

# EMPLOYEE BENEFITS UPDATE

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## Employers That Sponsor Group Health Plans Must Take Action to Comply with CHIPRA

On February 4, 2009, President Obama signed the Children's Health Insurance Program Reauthorization Act of 2009 ("CHIPRA") into law. CHIPRA reauthorized and significantly expanded the Children's Health Insurance Program ("CHIP"), which provides health coverage to children whose families do not otherwise qualify for Medicaid. CHIPRA impacts employers that sponsor group health plans. Employers need to be aware of state premium assistance subsidies and disclosure obligations, as well as new special enrollment rights and notice requirements, which are addressed in more detail below.

**CHIPRA is generally effective April 1, 2009.**

### Premium Assistance Subsidies

CHIPRA allows states to offer premium assistance subsidies to pay for coverage under an employer-sponsored group health plan for low-income children who are otherwise eligible for state child health assistance. States may also elect to offer premium assistance to parents of such low-income children. The subsidy is only available if the employer-

sponsored group health plan meets the following requirements:

- The plan qualifies as “creditable coverage” as a group health plan under the Health Insurance Portability and Accountability Act (“HIPAA”);
- The employer pays at least 40% of any premium for such coverage;
- The group health plan is available to a reasonable classification of employees that does not violate the nondiscrimination requirements of Internal Revenue Code Section 105(h)(3)(A)(ii); and
- The group health plan is not a health flexible spending arrangement (health FSA) or a high deductible health plan.

The premium assistance subsidy generally equals the difference between the employee contribution required for employee-only coverage under the group health plan and the employee contribution required for employee and child coverage. States can either: (1) reimburse employees the amount paid for employer-sponsored group health plan coverage; or (2) pay employers directly. Employers may opt-out of receiving direct payments from the state, although the employer must still allow eligible individuals to enroll in its group health plan. If an employer opts out

of receiving direct payments from the state, employees pay their share of the premium through payroll withholding and the state pays premium assistance subsidies directly to the employees.

The subsidy is voluntary. States cannot require that parents elect to enroll their child in an employer-sponsored group health plan as a condition of receiving child health assistance. States are also required to establish a process for permitting a parent of a low-income child receiving a premium assistance subsidy to disenroll the child from employer coverage and enroll the child in the state’s child health plan. This could be problematic for employers who allow employees to pay for group health plan coverage on a pre-tax basis under a cafeteria plan. The current Treasury Regulations allow mid-year election changes to add employer-sponsored group health plan coverage if CHIP coverage is lost, but do not currently allow for mid-year election changes to drop employer-sponsored group health plan coverage if CHIP coverage becomes available. Guidance from the IRS is needed with respect to this issue.

Children who are eligible for state health assistance and who are enrolled in an employer-sponsored group health plan through the subsidy program may still be covered under the state’s child health plan.

CHIPRA clarifies that employer-sponsored group health plans must pay primary to the state's child health plan.

*Employer Action Items:*

- Employers should determine: (1) if the state in which their employees reside provides premium assistance subsidies for coverage under employer-sponsored group health plans; and (2) whether it wants to opt out of receiving premium payments directly from the state. Employers that decide to opt-out of such direct payments must notify the state of its decision.
- Employers may need to amend their group health plans to ensure that the plan is primary to coverage under a state's child health plan.
- Employers that sponsor cafeteria plans should decide how to handle mid-year requests to cancel group health plan coverage to enroll in a state's child health plan.

**Special Enrollment Rights**

HIPAA currently requires that group health plans allow employees, and their spouses and eligible dependents, to enroll mid-year if COBRA coverage is exhausted or non-COBRA coverage is lost due to certain limited circumstances, provided certain

conditions are met. CHIPRA adds two new HIPAA special enrollment right events. Effective April 1, 2009, group health plans must allow employees and their dependents to enroll in the plan mid-year if either of the two following conditions is met:

- An employee or dependent becomes ineligible for coverage under a Medicaid plan or a state child health plan, and as a result, such coverage is terminated; or
- An employee or dependent becomes eligible for a premium assistance subsidy for the group health plan under Medicaid or the state child health plan.

The employee must request coverage under the group health plan within 60 days of the date the employee or dependent loses Medicaid or CHIP coverage or becomes eligible for a premium assistance subsidy. It is important to note that this is longer than the current HIPAA special enrollment period of 30 days. CHIPRA does not address whether group health plan coverage that is elected pursuant to these new special enrollment rights becomes effective retroactively or prospectively. Until additional guidance is issued, employers may want to consider allowing coverage to be elected on a prospective basis.

*Employer Action Items:*

- Employers who sponsor group health plans must allow employees to exercise these new special enrollment rights as of April 1, 2009.
- Employers may need to amend their group health plans and cafeteria plans to include the two new HIPAA special enrollment right events. Employers should also consider sending out summaries of material modification as soon as possible to notify employees of the change.
- Employers should update their special enrollment rights notice. The Department of Labor's model notice is currently out-of-date and is not clear when it will be updated.

**New Premium Assistance Subsidy Notice Requirement**

Employers that sponsor group health plans in a state that provides premium assistance subsidies for coverage under employer-sponsored group health plans under the state's Medicaid plan or child health plan must provide its employees with a written notice informing them of the availability of such subsidies. The Departments of Labor and Health and Human Services, in consultation with state Medicaid and CHIP

agencies, are directed to develop national and state-specific model notices by February 4, 2010 for employers to use to comply with this requirement. Employers are required to distribute the notices beginning with the first plan year that begins after the model notices are first issued.

Employers may provide the premium assistance subsidy notice applicable to the state in which an employee resides: (1) with materials notifying the employee of health plan eligibility; (2) with open enrollment materials; or (3) with the summary plan description.

Employers that fail to comply with the notice requirement may be subject to a \$100 a day penalty per employee.

*Employer Action Items:*

- Employers will eventually have to distribute state-specific premium assistance subsidy notices effective as of the first day of the first plan year following the date the model notices are issued.

**New State Disclosure Requirements**

Plan administrators of group health plans are required to disclose information about the benefits available under the group health plan to a state, upon request, so that the state can determine whether it is cost-effective to provide premium assistance subsidies and to coordinate benefits. The Departments

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of Labor and Health and Human Services are required to develop a model coverage coordination disclosure form. States may begin using the form beginning with the first plan year that begins after the date on which the model coverage coordination disclosure form is first issued.

### *Employer Action Items:*

- Plan administrators may need to disclose information about their group health plans upon request effective as of the first day of the

first plan year following the date the model coverage coordination disclosure form is issued.

Employers that fail to comply with a request for information may be subject to a \$100 a day penalty.

If you have any questions regarding this article, please call Denise Atwood at 602.382.6297, Nancy Campbell at 602.382.6374, or Megan Thiel at 602.382.6523.

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