PITTA LLP
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EMPLOYEE BENEFITS
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JUNE 21, 2024 EDITION

HIPAA PRIVACY RULE UPDATES TO IMPACT USE AND DISCLOSURE OF PROTECTED HEALTH INFORMATION RELATED TO REPRODUCTIVE HEALTH

In the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), which overturned *Roe v. Wade*, a number of states passed legislation to make it illegal for plan sponsors of group health plans, and persons and/or entities affiliated with those group health plans, to offer certain types of reproductive health service coverage to participants and/or their dependents. In response to this legislative activity, on April 12, 2023, the U.S. Department of Health and Human Services ("HHS") published a proposed rule modifying the Standards for Privacy of Individually Identifiable Health Information (the "Privacy Rule") under the Health Insurance Portability and Accountability Act of 1996 and the Health Information Technology for Economic and Clinical Health Act of 2009, to include privacy protections for reproductive health information. The proposed rule became final on April 26, 2024, with an effective date of June 25, 2024. The final rule may be read in its entirety here.

Now under the Privacy Rule, the definition of "health care" includes a subset for the term "reproductive health care". The term is defined as "care, services, or supplies related to the reproductive health of the individual" and is meant to include not only reproductive health care and services furnished by a health care provider and supplies filled pursuant to a prescription, but also the care, services or supplies furnished by other persons or non-prescription supplies purchased in connection with an individual's reproductive system, including but not limited to contraception, pregnancy-related health care, fertility-related health care, or the diagnosis and treatment of conditions related to the reproductive system. Further, HHS added prohibitions related to disclosure of protected health information ("PHI") for "reproductive health care" services or treatment obtained lawfully for certain non-health care related purposes.

As a result of these changes, group health plans and their business associates are generally prohibited from using or disclosing PHI when it is sought to investigate or impose liability on individuals, health care providers, or others who seek, obtain, provide or facilitate reproductive health care. Pursuant to the addition of a new Section 45 CFR 164.509 titled "Uses and disclosures for which an attestation is required," covered entities are required, upon receipt of a request for a covered individual's PHI, to obtain a signed attestation from the person or entity making the request that the use or disclosure of reproductive PHI shall not be used for health oversight activity, civil, criminal and administrative proceedings, law enforcement purposes and/or disclosures to coroners or medical examiners. HHS's Office of Civil Rights is in the process of

creating a model attestation for covered entities to review to pattern their respective attestation forms after.

Plan sponsors of group health plans and their business associates have one hundred and eighty (180) days after the effective date, or until December 23, 2024, to update their PHI policies and procedures to bring them into compliance with the modification to the Privacy Rule.

REASSESSING "ASSETS" AND THE VALUE OF PARTICIPANT DATA IN A SHIFTING CYBERSECURITY LANDSCAPE

As cybersecurity threats to employee benefit plans become more sophisticated, regulatory guidance providing best practices for recordkeepers to implement to combat such threats has struggled to keep pace. These gaps in guidance have increased liability exposure for employee benefit plans and their service providers. In April 2024, an employee of Merrill, recordkeeper for the Walmart 401(k) Retirement Plan, sent an email to an unauthorized entity and inadvertently shared the personally identifiable information ("PII") of more than 1,800 plan participants. This human error, the most recent in a wave of breaches involving employee benefit plan service providers, highlights the need for more robust statutory guidance on how to safeguard a plan's PII.

The Advisory Council on Employee Welfare and Pension Benefit Plans, otherwise known as the ERISA Advisory Council, recommended in 2011, and again in 2016, that the United States Department of Labor ("DOL") provide guidance regarding whether securing PII is a fiduciary responsibility. On April 14, 2021, the DOL published three forms of cybersecurity guidance for plan sponsors, fiduciaries, recordkeepers and plan participants. Two pieces of the 2021 guidance were aimed at plan sponsors who are required by the Employee Retirement Security Act of 1974, *as amended from time to time* ("ERISA"), to adhere to fiduciary duties of prudence and loyalty in the administration of employee benefit plans for the benefit of plan participants and beneficiaries. The Walmart breach, however, demonstrates that third-party service providers such as recordkeepers are often the parties responsible for potentially harmful data breaches. Since these service providers are often contractually insulated from fiduciary responsibility, they may fall outside the purview of oversight by the DOL.

