

Compliance Overview

Highlights

Compliance Rules

EAPs providing medical care are considered group health plans that must comply with various legal requirements, including:

- ERISA's documentation and reporting rules;
- COBRA continuation coverage; and
- HIPAA's privacy and security rules.

In addition, stand-alone EAPs must be structured as "excepted benefits" to comply with the ACA.

Medical Care

- EAPs that are staffed by trained professionals who provide counseling services will generally be considered group health plans because they provide medical care.
- EAPs that are not staffed by trained counselors and only provide referral services may be able to avoid group health plan status.



Employee Assistance Programs

Employee assistance programs (EAPs) are work-based intervention programs that connect employees with resources to identify and address personal problems. EAPs typically include a variety of services to help employees remain healthy and productive, such as mental health counseling, substance use disorder counseling, financial advising, legal services, and resources to address family issues and other personal challenges. EAPs are usually offered at no cost to employees by third-party vendors. They can also be provided as a component of the employer's group medical plan.

EAPs often provide medical care, such as mental health counseling, by trained professionals. EAPs providing medical care are considered group health plans that are generally subject to ERISA, COBRA, HIPAA and the Affordable Care Act (ACA). In addition, employers that sponsor high deductible health plans (HDHPs) should consider how an EAP may impact employees' eligibility for health savings account (HSA) contributions. Employers should also ensure that EAPs do not function as a gatekeeper to accessing their group medical plan's mental health or substance use disorder (MH/SUD) benefits.

This Compliance Overview summarizes key requirements for EAPs. Employers sponsoring EAPs should ensure they are familiar with these compliance requirements.

Links and Resources

- [DOL Advisory Opinion 88-04A](#), explaining when an EAP provides medical care
- [Final rules](#) outlining the requirements for an EAP to qualify as an excepted benefit
- [IRS Notice 2004-50](#), addressing when an EAP affects HSA eligibility

Provided by **Pierce Insurance Agency, Inc.**

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EAPs Providing Medical Benefits

In general, EAPs providing medical benefits are group health plans that are subject to a variety of compliance requirements. Whether a specific EAP provides medical benefits depends on the services offered through the program. The U.S. Department of Labor (DOL) has provided the following general parameters to determine whether an EAP provides medical benefits:

- **Medical benefits:** EAPs provide medical care if they are **staffed by trained counselors**, whether internally or through an outside vendor, who provide some type of **medical, health or wellness counseling** to employees (see, for example, [DOL Advisory Opinion 88-04A](#)).
- **No medical benefits:** EAPs that are **not staffed by trained counselors** and **only provide referrals** to employees do not provide medical care (see, for example, [DOL Advisory Opinion 91-26A](#)).

Based on this guidance, EAPs that are staffed by trained professionals who provide counseling services will generally be considered group health plans because they provide medical benefits. Only a narrow type of EAP (i.e., those that are not staffed by trained counselors and only provide referral services) may be able to avoid group health plan status.

Generally, employers with EAPs provided as a component of their group medical plan have fewer compliance obligations for the EAP because the compliance is mostly tied to the larger medical plan. However, many employers hire a separate EAP vendor and allow all employees, not just those enrolled in the group medical plan, to use the EAP's services. In this case, employers with EAPs that provide medical benefits should consider their compliance obligations under ERISA, COBRA and HIPAA. In addition, to avoid the ACA's market reforms, a stand-alone EAP that provides medical benefits must be carefully structured to qualify as an excepted benefit.

ERISA

ERISA sets minimum standards for employee benefit plans maintained by private-sector employers. ERISA exempts only two types of employers from its requirements: governmental and church employers. **EAPs providing medical benefits are considered group health plans that are subject to ERISA's requirements.** For example, ERISA requires employers to take the following steps with respect to their employee benefit plans:

- Adopt an official plan document that describes the plan's terms and operations;
- Explain the plan's terms and rules to participants through a summary plan description (SPD);
- File an annual report (Form 5500) for the plan unless a filing exemption applies; and
- Comply with certain fiduciary standards of conduct with respect to the plan.

For ERISA purposes, employers may combine (or wrap) their EAP's documentation with other welfare benefits, such as their group medical plan. Combining welfare benefits under a single wrap plan allows employers to simplify their ERISA compliance requirements for documentation and reporting. For example, rather than creating and distributing a separate SPD for the EAP, the EAP can be described in the overall plan's SPD. The EAP can also be included in the overall plan's Form 5500 filing, if applicable, rather than filing a separate Form 5500 for the EAP.

COBRA

COBRA requires covered group health plans to offer continuation coverage to employees, spouses and dependent children when group health coverage would otherwise be lost due to certain specific events, called qualifying events. COBRA generally applies to group health plans maintained by private-sector employers that had at least **20 employees** on more than 50% of typical business days in the previous calendar year. COBRA does not apply to group health plans maintained by small employers (those with fewer than 20 employees) or churches.

Compliance Overview

EAPs providing medical benefits are considered group health plans that are subject to COBRA. An employer's COBRA compliance obligations for its EAP can be complicated. For example, if the EAP is not a component of the employer's group medical plan, the employer may need to provide separate COBRA notices, election rights and premium calculations for the EAP. Also, any non-health benefits provided by the EAP (e.g., financial planning) should be carved out of the COBRA premium. To avoid offering COBRA coverage, employers may work with their EAP vendors to automatically extend the EAP's no-cost coverage after the occurrence of a qualifying event for the maximum continuation coverage period.

