



## New Federal Health Plan Laws Require Immediate Compliance Attention

In addition to provisions designed to invigorate the economy, the economic stimulus bill enacted February 17, 2009 also contains COBRA premium assistance for certain employees. In order to coordinate their Children's Health Insurance Program ("CHIP") with group health plans ("GHPs") and Medicaid, the CHIP Reauthorization Act enacted February 4, 2009 also deals with health plan premium assistance by permitting states to subsidize premiums for employer provided GHP coverage for eligible children and their families, making the state the secondary payor to the GHP, as well as provides related new HIPAA special enrollment rights. Both new laws impose new notice, disclosure and other compliance obligations. These new GHP requirements are highlighted below.

### COBRA Provisions

**Premium Assistance.** "Assistance eligible individuals" ("AEIs") are eligible for COBRA premium assistance for a COBRA "period of coverage" (generally a month) beginning on or after February 17, 2009 (generally March 1st). An AEI is a "qualified beneficiary" ("QB") under COBRA (so domestic partners and same-sex spouses are not included) who, at any time during the period beginning September 1, 2008 and ending December 31, 2009, is eligible for COBRA due to any type of involuntary termination (not limited to layoffs or reductions-in-force but excluding gross misconduct) of a covered employee's employment during that time and who elects COBRA. An individual who is denied treatment as an AEI may file an appeal directly with the Department of Labor ("DOL"). The DOL is then required to provide an expedited review, having only 15 business days after receipt of the appeal to make a determination of AEI eligibility.

This premium assistance is only available for a maximum of nine months of the maximum coverage period for the AEI and will terminate before then if the AEI merely becomes eligible (not entitled) to coverage under Medicare or another GHP (including a spouse's plan, whether at initial, special or open enrollment) or upon any expiration of the COBRA coverage period. The AEI is required to provide written notice of eligibility for Medicare or other

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GHP coverage and is subject to a 110% penalty for failure to do so.

For purposes of premium assistance, COBRA includes a state mini COBRA program. In addition, premium assistance is available for any group health coverage for which COBRA is available (major medical, prescription drugs, vision, dental, some employee assistance plans – whether stand-alone or bundled, as well as some HRAs [to the extent not also a FSA] but not HSAs), with the exception of health FSAs under a Section 125 cafeteria plan.

An AEI (or anyone on behalf of the AEI except the employer) is only required to pay 35% of the full 102% COBRA premium to the employer (or, if for state mini-COBRA coverage, to the insurer), with the employer (or insurer) being reimbursed for the other 65% of the full 102% COBRA premium by the federal government through a credit or refund of an overpayment of federal payroll taxes. Premium assistance provided to higher-income AEIs is subject to a phased in recapture between \$125,000 and \$145,000 (\$250,000 and \$290,000 on a joint return) on the AEI's individual federal income tax return. Premium assistance is automatic for all AEIs, irrespective of income level, except that those higher-income AEIs subject to recapture can permanently elect to opt-out.

**Special Election Period.** While premium assistance is not retroactive to September 1, 2008, if a qualified beneficiary who was involuntarily terminated on or after September 1, 2008 does not have a COBRA election in effect on February 17, 2009 (because COBRA was not elected when initially eligible; because an election was made but subsequently lost; or because the election period is still open), then the AEI has a special extended COBRA election period. This extended election period began on February 17, 2009 but does not end until 60 days following the date on which the qualified beneficiary is given notification of it (see **Notices** below).

If a qualified beneficiary makes a COBRA election during this extended election period, the COBRA coverage is not retroactive to the date of termination but will begin with the first "period of coverage" beginning after February 17, 2009 (generally March 1st). COBRA coverage resulting from an extended election period also does not extend the maximum COBRA coverage period, and COBRA coverage resulting from an extended election period will not exceed the maximum period of coverage that would have been available if COBRA had been elected when originally available to the qualified beneficiary. (However, for a COBRA election during the extended election period, the period between the date of the involuntary termination and the beginning of the period of COBRA coverage will be disregarded for purposes of the 63-day break in creditable coverage rules with respect to pre-existing conditions exclusions under HIPAA.)

**Options.** The employer may permit AEIs to enroll in certain coverages which are different than the coverage the AEIs had upon termination. This optional coverage must be coverage which

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is offered to active employees and cannot have a premium in excess of the premium for the coverage in which the AEI was enrolled at termination. If available, the plan administrator has 60 days to give notice of the option to the AEI, who then has 90 days to elect optional coverage.

