

Employee Benefits & Executive Compensation ADVISORY

March 10, 2009

Children's Health Insurance Program Reauthorization Act of 2009

The Children's Health Insurance Program Reauthorization Act of 2009 became law on February 4, 2009 (the "Act").¹ The Act amends the Internal Revenue Code (the "Code"), the Employee Retirement Income Security Act of 1974 (ERISA) and the Public Health Service Act (PHSA) to include a new special enrollment right for employees and dependents who lose coverage under a Medicaid or a State Children's Health Insurance Program under titles XIX and XXI of the Social Security Act (referred to, respectively, as "Medicaid Plan" and "State Plan"). The Act also allows states to provide premium assistance for low-income children to enroll under qualifying employer coverage and imposes certain notification requirements on plan sponsors. We discuss each of these in more detail below.

Special Enrollment Right

Background: The Current Requirements

Currently, under the cafeteria plan regulations, a plan may allow an eligible employee to enroll in an employer's underlying health plan if the employee or the employee's dependent child loses coverage under certain governmental health plans including a State Plan.² Under the cafeteria plan rule, if an employee loses medical coverage under the governmental plan, then the employer may permit the employee to enroll in the employer's health plan and change his or her salary reduction election if the change is requested within 30 days of the date the governmental coverage is lost. Importantly, there is no corresponding right to drop employer coverage when the employee gains governmental health coverage. This rule does not apply to health flexible spending accounts as defined in Code section 106(c)(2).

Group health plans and health insurers are also required under HIPAA to permit an employee who is eligible, but not enrolled, to enroll outside of open enrollment or allow participants to make mid-year election changes for certain events such as marriage, birth or adoption, or loss of other group health plan coverage if enrollment is requested within 30 days of the date of the event. The cafeteria plan rules permit an employee to revoke an existing pre-tax election and make a new election to correspond to the special enrollment right.³ The HIPAA special enrollment rights do not apply to health FSAs that are excepted benefits not subject to the HIPAA portability provisions.⁴

¹ Public Law No. 111-3

² See 26 CFR §1.125-4(f)(5)

³ See 26 CFR §1.125-4(b)

⁴ See 26 CFR §54.9831-1(c)(3)(v)(B)

The final HIPAA regulations require group health plans to furnish a notice of special enrollment rights at or before the time an employee is initially offered the opportunity to enroll in the group health plan.⁵ The regulations contain a model notice.⁶ As the HIPAA special enrollment rights describe important coverage provisions and how coverage may be lost and/or gained, it should also be included in the group health plan SPD under the DOL SPD regulations.

Changes Effective April 1st under the Act: New 60 Day Special Enrollment Rights

The Act creates two new Special Enrollment rights for eligible but unenrolled employees and dependent children who either (1) lose coverage under a Medicaid Plan or State Plan; or (2) become eligible for group health plan premium assistance under a Medicaid Plan or State Plan. Unlike the current 30-day time frame for employees to request enrollment upon an existing HIPAA special enrollment event, the Act gives such employees **60** days to request enrollment in the group health plan. Under the Act, an employee may request enrollment in the group health plan within 60 days of the date coverage terminates under the Medicaid Plan or State Plan, or within 60 days after the employee or dependent is determined to be eligible for state premium assistance. As the Act amends existing Code, ERISA and PHS provisions, we assume that this new special enrollment right will likely not apply to most health FSAs (i.e., those that are excepted benefits exempt from the HIPAA portability provisions). We hope that agency regulations will clarify this issue.

The special enrollment provisions of the Act do not include a specific effective date. As a result, the general effective date of the Act, April 1, 2009, should apply.⁷ Unless further regulatory clarifications suggest otherwise, we recommend that employers accept enrollments and election changes for qualifying special enrollment events under the Act beginning April 1, 2009.

Premium Assistance Subsidy

The Act authorizes States to provide a premium assistance subsidy for “qualified employer-sponsored” coverage to children of low-income individuals (as well as the employee parent or other family members, if the State determines coverage to be cost-effective). The subsidy is only available if the child or the child’s parent voluntarily elects to receive the subsidy and enrolls in the employer coverage. States cannot require the receipt of the subsidy as a condition to receiving child health assistance. States must also allow the child or the child’s parent to disenroll from employer coverage and enroll in a State Plan without a gap in coverage. It is unclear if dropping employer coverage and enrolling in a State Plan would be a permitted election change under the cafeteria plan rules that would allow the employee parent to reduce his or her pre-tax salary elections. Once again, we hope for clarification of this issue in agency regulations.

As with the special enrollment provisions, there is no specific effective date in the Act for the Premium Assistance Subsidy. Thus, the April 1, 2009, general effective date likely applies. From a practical standpoint, many states will likely need time to implement the program and will not begin providing subsidies until after the model coverage coordination forms are completed. (See below for more information.) However, we understand that

⁵ 26 CFR §54.9801-6(c); 29 CFR §2590.701-6(c); 45 CFR §146.117(c)

⁶ 26 CFR §54.9801-6(c)(1); 29 CFR §2590.701-6(c)(1); 45 CFR §146.117(c)(1)

⁷ The Joint Tax Committee’s “Technical Explanation of the Code Provisions of H.R. 2, ‘The Children’s Health Insurance Program Reauthorization Act of 2009,’ as passed by the House Of Representatives on January 14, 2009,” also states that the effective date of the special enrollment right provision is April 1, 2009.

some states currently subsidize employer-sponsored coverage through existing programs, so employers should be prepared to respond to special enrollment requests as a result of the State-sponsored assistance.

