

# RECENT LEGISLATIVE CHANGES

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# 2009 Legislative Update Agenda

- COBRA Subsidy
- Children's Health Insurance Program Reauthorization Act of 2009 (CHIP)
- Genetic Information Nondiscrimination Act of 2008 (GINA)
- Fostering Connections to Success and Increasing Adoptions Act of 2008
- ARRA Health Insurance Portability and Accountability Act (HIPAA)
- Medicare, Medicaid and SCHIP Extension Act of 2007
- Transportation Subsidy Equality
- IRS Information Letters 2009-08 and 2009-12
- IRS Notice 2009-3
- IRS Notice 2009-42
- DOL Final Regulations
- Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART)



# RECENT LEGISLATIVE CHANGES

## COBRA Subsidy



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# COBRA Subsidy: *Brief Overview*

- Enacted under ARRA
- Federal government subsidy to AEIs
  - 65% of COBRA premium actually charged
  - Up to 9 months
- Applies to coverage under
  - Federal COBRA laws, AND
  - State continuation laws (“mini-COBRA”)
- Employer given credit for subsidy against payroll and federal income tax withholding
- “Second chance” election period
  - Runs from date of Act’s enactment until 60 days after notification
- Model Notices issued by the DOL on 03/19/09

# Notice 2009-27: *Guidance on COBRA Subsidy*

- **Severance Benefits May Disqualify**

- **Only AEIs are eligible**

- AEI are:

- Qualified beneficiary as a result of involuntary termination that occurred between 09/01/08 and 12/31/09;
- Eligible for COBRA during that time; and
- Elects COBRA continuation

- **Need both**

- Involuntary termination, AND
- Loss of coverage during termination eligibility period

- **If severance benefits extend health coverage past the eligibility period, subsidy not available**

# Notice 2009-27: *Guidance on COBRA Subsidy*

- **Premium Reduction**

- Subsidy calculation based on actual premium charged
- Employers that charge less than the 102% maximum allowed may
  - Increase the premium, and
  - Calculate the subsidy on the adjusted premium

- **Payment to Insurers**

- Insured plans (except multiemployer plans) that directly collect premiums from COBRA participants are required to treat the participants' 35% as payment in full prior to receiving the employer portion
- Insurers that do not comply may be subject to excise taxes

# Notice 2009-27: *Guidance on COBRA Subsidy*

- **HRAs Eligible but FSAs Are Not**

- Premium reduction available for any group health plan regardless of whether employer pays portion of costs for active employees, including:
  - Vision-only
  - Dental-only
  - “Mini-med” plan
- Group health plan includes HRA but not a FSA

- **Gaps in Coverage May Occur**

- “Second chance” election
- Coverage NOT retroactive to the date originally lost

# Notice 2009-27: *Guidance on COBRA Subsidy*

- **Spouse's Employer and Retiree Medical Coverage**

- Subsidy ends on date AEI becomes eligible for other group health or Medicare coverage , unless other terminating event occurs first

- **Examples:**

- Spouse of AEI becomes eligible for his/her employer's group plan;
- AEI or eligible dependent becomes eligible for Medicare;

- **However, if retiree medical coverage is offered as alternative to COBRA under the same group health plan, there is no effect on eligibility subsidy**

- Treasury Regulations state all health plans provided by an organization constitute a single group health plan unless plan documents clearly specify they are separate plans

# Notice 2009-27: *Guidance on COBRA Subsidy*

- Reduction Period

- Applies as of the first coverage period on or after February 17, 2009 for which the AEI is eligible
- Cannot prorate monthly premiums for February - only March and later months

- Subsidy is Mandatory Unless Waived

- Plan cannot refuse subsidy to AEI even if income is enough that premium recapture will apply
- Subsidy must be provided unless permanent waiver of premium reduction is provided by AEI

# RECENT LEGISLATIVE CHANGES

## Children's Health Insurance Program Reauthorization Act of 2009 (CHIP)



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# CHIP: *Summary*

- SCHIP expanded by CHIP effective April 1, 2009
- Provides added flexibility to cover children whose annual income exceeds 200% of FPL
  - \$22,050 for family of 4 in 2009
- Also includes provisions allowing legal aliens to participate
- Allows (not required) states to provide premium assistance to qualifying children (and employed parents in some cases) to help pay employer group health plan premiums



