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RECENT HEALTH AND WELFARE DEVELOPMENTS

You may have thought you had enough on your plate in trying to implement the new COBRA premium subsidy legislation. However, you should be aware of several additional developments that will affect employers in their roles as sponsors of group health and welfare plans.

Children's Health Insurance Program

Premium Assistance Subsidy

The Children's Health Insurance Program Reauthorization Act of 2009 (CHIPR) reauthorizes and broadens the Children's Health Insurance Program (CHIP) through 2013. CHIP provides health insurance to low income children and families who earn too much to qualify for Medicaid.

- CHIPR expands CHIP eligibility to families with incomes up to 300% of the federal poverty level (approximately \$66,000 for a family of four in 2009).
- Of importance to employers are provisions in the Act which allow states to offer a premium assistance subsidy to qualifying low-income employees and dependents who are eligible for "qualified employer-sponsored coverage."
- Qualified employer-sponsored coverage includes group health plan coverage that qualifies as creditable coverage under the Public Health Plan Act, for which the employer contributes at least 40% of the cost, and is available in a non-discriminatory fashion.
- Qualified employer sponsored coverage does *not* include an HSA (health savings account) compatible high deductible health plan (with or without an HSA) and health flexible spending accounts.
- States that offer a premium assistance subsidy may pay the subsidy directly to the employer plan sponsor or to the eligible plan participant.
- Employers who sponsor group health plans must provide notice of premium assistance offered by the state where the employee resides.

While the law is generally effective April 1, 2009, the employer notice obligation does not begin until the first plan year after the government issues employer model disclosure notices. The government has until February 2010 to issue such employer model disclosure notices. Employers are also required to disclose to the state (upon its request) information about benefits available under the employer's group health plan to allow the state to analyze the cost effectiveness of a state premium subsidy.

Special Election Rights

CHIPR also amends ERISA, the Public Health Service Act, and the Internal Revenue Code to give special health and cafeteria plan enrollment rights (outside of open enrollment) to an employee who is eligible, but not enrolled in the employer's plan, if:

- an employee or dependent loses coverage under Medicaid or CHIP as a result of loss of eligibility; or
- the employee or dependent becomes eligible for Medicaid or CHIP premium assistance.
- the employee or dependent must request coverage within 60 days after the event giving rise to the special enrollment right.

These special election rights are effective April 1, 2009. Employers will need to amend their health and cafeteria plans to provide the special enrollment rights authorized by CHIPR.

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HIPAA Privacy and Security Amendments

In addition to the COBRA premium subsidy provisions (*see our HRO alert dated February 20, 2009*), the American Recovery and Reinvestment Act of 2009 (ARRA) includes provisions affecting the health care information privacy and security rules created by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). These new provisions are included in ARRA's Health Information Technology for Economic and Clinical Health Act or HITECH.

- The enforcement changes are effective for violations that occur after February 17, 2009.
- Otherwise, the changes are generally effective February 17, 2010, except for changes to the HIPAA security provisions, which will become effective 30 days after new regulations are issued.

Before these changes:

- HIPAA's protection of a patient's personal health information or PHI and limitation on the use of PHI applied only to "covered entities."
- Covered entities include group health plans, health care clearinghouses, and health care providers.

HITECH extends HIPAA's security obligations to business associates of covered entities. Business associates are entities that assist covered entities in performing duties that involve the use or disclosure of PHI, such as third party administrators, health information exchange organizations, consultants, attorneys, and accountants.

HITECH also modifies HIPAA's disclosure requirements.

- Previously, a covered entity was only required to disclose breaches of PHI privacy or security if it determined that disclosure was necessary to mitigate damage stemming from the breach.
- HITECH requires all privacy or security breaches to be disclosed to each individual whose PHI was released in the breach.
- In addition, if the breach affects 500 or more individuals, the breach must be reported to the Secretary of U.S. Health and Human Services Department ("HHS") and potentially others.
- HITECH also requires covered entities that use electronic health records to provide individuals with an accounting of disclosures from such records that are made for treatment, payment or health care operations for the three-year period before the request. An individual who pays the entire cost of a health care item or service may also prohibit disclosure of the individual's PHI relating to such item or service to the group health plan.

Finally, HITECH expands remedies for violations of HIPAA by giving state attorney generals the right to institute a private cause of action on behalf of state residents who have been threatened or damaged by HIPAA violations. This provision is important because previously, no private right of private action for violations of HIPAA existed, and enforcement was limited to the HHS. HITECH also expands the damages available for a breach of HIPAA to include money damages and increases the civil penalties for violations of HIPAA.

Michelle's Law

Michelle's Law, which was signed into law on October 8, 2008, amends ERISA, the Public Health Service Act, and the Internal Revenue Code to prevent a group health plan from terminating a college student's health coverage simply because the student takes a medically necessary leave of absence from school or a reduced part-time class load.

To qualify for continued coverage, the leave of absence must be medically necessary, begin while the student is suffering from a serious illness or injury; and would otherwise cause the student to lose coverage under the terms of the plan. The student must provide a written certification of medical necessity from his or her physician.

If eligible, the student on leave is entitled to the same benefits as if he or she had not taken a leave. Michelle's Law also provides that group health plans must include notice of these rights with any notice regarding a requirement for certification of student status for coverage under the plan. Michelle's Law is effective for plan years beginning on or after October 9, 2009 (January 1, 2010 for calendar year plans).

Qualified Transportation Fringe Benefits

For those employers who maintain qualified transportation benefits, ARRA increased the monthly limit for transit passes and vanpools to the amount allowed for qualified parking expenses. For 2009, this amount is \$230 a month (a significant increase from the \$120 per month previously allowed). This change will be in effect from March 1, 2009 through December 31, 2010.

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