

February 19, 2009

Take Action Now to Amend Cafeteria Plans and COBRA Practices

In the past two weeks, Congress and the President have enacted two new laws affecting employers' health and welfare plans. Both laws require employers to respond with immediate action.

2009 CHIP – Cafeteria Plan Amendment Required

The Children's Health Insurance Program Reauthorization Act of 2009 ("2009 CHIP"), was signed by the President February 4, 2009 and is effective April 1, 2009. It requires health plans to give special enrollment rights to employees and their dependents if they lose their Medicaid or CHIP coverage or if they become eligible for a premium assistance subsidy that states may offer under 2009 CHIP. Eligible individuals have 60 days measured from their date of loss of other coverage or eligibility for the subsidy to request coverage under the employer's health plan. Health plans must comply and should be amended accordingly. Employers also must notify employees of their state's subsidy opportunities and report certain information to the state once the Department of Health & Human Services and Department of Labor issue model forms.

An individual who enrolls in an employer health plan via the special enrollment rules of 2009 CHIP must be allowed to enroll in the cafeteria plan as well. Most cafeteria plan documents specifically allow mid-year enrollment for HIPAA special enrollments, even for pre-tax premiums, but the 2009 CHIP special enrollment rules provide for a longer enrollment period of 60 days (versus the 30 days that other HIPAA special enrollment rules allow). Thus, most cafeteria plans will need to be amended. Since the proposed cafeteria plan regulations prohibit retroactive amendments, cafeteria plans must be amended *before April 1, 2009*. If cafeteria plans are not amended, an individual who enrolls through 2009 CHIP would be required to pay for premiums with after-tax dollars.

Stimulus Act – Need to Notify Individuals and Change COBRA Practices

The American Recovery and Reinvestment Act of 2009 ("Stimulus Act") was signed February 17, 2009, and includes a federal government subsidy for COBRA premiums of assistance-eligible individuals. The Stimulus Act also includes a "second chance" COBRA enrollment period for assistance-eligible individuals.

Assistance-Eligible Individuals

The COBRA subsidy and the "second chance" enrollment period apply to "assistance-eligible individuals." An assistance-eligible individual is an individual who became (or becomes) eligible for COBRA continuation coverage due to the employee's involuntary termination from employment that occurred during the period beginning September 1, 2008 and ending December 31, 2009.

Only individuals who were *involuntarily* terminated are assistance-eligible individuals— yet the Stimulus Act does not define what it means to be involuntarily terminated. A determination that an employee is involuntarily terminated for purposes of the COBRA subsidy could affect entitlement to other employee benefits, such as severance, and could also affect employment law issues and claims, so the determination should be made with great care. However, if a group health plan treats an individual as not being an assistance-eligible individual (e.g., because the person was not

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involuntarily terminated), the individual may apply to the Secretary of Labor and receive an expedited review of the denial, and the employer may be subject to COBRA penalties. Plan claims procedures would not apply.

COBRA Subsidy

If an assistance-eligible individual pays 35% of the full COBRA premium, the employer (or the insurer, in some cases) is responsible for temporarily covering the remaining 65%. The employer may recover the 65% subsidy by claiming a credit against payroll taxes. The subsidy is effective beginning with the first period of COBRA health plan coverage that begins after the date the Stimulus Act was enacted, so for plans that bill monthly, the subsidy is effective March 1, 2009. The subsidy is available for up to 9 months, or less if the individual's regular COBRA period would have expired sooner, or if the individual becomes eligible for (not necessarily enrolled in) other group health plan coverage or Medicare. Employers and insurers must be ready to submit reports upon request by the Secretary of Labor verifying individuals' eligibility for the subsidy and the amounts.

If the employer pays the COBRA premiums (for example, pursuant to a severance agreement) or subsidizes the premiums, the employer may not be eligible for the subsidy or may be eligible for only a reduced subsidy. Employers may want to reconsider COBRA subsidy and severance arrangements in light of this restriction.

The 65% subsidy is tax-free but is phased out for individuals whose modified adjusted gross income for the taxable year exceeds \$125,000, (\$250,000 in the case of a joint return) If the assistance-eligible individual has gross income in excess of the income threshold, all or a portion of the COBRA subsidy will be recaptured on the individual's tax return. Alternatively, a high-income individual may make an election to waive the subsidy.

"Second Chance" Enrollment Period

Assistance-eligible individuals who did not elect COBRA coverage during the regular COBRA election period, or who elected COBRA coverage but have since terminated COBRA coverage, must be given a "second chance" enrollment period – even if they are not eligible for the subsidy (for example, because they are eligible for other coverage). The "second chance" enrollment period runs until 60 days after the employer notifies the employee of the "second chance" enrollment period. If an individual elects COBRA coverage during the "second chance" enrollment period, the individual's coverage will start on the first day of the first coverage period after the Act was enacted (generally March 1, 2009).

Required Employer Notices

The employer must notify all individuals who became (or become) eligible for COBRA coverage during the period beginning September 1, 2008 and ending December 31, 2009 about the subsidy, the "second chance" enrollment period, and other information.

Although COBRA coverage is generally required to be the same as the coverage an individual was already receiving under the plan, the Stimulus Act allows, with some restrictions, an employer to let an assistance-eligible individual elect different, less expensive coverage. Therefore, employers must decide whether to allow assistance-eligible individuals to choose different coverage.

Employers need to immediately modify their COBRA notices, including information on required premiums. The deadline for employers to send out the notices is *April 18, 2009*. The DOL is required to issue a model notice within 30 days after the enactment of the Act, but employers may want to send their notices sooner to close the "second chance" enrollment period.

Because the subsidy's effective date of March 1, 2009 likely will be before an assistance-eligible individual is notified of eligibility for the subsidy, the individual may have already paid the full COBRA premium for the March (and possibly April) period of coverage. If that happens, the employer or insurer who receives the full payment must reimburse the excess payment to the assistance-eligible individual within 60 days or provide a credit against future COBRA payments. There is no provision for reimbursement of any premiums for May coverage, which is after the required notice date, so employers should watch May premiums to ensure they are properly administered.

Conclusion

Employers and all those involved in administering group medical plans will be scrambling to understand and comply with these new requirements by the deadlines. The Stimulus Act also made changes to HIPAA privacy and security rules and an increase in the monthly limit for transit passes and vanpools. Employers should also analyze these new provisions and determine whether any changes their benefit programs and documents are required. Please contact any member of the Benefits Law Group with any questions about these recent health and welfare plan changes, or any other issues relating to employee benefits.



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