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Health Care Reform's No-rescission Rule And COBRA — Here We Go Again

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October 29, 2010 — As previously reported in the newsletter, as a part of health care reform, the Patient Protection and Affordable Care Act (known simply as the "Affordable Care Act") enacted a rule that prohibits group health plans from rescinding group health coverage. This no-rescission rule applies to all group health plans effective for plan years beginning on or after Sept. 23, 2010 (Jan. 1, 2011 in the case of a calendar year group health plan), including so-called grandfathered group health plans (that is, plans in existence on March 23, 2010, the date of the Act's enactment). On June 28, 2010, the federal agencies that interpret the Act's mandates issued an interim final rule (IFR) explaining how the no-rescission rule works. (See box for a description of the rule.) In that guidance, the agencies provided the following example:

- **Facts.** An employer sponsors a group health plan that provides coverage for employees who work at least 30 hours per week. Individual B has coverage under the plan as a full-time employee. The employer reassigns B to a part-time position. Under the terms of the plan, B is no longer eligible for coverage. The plan mistakenly continues to provide health coverage, collecting premiums from B and paying claims submitted by B. After a routine audit, the plan discovers that B no longer works at least 30 hours per week. The plan rescinds B's coverage effective as of the date that B changed from a full-time employee to a part-time employee.
- **Conclusion**. In this example, the plan cannot rescind B's coverage because there was no fraud or an **intentional** misrepresentation of material fact. The plan may cancel coverage for B prospectively, subject to other applicable Federal and State laws.

  This example raised the possibility that the no-rescission rule overrides certain fundamental COBRA principles. As plan administrators know, COBRA allows plans to continue coverage during the 60-day election period and the premium grace periods subject to a retroactive termination of coverage if the qualified beneficiary fails to pay for the coverage. Because this example used a fact pattern that did not reference the ability to terminate coverage retroactively for failure to pay the COBRA premium, a question arose on whether the no-rescission rule is intended to override COBRA coverage.

DOL Webcast Provided Informal Guidance

On Sept. 8, 2010, DOL sponsored a compliance assistance webcast that addressed health care reform issues, including the no-rescission rule. In that context, the government officials addressed the interplay between COBRA and the no-rescission rule and clarified that the ability to terminate COBRA coverage retroactively for a qualified beneficiary's failure to pay the premium is permissible.

The No-rescission Rule

Under the "no rescission" rule, a group health plan may not rescind a participant's coverage (that is, terminate that coverage retroactively) except in the case of fraud or the individual's intentional representation of a material fact, as prohibited by the plan terms. In addition, a group health plan must provide at least 30 days' advance written notice to each participant who would be affected before any coverage may be rescinded (due to fraud or an intentional misrepresentation of material fact). Separately, a group health plan may cancel coverage, even retroactively, if the termination of coverage is due to a failure to timely pay required premiums or contributions toward the cost of coverage.

The basis for this position is the rule in the IFR that plans are allowed to terminate coverage retroactively if an individual fails to pay the premium. Therefore, if a group health plan requires the payment of a COBRA premium to continue coverage after a qualifying event and that premium is not paid, the no-rescission rule is not violated if the plan retroactively terminates coverage due to a failure to elect and pay for COBRA coverage.

Technically, these comments were not "official" government positions. However, they are helpful to plan administrators in deciding how best to adhere to a good faith interpretation of the statute and regulatory guidance.

Note that this issue arises in many cases involving a divorce. For example, an employee might get divorced and neglect to tell the plan administrator of the divorce for several months. Once an affected plan administrator finds out about that divorce, the administrator typically will want to terminate the qualified beneficiary's coverage retroactively because the individual failed to notify the plan of the divorce in a timely manner and therefore failed to elect and pay for COBRA coverage. If this action is taken, it should not violate the no-rescission rule.

