A Timely Analysis of Legal Developments

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In February 2009, President Obama signed into law the Children's Health Insurance Program Reauthorization Act of 2009, which establishes new rights for participants in employer group health plans to make changes to their enrollment based on eligibility in certain government sponsored health care programs. Employers will want to make sure that they are in compliance with these new group health plan rules.

Effective Date of New Special Enrollment Period Under CHIPRA Arrives

By Russell D. Chapman and Andrea Jackson

On February 4, 2009, President Obama signed into law the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA). CHIPRA reauthorizes and expands the scope of the State Children's Health Insurance Program (now known as CHIP). Of special note are new requirements that directly affect employer-sponsored group health plans: (1) a new Health Insurance Portability and Accountability Act (HIPAA) special enrollment period that takes into account changes in eligibility for health benefits provided under Medicaid or CHIP; and (2) new notice requirements for employers including a notice of availability of benefits under Medicaid or CHIP and a notice to the state of coverage coordination information.

What is CHIP?

CHIP is a program offered by the federal government that provides matching funds to states that offer health insurance benefits for children whose families earn more than permitted under state Medicaid programs, but whose income is insufficient to provide health insurance through other means (most commonly an employer-provided group health plan). As a result of CHIPRA, matching funds were increased, thereby expanding the scope of CHIP to include coverage of millions more uninsured children and pregnant women. The new provisions allow state programs to provide a premium subsidy toward enrollment in employer-sponsored group health plans, in lieu of direct provision of medical benefits under Medicaid.

Special Enrollment Under HIPAA

CHIPRA amends the Internal Revenue Code (IRC), Employee Retirement Income Security Act (ERISA) and the Public Health Service Act (PHSA) to require group health plans to permit an employee to enroll in coverage when the employee (or his or her dependent) either becomes eligible for a premium subsidy under CHIP or loses eligibility for Medicaid or CHIP benefits. HIPAA already included a special enrollment right when coverage under a group health plan was lost (including coverage under Medicaid and

CHIP), but it did not include a special enrollment right when eligibility under a governmental plan was *gained*. Because the premium subsidy alternative now allows states to direct their aid recipients to enroll in private employers' group health plans, the new special enrollment right requires group health plan's to allow mid-year entrance to these aid recipients.

Effective April 1, 2009, CHIPRA requires a group health plan and a health insurance issuer to permit an employee who is eligible for, but not enrolled for, coverage under the employer's group health plan (or a dependent of such employee, if the dependent is eligible, but not enrolled) to enroll for coverage where certain conditions are met:

1. **Termination of coverage under Medicaid or CHIP.** An employee (or dependent) who is covered under Medicaid or CHIP, but whose coverage is terminated for loss of eligibility for such coverage, may request coverage under the employer's group health plan no later than 60 days after the date of termination of coverage; or
2. **Gain of eligibility for coverage under Medicaid or CHIP.** An employee (or dependent) who becomes eligible for premium assistance under Medicaid or CHIP with respect to group health coverage may request coverage under the employer's group health plan no later than 60 days after the date of eligibility determination.

The new special enrollment rights are applicable to group health plans as defined under HIPAA, with the exception of health care flexible spending account arrangements.

It is important to note that the new 60-day special enrollment period differs from the current HIPAA portability rule, which states an employee must generally be given at least *30 days* to request coverage under the employer's group health plan in the event of loss of other coverage or acquisition of a new dependent. And while IRC Section 125 regulations impose no maximum time period when requesting a mid-year election change, many plans are written to include 30-day notice periods to reflect the prior HIPAA special enrollment rights.

Also, while the new special enrollment rights under HIPAA require group health plans to permit mid-year enrollment of eligible employees and their dependents, there may be a conflict between HIPAA and the change-in-status rules contained in a related cafeteria plan. If the cafeteria plan does not permit a mid-year election change in the event of a HIPAA special enrollment right, then the employee would not be permitted to change an existing pre-tax premium payment election , even though the group health plan would be required to permit enrollment as required under CHIPRA. In that event, the employee would pay for coverage on an after-tax basis. Accordingly, plan sponsors may wish to review their current plan designs and assess the changes that may be necessary to coordinate with these new HIPAA special election periods.

