

February 13, 2009

## MEMORANDUM TO CLIENTS

### **Re: CHIP Reauthorization and Expansion Impacts Health Plans**

On February 4, 2009, President Obama signed into law H.R. 2, the Children's Health Insurance Program Reauthorization Act of 2009 ("CHIP" or "Act"). Significant for employer sponsors of group health plans, the Act contains new rules relating to state assistance for payment of employee premiums under a group health plan, new special enrollment rights, new employer notice requirements, and penalties for failure to comply. In addition, the effective date of the Act's premium payment and special enrollment rules is **April 1, 2009**.

#### **Background**

Generally, CHIP is a shared federal and state program that provides health insurance coverage to pregnant women and children. The program is designed to provide coverage for lower-income pregnant women and children who do not qualify for Medicaid, but who fall within 300% of the federal poverty level ("FPL") (previously 200%). States are generally permitted to design their own CHIP programs within flexible federal guidelines. The Act, which is generally effective April 1, 2009, reauthorizes and expands CHIP through 2013. The Act increases taxes on tobacco products to pay for the expansion. In addition to funding increases, the Act changes the name of the program from the State Children's Health Insurance Program (SCHIP) to the Children's Health Insurance Program (CHIP). The Act also raises the state minimum allowable eligibility standard to 185% of the FPL for pregnant women and 200% for children under age 19 and sets the cap at 300% of FPL, while phasing out coverage for non-pregnant childless adults. In addition, the Act increases coverage for dental care and permits children enrolled in group health plans without dental coverage to receive CHIP dental coverage. Finally, the Act creates several new obligations that apply to employer sponsors of group health plans, as described below.

#### **Premium Assistance Program**

The Act's new premium assistance program provisions are particularly significant for employer sponsors of group health plans. Premium assistance programs generally permit a state CHIP to provide coverage to a CHIP participant by paying the participant's share of the premium under an employer-provided group health plan that is available and meets certain requirements instead of providing such coverage through some other source. Currently, some states have demonstration programs that include health insurance premium assistance programs. These states can choose to keep their existing programs.

Under the new premium assistance program, adopting states will be permitted to enroll CHIP-eligible children, and in some cases their families, in "qualified employer coverage." If the parents or children agree to the enrollment, CHIP will pay the employee's portion of the premium. The Act provides a "limited opt-out" for an employer that permits the employer to refuse to receive direct premium payments from the states. If an employer chooses the limited opt-out, the employer must still permit eligible individuals to enroll in the plan and to pay for coverage through salary reductions. In these cases, the state will pay the premium assistance payment directly to the employee.

The Act defines "qualified employer coverage" as coverage where:

- the employer provides 40% of cost of coverage,
- coverage is "creditable coverage" as defined under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and
- coverage is available to a reasonable classification of employees (as defined in section 105(h) of the Internal Revenue Code ("Code")).

Health FSAs and high deductible health plans are excluded from the definition of qualified employer coverage. The new premium assistance program applies to both insured and self-insured plans.

The Act also provides that states shall create a process that will allow the parent of a child receiving premium assistance to disenroll from the employer coverage during any month and enroll the child in the State's child health plan.

***Practice Pointer: The Premium Assistance provisions take effect on April 1, 2009. Employers will need to determine whether to opt-out of direct state premium payments, and will need to consider how to administer an employee's request to disenroll from the group health plan, which may involve changing the employee's election under the employer's cafeteria plan as well.***

### **Special Enrollment Rights**

Additionally, the Act creates two new HIPAA special enrollment rights, by amending the HIPAA special enrollment rules under ERISA, the Code and the Public Health Service Act. After the effective date of April 1, 2009, group health plans must permit eligible employees enrolled in Medicare or CHIP to enroll in the plan within 60 days of the loss of Medicare or CHIP eligibility. Plans must also permit employees who are eligible under the terms of the plan to enroll within 60 days of a notice of eligibility for Medicare or CHIP premium assistance.

***Practice Pointer: Plans must begin administering these new HIPAA special enrollment rules as of April 1, 2009. In addition, plan documents that describe available special enrollment rights may need to be amended.***

### **Employee Notification and State Disclosure Notice**

A new notice requirement directs employers to provide participants with a notice describing the premium assistance program and the benefits available to them. The new notice can be included in the summary plan description or with other plan information. The Secretaries of the Departments of Labor and Health and Human Services (HHS) are required issue a model notice within one year of the date of enactment (*i.e.*, on or before February 4, 2010).

The Act also requires plan administrators to disclose to the state, upon request, detailed information about the benefits available under the plan. The disclosure notice will help states determine whether the coverage is eligible employer coverage. The disclosure notice must include information about benefits, premiums, cost-sharing, and other relevant items. The content of the notice will be determined by regulations issued by HHS. A working group will be established to advise HHS on the development of the disclosure notice. The working group will include employers, insurers, and plan sponsors, among others.

**Penalties and Effective Date**

Under the Act, the Secretary of Labor may assess a \$100 per day per failure penalty against any employer that fails to meet the employee notice requirement or that fails to provide the disclosure notification, when requested, to the state. Employers are required to comply with the employee notice requirement beginning with first plan year after the model notice is issued (i.e., January 1, 2011 for calendar year plans). Similarly, employers are required to supply the disclosure notice for state requests beginning with the first plan year after the disclosure model is issued. However, as noted above, the effective date for premium assistance and special enrollment provisions is April 1, 2009.

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