

ADP, LLC
HIPAA BUSINESS ASSOCIATE AMENDMENT
[Updated for 2013 Omnibus HIPAA Regulations]

The terms and provisions of this Business Associate Amendment (“Amendment”), dated _____, between ADP, LLC (“ADP”) and the ADP client executing below (“Client”), shall supersede any conflicting or inconsistent terms and conditions of the Major Accounts Services, National Account Services Master Services Agreement, FSA/TRIP Services Agreement, COBRA/HIPAA Services Agreement, Sales Order, or similar agreement for the provision of benefit services by ADP (the “Agreement”) to the extent of such conflict or inconsistency. Capitalized terms used in this Amendment without definition shall have the respective meanings assigned to such terms in the administrative simplification section of the Health Insurance Portability and Accountability Act of 1996 and its implementing regulations (45 CFR parts 160 and 164) and the Health Information Technology for Economic and Clinical Health Act and its implementing regulations (“HITECH”) (collectively “HIPAA”).

RECITALS

WHEREAS, the Agreement requires ADP to have access to Protected Health Information; and

WHEREAS, the parties acknowledge and agree that Client is a Covered Entity and ADP when providing COBRA administration services and/or health care-related spending account services (for purposes of this Amendment, referred to as “Services”) is a Business Associate of a Covered Entity when ADP creates, receives, maintains, transmits, uses or discloses Protected Health Information on behalf of Client in connection with those Services; and

WHEREAS, the parties desire to amend the Agreement to comply with HIPAA.

NOW THEREFORE, the Agreement is hereby amended and modified as follows:

AGREEMENT

1. General. A reference in this Amendment to a section in HIPAA means the section as it may be amended from time-to-time.

2. Obligations and Activities of ADP.

(a) ADP agrees to not use or further disclose Protected Health Information (“PHI”) other than as permitted or required by the Agreement (including this Amendment) or as Required by Law. ADP further agrees that, when requesting, using, or disclosing PHI, it shall limit PHI, to the extent practicable, to a Limited Data Set or, if needed, to the minimum necessary to accomplish the intended purpose of such request, use or disclosure. Client agrees and certifies that all requests or directions to ADP to use or disclose PHI will be limited to the minimum necessary PHI. To the extent that the Agreement requires ADP to carry out any of Client’s obligations under Subpart E of 45 CFR Part 164, ADP shall comply with the requirements of Subpart E that apply to Client in the performance of such obligations.

(b) ADP agrees to use appropriate safeguards, and comply with the applicable requirements of Subpart C of 45 CFR Part 164 with respect to electronic protected health information (“EPHI”), to prevent use or disclosure of the EPHI other than as permitted or required by the Agreement and this Amendment. In addition, ADP shall implement Administrative Safeguards, Physical Safeguards and Technical Safeguards that reasonably and appropriately protect the Confidentiality, Integrity and Availability of the EPHI that it creates, receives, maintains or transmits on behalf of Client.

(c) ADP agrees to take commercially reasonable steps to mitigate any harmful effect that is known to ADP of a use or disclosure of PHI by ADP in violation of the requirements of the Agreement or this Amendment.

(d) ADP agrees to report to Client any use or disclosure of the PHI that is not provided for by the Agreement, this Amendment or permitted by HIPAA of which it becomes aware. ADP agrees to report to Client any Security Incident, as defined in 45 CFR § 164.304, of which ADP becomes aware. Notwithstanding the foregoing sentence, the parties recognize and agree that there is likely to be unsuccessful attempts to access, use, disclose, modify or destroy Electronic PHI without authorization (“Unsuccessful Security Incident”) that do not necessitate reporting or mitigation because such an Unsuccessful Security Incident does not compromise Electronic PHI. Therefore the parties agree that Unsuccessful Security Incidents do not need to be reported at all and will not be reported. Among other examples, the parties consider the following to be illustrative of Unsuccessful Security Incidents when they do not result in actual unauthorized access, use, disclosure, modification or destruction of Electronic PHI, or interference with an information system:

- i. Pings on ADP’s firewall,
- ii. Port scans,
- iii. Attempts to log on to an ADP system or enter an ADP database with an invalid password or username,
- iv. Denial-of-service attacks that do not result in an ADP server being taken off-line, and
- v. Malware (worms, viruses, etc.)

ADP agrees to notify Client of any Breach of Unsecured PHI in accordance with 45 CFR § 164.410. Such notification shall be made without unreasonable delay. The parties acknowledge and agree that ADP is not an agent of Client and is performing services as an independent contractor for purposes of Breach notification pursuant to HIPAA.

(e) ADP will obtain satisfactory assurances that meet the requirements of 45 CFR §§ 164.504(e) and 164.314(a)(2) from any Subcontractor who creates, receives, maintains or transmits PHI on behalf of ADP in connection with the Services subject to this Amendment. ADP shall ensure that the contract or other arrangement with each agent or Subcontractor obligates the same to comply with restrictions and conditions that are at least as restrictive as the restrictions and conditions that apply to ADP with respect to such information under the Agreement and this Amendment.

