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Governor Paterson Signs New Health Care Reform Bills Into Law For New York State

On July 29, 2009, Governor Paterson signed into law three new health care reform bills, which are intended to make health insurance both more affordable and more accessible for New York State residents. The first bill extends health insurance continuation coverage under a group health insurance plan from 18 months to 36 months. The second bill permits unmarried children to be covered under a parent's group health insurance policy through age 29. The third bill enacts a series of managed care reforms designed to enhance consumer and provider protections.

1. Expansion of COBRA for 36 Months

Prior Law. Previously existing New York State Insurance Law Section 3221(m) permitted individuals covered under group health insurance policies that are not subject to the Federal Consolidated Omnibus Budget Reconciliation Act ("COBRA") law to elect to participate in New York State continuation coverage in the event of job loss, reduction in work hours or loss of eligibility for a period of up to 18 months (in cases where dependents lose coverage due to divorce, separation, or loss of dependent child status, the period of continuation coverage is 36 months). Generally, New York State's continuation coverage law (often referred to as "mini-COBRA") mirrors coverage under COBRA, but is applicable to employers with fewer than 20 employees (COBRA is applicable to employers with 20 or more employees). New York State mini-COBRA is also inapplicable to group dental policies, whereas Federal COBRA applies to such policies.

New Law. The new bill signed into law by Governor Paterson amends New York State Insurance Law Section 3221(m) to require insurers offering group health insurance policies providing hospital, surgical or medical expense (presumably not including dental or vision) coverage to extend the period of state continuation coverage from 18 months to 36 months for all qualifying events. The bill also provides that an individual who has otherwise exhausted Federal continuation benefits under COBRA shall be permitted to maintain coverage for up to 36 months, if the individual is entitled to less than 36 months of Federal COBRA benefits.

Effective Date. The effective date of this bill is July 1, 2009, and applies to all group health insurance policies and contracts issued, renewed, modified, amended or altered on or after July 1, 2009.[1] This means that a calendar year plan that is not modified or amended between now and the end of the year will not be subject to this law until January 1, 2010.

2. Coverage for Dependent Children Through Age 29

Prior to adoption of the second bill signed into law by Governor Paterson, New York State Insurance Law did not impose a minimum age to which an insurer must extend coverage for dependent children under a health insurance policy. This bill requires insurers to allow employers the opportunity to elect extended coverage for "dependent children" under a parent's health insurance policy. The bill defines a "dependent child" as an unmarried child through the age of 29 of an employee or member insured under a group contract, who is not a named insured under any other group insurance policy and is not eligible for coverage under

[1] http://www.ny.gov/governor/bills/pdf/gpb_11.pdf

Medicare. Children are not required to be financially dependent on their parents to elect this benefit.

The bill provides that an employee, group member or dependent child may elect in writing to continue coverage under a parent's group policy: (1) within 60 days following the date coverage would otherwise terminate due to age under the applicable group policy; (2) within 60 days after meeting the definition of "dependent child"; or (3) during the policy's annual 30-day open enrollment period. Dependent children whose coverage terminated prior to the effective date of this bill will have a period of 12 months from the effective date of the bill to elect coverage. The bill further provides that coverage will be retroactive to the date coverage would otherwise have terminated if the election is made within 60 days following the date coverage would otherwise terminate due to age, and that coverage will be prospective (no later than 30 days after the election and payment of the first premium) if an election to resume coverage is made either during an annual open enrollment period or during the 12-month period after the effective date of the bill. The bill also states that the employee, group member or dependent child, not the employer, must pay for the cost of this coverage.

We note that under the new law insurance companies writing policies in New York must make this option available to policyholders (i.e., employers), but employers are not required to offer this extended coverage to dependent children under their plans. Employers may decide whether or not they want to include this coverage in their plans. However, if an employer does not elect to extend coverage through age 29, the insurer is still required to offer continuation coverage for dependents through age 29. The bill requires that insurers establish a distinct premium rate for this coverage.

Effective date. The effective date of this bill is September 1, 2009, and applies to all group health insurance policies and contracts issued, renewed, modified, amended or altered on or after September 1, 2009.[2] This means that a calendar year plan that is not modified or amended between now and the end of the year will not be subject to this law until January 1, 2010.

Impact on Self-Insured Plans and Out-of-State Contracts

The dependent and COBRA extension laws apply only to *insured* plans written in New York state. Self-insured plans are not subject to this law. In addition, insurance contracts written in another state but covering individuals residing in New York, in general, should not be subject to this law. Employers sponsoring self-insured plans or offering insurance through out-of-state contracts should discuss with ERISA counsel whether design changes should be considered, particularly if they also offer an insured plan that is subject to New York state law.

