

under Medicaid and the Children's Health Insurance Program (CHIP). The Department of Labor (Department) is required to provide the model notice to employers within one year of CHIPRA's enactment. This document announces the availability of a Model Employer CHIP Notice. This notice also requests comments regarding compliance with the Employer CHIP Notice requirement for use in the development of future compliance assistance materials and/or regulations.

DATES: *Comment Date:* Comments are due on or before April 5, 2010.

ADDRESSES: Written comments may be submitted via any of the methods specified below. Please do not submit duplicates. All comments will be made available to the public. *Warning:* Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments are posted on the Internet exactly as received, and can be retrieved by most Internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:* E-OHPSCA.EBSA@dol.gov.

- *Mail or Hand Delivery:* Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N-5653, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, *Attention:* Employer CHIP Notice.

Comments will be posted without change to <http://www.regulations.gov> and <http://www.dol.gov/ebsa>, and available for public inspection at the Public Disclosure Room, N-1513, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Amy Turner or Beth Baum, Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, (202) 693-8335. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Purpose

This document addresses the Employer CHIP Notice requirement under CHIPRA and announces the availability of a model notice that can be used to satisfy the content requirements for the Employer CHIP Notice.

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Publication of Model Notice for Employers to Use Regarding Eligibility for Premium Assistance Under Medicaid or the Children's Health Insurance Program, Notice

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice of the Availability of the Model Notice for Employers Regarding Premium Assistance under Medicaid or the Children's Health Insurance Program, with Request for Comments.

SUMMARY: On February 4, 2009, President Obama signed the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA, Pub. L. 111-3). CHIPRA includes a requirement that the Departments of Labor and Health and Human Services develop a model notice for employers to use to inform employees of potential opportunities currently available in the State in which the employee resides for group health plan premium assistance

II. Coordination of Administration

Section 701(f)(3)(B)(i)(II) of the Employee Retirement Income Security Act (ERISA), as added by CHIPRA, requires the Departments of Labor and Health and Human Services, in consultation with State Medicaid and CHIP Agencies, to develop model language for the Employer CHIP Notice required under section 701(f)(3)(B)(i) of ERISA, section 2701(f)(3)(B)(i) of the Public Health Service Act (PHS Act), and section 9801(f)(3)(B)(i) of the Internal Revenue Code (Code).

Section 311(b)(1)(D) of CHIPRA provides that the Departments of Labor and Health and Human Services shall develop initial model notices as provided under ERISA section 701(f)(3)(B)(i)(II) and the Department of Labor shall provide such notices to employers by February 4, 2010, which is one year after the enactment of CHIPRA.

Section 104 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) requires the Departments of Labor, the Treasury, and Health and Human Services (the Departments) to ensure that guidance under the health coverage provisions of Part 7 of the ERISA, Title XXVII of the PHS Act, and Chapter 100 of the Internal Revenue Code,¹ and issued by the Departments that relates to the same matter, be administered so as to have the same effect at all times.

In accordance with these requirements, this document has been developed in coordination with the Departments of Health and Human Services and the Treasury, and in consultation with State Medicaid and CHIP Agencies.

III. Background

Under ERISA section 701(f)(3)(B)(i)(I), PHS Act section 2701(f)(3)(B)(i)(I), and section 9801(f)(3)(B)(i)(I) of the Code, as added by CHIPRA, an employer that maintains a group health plan in a State that provides medical assistance under a State Medicaid plan under title XIX of the Social Security Act (SSA), or child health assistance under a State child health plan under title XXI of the SSA, in the form of premium assistance for the purchase of coverage under a group health plan, is required to make certain disclosures. Specifically, the employer is required to notify each employee of potential opportunities currently

¹ The Employer CHIP Notice requirements in the provisions of section 701(f)(3)(B)(i) of ERISA, section 2701(f)(3)(B)(i) of the PHS Act, and section 9801(f)(3)(B)(i) of Code are included within Part 7 of ERISA, Title XXVII of the PHS Act, and Chapter 100 of the Code.

available in the State in which the employee resides for premium assistance under Medicaid and CHIP for health coverage of the employee or the employee's dependents. These notices are referred to in this document as "Employer CHIP Notices".