(f) ADP agrees to provide access upon the request of Client, and in a time and manner not materially disruptive of ADP’s operations or business, to PHI in a Designated Record Set to Client in order for the Client to meet its obligations under 45 CFR § 164.524.

(g) ADP agrees to make any amendment(s) to PHI in a Designated Record Set required by 45 CFR § 164.526, upon notification from Client, and in a time and manner not materially disruptive of ADP’s operations or business.

(h) ADP agrees to make internal practices, books, and records, including policies and procedures and PHI, relating to the use and disclosure of PHI received from, or created or received by ADP on behalf of, Client available to the Secretary, in a time and manner designated by the Client or the Secretary and not materially disruptive of ADP’s operations during normal business hours, for the purposes of the Secretary determining Client’s compliance with the applicable administrative simplification provisions of HIPAA. The ADP business unit providing the Services shall reasonably cooperate with Client and Secretary in responding to the Secretary’s requests. All information provided by ADP pursuant to this provision shall remain subject to restrictions on use and disclosure of confidential information as set forth in the Agreement.

(i) ADP agrees to document such disclosures of PHI and information related to such disclosures as would be required for Client to respond to a request by an Individual for an accounting of disclosures of

PHI in accordance with 45 CFR §164.528, and to reasonably cooperate with Client in responding to such requests.

(j) ADP agrees to provide to Client in a time and manner not materially disruptive of ADP's operations or business, information collected in accordance with Section 2(i) of this Amendment, to permit Client to respond to a request by an Individual for an accounting of disclosures of PHI in accordance with 45 CFR § 164.528. All information provided by ADP pursuant to this provision remains subject to restrictions on use and disclosure of confidential information as set forth in the Agreement.

(k) If, in the performance of its obligations set forth in Sections 2(f) through 2(j), inclusive, ADP expends time and materials in addition to the Services to be provided by ADP pursuant to the Agreement, ADP shall provide Client with an estimate of the fees for such time and materials. Upon the mutual agreement by Client and ADP as to the fees to be charged by ADP for such time and materials, ADP will invoice Client on a time and materials basis at the agreed-upon rate(s), and Client will pay ADP all such fees in accordance with the payment terms of the Agreement.

3. Permitted Uses and Disclosures by ADP

Except as otherwise limited in this Amendment, ADP may use or disclose PHI to perform functions, activities, or services for, or on behalf of, Client and as specified in the Agreement, provided that such use or disclosure would not violate Subpart E of 45 CFR Part 164 if done by Client or the minimum necessary policies and procedures of the Client of which ADP has been informed.

4. Specific Use and Disclosure Provisions

(a) Except as otherwise limited in this Amendment, ADP may use PHI for the proper management and administration of ADP or to carry out the legal responsibilities of ADP.

(b) Except as otherwise limited in this Amendment, ADP may disclose PHI for the proper management and administration of ADP, provided that disclosures are Required by Law, or ADP obtains reasonable assurances from the person to whom the information is disclosed that it will remain confidential and used or further disclosed only as Required by Law or for the purpose for which it was disclosed to the person, and the person notifies ADP of any instances of which it is aware in which the confidentiality of the information has been breached.

(c) Except as otherwise limited in this Amendment, ADP may use PHI to provide Data Aggregation services to Client as permitted by 45 CFR §164.504(e)(2)(i)(B) and may de-identify PHI pursuant to 45 CFR § 164.514.

5. Obligations of Client

(a) Client shall provide ADP with any limitations in the notice of privacy practices of Client under 45 CFR §164.520, to the extent that such limitation may affect ADP's use or disclosure of PHI.

(b) Client shall provide ADP with any changes in, or revocation of, permission by Individual to use or disclose PHI, to the extent that such changes may affect ADP's use or disclosure of PHI.

(c) Client shall notify ADP in writing of any restriction to the use or disclosure of PHI that Client has agreed to or is required to abide by in accordance with 45 CFR §164.522, to the extent that such restriction may affect ADP's use or disclosure of PHI. At the request of Client, ADP agrees to comply with the requirements of 45 CFR §164.522(a)(1)(vi) regarding requests for restriction on the disclosure of PHI to health plans to the extent practicable if (i) the disclosure is for the purpose of carrying out payment or health care operations and is not otherwise Required by Law; and (ii) the PHI pertains solely to a health care item or service for which the Individual or person other than the health plan on behalf of the Individual, has paid the Client in full. Except to the extent a request must be granted under 45 CFR

§164.522(a)(1)(vi), ADP shall not be required to comply with a Client request to restrict the use or disclosure of PHI.

