



Benefits Alert

Legal developments affecting employee benefits

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Compliance deadline looms for new special enrollment rights created by CHIPRA

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Overshadowed by the discussion surrounding the Stimulus Bill, the Children's Health Insurance Program Reauthorization Act of 2009 ("CHIPRA") was enacted without fanfare on February 4, 2009. CHIPRA created new special enrollment rights, provisions regarding state payment of employee group health plan premiums, and new notice requirements and compliance penalties. The new special enrollment rights will take effect on April 1, 2009. Employers who have not already acted to comply must do so quickly.

By way of background, the State Children's Health Insurance Program ("SCHIP"), enacted in 1997, is a joint federal and state program that provides health insurance to certain low-income children and their families who have too much income to qualify for Medicaid, but too little to afford private health insurance. CHIPRA extended SCHIP, which was set to expire at the end of March, through 2013. It also renamed it the Children's Health Insurance Program or CHIP.

Of primary importance to employers in the short term, CHIPRA creates two new special enrollment rights for CHIP participants under the Health Information Portability and Accountability Act ("HIPAA"). As noted above, these new rights take effect April 1, 2009:

1. Plans must permit eligible employees to enroll within 60 days if the employees' Medicaid or CHIP coverage terminates due to loss of eligibility (as opposed to termination due to failure to pay premiums); and
2. Plans must permit eligible employees to enroll in the plan within 60 days of a determination that the employees are eligible for Medicaid or CHIP premium assistance, described below.

CHIPRA also directs states to create a process to allow the parent of a child receiving premium assistance to enroll the child in the state's CHIP and disenroll the child from the employer's group health plan during any month. This new disenrollment opportunity appears to be inconsistent with the cafeteria plan regulations, which permit disenrollment only upon the occurrence of specified events. We can only hope that the discrepancy will be recognized and remedied by the regulators.

Another CHIPRA provision makes it easier for states to provide premium assistance subsidies toward qualified employer coverage where it would be cost-effective to do so, rather than enrolling the individual in Medicaid or CHIP. A few states already have such programs in place. The new provisions allow states to provide premium assistance where:

- the employer contributes at least 40% of the premium;
- the plan qualifies as creditable coverage under HIPAA; and
- the plan satisfies certain nondiscrimination rules.

Notably, high deductible health plans and health flexible spending arrangements are excluded from the definition of qualified employer coverage.

In conjunction with this program, group health plans will be required to respond to state inquiries about plan benefits, so the states can determine whether it is more cost-effective to provide premium assistance or to enroll individuals in the state plan. The Departments of Labor (“DOL”) and Health and Human Services (“HHS”) have been directed to develop a model form for this purpose. This form will require disclosure of the benefits offered under the group health plan, whether the employee is eligible for coverage, the name and contact information of the plan administrator, and other information relevant to coverage under the plan.

Employers may opt-out of receiving direct payment of the employee’s premiums from the state. In that case, employers may withhold the employee's share of premiums from his or her pay, and the state will issue the premium assistance reimbursement directly to the employee.

CHIPRA also creates a new annual notice requirement. Group health plans must notify employees about any premium assistance program available in the state where the employee *resides* (which may be different than the state where the employee works). Congress directed the DOL and HHS to create model notices no later than February 4, 2010. The notice requirements will not go into effect until the first plan year following issuance of the model notices. Employers have the option to provide stand-alone notices or to include the notice along with notices of health plan eligibility, open enrollment materials or summary plan descriptions.

Employers that do not comply with CHIPRA’s requirements may be subject to fines of up to \$100 per day, per participant.

Group health plan sponsors should act immediately to implement those requirements that are effective on April 1. For CHIPRA’s other provisions, thankfully, there is more time to comply. The following steps are necessary:

- Begin administering the new HIPAA special enrollment rights on April 1, 2009, even if plan documents and materials have not yet been updated.
- Amend plan documents as soon as practical to memorialize the two new HIPAA special enrollment rights and the new CHIPRA disenrollment right.
- Update any associated plan forms or materials describing special enrollment rights.
- Prepare and issue a summary of material modifications or restated summary plan description to participants describing the new special enrollment rights.
- Respond in a timely manner to any state information requests in conjunction with the CHIPRA premium subsidy.
- Decide whether the plan will accept direct premium assistance payments from the state, or will, instead, opt-out of this provision.
- When the model notices are published, distribute them to participants on an annual basis, beginning with the plan year after the notices are published.

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