# CHIP: *Qualified Coverage*

- Applies to “qualified employer-sponsored coverage”
  - Group health plan or health insurance coverage offered through employers which meet the following:
    - Coverage must be “creditable coverage” for HIPAA purposes;
    - Employer contribution toward the cost of any premium for the coverage must be at least 40%; AND
    - Coverage must be available as a nondiscriminatory group for eligibility purposes under Internal Revenue Code’s Section 105(h) rules
  - Does not include Health FSAs or HDHPs (for HSA purposes)

# CHIP: *Premium Assistance*

- Incremental difference in cost to employee between cost of enrolling only the employee and cost of enrolling employee and child(ren) under employer-sponsored coverage
- May be either a direct reimbursement to employee or a reimbursement to employee's employer
  - **Opt-out provision available for employers**
    - Employer continues to withhold entire amount from employee and employee directly reimbursed by State



# CHIP: *Special Enrollment Period*

- Employees and dependents eligible for but not enrolled receive if the employee/dependent(s):
  - Lose Medicaid or CHIP coverage due to lack of eligibility;  
OR
  - Become eligible for State's premium assistance program
- 60 days from date of event to timely request enrollment in employer-sponsored plan
- Method or timing of employee notification not addressed
  - Assumption is that employers should update their current notices to include the provisions, since CHIP amends HIPAA's special enrollment provisions



# CHIP: *Notice and Disclosure Obligations*

- **Notification of availability**
  - Model national and state-specific notices to be issued within 1 year of enactment (2/4/09)
  - Notice must be provided with 1st plan year on or after date model notices issued
  - Once notice obligations are effective, can be included with other benefits information (e.g. annual enrollment packets, SPDs)
- **Information for State**
  - Must provide info to the State on employee/family's plan coverage as requested
  - Model form for submission of requested information to be provided
    - No deadline currently given
  - Anticipated information to be included in Model form:
    - Eligibility status for employer-sponsored coverage
    - Plan administrator contact information
    - Description of Plan benefits
    - Premium and cost sharing amounts for coverage
  - No guidance currently available on responding to State requests for information prior to Model form being issued



# CHIP: *Penalties*

- Employers that fail to provide the required employee notice may be subject to a \$100 daily penalty for each violation
- Each employee who does not receive the notice is considered a separate violation
- Plan administrators that fail to respond to state information requests face similar penalty assessments

# RECENT LEGISLATIVE CHANGES

## Genetic Information Nondiscrimination Act of 2008 (GINA)



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# GINA: *Summary*

- Enhances HIPAA and ERISA by prohibiting employers and group health plans from discriminating against employees based on their or their family members' genetic information
- Employment provisions effective November 21, 2009
- Health plan provisions effective May 21, 2009
- Proposed regulations issued by the EEOC on March 2, 2009



# GINA: *Employment Provisions*

- Prohibits employers, employment agencies and labor organizations from:
  - Requesting or acquiring genetic information (except for limited circumstances)
  - Using generic information to make employment decisions
  - Using genetic information to limit, segregate or classify employees in any way that would limit or affect their status as employees
  - Disclosing genetic information (except in limited circumstances)
  - Retaliating against employees for exercising their rights under GINA

# GINA: *Health Plan Provisions*

- Prohibits health plan sponsors and health insurers from:
  - Requesting, requiring or purchasing genetic information for underwriting purposes or in advance of an individual's enrollment
  - Adjusting premiums or contribution amounts of the group based on genetic information
  - Requesting or requiring an individual or family member to undergo a genetic test (unless specifically allowed by GINA)
  - Imposing a preexisting condition exclusion based solely on genetic information (absent a diagnosis of a condition)
  - Discriminating against individuals in eligibility and continued eligibility for benefits based on genetic information
  - Discriminating against individuals in premium or contribution rates under the plan or coverage based on genetic information
- Genetic information may be used by health plans for payment determinations, but must be handled in same manner as other HIPAA-protected information



# GINA: *Definition of Genetic Info*

- GINA defines genetic information to include any information about:
  - An individual's genetic tests,
  - The genetic tests of family members of such individual, AND
  - The manifestation of a disease or disorder in family members of such individual