New York Follows Trend. Responding to the national problem of twenty-somethings who are uninsured and costing state's money for free care, more than 30 other states have now enacted laws extending health coverage for dependent children beyond the typical age limit of 19 or 23 years. New York's law is a bit different in that it allows an employer to opt-out (or, more precisely, permits them not to opt-in) of the coverage requirement, but achieves the same results because it imposes upon the insurance companies doing business in New York a requirement that they offer coverage. A small sampling of similar laws from across the country is as follows:[3]

- New Jersey law extends coverage through age 30 if the dependent child is unmarried, not covered by other insurance and not eligible for Medicare, has no dependents, and is a resident of New Jersey or enrolled as a full-time student at an accredited public or private institution of higher education. Additionally, if coverage terminates prior to the 30th birthday and the dependent requests continuation within 30 days of aging out of the policy or during open enrollment, coverage continues until the date of dependent's 31st birthday.

- Pennsylvania law requires that group coverage be extended through age 29. To qualify, the child must be under age 30, unmarried with no dependents of his or her own, and be either a Pennsylvania resident or a full-time college student (no matter where located). There is no requirement that the child be a tax dependent.

- Illinois law requires health insurance contracts to cover unmarried adult children as dependents under their parent's insured health coverage until they reach age 26. It also allows those adult children who have served in the military to be included as dependents under their parents' group coverage until they reach age 30. To qualify, the child must be unmarried and under age 26, but there is no restriction on the child having his or her own dependents, nor is there an Illinois residency requirement. The law states clearly that eligibility may not be

[2] http://www.ny.gov/governor/bills/pdf/gpbm_74.pdf

[3] While the laws of each state contain their own definition of "dependent child", these laws often include eligibility criteria such as unmarried, not covered by other insurance policies, not eligible for Medicare, and state residency requirements. Some states also include a financial dependency and/or full-time student requirement.

conditioned on student status. There is no requirement that the child be a tax dependent.

- Massachusetts law extends coverage up to age 26 or two years following the loss of dependent status under the U. S. Internal Revenue Code (the "Code"), whichever occurs first.

- California law extends coverage up to age 27, but employers are generally not required to pay the cost of coverage for dependents between the ages of 23 and 27.

Federal Definition of "Dependent"/Possible Tax Consequences. It is important to note that the definition of "dependent child" under New York's bill and other state laws do not change the definition of "dependent" under the Code. This can result in a tax issue for employees covering children who meet state mandated definitions of dependent but who do not meet the Code's definition. For tax purposes, medical coverage for employees, their spouses and their dependents is typically excluded from the employees' gross income, but only if, in the case of a "dependent," he or she meets the Code definition for a dependent. Consequently, there will be instances in which a child is his or her parent's dependent for health plan eligibility purposes under state law, but *not a dependent under the Code definition*. When this happens, the **employee** will be subject to bifurcated tax treatment—with imputed income at the federal tax level but not at the state level. While the value of the insurance provided to the child may not be included in taxable income for state tax purposes (because it is provided as a result of the state mandate), the value of the child's insurance coverage will be required to be included in the employee's income for federal tax purposes.

The Internal Revenue Service ("IRS") has offered scant guidance on how to value the insurance for dependent children. However, they have informally indicated that they disfavor any "incremental cost" basis for imputation of tax. Employees may argue that, for example, if they cover the employee and spouse plus three children, one of whom is not a dependent for federal tax purposes, then the value of the coverage is 1/5th of the family premium. This is an incremental cost argument and the IRS will likely not approve. Why? Because another employee with two children, one of whom is not a dependent for federal tax purposes, would have imputed as income 1/4th the cost of the family premium—the IRS would not accept that the second employee would have more income imputed than the first for the very same benefit. Imputation of tax is an important and complex issue. Employers should seek advice from qualified ERISA or tax counsel to determine the impact of the new law and whether, to what extent and how they must impute income to employees for dependent coverage.

3. Managed Care Reform

The third bill signed into law by Governor Paterson implements reforms designed to assist both health care consumers and providers. The following are some of the reforms included in the bill:

- Prohibiting insurers and HMOs from treating an in-network provider as an out-of-network provider;

- Requiring insurers to have an adequate provider network;

- Requiring insurers and HMOs to pay electronic claims promptly;

- Requiring insurers and HMOs to give participating providers notice of adviser reimbursement changes to provider contracts and giving providers an opportunity to cancel the contract;

- Permitting newly licensed providers and providers moving to New York to be provisionally credentialed until the a final credentialing determination is rendered;

- Shortening utilization review timeframes for determination involving post-hospital health care services;

- Requiring that services be approved if a utilization review agent fails to meet a utilization review timeframe;

- Allowing providers to appeal concurrent adverse determinations through the external appeal process; and

- Establishing a new external appeal standard for rare disease treatments.

While the general effective date of this bill is January 1, 2010, certain provisions are effective October 1, 2009.[4]

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As these new bills will likely lead to questions regarding their effect on employee welfare benefit plans, we recommend that employers and plan sponsors consult with legal counsel and their insurers as to what specific effect the bills will have on their plans as well as the scope of their obligations under the bills.

[4] http://www.ny.gov/governor/bills/pdf/gpb_13.pdf

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