

# Alphabet Soup: What's it all Mean?

By Marilyn Gaipa

Are EAPs covered under HIPAA regulations? Where does ERISA fit in? What about COBRA or the security rule? Accreditation? How does Sarbanes-Oxley impact EAPs?

All this “alphabet soup” may be enough to give you a headache! Just what does an EA professional need to know anyway? Hopefully, this article will sort things out for you.

Unfortunately, there are no easy cut and dry answers regarding the relationship between EAPs and HIPAA and ERISA. At this point, in terms of how they are reimbursed and structured by employers, EAPs are increasingly being defined as “employee welfare benefit plans.” This definition can create compliance responsibilities under the Health Insurance Portability and Accountability Act (HIPAA), the Employee Retirement Income Security Act (ERISA), and the Consolidated Omnibus Budget Reconciliation Act (COBRA).

ERISA is a federal law that regulates employee benefit plans sponsored by private sector employers. The Department of Labor (DOL) is the agency responsible for implementing and overseeing ERISA. The status as an “employee welfare benefit plan” within ERISA is determined by:

- The delivery of EAP services under definitions established by the DOL; and
- How those definitions relation to HIPAA regulations, defining EAP as a healthcare plan, healthcare provider, or as a business associate.

HIPAA defines a healthcare plan as:

- (i) “A group health plan, as defined in this section. . .”; and
- (viii) “An employee welfare benefit plan or any other arrangement that is established or maintained for the purpose of offering or providing health benefits to the employees.”
- Download the privacy rule at [www.hhs.gov/ocr](http://www.hhs.gov/ocr).

## **DOL Rulings: How is a Group Health Plan Defined?**

Basically, the DOL has taken the position that an EAP provides medical benefits whenever it is:

- Staffed by trained counselors, whether internal or external; and when it
- Provides any form of counseling.

The DOL has affirmed this position on numerous occasions. In one ruling, it stated that, “EAPs provide medical benefits when it is staffed by trained counselors who provide any form of counseling, assessment or care.” (DOL Advisory Opinion 83-35A – June 27, 1983.)

In 1991, the DOL ruled that an employer-established voluntary EAP was mandatory for employees identified under random drug testing. In this case, two toll-free numbers listed in an EAP benefit book given to employees provided the referrals. One number was a National Institute of Drug Abuse hotline. However, an employee who simply gave out referral information staffed the other number. He/she had no clinical background or training. In this case, the DOL said that the EAP was not an employee welfare benefit plan, as it only provided referrals and not “medical” benefits or benefits “in the event of sickness.”

These issues have changed since the passage of HIPAA, which maintains that compliance extends to unlicensed professionals. The U.S. 9<sup>th</sup> District Court of Appeals ruled in *Oleszka vs. the State Insurance Compensation Fund* in 2001 that therapist privilege extended to unlicensed counselors in employee assistance programs. This privilege previously only covered licensed mental health professionals.

### **Is an EAP a Health Plan?**

If an EAP is a health plan, what compliance obligations are created? It really depends on how the employer approaches the matter: 1) Whether the employer makes it part of a health or other ERISA welfare plan; 2) Whether there is a separate 5500 plan document; and 3) Whether there is bundling or unbundling of the EAP benefit. There could also be compliance obligations as part of a general employer health plan or an EAP health plan.

Employers generally are sponsors of the health plan. However, directly speaking, employers are not covered entities. Furthermore, while employer functions are generally exempt from HIPAA regulations, additional compliance obligations for employers may be implemented under HIPAA. *This is a potential concern for EAPs.* Still, employers in most cases want EAPs to understand and comply with regulations.

Another important consideration for the EAP is whether there is an employee welfare benefit plan designation. Generally:

- There must be 50 or more participants in the plan for compliance obligations to apply.
- Once covered by ERISA, employees can select the EAP as a COBRA benefit.
- Federal law does not permit the employer to charge the former employee more than 110% of the employer's usual cost or fee.
- There may be a significant cost for an EAP to provide this designation.

### **Security Rule**

The security rule portion of HIPAA is grouped around the same concept as the privacy rule, with administrative, technical, and physical safeguards. An excellent, free compliance document is available at [www.wedi.org/snip](http://www.wedi.org/snip).

The compliance deadline for the security rule portion of HIPAA went into effect in April. The deadline for small health plans will be April 2006. However, the security rule only applies to electronic confidential information, or ePHI. Also, the risks of inappropriate use or disclosure of ePHI must be weighed against the cost of protective measures.

### **Impact on EAPs**

What is the effect of all this legislation on an individual EAP? Since there are many forms of employee assistance plans, go to [www.cms.gov/hipaa/hipaa2/support/tools/decisionsupport/default.asp](http://www.cms.gov/hipaa/hipaa2/support/tools/decisionsupport/default.asp) and view the covered entity decision tools. Read this material to decide how your specific EAP is covered under these regulations.

### **Sarbanes-Oxley**

The accreditation process can help an EAP organize compliance efforts, should you so choose. Commission on Audit (COA) and Commission on Accreditation of Rehabilitation Facilities (CARF) standards address the privacy aspect of HIPAA, but security rule standards are not covered by COA/CARF in any detail.

As part of an accreditation process, the EAP needs to examine internal requirements such as regulations, and external factors such as credibility and customer needs.

### **Cost-Effective Business Strategy**

To develop an effective business strategy, begin by evaluating compliance requirements and responsibilities. What are some potential customer requirements? How do you plan on delivering EAP services over the next year? Five years? What is the potential cost if the EAP chooses not to comply?

Finally, if the EAP decides to develop a compliance program and/or pursue accreditation, consider:

- What internal resources does the EAP have already?
- Will the EAP need to use outside consulting services?
- How will the EAP assess ROI (return on investment) or cost benefit analysis?

### **Summary**

There is a lot to consider for the individual EAP to address the myriad of compliance regulations that abound today. But you need to know how these laws affect your company clients, and you need to know how they impact your EAP. Hopefully, this article has given you a good start.

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