# GINA: *Exceptions to Acquiring Genetic Info*

- There are 6 exceptions to the prohibition on acquiring genetic information
  - Inadvertent disclosures
  - Commercially and publicly purchased documents
  - Wellness programs
  - Medical leave laws
  - Workplace monitoring
  - Law enforcement purposes

# GINA: *Exceptions to Disclosing Genetic Info*

- There are 6 exceptions to the prohibition on disclosing genetic information
  - Disclosure to the employee at the employee's request
  - Disclosure to an occupational or other health researcher
  - Disclosure in response to a court order
  - Disclosure to government officials investigating GINA compliance (if the information is relevant)
  - Disclosure to comply with federal/state family and medical leave law requirements
  - Disclosure to public health agencies only for information that concerns contagious disease that presents an imminent hazard of death or life-threatening illness

# GINA: *EEOC Proposed Regulations*

- Proposed regulations provide additional guidance
  - Employee is defined to cover not just current employees but also applicants and former employees
  - Definition of “genetic information” updated to include genetic information of a fetus carried by an individual or family member receiving assistive reproductive services
  - Drug and alcohol tests are not “genetic tests”
- Although the ADA allows employers to obtain genetic information after making a job offer, GINA now prohibits this action



# GINA: *Penalties*

- **Employment Provision Penalties**

- **Damages may include**

- Front pay, back pay, emotional distress and compensatory and punitive damages

- **Disparate impact theory is not available**

- **Health Plan Provision Penalties**

- **Civil penalties of up to \$100 per day per individual**

- **If violations are not corrected, a minimum penalty of \$2,500 for de minimus violations or \$15,000 for material violations**

- **Cap on penalties of the lesser of 10% of the amount paid by the plan sponsor during the preceding taxable year or \$500,000**

- **No penalties if reasonable diligence used, if failure due to reasonable cause or if failure corrected within 30-days**

# RECENT LEGISLATIVE CHANGES

## Fostering Connections to Success and Increasing Adoptions Act of 2008



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# Fostering Connections to Success and Increasing Adoptions Act of 2008

- Enacted on October 7, 2008, effective for taxable years beginning on or after December 31, 2008
- Changes to the IRC
  - Section 152 – definition of dependent
    - Section 152 forms the basis for determination of whether a dependent can be covered on group health plans on a tax preferred basis
    - Generally, tax payers may claim someone as “dependent” for purposes of federal income tax only if the dependent meets the definition of a “qualifying child” or “qualifying relative” as defined by Section 152
  - Section 152 definition requirements
    - Relationship
    - Age
    - Financial Support

# Fostering Connections to Success and Increasing Adoptions Act of 2008

- **Relationship**

- Non-parent taxpayer can now claim an individual where parents are eligible to claim a “qualifying child” but do not
- Non-parent taxpayer’s adjustable gross income must be higher than that of either parent

- **Age**

- The “qualifying child” must be younger than the taxpayer claiming the individual as a “qualifying child”

- **Financial Support**

- The “qualifying child” must not have filed a joint return (other than for a claim of refund) for taxable year in which taxable year of taxpayer begins
  - A married individual who files a joint return only for a claim of refund could constitute a “qualifying child” if other requirements are met

# RECENT LEGISLATIVE CHANGES

## EEOC Informal Discussion Letter – Health Risk Assessments and the Americans with Disabilities Act (ADA)



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# EEOC Informal Discussion Letter: Health Risk Assessments and the ADA

- Information discussion letter released on March 6, 2009 by EEOC
- Provides guidance on the relation between Health Risk Assessments and the ADA
- Does not constitute an official opinion for reliance but provides indication on how EEOC would rule
- Employer Situation
  - Employer requires that employees participate in a Health Risk Assessment in order to obtain coverage under employer's self-funded health plan
    - HRA involved short health-related questionnaire, blood pressure screening and blood panel
    - Results sent directly to employee with employer receiving only aggregate information
    - Employees who declined to participate were ineligible from participation in health plan