**Notices.** An "additional notice" describing COBRA premium assistance must be given to any qualified beneficiaries (even though not eligible to be an AEI) who became or becomes entitled to elect COBRA between September 1, 2008 and December 31, 2009 for whatever reason. A notice of extended election period must be provided to any potential AEI who became eligible for COBRA between September 1, 2008 and February 17, 2009 explaining the assistance and the extended election period within 60 days after February 17, 2009. The consequences for noncompliance are the same \$110/day DOL and \$100/day IRS penalties generally applicable to all other COBRA notice violations, as well as possible private lawsuits.

### **MEDICAID, CHIP and Special Enrollment**

**Premium Assistance.** Each of the states may decide whether or not to offer a subsidy that will pay an employee's share of the premium for coverage of an eligible low income child (and in some cases for the parent and other family members also) for "qualified employer sponsored coverage" (specifically excluded are health FSAs and high deductible health plans). This subsidy may be provided as a reimbursement to either the employee or the employer (but the employer may opt out of receiving direct payments).

**New Special Enrollment Rights.** An employer's GHP must permit employees and their dependents who are eligible but not enrolled for coverage to enroll at any time in two new situations beginning April 1, 2009: (i) if the employee or a dependent becomes eligible for a premium subsidy under Medicaid or CHIP; or (ii) the Medicaid or CHIP coverage of the employee or dependent is terminated as a result of loss of eligibility. In both cases the employee must request coverage within 60 days (the enrollment period for all other special enrollment rights is only 30 days) after the eligibility determination or termination, as applicable.

**Employee Notices.** If an employer maintains a GHP in a state that elects to provide premium assistance, written notices must be provided to its employees giving them state specific information regarding the premium assistance available to them. DHHS is required to provide model notices by February 4, 2010, with the notice requirement being effective for the first plan year beginning after the date on which model notices are first issued by DHHS. This notice may be provided to the employee at the same time as other information about health plan eligibility, at open enrollment, or upon an SPD being provided. There is a \$100/day penalty for failure to comply with notice provision.

### **IMMEDIATE EMPLOYER ACTIONS REQUIRED**

- Coordinate with any third-party service providers responsible for COBRA and enrollment, as well as benefits legal counsel, with respect to compliance responsibilities.
- Begin process of identifying all QBs who became eligible for COBRA between September 1, 2008 and February 17, 2009 for whatever reason
- Begin process of identifying all potentially eligible AEIs from that group of QBs
- Prepare new "additional notice" for **all** qualified beneficiaries who became entitled to COBRA between September 1, 2008 and February 17, 2009
  - Describing the new premium subsidy
  - Describing any options available to enroll in different coverage
  - Containing the statutorily required contents information
  - Describing the appeal rights to the DOL for determinations of AEI eligibility
  - Providing information about how electing COBRA can prevent the application of certain pre-existing condition exclusions
- Prepare notice of extended COBRA election period for any potential AEIs who did not have COBRA coverage on February 17, 2009
  - Due within 60 days after February 17, 2009
  - Describing information on right to extended election period, premium assistance, and enrollment options (if applicable)
  - Provide opt-out for higher-income AFIs
  - Describing the appeal rights to the DOL for determinations of AEI eligibility
  - Providing information about how electing COBRA can prevent the application of certain pre-existing condition exclusions
- Revise or supplement initial or general COBRA notice, COBRA election notice, plan document, and SPD (or provide summary of material modifications) to provide information on right to extended election period, premium assistance, and enrollment options (if applicable)
- Revise COBRA Notice Procedures to describe notice required to be given by AFIs upon becoming eligible for Medicare or another GHP and the appeal rights to the DOL for determinations of AEI eligibility
- Revise Special Enrollment Rights Notice (provided to employees at or before being offered opportunity to enroll in the GHP) in order to explain the new special enrollment rights effective April 1, 2009.
- Amend plan documents for covered GHPs and revise summary plan descriptions (or prepare summaries of material modifications) with respect to new HIPAA Special Enrollment Rights.
- Review cafeteria plan documents to assure that the new special enrollment rights and requests to disenroll a child from a GHP in order to enroll in CHIP are covered and

explained as change of status events

- Actively monitor states in which GHPs are maintained for state elections to provide premium subsidies in order to determine for which states state-specific premium subsidy notices will need to be provided.

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