 104-204, 110 Stat. 2935 (29 U.S.C. 1185 and 1191c).

2. Section 2520.102-3 is amended by revising paragraph (u) to read as follows:

**§ 2520.102-3 Contents of summary plan description.**

\* \* \* \* \*

(u) In the case of a group health plan, as defined in section 733(a)(1) of the Act, that provides maternity or newborn infant coverage, a statement indicating the following: Group health plans and health insurance issuers generally may not, under Federal law, restrict benefits for any hospital length of stay in connection with childbirth for the mother or newborn child to less than 48 hours following a vaginal delivery, or less than 96 hours following a cesarean section. However, Federal law generally does not prohibit the mother's or newborn's attending provider, after consulting with the mother, from discharging the mother or her newborn earlier than 48 hours (or 96 hours as applicable). In any case, plans and issuers may not, under Federal law, require that a provider obtain authorization from the plan or the issuer for prescribing a length of stay not in excess of 48 hours (or 96 hours).

\* \* \* \* \*

Signed at Washington, D.C., this 28th day of August, 1998.

**Meredith Miller,**  
Deputy Assistant Secretary for Policy, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 98-24066 Filed 9-4-98; 8:45 am]

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