

MEMORANDUM

May 13, 2010

Re: Dependent Coverage to Age 26 Interim Final Rule

On May 10, 2010, the Internal Revenue Service (IRS), Department of Labor (DOL), and Department of Health and Human Services (HHS) jointly released interim final regulations on the dependent child coverage extension requirement included in the Patient Protection and Affordable Care Act ("PPACA"). The regulations were published in the Federal Register May 13, 2010 and are effective for plan years beginning on or after September 23, 2010. Comments are due 90 days after Federal Register publication (August 11, 2010).

Background

New section 2714 of the Public Health Service Act (PHSA), as added by PPACA, requires group health plans and health insurance issuers offering group or individual health insurance coverage that provide dependent coverage for children to continue coverage for children up to age 26. This requirement is effective for plan years beginning on or after September 23, 2010, or January 1, 2011 for calendar year plans.

Another provision included in the Health Care and Education Reconciliation Act of 2010 (HCERA) amends the Internal Revenue Code (effective March 30, 2010) to provide a tax exclusion for reimbursements from an employer-provided health plan for medical expenses of a child who has not reached the age of 27 as of the end of the year. On April 27, 2010, the IRS released Notice 2010-38, which, among other things, extends the tax exclusion for employer-provided health coverage provided to adult children through age 26. (A summary of Notice 2010-38 can be found at <http://www.groom.com/resources-492.html>.)

Meanwhile, HHS Secretary Kathleen Sebelius has been leading efforts by the Obama administration to encourage insurers and employers to voluntarily offer this extended dependent coverage benefit prior to the provision's effective date.

Summary of Regulations

Key issues addressed in the regulations are briefly summarized below.

- **General Rule:** The regulations restate the general rule that group health plans or health insurers that make dependent coverage available for children must make such coverage available until the child attains age 26.
- **Relationship Requirement Only:** A group health plan or insurer may base eligibility for dependent child coverage only in terms of the relationship between a child and participant, and may not deny or restrict coverage based on factors such as: financial dependency, residency, student status, employment, eligibility for other coverage (except under the pre-2014 grandfather rule described below), or marital status. Unlike the tax exclusion guidance in Notice 2010-38, which generally define a "child" as a son,

daughter, stepchild, adopted child, or foster child, these regulations do not provide a definition of "child" for these purposes.

- Grandchildren/Spouse: Plans and insurers are not required to cover grandchildren (i.e., a child of an adult child receiving coverage) or the spouse of an adult child.
- Uniform Treatment: The terms of the plan or coverage providing dependent child coverage cannot vary based on the age of the child, except with respect to children who are age 26 or over.

Examples in the regulations illustrate the following:

- A plan may not charge an "additional premium surcharge" based on a child's age (e.g., additional premium for children over age 18).
- A plan may not limit available benefit options available to children based on age (e.g., restricting children over age 18 to the HMO option).
- A plan providing dependent child coverage until age 26 may, however, charge more for each individual added (e.g., under tiers of coverage such as self-only, self-plus-one, self-plus-two, etc.), as long as the additional charge is uniform and does not vary based on the child's age.
- Transition Rules for Children Who Aged Out: The regulations confirm that the coverage requirement applies to children whose eligibility for coverage previously ended, or who were denied coverage (or were not eligible for coverage), because of age. Moreover, the plan or insurer is required to provide such children who become eligible for coverage as a result of the new coverage requirement with a special 30-day enrollment period. The plan or insurer must provide written notice of the opportunity to enroll, and the enrollment period must begin, by the first day of the first plan year for which the requirement is effective (i.e., January 1, 2011 for calendar year plans). The notice must affirmatively state such children are now eligible to enroll in the plan or coverage. It may be provided to the employee on behalf of the child and may be included with other enrollment materials, as long as it is prominently displayed.
- Transition Rule Enrollment: Coverage for individuals enrolling under the special enrollment rules must take effect no later than the first day of the first plan year for which the requirement is effective (i.e., January 1, 2011 for calendar year plans). A child enrolling under these transition rules is treated as a HIPAA special enrollee, which means the child (and the participant through whom the child is eligible for coverage) must be offered all of the benefit packages (with the same benefits, cost-sharing requirements and premiums) available to similarly situated individuals.

Examples in the regulations illustrate the following:

- An employee whose 23-year old child aged out and terminated coverage under a employer's calendar year plan must be provided notice by January 1, 2011, with at least a 30-day opportunity to enroll the child retroactively to January 1, 2011.
- An employee who switched to a lower-cost benefit option when the employee's child aged out must be provided notice and at least a 30-day opportunity to enroll in any coverage option available to similarly situated individuals who enrolled when first eligible.
- In the case of an employee's child who had elected COBRA continuation coverage upon aging out, the employee must be provided notice and the employee and child given at least a 30-day opportunity to enroll in a coverage option other than COBRA.
- In the case of a child who had already aged out of coverage at the time the employee parent joined the plan, the plan must provide the employee notice and at least a 30-day opportunity to enroll the child.
- Grandfather Rule: For plan years beginning before 2014, a grandfathered group health plan (i.e., one in place on March 23, 2010) may exclude an adult child if the adult child is eligible to enroll in an employer-sponsored health plan other than a group health plan of a parent. The preamble to the regulation states that regulations on the grandfather rule are expected to be issued in the "very near future" and the regulations will clarify that compliance with the adult child coverage requirements, including voluntary compliance before the requirements are effective, will not jeopardize the plan's grandfather status.
- Policy Year: For individual insurance policies, the regulations substitute the term "policy year" for "plan year" for purposes of the effective date and applicable periods of coverage. The regulations define "policy year" as the year designated in the policy documents or, if no year is designated or no document is available, the deductible or limit year used under the coverage. If deductibles or other limits are not imposed on a yearly basis, the policy year will be the calendar year.

Conclusion

The new definition of dependent will require plan amendments, not only with respect to the age of the dependent, but also with respect to the general definition of dependent. It is currently common for plans to define dependents by requiring that the dependent be claimed on the employee's tax return, live with the employee, or be unmarried. The new definition of dependent is much broader. Further, it may be difficult for plans to recover costs associated with the additional coverage, due to the restrictions on charging higher premiums based upon age. To the extent that these changes will result in administrative burdens and additional costs, plan sponsors should consider submitting comments on these issues.

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