Note, however, fiduciary liability under ERISA may be extended to other parties if those parties were "exercising control" over plan assets when the breach in question occurred. This begs the question: can data qualify as a plan asset? While ERISA does not provide a definition for the term "plan asset," the protection of plan data and the protection of plan assets are often differentiated as two different considerations. For example, plans may have different insurance policies covering cyber threats: cybersecurity insurance, which tends to cover the loss or misappropriation of data; fidelity/crime coverage, which covers the theft of plan assets; and separate coverage for fiduciary liability. Courts too have been reluctant to consider data as a plan asset. For example, in *Harmon v. Shell Oil Co.*, No. 3:20-cv-00021, 2021 WL 1232694 (S.D. Tex. Mar. 30, 2021), the U.S. District Court for the Southern District of Texas held that

participant data does not qualify as a plan asset, and consequently found the plan's recordkeeper, Fidelity, not liable for breach of fiduciary duty when it shared participant data with other Fidelity entities.

Recently, in *Cassell v. Vanderbilt Univ.*, No. 3:16-cv-02086, (M.D. Tenn. filed Aug. 10, 2016), Vanderbilt University defended a number of breach of fiduciary duty claims against its administration of its ERISA 403(b) plan - among the claims was that the total cost of the plan's recordkeepers' fees were unreasonably high partly because they failed to account for the value of the recordkeepers' access to personal data, which a recordkeeper used to market its own products directly to participants. The case never made it to trial, as the parties settled. However, terms of the settlement required Vanderbilt to prohibit its recordkeepers from using participant data for marketing purposes. Although the *Cassell* settlement will not serve as legal precedent, the settlement could signal a shift in how participant data is valued in the future.

Whether technically a "plan asset" or not, plan participants' PII is increasingly at risk, and its safeguarding is crucial to the health of employee benefits. While there are models for cybersecurity standards available in other contexts, such as the Securities and Exchange Commission's Regulation S-P, plan administrators for employee benefit plans, third-party service providers and especially plan participants, would greatly benefit from more ERISA-specific regulation on this increasingly crucial issue.

FORMER PLAN INVESTMENT MANAGER ORDERED TO RETURN MILLIONS, BUT "PROFITS" REQUIRES CLARIFICATION

The U.S. Court of Appeals for the Second Circuit partially affirmed the confirmation of an arbitration award by the U.S. District Court for the Southern District of New York that ordered the return of fees to a nurses' union pension plan from a self-dealing investment advisor who had been employed by the plan as its Chief Investment Officer ("CIO"). *Trustees of N.Y. State Nurses Ass'n Pension Plan v. White Oak Global Advisors, LLC*, 2d Cir. No. 22-1783 (May 21, 2024).

White Oak was recommended to the Board of Trustees for the N.Y. State Nurses Association Pension Plan ("Plan") in 2013 by the Plan's CIO, Russell Niemie ("Niemie"). The Plan's Board of Trustees accepted and approved Niemie's recommendation and entered into a two-year investment management agreement with White Oak to become the Plan's investment manager, effective December 31, 2013. White Oak managed approximately $80 million in Plan assets. Before the agreement was to expire, without the knowledge of the Plan's Board of Trustees, Niemie negotiated a deal with White Oak to become their vice-chairman and gave his notice of resignation to the Plan. He also recommended that the Plan renew its agreement with White Oak. When the Board of Trustees discovered that their former CIO was now employed by White Oak, the Plan Trustees commenced an investigation of Niemie's investment recommendations, including the Plan's White Oak investment portfolio.