“Qualified employer sponsored coverage” means group health plan or health insurance coverage offered through an employer that (i) qualifies as creditable coverage for purposes of HIPAA portability; (ii) for which the employer contribution toward any premium for such coverage is at least 40 percent; and (iii) is offered to all individuals in a manner that would be considered a nondiscriminatory eligibility classification for purposes of the tax nondiscrimination rules applicable to self-funded health plans.⁸ It is unclear under the Act if the nondiscriminatory eligibility classification requirements in Code Section 105(h) would apply to fully insured group coverage. Qualified employer-sponsored coverage does not include a health flexible spending arrangement as defined in Code section 106(c)(2), or an HSA eligible high deductible health plan as defined in Code section 223(c)(2).

The state subsidy is the amount equal to the difference between the employee contribution required for employee-only coverage and the employee contribution required for employee and child coverage under the employer coverage, less any applicable premium cost-sharing applied under the state child health plan. The state may pay the premium assistance subsidy either as a reimbursement to the employee for out-of-pocket expenses or directly to the employer. However, an employer may opt out of direct state payment of the premium assistance subsidy. If the employer opts out of direct state payment, the state would pay the subsidy directly to the employee. The employer could then charge the employee the full cost of the coverage.

The Act further allows states to provide the low-income children supplemental coverage under the State Plan for items or services not covered, or partially covered, under the employer coverage. Any State Plan must be a secondary payer for items or services provided under the employer plan for which the state provides child assistance. The Act provides additional options to states by allowing them to create employer premium assistance purchasing pools for employers with fewer than 250 employees. States may also offer a premium assistance subsidy for qualified employer-sponsored coverage to individuals age 19 and under who are entitled to Medicaid assistance (and to the parent of such an individual).

New Employer Notice Obligations

To the Employee

Employers that maintain a group health plan in a state that provides medical assistance under a Medicaid Plan, State Plan or premium assistance for employer coverage must provide each employee who resides in the state written notice of the availability of premium assistance programs for purchase of coverage under a group health plan. The notice must include information on how to apply for assistance and how to contact the state in which the employee resides for additional information. The Act directs the Secretary of Health and Human Services and the Secretary of Labor, in consultation with directors of state Medicaid agents and state CHIP agencies, to jointly develop national and state-specific model notices by February 4, 2010. The Secretary of Labor must provide employers with such model disclosure forms. Each employer must provide notices to employees the first plan year that begins after the date on which the model notices are first issued (i.e., likely January 1, 2011, for a calendar year plan). The notice may be provided concurrently with initial enrollment materials, annual enrollment materials or with the summary plan description.

⁸ Code section 105(h)(3)(A)(ii) (without regard to the three-year service requirement in clause (i) in subparagraph B).

To the State

The Plan Administrator of a group health plan must disclose to a state, upon request, information about the benefits available under the group health plan, so as to enable the state to determine the cost-effectiveness of the state providing medical or child health assistance through the State Plan or through premium assistance for the purchase of coverage under the group health plan. The Act further directs the Secretary of Labor and the Secretary of Health and Human Services to establish a Medicaid, CHIP and Employer-Sponsored Coverage Coordination Working Group to develop a model coverage coordination disclosure form for plan administrators to complete. The Working Group must submit the model disclosure form to the Secretary of Labor and the Secretary of Health and Human Services no later than August 4, 2010 (18 months after the date of enactment of the Act). States may request the model coverage coordination disclosure form beginning the first plan year after the date the model coverage continuation disclosure form is first issued (i.e., likely January 1, 2011, for a calendar year plan).

Penalties

The Secretary of Labor may impose a civil penalty against an employer of up to \$100 a day from the date of the employer's failure to meet the employee notice requirements. Further civil penalties may be assessed of up to \$100 per day against any plan administrator for failure to timely provide any state the information required to be disclosed on the compliance form. Each violation with respect to any single participant or beneficiary shall be treated as a separate violation. Currently, under Section 9801(f) of the Code, an excise tax of \$100 is imposed for each day a group health plan fails to comply with the special enrollment provisions. For single employer plans, the penalty is imposed on the employer that maintains the plan with respect to each individual to whom the failure relates.

What Plan Sponsors Should Do Now

We recommend that plan sponsors update their initial enrollment materials to include the new special enrollment right prior to April 1, 2009. We also recommend that existing SPDs be updated, or Summaries of Material Modifications be issued, to reflect the new right and the 60-day election time frame, to avoid penalties. Although most cafeteria plan documents and ERISA group health plan documents include HIPAA special enrollment rights under Code Section 9801(f), many plans likely do not allow for a 60-day election period. Thus, a plan amendment is likely necessary. Also, if not already provided, plan sponsors will need to amend their SPDs and Plans to be primary to any Medicaid or State Plans through which an employee receives premium assistance or supplemental coverage.

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