(d) Client shall not request ADP to use or disclose PHI in any manner that would not be permissible under the Privacy Rule if done by Client.

(e) Client (on behalf of itself and the relevant plans) warrants and represents that its plan documents reflect the requirements of the Privacy Rule, as applicable, and that the plan has received such certification from Client as required by the Privacy Rule for the plan to disclose or provide access to PHI to Client.

6. Term and Termination

(a) *Term.* The Term of this Amendment shall be effective as of the date written above, and shall terminate when all of the PHI provided by Client to ADP, or created or received by ADP on behalf of Client, is destroyed or returned to Client, or, if it is infeasible to return or destroy PHI, protections are extended to such information, in accordance with the termination provisions in this Section.

(b) *Termination for Cause.* In addition to any termination rights set forth in the Agreement, if either party fails to perform any material obligation related to its obligations under this Amendment, and (i) if cure is possible, such failure continues for a period of 60 days after the breaching party's receipt from the non-breaching party of written notice thereof (specifying in reasonable detail the nature of such failure), or (ii) cure is not possible, the non-breaching party may by further written notice to the breaching party terminate the portion of the Agreement subject to this Amendment.

(c) *Termination upon Issuance of Guidance or Change In Law.* If the Secretary provides additional guidance, clarification or interpretation on the Privacy Rule, or there is a change or supplement to the HIPAA statutes or regulations (both referred to as a "HIPAA Change"), such that a party hereto determines that the service relationship between ADP and Client is no longer a Business Associate relationship as defined in HIPAA, such party shall provide written notice to the other party of the HIPAA Change, and upon mutual agreement of the parties that the HIPAA Change renders this Amendment unnecessary, this Amendment shall terminate and be null and void.

(d) *Effect of Termination.*

(1) Except as provided in paragraph (2) of this subsection, upon termination of this Amendment, for any reason, ADP shall return or destroy all PHI received from Client, or created, maintained or received by ADP on behalf of Client that ADP still maintains in any form. This provision shall apply to PHI that is in the possession of subcontractors or agents of ADP. Except as provided in paragraph (2) below, ADP shall retain no copies of the PHI.

(2) In the event that ADP determines that returning or destroying the PHI is infeasible, ADP shall provide to Client notification of the conditions that make return or destruction infeasible. In such event, ADP shall extend the protections of this Amendment to such PHI and limit further uses and disclosures of such PHI to those purposes that make the return or destruction infeasible, for so long as ADP maintains such PHI.

7. Miscellaneous

(a) *Client Rights and Remedies Upon Breach By ADP.* In the event ADP fails to perform its obligations hereunder or otherwise breaches this Amendment, Client may exercise all rights and remedies available to it under the Agreement, subject to applicable limitations of liability set forth in the Agreement or such other conditions as may apply to Client rights or remedies.

(b) *Amendment.* The Parties agree to take such action as is necessary to amend the Agreement from time to time as is necessary for Client to comply with the Privacy Rule and/or HIPAA. If, following good faith negotiations that shall not exceed ninety (90) calendar days from the date of the request for negotiations,

the parties are unable to agree on the modifications to the terms of the Agreement that may be necessary or appropriate in order for Client to comply with the Privacy Rule and/or HIPAA, and/or the Agreement, either party shall have the right to terminate the Agreement without cause as of a date specified in a notice of termination, such date to be no less than thirty days following the effective date of such notice.

(c) *Survival.* The respective rights and obligations of ADP under Section 6(d) of this Amendment shall survive the termination of the Agreement.

(d) *Interpretation.* Any ambiguity in this Amendment shall be resolved in favor of a meaning that permits Client and ADP to comply with HIPAA, HITECH, and any regulations issued thereunder.

(e) *Relationship of the Parties.* The performance by ADP of its duties and obligations under this Agreement will be that of an independent contractor and nothing contained in this Agreement will create or imply an agency, joint venture or partnership between ADP and Client. Neither the employees of ADP nor ADP's subcontractors will be considered employees or agents of Client. Unless expressly stated in this Agreement, none of ADP, its employees or its subcontractors may enter into contracts on behalf of, bind, or otherwise obligate Client in any manner whatsoever. To the extent ADP receives direction from Client with respect to its obligations under HIPAA, such direction shall not be construed as rendering ADP an agent of Client.

(f) *Regulatory References.* A reference in this Amendment to a section HIPAA, as applicable means the section as in effect or as amended.

All other terms and conditions of the Agreement shall remain in full force and effect. In the event of any conflict between the terms and conditions of this Amendment and the terms and conditions of the Agreement, this Amendment shall prevail. The terms defined in the Agreement and used in this Amendment shall have the same respective meanings as set forth in the Agreement, unless clearly otherwise defined in this Amendment.

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be duly executed by its authorized representatives as of the date first above written.

ADP, LLC

CLIENT: _____

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____