Proskauer

Health Coverage For Children To Age 26: Interim Final Regulations

May 11, 2010

On May 10, 2010, the Departments of Labor and Health and Human Services published interim final regulations (the "Regulations") implementing the requirements regarding dependent coverage of children who have not attained age 26 for group health plans and health insurance issuers under the provisions of the Affordable Care Act (the "Act").[1]

Background

The Act requires plans and issuers that provide dependent child coverage to make that coverage available for children until the attainment of age 26. There is no requirement for a group health plan or insurance issuer to provide coverage to dependent children; however, if a plan or issuer offers dependent child coverage, that coverage must be available until the attainment of age 26. This coverage mandate applies to all plans otherwise subject to the Act but not those that are excepted from coverage (such as HIPAA-excepted flexible spending accounts or HIPAA-excepted stand-alone dental or vision plans).

Understanding The Regulations

Effective Date Issues/Grandfathering

In general, the requirement to make available dependent coverage for children who have not attained age 26 is effective for plan years beginning on or after September 23, 2010 (January 1, 2011 for calendar year plans). However, there is a limited delayed effective date for certain grandfathered plans (*i.e.,* plans in existence on March 23, 2010), which may exclude an adult child who has not attained age 26 from coverage if the adult child is eligible to enroll in an eligible employer-sponsored health plan *other than* a group health plan of either parent. Thus, for example, in the case of an adult child who is eligible for coverage under the plans of the employers of both parents, neither plan may exclude the adult child from coverage based on the fact that the adult child is eligible to enroll in the plan of the other parent’s employer.

Plans and issuers are allowed to adopt the coverage mandate rule earlier than otherwise required. In fact, the preamble to the Regulations clarifies that this early adoption should not adversely affect a plan's grandfathered status. Separate guidance is expected on the definition of grandfathering and what types of amendments, if any, will adversely affect grandfathering treatment.

Definition of Dependent

The Regulations clarify that plans and issuers may no longer condition coverage on whether a child under the age of 26 is a dependent under the Internal Revenue Code (the "Code") or student. Instead, the term "dependent" may only be defined in terms of the relationship between the child and the participant. Specifically, the following factors may not be used for defining "dependent" for purposes of eligibility or continued eligibility for children under age 26: (1) financial dependency; (2) residency; (3) student status; (4) employment; (5) eligibility for other coverage; or (6) any combination of these factors. Presumably, a plan could impose these types of requirements for covered children who are age 26 or older, subject to applicable state law for insured plans.

In light of this, employers should review the specific terms of their group health plans (as well as summary plan descriptions and open enrollment materials) for the following issues and amend them as necessary:

- Review definitions and other applicable provisions to ensure that they do not reference only Code dependent children.
- Review definitions and other applicable provisions to ensure that, where appropriate, the plan terms clearly distinguish between dependent children who have not attained age 26 and other non-Code dependents who may also be eligible for coverage, such as domestic partners or children of domestic partners.
- Remove references to Michelle's Law, to the extent it no longer applies to the plan at issue.

Tax Treatment of Coverage

As described in more detail in our April 28, 2010 Client Alert entitled "Important IRS Guidance on Tax Treatment of Health Coverage for Children Under Age 27," [click here] employers are permitted to exclude from an employee's taxable income the value of any employer-provided health coverage for an employee's child for the period before the child turns age 26 and for the entire taxable year in which the child turns 26.

In this regard, however, there is some uncertainty about the extent to which the definition of “child” under the Regulations is the same as the definition of child under previously issued IRS guidance. For purposes of determining whether coverage for a child is tax free, the IRS clarified that a child is defined based on the Code list of parent-child relationships (without regard to any financial dependency or whether the parent can claim the child as a tax dependent). Under the Regulations, however, no specific definition is used. Instead, the rule appears to be based on the plan’s or issuer’s definition of dependent child. Therefore, it is possible that if a plan’s or issuer’s definition of child is broader than the Code’s definition, the coverage mandate may apply based on the specific coverage terms, even if that coverage is not tax-free coverage. Further clarification on this point is needed.