ERISA section 701(f)(3)(B)(i)(II) requires the Department to provide employers with model language for the Employer CHIP Notices to enable them to timely comply with this requirement. The model is required to include information on how an employee may contact the State in which the employee resides for additional information regarding potential opportunities for premium assistance, including how to apply for such assistance.

Section 311(b)(1)(D) of CHIPRA provides that the Departments of Labor and Health and Human Services shall develop the initial model notices under ERISA section 701(f)(3)(B)(i)(II), and the Department of Labor shall provide such notices to employers, by February 4, 2010. Moreover, each employer is required to provide the initial annual notices to such employer's employees beginning with the first plan year that begins after the date on which the initial model notices are first issued.

ERISA section 701(f)(3)(B)(i)(III), PHS Act section 2701(f)(3)(B)(i)(II), and Code section 9801(f)(3)(B)(i)(II) provide that an employer may provide the Employer CHIP Notice concurrent with the furnishing of materials notifying the employee of health plan eligibility, concurrent with materials provided to the employee in connection with open season (or other coverage election process under the plan), or concurrent with the furnishing of the Summary Plan Description (SPD) provided under ERISA section 104(b).

IV. Compliance With the Employer CHIP Notice and Model Language

A. Employers Subject to the Employer CHIP Notice Requirement

For purposes of the Employer CHIP Notice requirement, an employer providing benefits (directly or through insurance, reimbursement, or otherwise) for medical care in a State is considered to maintain a group health plan in that State. If that State provides medical assistance under a State Medicaid plan, or child health assistance under a State child health plan, in the form of premium assistance for the purchase of group health plan coverage, the employer is required to provide the Employer CHIP Notice. The Department of Health and Human Services, in consultation with State Medicaid and CHIP offices, has informed the

Department that, as of January 22, 2010, the following States offer one or more programs that meet this standard:

- Alabama,
- Alaska,
- Arizona,
- Arkansas,
- California,
- Colorado,
- Florida,
- Georgia,
- Idaho,
- Indiana,
- Iowa,
- Kansas,
- Kentucky,
- Louisiana,
- Maine,
- Massachusetts,
- Minnesota,
- Missouri,
- Montana,
- Nebraska,
- Nevada,
- New Hampshire,
- New Jersey,
- New Mexico,
- New York,
- North Carolina,
- North Dakota,
- Oklahoma,
- Oregon,
- Pennsylvania,
- Rhode Island,
- South Carolina,
- Texas,
- Utah,
- Vermont,
- Virginia,
- Washington,
- West Virginia,
- Wisconsin, and
- Wyoming.

Accordingly, if a group health plan provides benefits for medical care directly (such as through a health maintenance organization); or through insurance, reimbursement or otherwise to participants, beneficiaries, or providers in one of these States, the plan is required to provide the Employer CHIP Notice, regardless of the employer's location or principal place of business (or the location or principal place of business of the group health plan, its administrator, its insurer, or any other service provider affiliated with the employer or the plan). This principle is illustrated by the following example:

Example 1. (i) Facts. An employer in the District of Columbia sponsors a group health plan that provides reimbursement for medical care to plan participants or beneficiaries residing in the District of Columbia, Virginia, Maryland, West Virginia, Delaware, and Pennsylvania.

(ii) Conclusion. In this *Example 1*, the plan is considered maintained in all six States. Because at least one of these States offers a premium assistance program, the employer is subject to the Employer CHIP Notice requirement.

B. Employees Entitled to Notice

An Employer CHIP Notice must inform each employee, regardless of enrollment status, of potential opportunities for premium assistance in the State in which the employee resides. The State in which the employee resides may or may not be the same as the State in which the employer, the employer's principal place of business, the health plan, its insurer, or other service providers are located. This principle is illustrated by the following example:

Example 2. (i) Facts. Same facts as *Example 1*, above.

