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CHIP Expansion Affects Employer Health Plans

Congress has recently expanded the Children's Health Insurance Program (“CHIP”) in several significant respects. Many of these changes will directly affect employer-sponsored health plans by April 1, 2009.

Premium Assistance

CHIP (formerly known as the *State Children's Health Insurance Program*, or “SCHIP”) is a federal-state program designed to increase the number of low-income children who have health coverage. States may still provide that coverage directly. Under the expanded CHIP, however, states now have the option of subsidizing the cost of coverage available to eligible children under employer-sponsored health plans. This premium assistance provision of CHIP takes effect as of April 1st.

This premium subsidy may be paid either to the employee or to the sponsoring employer, although an employer may opt out of receiving these payments. In that event, the subsidy would go to the employee, who would be expected to use the subsidy to help pay for the child's health coverage.

Special Enrollment Events

Employers cannot opt out of the other CHIP requirements. For instance, as of April 1st, an employer health plan must allow an eligible child (and, under certain circumstances, the child's parent-employee) to enroll in the employer's health plan upon becoming eligible for this premium assistance (or for similar premium assistance under the Medicaid program). This eligibility for premium assistance will constitute an additional “special enrollment” event under HIPAA. A key difference, however, is that children or their parents will have 60 days, rather than only 30, in which to request this new type of special enrollment.

The CHIP expansion also created a *second* new HIPAA special enrollment event. This is a loss of coverage under either CHIP or Medicaid. Again, any employee or child who is affected by such a loss of coverage has 60 days in which to request special enrollment under an employer health plan.

Coordination of Benefits with CHIP

Depending on the terms of an employer plan, a state may continue to provide CHIP coverage directly to an eligible child who is also enrolled in the employer plan. Should this occur, the new law makes clear that the employer plan must be *primary* to CHIP. Such a coordination-of-benefits rule already applies to employer plans covering individuals who are also receiving Medicaid benefits.

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Health Plan Amendments

Health plan sponsors – and particularly those sponsoring self-funded plans – will have to amend their plan documents to reflect these new CHIP provisions. The two new special enrollment events should be added, along with the 60-day period in which to request such enrollment. Moreover, the plan's coordination-of-benefits provisions may need to be tweaked to provide that the plan's coverage will always be primary to CHIP. Because all of these changes take effect as of April 1, 2009, health plan amendments should be effective as of that date, as well.

Excluded Employer Plans

Although this CHIP expansion applies to virtually all employer health plans, a few plans are excluded. These changes do not apply to voluntary insurance arrangements or to employee-pay-all plans. This is because CHIP allows states to subsidize coverage under an employer plan only if the employer pays at least 40% of the premium. Moreover, these rules do not apply to health flexible spending accounts or to high deductible health plans.

Cafeteria Plan Implications

The new special enrollment events will raise questions under many employers' cafeteria plans. IRS regulations currently allow a mid-year change in a cafeteria plan election in connection with any HIPAA special enrollment event, and the special enrollment events created by the CHIP expansion automatically fall within the scope of these regulations. Accordingly, if a cafeteria plan document simply provides that a mid-year election change is permissible in connection with *any* HIPAA special enrollment event (without actually *describing* those events), it may not be necessary to amend the document to allow an employee to pay his or her share of the premiums on a pre-tax basis.

On the other hand, if a cafeteria plan document does describe the existing special enrollment events (which do not include the two events added by the CHIP expansion), an employer who wants to allow an employee or child who enrolls under these new rules to pay his or her share of the premiums on a pre-tax basis will likely have to amend the cafeteria plan document. That amendment should probably be adopted *before* any such mid-year election change is permitted.

Notification and Response Requirements

Two other aspects of the CHIP expansion will affect sponsors of employer health plans, though not in the immediate term. These involve requirements to notify employees of the CHIP premium assistance, and to respond to requests for information from state CHIP agencies concerning a health plan's provisions.

Under the recent legislation, the government is to draft a model notice concerning this CHIP premium assistance. Once that notice has been drafted, employers will be required to provide it to their health plan participants. It will likely take some time to draft this model notice, however, because a separate notice will be required for each state.

Similarly, the government is to draft a model form by which an employer may respond to a state CHIP agency's request for information concerning the employer's health plan. The states need this information not only to determine whether it would be cost-effective to subsidize an employee's premiums under the plan – as opposed to simply providing the coverage directly – but also to determine whether the state should *supplement* the employer coverage. This model response form is to be used in responding to requests for information in the first plan year beginning after it is issued. Thus, calendar-year plans will have at least several more months in which to prepare to respond to these requests.

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The new law provides stiff penalties (\$100 per participant per violation) for failing to comply with either of these notice or response requirements. Employers or their third-party administrators will therefore want to monitor these aspects of CHIP for further developments.

Employer Next Steps

In the immediate term, employers may want to consider taking the following steps:

- Amending their health plans to reflect the two new special enrollment events, as well as the requirement to provide coverage that is primary to CHIP;
- Making any conforming amendments to their cafeteria plan documents;
- Revising their existing HIPAA special enrollment notices to include the two new events; and
- Confirming that the plan's insurer or third-party administrator will be able to comply with these new special enrollment requirements as of the April 1st deadline.

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