(Of course, administrators still need to make sure that plan procedures are in place so that qualified beneficiaries know when and how to notify the plan administrator of qualifying events. If qualified beneficiaries are not advised of these procedures, the plan cannot deny them COBRA coverage for failure to notify the plan of the qualifying event within 60 days — because they were not notified of the rule, the plan cannot penalize them for failure to comply with the rule.)

'Sub-regulatory' Guidance Issued

Subsequent to this government-sponsored webinar, the government actually issued what is called "sub-regulatory" guidance — answers to frequently asked questions, available on DOL's website. Although this guidance does not have the same force as regulations, it is relied upon regularly by practitioners (and the government) in applying the legal requirements.

Question & Answer 7 of those new FAQs (in ¶1840 and http://www.dol.gov/ebsa/faqs/faq-aca2.html), states the following (key wording is italicized):

> **Rescissions**
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> **Q7: The Affordable Care Act (through Public Health Service Act section 2712) generally provides that plans and issuers must not rescind coverage unless there is fraud or an individual makes an intentional misrepresentation of material fact. A rescission is defined as it is commonly understood under the law — a cancellation or discontinuance of coverage that has a retroactive effect, except to the extent attributable to a failure to pay timely premiums towards coverage.**
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> **Is the exception to the statutory ban on rescission limited to fraudulent or intentional misrepresentations about prior medical history? What about retroactive terminations of coverage in the "*normal course of business*"?**
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> The statutory prohibition related to rescissions is not limited to rescissions based on fraudulent or intentional misrepresentations about prior medical history. An example in the Departments' interim final regulations on rescissions clarifies that some plan errors (such as mistakenly covering a part-time employee and providing coverage upon which the employee relies for some time) may be cancelled prospectively once identified, but not retroactively rescinded unless there was some fraud or intentional misrepresentation by the employee.
> On the other hand, some plans and issuers have commented that some employers' human resource departments may reconcile lists of eligible individuals with their plan or issuer via data feed only once per month. If a plan covers only active employees (subject to the COBRA continuation coverage

provisions) and an employee pays no premiums for coverage after termination of employment, the Departments do not consider the retroactive elimination of coverage back to the date of termination of employment, *due to delay in administrative record-keeping*, to be a rescission.

Similarly, if a plan does not cover ex-spouses (subject to the COBRA continuation coverage provisions) *and the plan is not notified of a divorce* and the full COBRA premium is not paid by the employee or ex-spouse for coverage, the Departments do not consider a plan's termination of coverage retroactive to the divorce to be a rescission of coverage. (Of course, in such situations COBRA may require coverage to be offered for up to 36 months if the COBRA applicable premium is paid by the qualified beneficiary.)

This guidance is very helpful in providing that terminating coverage retroactively in the normal operation of a plan's record-keeping system or as a normal part of COBRA compliance should not violate the no-rescission rule. However, if coverage is continued inadvertently, outside of normal record-keeping, it is less clear that the plan could terminate that coverage retroactively absent fraud or an intentional misrepresentation of fact. For example, if a group health plan only provides coverage to active employees (subject only to COBRA's requirements), the FAQ clearly allows for retroactive termination when the employment termination is not reported to the plan administrator in the normal course for several weeks. It is not as clear that a retroactive termination would be permitted if the plan administrator was notified of a termination of employment but still kept a former employee and family on coverage for, say, six months after notification of the termination of employment. Ideally, from the plan's perspective, the answer would be that a retroactive termination of coverage would be permitted, subject to payment of the COBRA premium; but the guidance did not specifically address this type of situation.

Also not addressed was a case where a plan administrator *was* notified of the divorce and, due to an error in recordkeeping, kept the ex-spouse on the coverage for several months until it realized the error. In this case, a retroactive rescission might not be permissible even under the new FAQ. Further guidance on this issue would help clarify the answer. Until then, plan administrators should consult with their benefits advisors before retroactively terminating group health plan coverage under any circumstances.

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