(ii) *Conclusion.* In this *Example 2*, employees residing in Virginia, West Virginia, and Pennsylvania are entitled to receive the notice because those three States offer premium assistance programs. Of course, the employer may send the notice to all employees if the employer chooses (for example, if it is administratively easier to send the notice to all than to distinguish between employees based on residency).

C. Form and Content of Notice

The Model Employer CHIP Notice was designed as a template to cover an array of situations where employees may be entitled to notice and may reside (or their families may reside) in States across the nation. Employers may use the model template as a national notice to fulfill their employer notice disclosure obligation under ERISA section 701(f)(3)(B)(i), and the parallel provisions of section 2701(f)(3)(B)(i) of the PHS Act and section 9801(f)(3)(B)(i) of the Code. The notice is required to be provided automatically, free of charge.

In consultation with State Medicaid and CHIP offices, some States suggested significant modifications to the template and more detailed descriptions of their own State programs. Of course, the Model Employer CHIP Notice is just a model and States may wish to include additional information on their Web sites and in their own compliance assistance materials that would encourage further disclosure of any individual State premium assistance program. Nonetheless, because employees (and their families) may reside in different States than their employer, its principal place of business, their health plan, its insurer, or its other service providers that may distribute the notice on behalf of the employer, the approach of the Model Employer CHIP Notice is to provide a very brief description of premium assistance and rely on State contact information for State-specific program descriptions. An employer which is not facing multi-State complexities and who wants to provide more comprehensive State-specific information to its

workforce may modify the Model Employer CHIP Notice to its employees. However, employers should be mindful of the requirement to include at least the minimum relevant State contact information for any employee residing in a State with premium assistance.

The employer CHIP disclosure requirement in ERISA, the PHS Act, and the Code requires that the notice inform employees of potential opportunities for premium assistance "currently available." CHIPRA section 311(b)(1)(D) requires the Department of Labor to provide "initial" model notices within one year of CHIPRA's enactment. Employers are required to provide "initial annual notices beginning with the first plan year after the date on which such initial model notices are first issued." The Department, working with the Departments of Health and Human Services and the Treasury, and the States, intends to update its Web site annually to reflect any changes in the number of States offering premium assistance programs (or the contact information for those States), to help enable employers to meet their CHIP disclosure requirements.

D. Timing and Delivery of the Notice

Employers are required to provide these notices by the date that is the later of (1) the first day of the first plan year after February 4, 2010; or (2) May 1, 2010. Accordingly, for plan years beginning between from February 4, 2010 through April 30, 2010, the Employer CHIP notice must be provided by May 1, 2010. For employers whose next plan year begins on or after May 1, 2010, the Employer CHIP notice must be provided by the first day of the next plan year (January 1, 2011 for calendar year plans).

The Employer CHIP notice is not required to be provided in a separate mailing. Plans may combine information to reduce administrative costs, if the other requirements of this Notice are met. Thus, the Employer CHIP Notice may be furnished concurrent with enrollment packets, open season materials, or the plan SPD, provided that (1) such materials are provided no later than the date determined above, (2) such materials are provided to all employees entitled to receive the Employer CHIP Notice, and (3) the Employer CHIP Notice appears separately and in a manner which ensures that an employee who may be eligible for premium assistance could reasonably be expected to appreciate its significance.

Accordingly, an employer may provide the Employer CHIP notice concurrent with other materials

(including, for example, enrollment packets, open season materials, or the plan SPD) that may be provided in advance of the upcoming plan year. This principle is illustrated by the following example:

Example 3. (i) Facts. An employer maintains a group health plan with a plan year beginning January 1, 2011. The plan has an annual open enrollment season that occurs from October 15, 2010 through November 30, 2010 with coverage effective January 1, 2011. Open season packets are to be distributed on October 1, 2010 to all employees of the employer.

(ii) *Conclusion.* In this *Example 3*, the employer may distribute the Employer CHIP notice as a separate, prominent document in the open season packet on October 1, 2010 and the notice is required to be provided no later than January 1, 2011.

