

"CHIPRA adds new special enrollment period rules to HIPAA and new notice and disclosure obligations to the SCHIP program."

Employer Obligations Under the Children's Health Insurance Program Reauthorization Act of 2009

by

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Prior to signing the well-publicized stimulus bill, President Obama signed another piece of legislation that creates new obligations for employers and their group health plans. This other, less-publicized piece of legislation is the Children's Health Insurance Program Reauthorization Act of 2009 (called "CHIPRA"), and it was signed into law by President Obama on February 4, 2009.

CHIPRA's main purpose is to provide reauthorization funding for the State Children's Health Insurance Program ("SCHIP") that was set to expire on March 31, 2009. In addition to providing for this additional funding, however, **CHIPRA adds new special enrollment period rules to HIPAA and new notice and disclosure obligations to the SCHIP program with which employers and their group health plans must comply. Although the new notice and disclosure obligations have a delayed effective date, employers and their group health plans will need to begin complying with the new HIPAA special enrollment period rules as of April 1, 2009.**

The SCHIP program is renamed under CHIPRA as the "Children's Health Insurance Program" (or "CHIP"). Thus, for the balance of this Newsletter, we will refer to the SCHIP program simply as the CHIP program.

Background on the CHIP Program

The CHIP program was originally created more than a decade ago, as part of the Clinton administration's Balanced Budget Act of 1997. Initially, the CHIP program was authorized for a ten-year period, through September of 2007. Congress previously passed a short-term extension of the CHIP program, up through March 31, 2009. CHIPRA now reauthorizes and extends the CHIP program for an additional four-plus years, up through September of 2013.

In broad terms, the CHIP program's purpose is to provide health insurance coverage to uninsured children in families whose incomes are too high to qualify for Medicaid, but not high enough to afford private health insurance. It does this through the federal government's provision of certain matching funds to each state that establishes its own CHIP (all states have their own CHIPs). There are broad federal guidelines which states must follow in establishing their CHIPs. Beyond those guidelines, states are free to design their CHIPs as they see fit in terms of eligibility, benefits offered, etc.

New Rules Under CHIPRA

1. **New Special Enrollment Period Rules.** Effective April 1, 2009, CHIPRA adds two new special enrollment events to HIPAA's special enrollment period rules. Specifically, CHIPRA provides that a group health plan is required to permit an employee who is eligible, but not enrolled, for coverage under the group health plan (or a dependent of the employee if the dependent is eligible, but not enrolled, for coverage) to enroll for coverage under the plan in either of the following circumstances:

- (i) the employee or dependent is covered under Medicaid or a state's CHIP and coverage of the employee or dependent under the Medicaid or CHIP plan is terminated as a result of a loss of eligibility for such coverage, and the employee requests coverage under the group health plan within 60 days of the loss of coverage; or
- (ii) the employee or dependent becomes eligible for a premium assistance subsidy (see numbered paragraph 2 below) with respect to coverage under the group health plan, and the employee requests coverage under the group health plan within 60 days after the date the employee or dependent is determined to be eligible for the premium assistance subsidy.

Note that employees have a **60 day period** to enroll for coverage under these two new special enrollment events, instead of the shorter **30 day period** that group health plans are allowed to impose under HIPAA's existing special enrollment event rules.

Importantly, employers will need to review the special enrollment period provisions of the plan documents for their group health plans to determine whether such provisions need to be amended to reflect these two new special enrollment events (we expect that most plan documents will need to be amended, unless the document simply incorporates the HIPAA special enrollment period rules by reference). Ideally, any needed amendments should be adopted by an employer prior to the April 1st effective date of the new rules, so that the employer's group health plan will continue to be operated in accordance with its terms. In any event, though, employers will need to begin operationally complying with the provisions of these two new special enrollment event rules as of April 1st.

2. **Premium Assistance Subsidy.** Effective April 1, 2009, states are permitted (but not required) to offer a premium assistance subsidy for coverage under certain employer-sponsored health plans to all low-income children (and, in some cases, their parents) who are eligible for the CHIP program. The subsidy is only provided if the low-income child (or the child's parent) voluntarily elects to receive the subsidy. If a state provides the subsidy and a particular low-income child (or his or her parent) elects to receive the subsidy, health coverage for the child is provided through the employer-sponsored health plan, instead of being provided in some other manner through the state's CHIP program.

The employer-sponsored coverage for which a state may provide the premium assistance subsidy (referred to in CHIPRA as "qualified employer-sponsored coverage") must be a group health plan or health insurance coverage offered through the employer which meets the following requirements:

- (i) the coverage must be "creditable coverage" for HIPAA purposes;
- (ii) the employer contribution toward the cost of any premium for the coverage must be at least 40%; and

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Consult your attorney for advice appropriate to your circumstances.