# EEOC Informal Discussion Letter: *Health Risk Assessments and the ADA*

- EEOC response

- No official position taken on issue yet
- Requiring all employees to take a Health Risk Assessment that includes disability-related inquiries and medical examinations as prerequisite for obtaining health coverage “does not appear to be job-related and consistent with business necessity”
- Therefore, requirement would violate ADA
- Disability-related inquiries/examinations only permitted as part of voluntary wellness program



# RECENT LEGISLATIVE CHANGES

American Recovery and Reinvestment Act of 2009 (ARRA) Health Insurance Portability and Accountability Act (HIPAA) Changes



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# ARRA HIPAA Changes: *Overview*

- Title XIII of ARRA imposes numerous new requirements, enforcement provisions and penalties for covered entities, business associates and vendors
- Many of the changes focus on privacy and security requirements
- Most challenging requirements will affect BAs
  - Defined as individuals or corporate persons that perform ANY function or activity involving the use of PHI

# ARRA HIPAA Changes: *Business Associates*

- **BAs required to comply with HIPAA Privacy and Security rules**
  - **Privacy rules**
    - Any entity that engages in health information exchanges or provides data transmission of PHI including PHR vendors and health information exchanges is considered a BA
    - These entities must enter into a BA contract with the covered entity and will be subject to ARRA's civil and criminal penalty provisions
  - **Security rules**
    - Administrative, physical and technical safeguards and the policy, procedure and documentation requirements of HIPAA's security rule apply to BAs of a covered entity in the same manner as they apply to the covered entity
    - Requirements must be incorporated into BA contracts and provide for notification provisions for a breach and the application of ARRA's criminal and civil penalties

## ARRA HIPAA Changes: *Business Associates*

- BAs prohibited from using or disclosing any PHI in a manner not compliant with HIPAA requirements of the BA contract or agreement
- ARRA requires an amendment of existing BA contracts or agreements to reflect the new provisions
- Required changes become effective February 17, 2010 (one year after enactment of ARRA)

# ARRA HIPAA Changes: *Data Breach Events*

- **Notice to individuals of privacy and security breaches**
  - ARRA imposes certain notification requirements on covered entities and BAs in the event of a breach of “unsecured PHI”
  - Breach is defined as “the unauthorized acquisition, access, use, or disclosure of PHI which comprises the security or privacy of such information, except where an authorized person to whom such information is disclosed would not reasonably have been able to retain such information”
  - Unsecured PHI is defined as PHI that the covered entity or BA has not secured via standards approved by the Secretary of Health and Human Services (HHS)
- **Notification Provisions**
  - Generally, notification of breach must be provided “without reasonable delay”
  - In no case later than 60 days after
    - Discovery of breach, OR
    - When the breach should reasonably have been discovered
  - If full 60 days used entity involved must justify reasons

# ARRA HIPAA Changes: *Data Breach Events*

- For Covered Entities notification must be made to individuals whose unsecured PHI was or is reasonably believed to be accessed, acquired or disclosed due to security breach
- For BAs, notification must be made to the Covered Entity of a breach of information and identity of all individuals affected or potentially affected
- Generally notification must be made via first class mail – however special notification provisions apply
  - If contact information is out of date or breach affects more than 10 people, AND
  - For breaches involving more than 500 individuals
- Secretary of HHS must be notified of all breaches

# ARRA HIPAA Changes: *Data Breach Events*

- **Notices must contain (to the extent possible):**
  - Brief description of what happened, including the date of the breach and the date of the discovery of the breach (if known);
  - Description of the types of unsecured PHI involved in the breach;
  - Steps individuals should take to protect themselves from potential harm as a result of the breach;
  - Brief description of what the entity involved is doing to investigate the breach, to mitigate losses and to protect against further breaches; and
  - Contact procedures for individuals to ask questions or receive additional information, including a toll-free telephone number and an e-mail address, web site or postal address;

# ARRA HIPAA Changes: *Enforcement Provisions*

- Periodic audits of covered entities and Business Associates by HHS
- Secretary of HHS required to impose civil penalties if violation due to willful neglect
- Criminal enforcement not limited to covered entities
- States' Attorney General authorized to bring civil action on behalf of state residents