The notice must be provided in writing in a manner calculated to be understood by the average employee. It may be provided by first-class mail. Alternatively, it may be provided electronically to the extent the criteria of the Department's electronic disclosure safe harbor at 29 CFR 2520.104b-1(c) are satisfied.

CHIPRA requires the notice to be provided annually. The Department expects to update its Web site with the list of States that offer premium assistance programs and provide other additional information annually to help enable employers to meet their Employer CHIP notice obligations. Comments regarding the Employer CHIP notice requirement are invited.

V. Model Employer CHIP Notice

The model Employer CHIP Notice is available in modifiable, electronic form on the Department's Web site: <http://www.dol.gov/ebsa>.

VI. Additional Information

In addition to the Employer CHIP Notice requirement, CHIPRA also provides that, in order for States to evaluate an employment-based plan to determine whether premium assistance is a cost effective way to provide medical or child health assistance to an individual, group health plans are required to provide, upon request, information about their benefits to State Medicaid or CHIP programs. The Departments, in conjunction with an advisory committee, are separately developing a model coverage coordination disclosure form that will be issued in the future. States may begin requesting this information from plans beginning with the first plan year after this model form is issued.

Group health plans and group health insurance issuers must also offer new special enrollment opportunities after

CHIPRA. Effective April 1, 2009, plans and issuers are required to permit employees and dependents who are eligible for, but not enrolled in, a group health plan to enroll in the plan upon: (1) Losing eligibility for coverage under a State Medicaid or CHIP program, or (2) becoming eligible for State premium assistance under Medicaid or CHIP. The employee or dependent must request coverage within 60 days of being terminated from Medicaid or CHIP coverage or within 60 days of being determined to be eligible for premium assistance. Information is available on the Department's Web site at <http://www.dol.gov/ebsa> regarding special enrollment. Information is also available on the Department of Health and Human Service's Web site at <http://www.cms.hhs.gov>.

Individuals should contact their State's Medicaid or CHIP program to determine if they are eligible for Medicaid or CHIP, and to see if their State will subsidize group health plan premiums. Information is also available by calling 1-877-KIDS NOW or on the Internet at <http://www.insurekidsnow.gov>. If they are eligible for premium assistance, individuals must contact their plan administrator or employer to take advantage of the new special enrollment opportunity and enroll in the group health plan.

Individuals needing assistance or with questions about the application of these provisions to their employment-based group health plan can call toll free 1.866.444.3272 (EBSA) to speak to a Benefits Advisor. Information is also available on EBSA's Web site at <http://www.dol.gov/ebsa>.

VII. Paperwork Reduction Act Statement

According to the Paperwork Reduction Act of 1995 (Pub. L. 104-13) (PRA), no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The Department notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. See 44 U.S.C. 3507. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. See 44 U.S.C. 3512.

OMB has approved the model Employer CHIPRA notice information collection request pursuant to the emergency review procedures under 5 CFR 1320.13. The public reporting burden for this collection of information is estimated to average approximately 30 seconds per respondent. Interested parties are encouraged to send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, Office of the Chief Information Officer, Attention: Departmental Clearance Officer, 200 Constitution Avenue, NW., Room N-1301, Washington, DC 20210 or e-mail DOL_PRA_PUBLIC@dol.gov and reference the OMB Control Number 1210-0137.

VIII. Statutory Authority

Authority: 29 U.S.C. 1027, 1059, 1135, 1161-1169, 1181-1183, 1181 note, 1185, 1185a, 1185b, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Public Law 104-191, 110 Stat. 1936; sec. 401(b), Public Law 105-200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 101(f), Public Law 110-233, 122 Stat. 881; sec. 512(d), Public Law 110-343, 122 Stat. 3765; Public Law 110-460, 122 Stat. 5123; Public Law 111-3, 123 Stat. 8; Secretary of Labor's Order 6-2009, 74 FR 21524 (May 7, 2009).

Signed at Washington, DC, this 1st day of February 2010.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration.

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