



Major Health Plan Reform Issues – It’s Time to Update Your Health and Welfare Plans

Cher E. Wynkoop

Recently, Congress and several governmental agencies have enacted and/or amended various legal requirements regarding the operation and administration of employer-sponsored group health and welfare plans. Many of these requirements become effective during 2009 or 2010.

As a result, employer plan sponsors and plan administrators of group health and welfare plans must review and amend legal plan documents and/or procedures, prepare governmental filings, update summary plan descriptions and participant communication materials/required notices, negotiate with service providers as to allocation of new duties, communicate with insurers and third party administrators regarding reviewed processes and/or train and retrain employees who participate in health plan administration.

Employers should consult with their legal advisors as to specific effective dates and individually-tailored strategies to ensure complete legal compliance.

The following list provides a summary checklist of legal compliance issues for health and welfare plans, that must generally be accomplished in the 2009-2010 time frame. This list is not exhaustive, but is intended only to cover several primary areas in which plan sponsors and administrators should focus their health and welfare plan compliance efforts. Additionally noted below are various legal issues regarding health and welfare plans that have received recent attention, of which sponsors should be aware and consider.

COMPLIANCE ITEM	BRIEF SUMMARY OF REQUIREMENTS	TASKS/COMPLIANCE ACTIONS
Americans With Disabilities Act Amendments of 2008 (ADA)	Conditions that substantially limit major life activity considered “disability,” even if employee can offset/compensate with mitigating measures. Prohibits consideration of certain mitigating measures in determining whether impairment substantially limits a major life activity.	Review plans/policies/employee handbooks to determine whether definitions need to be changed. Review current ADA requests.
Bicycle Commuting Benefit	Optional provision of tax-free reimbursement of employees’ bike commuting expenses – up to \$20/month. Cannot be part of a cafeteria plan or concurrently receive other commuter benefits and cannot fund with pre-tax salary reductions.	Consider implementation, including need to cross check against other commuter benefits and create enrollment process.
Enhanced HIPAA Enforcement, Breach Notification, Direct Application to Business Associates and Privacy and Security Changes	New and substantial criminal and civil penalties for violations. New HIPAA breach notification requirement for unauthorized use of protected health information. Business associates must now implement their own HIPAA safeguards and adopt written policies and procedures. Changes regarding electronic health information and other new privacy and security standards.	Update HIPAA privacy and securities policies, as well as health plan documents which may reference impacted HIPAA provisions. Re-train all employees with access to protected health information. Review encryption procedures and policies and consider revisions per new disclosure requirements. Collect and amend all business associate agreements that address HIPAA privacy and security. Negotiate changes to indemnification provisions. Self-funded health plans need to coordinate changes with third party administrators. Distribute HIPAA Notice of Privacy Practices – for large plans, the periodic notice is generally due in 2009.
Medicare “Creditable Coverage” Reporting and Disclosure	Health plans must annually disclose to Center for Medicare Services (CMS) (online notification) whether prescription drug coverage is “creditable” for Medicare Part D purposes – sample notices available at www.cms.hhs.gov . Annual participant notices regarding “creditable coverage” due by November 15.	Prepare and post disclosures and notices to CMS and participants (may be part of annual open enrollment).