# ARRA HIPAA Changes: *Civil Penalties*

- Tier 1 – where violator did not know of violation
  - \$100 per violation, not to exceed \$25,000 in calendar year
- Tier 2 – where violation due to reasonable cause
  - \$1,000 per violation, not to exceed \$100,000 in calendar year
- Tier 3 – where violation due to willful neglect but corrected within 30 days
  - \$10,000 per violation, not to exceed \$250,000 in calendar year
- Tier 4 – where violation due to willful neglect and not corrected within 30 days
  - \$50,000 per violation, not to exceed \$1,500,000 in calendar year

# RECENT LEGISLATIVE CHANGES

## Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA)



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# MMSEA New Reporting Requirements

- Effective July 1, 2009, MMSEA added new mandatory reporting requirements for group health plans and other arrangements impacted by the MSP rules (i.e., liability insurance, no-fault insurance, and workers' compensation)
- To enable CMS to monitor proper payment of benefits
- Group health plans must report relevant information to CMS electronically on a quarterly basis
  - Plans may report to CMS themselves or may use plan's insurer or TPA as "responsible reporting entity"
- Penalty for non-compliance - \$1,000 per day per reportable Medicare claim



# RECENT LEGISLATIVE CHANGES

## Transportation Subsidy Equality



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# Transportation Subsidy Equality

- Enacted by the Stimulus Act
- Effective between March 1, 2009 and December 31, 2010
- Requires equity in transportation benefits
  - Raises monthly tax-free commuter benefits to \$230 for both parking and commuter benefits
  - Employers may need to update Section 132 plans (fringe benefit plans) if the plan defines the maximum benefit permitted



# RECENT LEGISLATIVE CHANGES

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## IRS Information Letters 2009-08 and 2009-12: Qualified Transportation Accounts



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# IRS Information Letters 2009-08 and 2009-12: *Qualified Transportation Accounts*

- Compensation reduction amounts for qualified transportation benefits are essentially non-refundable
- Qualified transportation fringe benefits include
  - Transportation in commuter highway vehicle
  - Transit pass
  - Qualified parking
  - Cash reimbursement
  - Employee contributes pre-taxed earnings to purchase the benefit, essentially converting pre-tax compensation into tax-free employer-provided benefit

# IRS Information Letters 2009-08 and 2009-12: *Qualified Transportation Accounts*

- Conversion only works where election becomes irrevocable by the time employee is able to currently receive cash and by beginning of the period for which fringe benefit will be provided
- If employee has right to receive cash after that time, constructive receipt doctrine applies
  - Only where the reduction election is revoked before the date the employee is currently able to receive the cash – and before the start of the period for which the benefits will be provided – can the employee instead receive the cash compensation

# RECENT LEGISLATIVE CHANGES

## IRS Notice 2009-3: Relief from Compliance with 403(b) Written Plan Requirement



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# IRS Notice 2009-3: *Relief from Compliance with 403(b) Written Plan Requirement*

- Final regulations under section 403(b) published July 26, 2007
- Final regulations required sponsors of 403(b) plans to maintain written plan document that satisfies the regulations effective January 1, 2009
  - However, no program established for plan sponsors to ensure plan document satisfies the requirements
- Notice 2009-3 provides relief to 403(b) plan sponsors who have made appropriate efforts to comply with the final regulations

# IRS Notice 2009-3: *Relief from Compliance with 403(b) Written Plan Requirement*

- 403(b) plans will not be treated as having failed to satisfy the final regulation requirements during the 2009 plan year if:
  - Written plan document that is intended to satisfy the requirements is adopted on or before December 31, 2009;
  - Plan is operated in accordance with reasonable interpretation of 403(b) and final regulations during 2009;
  - Prior to end of 2009, plan sponsor attempts to correct any operational failure, based on general principles of the Employee Plans Compliance Resolution System (EPCRS)

# RECENT LEGISLATIVE CHANGES

## IRS Notice 2009-42: Extending Deadline Under WREERA



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# IRS Notice 2009-42: *Extending Deadline Under WREERA*