New Notice Requirements

CHIPRA imposes two, new notice requirements on employers and, although not specifically addressed in the new legislation, will also expand the scope of disclosure with respect to a plan's existing HIPAA special enrollment notice.

HIPAA Special Enrollment Notice

The final HIPAA portability regulations require a notice of special enrollment rights that summarizes the plan's special enrollment right provisions, as required under federal law. The notice must be provided at or before eligibility under the group health plan. While there is no specific requirement under CHIPRA, HIPAA special enrollment notices must now be amended to include information about the availability of mid-year enrollment due to eligibility changes with respect to Medicaid or CHIP. The Department of Labor (DOL) will likely revise the current model notice. However conservative plan sponsors may want to revise their own notices in advance of any DOL revision.

Employer Notice to Employees

Employers in those states that offer Medicaid or CHIP benefits in the form of premium assistance for coverage under a group health plan

must provide a written notice of any potentially and currently available premium assistance program opportunities to each employee and his or her dependents in the state in which the employee resides. Employers may use model notices to be developed by the DOL and Department of Health and Human Services (HHS). These notices are to be distributed annually and may be distributed in conjunction with annual or open enrollment materials, in a summary plan description or upon initial eligibility in the employer's group health plan. The notice requirement is effective the first day of the plan year following February 4, 2010 (or January 1, 2011 for calendar year plans).

Employer Notice to State Agency

CHIPRA also establishes a requirement obligating the plan administrator of any group health plan that has a participant or beneficiary who is covered under Medicaid or CHIP to disclose to the state, upon request, information about the benefits available under the plan so that the state can determine the cost-effectiveness of its provision of premium assistance. The DOL and HHS are instructed to develop a model coverage coordination disclosure form that will apply to requests made by the various states beginning with the first plan year on or after the development of the model notice (most likely January 1, 2011, for calendar year plans).

Penalty for Failure to Comply

A civil penalty of $100 per day may be assessed by the DOL for failure to comply with CHIPRA's notice and disclosure requirements.

What To Do Now

- **Revise Mid-Year Enrollment Policies:** Given the April 1, 2009, effective date for the special enrollment rights under CHIPRA, plan sponsors will need to revise initial and annual group health benefit plan enrollment materials as soon as possible and communicate effectively with any third-party administrators and/or insurers to ensure these entities are in full compliance with the new requirements.
- **Amend All Applicable Group Health Benefit Plan Documents:** Effective April 1, 2009, all health and welfare plan documents that provide for HIPAA special enrollment rights and Section 125 cafeteria plan documents that permit changes in the event of a special enrollment right as must be amended as soon as possible, but not later than the end of the current plan year. If your plan is insured, request a specific amendment to your group certificate of coverage from your insurer as soon as possible.
- **Coordination of Benefits:** Plan sponsors should review their current plan coordination of benefits provision and make any necessary changes to the primacy of the group health plan to Medicaid or CHIP coverage.
- **Update Plan Communication Documents:** Summary plan descriptions and other benefit communications or booklets that communicate the terms and conditions of an employer's group health plan must be amended within statutory requirements, (generally within 210 days of the plan's amendment for plans subject to ERISA). Consult with your benefits counsel to determine the specific timing requirements applicable to your group health benefit plans to avoid expensive and unnecessary penalties for noncompliance.
- **Update Notices:** Update the HIPAA special enrollment rights notice for newly eligible employees and their beneficiaries as required under HIPAA as soon as possible. The DOL will likely provide an updated model notice; however, the model notice should always be tailored to fit your specific plan design. Plan sponsors are encouraged to revise their HIPAA special enrollment rights disclosure now, in advance of the release of the DOL's model notice.

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