Premium Differences for Children Under Age 26

The Regulations clarify that separate premiums for covered children are not allowed if they are based solely on the age of a child. For example, a group health plan cannot charge one premium amount for children up to age 22 and another premium amount for children between ages 23 and 26. On the other hand, if a plan has a tiered premium structure for single coverage as opposed to single plus a certain number of dependents, the plan is allowed to charge the employee for the appropriate number of dependents as long as it is without regard to age.

Coverage Differences for Children Under Age 26

Under the Regulations, the coverage terms of a plan or policy for dependent children cannot vary based on the age of a child under age 26. Additionally, dependent child coverage may not be limited based on whether a child is married. Nevertheless, a plan is not required to cover the spouse or child of a child receiving dependent coverage.

Transitional Rule

When this mandate becomes applicable for a plan or issuer, children under age 26 may not be excluded, regardless of whether or when a child was enrolled in the plan or coverage. The Regulations therefore provide transitional relief for a child whose coverage ended or who was denied coverage because, under the terms of the plan or coverage, the availability of dependent coverage ended before the attainment of age 26.

The Regulations require plans and issuers to give these adult children a special opportunity to enroll (or re-enroll) as well as notice of that opportunity no later than the first day of the first plan year beginning on or after September 23, 2010 (January 1, 2011 for calendar year plans). The enrollment opportunity must continue for at least 30 days, regardless of whether the plan or coverage offers an open enrollment period and regardless of when any open enrollment period might otherwise occur. A plan could provide this enrollment opportunity as part of its regular open enrollment period as well.

Importantly, even if the request for enrollment is made after the first day of the plan year, if the child is enrolled, coverage must begin not later than the first day of the first plan year beginning on or after September 23, 2010 (January 1, 2011 for calendar year plans). This could raise issues regarding premium refunds for children who were enrolled in COBRA coverage prior to enrolling in dependent coverage as permitted under the transitional rule. In subsequent years, dependent coverage may be elected for an eligible child in connection with normal enrollment opportunities under the plan or coverage.

The Regulations clarify that notice of this enrollment right may be provided to an employee on behalf of the employee's child. Additionally, the notice may be included with other enrollment materials distributed to employees so long as the statement is prominent. Although the Regulations do not specify a means of delivery for this notice, presumably a notice sent by first class mail to the employee's last known address should be sufficient.

Also, note that the mandate for covering dependent children up to age 26 would have to be extended to qualified beneficiaries under COBRA coverage as well. Therefore, if a former employee is on COBRA coverage, that former employee would have the same right to add an adult child up to age 26 as a similarly situated active employee.

Children who enroll in group health plan coverage pursuant to this transitional rule must be treated as HIPAA special enrollees. This means, among other things, that the child (1) must be offered all benefit packages available to, and (2) cannot be required to pay more for coverage than, similarly situated individuals who did not lose coverage by reason of cessation of dependent status. It also means that parents have the ability to enroll themselves in the plan in addition to the child.

State Law

Notably, state laws that impose stricter requirements on health insurance issuers than those imposed by the Act are not preempted. Therefore, employers offering insured group health plans in states such as New York, New Jersey, and Pennsylvania, which already require dependent coverage to continue beyond age 26, must continue to meet these state law insurance requirements.

Outstanding Issues

Although the Regulations clarify many important issues and are relatively straightforward, certain open issues remain:

- It is clear that a child under age 26 who is receiving COBRA coverage under his or her parent's plan must be afforded an opportunity to enroll as a dependent of his or her parent under the Regulations' transitional rule. However, it is not clear whether a child under age 26 who is receiving COBRA coverage under his or her former employer's plan or spouse's employer's plan must be given the same enrollment opportunity under a grandfathered plan for pre-2014 years.
- As indicated above, the Regulations do not include a definition of the term "child." Thus, for example, it is not clear whether a broad plan definition of child will apply to the coverage mandate even if it is broader than the definition of child for tax exclusion purposes.
- Guidance regarding the effective date of the dependent coverage provisions for collectively-bargained plans has not been provided.

We will monitor these and all other issues related to health care reform and provide updates as guidance becomes available.

[1] "Affordable Care Act" means The Patient Protection and Affordable Care Act (PPACA) and the Health Care and Education Reconciliation Act of 2010 (HCERA).

Related Professionals

- **Ira M. Golub**
- **Robert M. Projansky**

Partner

- **Steven D. Weinstein**
  Partner
- **Edward S. Kornreich**