During their investigation, the Board of Trustees also requested that White Oak turn over documentation related to fees they had collected, as it was believed the

receipt of these fees was in violation of the investment management agreement. Instead of turning over any documentation, White Oak provided notice of termination to the Plan, which prompted the Plan to exercise rights within the investment management agreement to extend it for a six (6)-month period until the Plan could find a successor. On July 31, 2018, the Plan filed a demand for arbitration against White Oak and Niemie pursuant to the investment management agreement's arbitration clause and sought demand of the return of the Plan's investment. The Plan won an arbitration award against Niemie and White Oak ordering the return of a portion of the fees charged and "profits" totaling about $96 million. The U.S. District Court for the Southern District of New York confirmed the arbitration award on March 17, 2022, which White Oak appealed.

Circuit Judge Lynch, joined by Judge Park and District Court Judge Clarke confirmed the award as to fees but remanded for clarification as to "profits" and attorney's fees. White Oak had argued that the District Court lacked jurisdiction to confirm the award where jurisdiction was based on the Federal Arbitration Act. The Court rejected this argument, finding that Section 502(a)(3) of the Employee Retirement Security Act of 1974, *as amended from time to time* ("ERISA"), provided the necessary jurisdiction since it authorized the Board of Trustees to sue on behalf of the Plan to enforce the terms of an investment management agreement, a Plan document pursuant to ERISA Section 3(38), between two co-fiduciaries to an ERISA plan. The Judges also found that pre-judgment interest was due as prescribed by the arbitrator. However, the Court agreed that neither the award nor the District Court decision sufficiently clarified the details needed for Plan recovery of "profits" and attorneys' fees. Accordingly, the Appeals Court remanded the case to the District Court and arbitrator for clarification of those points.

A FEW REMINDERS
(Based on calendar-year plans)

These reminders are for informational purposes only and are not intended to replace your regular compliance calendar as they do not include all deadlines that may be applicable to your plan.

JUNE

HEALTH AND WELFARE PLANS

- **Prescription Drug Reporting**
  - June 1, 2024 was the deadline by which group health plans must submit information on prescription drug and other health care spending to CMS for the 2023 calendar year.

DEFINED CONTRIBUTION PLANS

- **Corrective Distributions for Failed Actual Deferral Percentage ("ADP") and Actual Contribution Percentage ("ACP") Tests for Certain Eligible Automatic Contribution Arrangements ("EACAs")**
  - June 30, 2024 is the deadline by which certain EACAs must process corrective distributions for failed ADP/ACP tests without incurring a 10% excise tax (i.e., six (6) months after the end of the plan year).

JULY

ALL PLANS

- **Summary of Material Modifications ("SMM")**
  - July 28, 2024 is the deadline by which plan administrators must furnish an SMM to participants and beneficiaries receiving benefits explaining a material plan change that was adopted in Calendar Year 2023 unless a revised Summary Plan Description containing the modification was distributed.
- **Form 5500 Series (Annual Return/Report of Employee Benefit Plan) and Schedules**
  - July 31, 2024 is the deadline by which a plan administrator must file the Form 5500 unless an extension is granted by filing the Form 5558 before the due date.

HEALTH AND WELFARE PLANS

- **Form 720, Quarterly Federal Excise Tax Return**
  - July 31, 2024 is the deadline by which self-insured group health plans must pay its fees to the Patient-Centered Outcomes Research Institute ("PCORI") by filing the Form 720.

DEFINED BENEFIT AND DEFINED CONTRIBUTION PLANS

- **Form 8955-SSA**
  - July 31, 2024 is the deadline by which the Form 8955-SSA must be filed by the plan to identify separated participants with deferred vested benefits unless an extension is granted by filing the Form 5558 before the due date.

DEFINED BENEFIT PLANS

- **Quarterly Installments of Required Contributions**
  - July 15, 2024 is the deadline by which second quarter 2024 contributions are due.

DEFINED CONTRIBUTION PLANS

- **Form 5330**
  - July 31, 2024 is the deadline by which the Form 5330 must be filed if the plan had delayed contribution deposits for the prior calendar year.

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

To Our Clients and Friends: To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.