- WREERA provided 2 types of funding relief to multiemployer plans
  - One year “zone status” freeze for all plans
  - Three year correction period extension for plans in “yellow zone” and “red zone”
- Relief available based on plan’s zone status in the first plan year the plan is subject to PPA funding provisions
- Guidance extends deadline for WREERA’s zone freeze election to the later of June 30, 2009 or 30 days after due date of annual certification of status for the election year
- Provides relief for plans that will have to arbitrate WREERA election decision
  - Request to revoke election that is made by the modified deadline will be automatically approved if:
    - Plan trustees have not been able to agree on an election so arbitration is necessary;
    - Plan trustees make election by modified deadline that is contingent on arbitration; AND
    - Resolution of arbitration is not to make the election

# RECENT LEGISLATIVE CHANGES

## DOL Final Regulations



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# DOL Final Regulations: *Civil Penalties Under ERISA Section 502(c)(4)*

- The PPA added disclosure requirements to Title I of ERISA and authorized civil penalties for failure to comply with the added disclosure requirements
- DOL issued final regulations on January 2, 2009 establishing process to be used to assess penalties
- Final regulations effective March 3, 2009
- Disclosures subject to the civil penalty include:
  - Funding-based limits on distributions or benefits
  - Multiemployer plan information
  - Potential withdrawal liability
  - Automatic contribution arrangements
- Civil penalty allowed by ERISA section 502(c)(4)
  - Not more than \$1,000 a day for each violation by any person

# DOL Final Regulations: *Civil Penalties Under ERISA Section 502(c)(4)*

- **Process for determining civil penalty**
  - DOL determines amount of penalty and informs plan administrator
  - Plan administrator allowed 30 days to show reasonable cause for waiver or reduction of penalty
  - DOL reviews plan administrator response and issues final written determination
  - Plan administrator has 30 days to request administrative hearing on final written determination (appeal)
  - Determination becomes final order in 45 days unless appealed

# DOL Final Regulations: *Civil Penalties Under ERISA Section 502(c)(4)*

- Key factors in DOL's determination of penalty amount
  - Culpability
  - Number of separate violations
  - Reasonable cause/mitigating circumstances
  - Joint and several liability

# RECENT LEGISLATIVE CHANGES

## Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART)



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# HEART: *Retirement Plan Provisions Effective in 2009*

- HEART signed into law on June 18, 2008
- Contains some provisions that are effective in 2009
- Differential Pay
  - IRC section 3401(h) added to the Code effective January 1, 2009
    - Requires federal income tax withholding from “differential wage payments to active duty members of the uniformed services”
  - IRC section 414(u) added to the Code effective January 1, 2009
    - Permits qualified retirement plans to recognize differential pay for contribution or benefit purposes

# HEART: *Retirement Plan Provisions Effective in 2009*

- **Distributions of Salary Deferrals**

- Applies to 401(k), 403(b) and eligible 457 plans
- Plan participants called to active duty for more than 30 days treated as having severed from employment for distribution purposes
  - If distribution is taken, participant then subject to 6-month suspension of right to make salary deferrals or employee contributions (beginning on date of distribution)



# Questions?

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# Reference - List of Acronyms

- ADA – Americans with Disabilities Act
- ARRA – American Recovery and Reinvestment Act of 2009
- AEI – Assistance Eligible Individual
- BA – Business Associates
- CHIP – Children’s Health Insurance Program Reauthorization Act of 2009
- COBRA – Consolidated Omnibus Budget Reconciliation Act
- DOL – Department of Labor
- EEOC – Equal Employment Opportunity Commission
- EPCRS – Employee Plans Compliance Resolution System
- ERISA – Employment Retirement Income Security Act
- FPL – Federal poverty level
- FSA – Flexible Spending Account
- GINA – Genetic Information Nondiscrimination Act of 2008
- HIPAA – Health Insurance Portability and Accountability Act
- HRA – Health Reimbursement Arrangement
- HSA – Health Savings Account
- HEART – Heroes Earnings Assistance and Relief Tax Act of 2008
- HDHP – High Deductible Health Plan
- IRC – Internal Revenue Code
- IRS – Internal Revenue Service
- MMSEA – Medicare, Medicaid and SCHIP Extension Act of 2007
- MSP – Medicare Secondary Payer
- PPA – Pension Protection Act of 2006
- PHI – Protected Health Information
- PHR – Personal Health Record
- SPD – Summary Plan Description
- WRERA – Worker, Retiree, and Employer Recovery Act of 2008