HIPAA Privacy and Security Rules

The HIPAA privacy and security rules protect individuals' identifiable health information—called protected health information (PHI)—held by covered entities or their business associates. Health plans are a type of covered entity. **EAPs providing medical benefits are considered group health plans that are subject to HIPAA's privacy and security rules.**

When an EAP is considered a group health plan, the individually identifiable health information collected from or created about employees using the EAP is PHI and protected by the HIPAA rules. Stand-alone EAPs (i.e., EAPs that are not components of group medical plans) have their own HIPAA compliance responsibilities. If an EAP is part of a fully insured arrangement, most HIPAA compliance responsibilities may fall on the insurer. However, employers with self-insured EAPs may need to take the following steps to comply with the HIPAA rules:

- Implement appropriate administrative, technical and physical safeguards to protect the privacy and security of PHI;
- Designate a privacy officer and security official;
- Train workforce members on HIPAA policies and procedures;
- Provide a notice of privacy practices;
- Comply with certain individual rights' requirements; and
- Adopt a breach notification policy.

In addition, employers with self-insured EAPs should ensure they have **business associate agreements** in place with their EAP vendors if the programs involve the collection or creation of individually identifiable health information.

ACA Reforms

Generally, if an EAP provides benefits for medical care, the EAP will be a group health plan subject to the ACA's market reform requirements, such as the ACA's prohibition on annual dollar limits and the requirement to cover preventive care without cost sharing. **To be exempt from the ACA's market reforms, a stand-alone EAP must meet the criteria for being an excepted benefit.**

[Final rules](#) provide that an EAP is an excepted benefit if the following four requirements are met:

1. The program **does not provide significant benefits in the nature of medical care** (see below for more information on this requirement);
2. The EAP's benefits are not coordinated with benefits under another group health plan. This requirement has two elements:
 - Participants in the separate group health plan must not be required to use and exhaust benefits under the EAP before an individual is eligible for benefits under the group health plan; and
 - Participant eligibility for benefits under the EAP must not be dependent on participation in another group health plan;
3. **No employee premiums or contributions** may be required to participate in the EAP; and

Compliance Overview

4. The EAP does not impose any cost-sharing requirements.

To determine whether an EAP provides significant benefits in the nature of medical care, the **amount, scope and duration of covered services** must be considered. The final rules provide the following examples regarding this requirement:

- **No significant benefits:** An EAP that provides only limited, short-term outpatient counseling for substance use disorder services (without covering inpatient, residential, partial residential or intensive outpatient care) without requiring prior authorization or review for medical necessity does not provide significant benefits in the nature of medical care.
- **Significant benefits:** An EAP that provides disease management services (such as laboratory testing, counseling and prescription drugs) for individuals with chronic conditions, such as diabetes, does provide significant benefits in the nature of medical care.

Other Compliance Concerns

HSA Eligibility

Employers that offer HDHPs that are compatible with HSAs should consider how an EAP may impact participants' HSA eligibility. To be eligible for HSA contributions, an individual generally cannot have health coverage other than HDHP coverage. According to [IRS Notice 2004-50](#), an individual's EAP coverage will not affect their eligibility for HSA contributions if the program does not provide "**significant benefits in the nature of medical care or treatment.**" For HSA purposes, screenings and other preventive care services are disregarded to determine whether a program provides significant benefits in the nature of medical care or treatment. IRS Notice 2004-50 (Q&A-10) provides the following example to illustrate when an EAP does not provide significant benefits in the nature of medical care or treatment:

Example: An employer offers a program that provides employees with benefits under an EAP, regardless of enrollment in a health plan. The EAP is specifically designed to assist the employer in improving productivity by helping employees identify and resolve personal and work concerns that affect job performance and the work environment. The benefits consist primarily of free or low-cost confidential short-term counseling to identify an employee's problem that may affect job performance and, when appropriate, referrals to an outside organization, facility or program to assist the employee in resolving the problem. The issues addressed during the short-term counseling include but are not limited to substance abuse, alcoholism, mental health and emotional disorders, financial and legal difficulties, and dependent care needs. This EAP does not provide significant benefits in the nature of medical care or treatment.

The Mental Health Parity and Addiction Equity Act

The Mental Health Parity and Addiction Equity Act (MHPAEA) is a federal law that generally prevents group health plans and health insurance issuers that provide MH/SUD benefits from imposing less favorable limitations on those benefits than on medical and surgical coverage. MHPAEA generally applies to health plans sponsored by employers with more than 50 employees. However, non-grandfathered health plans in the small group market must provide essential health benefits (which include MH/SUD services) and comply with MHPAEA.

If an EAP qualifies as an excepted benefit, the EAP's benefits are not subject to MHPAEA's parity requirements. However, to comply with MHPAEA, **employees cannot be required to use the EAP's benefits before allowing access to a group medical plan's MH/SUD benefits** unless there is a similar program in place for medical and surgical benefits.