"If a state decides to provide premium assistance subsidies, each employer maintaining a group health plan in that state must provide each of its employees with a written notice."

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- (iii) the coverage must be available to individuals in a manner that would be considered to be a nondiscriminatory group for eligibility purposes under the Tax Code's Section 105(h) rules.

CHIPRA specifically excludes coverage under either a health flexible spending arrangement (such as a Health FSA or a Medical Reimbursement Account) or a high deductible health plan (for HSA purposes) from being "qualified employer-sponsored coverage."

Generally, the amount of the premium assistance subsidy which the state can provide to a low-income child is the incremental difference in cost to the employee between the cost of enrolling only the employee under the employer-sponsored coverage and the cost of enrolling the employee and the low-income child under the employer-sponsored coverage. If premium assistance is also provided to the parent of a low-income child, the amount of the subsidy is increased to take into account the cost of enrollment of the parent in the employer-sponsored coverage (or, if the state determines it to be cost-effective, the cost of enrollment of the low-income child's family in the employer-sponsored coverage). The amount of the subsidy is reduced by any premium cost-sharing that applies under the particular state's CHIP program for CHIP coverage.

Under CHIPRA, a state is allowed to provide the premium assistance subsidy either as a direct reimbursement to an employee for out-of-pocket expenditures, or instead as a reimbursement to the employee's employer. Fortunately, CHIPRA allows employers to opt-out of being reimbursed for the subsidy. In the case of such an opt-out by the employer, the employer is effectively removed from the subsidy process, and the state will then make its reimbursement for the subsidy directly to the employee. This opt-out possibility (the mechanics of which will presumably be forthcoming) allows the employer to continue to withhold the full amount of the employee contribution required for coverage of the employee and the low-income child under the employer's group health plan.

If a state provides premium assistance subsidies for employer-sponsored coverage, CHIPRA requires the state to establish a process for allowing the parent of the low-income child who is receiving the subsidy (i) to disenroll the low-income child from the employer-sponsored coverage, and (ii) correspondingly, to enroll the child in the state's CHIP plan. This ability to disenroll the low-income child from the employer-sponsored coverage and enroll the child in the state's CHIP plan must be available as of the first day of each month. It remains to be seen how, if at all, this rule will interact with the "mid-year change in election" provisions of the Tax Code's Section 125 rules if the employee was paying any additional premium for coverage of the low-income child on a pre-tax basis through the employer's cafeteria plan.

3. **Notice Obligation Relating to the Premium Assistance Subsidy.** If a state decides to provide premium assistance subsidies, each employer maintaining a group health plan in that state must provide each of its employees with a written notice informing the employees of the premium assistance opportunities then currently available to the employees. This written notice may be provided in conjunction with the provision of (i) health plan eligibility materials, (ii) open enrollment materials, or (iii) the summary plan description ("SPD") for the group health plan.

Fortunately, CHIPRA directs the Department of Labor (the "DOL") and the Division of Health and Human Services ("DHHS") to develop national and state-specific model notices which can be used by employers to satisfy this written notice requirement. These model notices are required to be issued by the DOL and DHHS within one year of CHIPRA's enactment (i.e., by February of 2010), and employers are required to provide the notices to their employees beginning with the first plan year that begins after the date on which the model notices are first issued.

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4. Disclosure Obligation Relating to the Premium Assistance Subsidy. CHIPRA also provides that the plan administrator of a group health plan must disclose to a state, upon the request of the state, certain information about the benefits available under the group health plan. The exact information required to be disclosed will be fleshed out in yet-to-be developed regulations issued by DHHS and the DOL. The purpose of this disclosure will be to allow states to make a determination as to the cost-effectiveness of providing the premium assistance subsidies for employer-sponsored coverage versus providing coverage directly through their respective CHIP programs.

Again, CHIPRA directs the DOL and DHHS (as part of a working group established under CHIPRA) to develop a model form which plan administrators may use for purposes of making this required disclosure. Plan administrators will be required to begin using the model form with respect to requests made by states for information beginning with the first plan year that begins after the date on which the model form is first issued.

Conclusion

Although there are delayed effective dates with respect to the new notice and disclosure obligations of CHIPRA relating to the premium assistance subsidies, the two new HIPAA special enrollment event rules take effect as of April 1, 2009. As a result, employers should begin complying with these two new special enrollment event rules as of April 1st, and should consider adopting any necessary amendments to the plan documents for their group health plans relating to these two new special enrollment event rules prior to April 1st as well.