COMPLIANCE ITEM	BRIEF SUMMARY OF REQUIREMENTS	TASKS/COMPLIANCE ACTIONS
Temporary Commuter Benefit	3/1/09-12/31/10 Temporarily increases exclusion for transit passes associated with van pooling. Does not affect bicycle commuting benefit.	Amend applicable fringe benefit plans and employee handbooks. Mark on calendar to return to pre- 3/1/09 exclusion rate in case increase not extended.
New COBRA Subsidy	Sixty-five percent (65%) employer-provided subsidy (for 9 months) to pay for COBRA for employees (and families of employees) who are involuntarily terminated between 9/1/08-12/31/09. Complex analysis of amount and availability of subsidy where severance benefits, retiree medical or other employer-subsidized medical coverage is involved. Phase-outs for high- income individuals, but they must still be offered the subsidy, and can opt to waive. Need caution in coding “involuntary termination” for subsidy vs. other employment and plan purposes. Model notice provided by IRS.	Update plans, summary plan descriptions and provide COBRA subsidy notices, including applicable waiver forms for high-income employees. Work with third party administrators and insurers to coordinate employee payment, employer payment reimbursement process, and governmental reporting.
Children’s Health Insurance Program Reauthorization Act of 2009 – Special Enrollment Rights (SCHIP)	Group health plans must permit employees/ dependents special enrollment rights in the case of eligibility for or cessation of Medicaid or CHIP coverage. Model participant notices to be provided by DOL and HHS by 2/4/2010.	Amend cafeteria plan and group health plan. Revise special enrollment procedures/forms.
Section 111 Mandatory Medicare Secondary Payer Reporting; Online Registration	Applies to insurers and self-funded group health plans. New online registration required. Requires group health plans to submit information to Health and Human Services (HHS) regarding when group health plan coverage is primary to Medicare, “active covered individuals” and related social security numbers. \$1000/day noncompliance penalty	Review and implement registration and reporting process.
GINA – Genetic Information Nondiscrimination Act	Bans use of genetic information for health insurance and employment purposes.	Review/amend health plans, employee handbooks if plan defines “health conditions” under HIPAA. Review health assessment questions that relate to genetic disposition.
Mental Health Parity and Addiction Act of 2008	Requires full parity between mental health/ substance abuse benefits (if offered) and the medical benefits offered under a group health plan. Applies to plans with over 50 participants.	Review/amend plans and programs to adhere to parity requirements. Check EAP documents for parity. Check “wrap” documents for parity references.
Michelle’s Law	Requires group health plans to continue to provide health coverage to dependent college students on medical leave for up to one year, or if earlier, the date on which plan coverage would otherwise end.	Review/amend plans and programs, including student certification forms and include notice of the extended coverage rights. Consider similar extension of coverage for other benefits.
Cafeteria Plan Final Regulations	Final regulations are expected in Summer 2009. Required written documentation of premium-only plans, revised nondiscrimination rules, certain post-termination reimbursements, “reasonable availability basis” reimbursement vs. lump-sum reimbursement. Required written documentation of any cash payment in lieu of coverage. HEART Act – optional relaxation of use-it-or-lose-it rules for active duty military personnel.	Review/amend cafeteria plans, summary plan descriptions, and administration forms to comply with final regulations.

COMPLIANCE ITEM	BRIEF SUMMARY OF REQUIREMENTS	TASKS/COMPLIANCE ACTIONS
“Dependent” definition	<p>IRS defines “student” dependent as full-time students between age 18 and 23.</p> <p>Employees must certify that a student dependent is a qualified dependent in order to reap “tax-free” benefit in the group health plan.</p> <p>Benefits provided to full-time students (who are not otherwise “dependents”) over age 23 are taxable to the employee.</p>	<p>Review/amend “student” definition to comply with “dependent” definition or make certain that benefits for non-dependent students are provided on an after-tax basis.</p>
“Retiree Benefits” Offered to Executives under Self-Funded Plans	<p>Where an employer with a self-funded group health plan offers only certain highly paid employees post-retirement coverage, the coverage will be subject to nondiscrimination requirements and will likely be taxable coverage, rather than tax-free coverage, under Internal Revenue Code Section 105(h).</p> <p>May also trigger Internal Revenue Code Section 409A issues.</p>	<p>Review self-funded executive retiree medical coverage and consider offering on a post-tax basis.</p>
COBRA for Small Employers (less than 20 employees)	<p>Generally, federal COBRA only covers employees of employers with 20 or more employees.</p> <p>Many states (currently about 40) including Virginia and Pennsylvania – have enacted “mini-COBRA” statutes to require the option to elect certain levels of federal COBRA-like coverage and provide for a “subsidy” that is similar to the Federal COBRA subsidy.</p> <p>Each state provision can vary widely as to coverage, cost and duration.</p>	<p>Small employers should check to determine whether the states where their employees work are covered by a state mini-COBRA statute, which may require employers to offer some level of health coverage continuation, as well as an employer-provided subsidy in the case of involuntary termination.</p>
Employer-Provided Cell Phones	<p>Generally, the full value of employer-provided cell phones and laptops are required to be included in an employee’s income, unless appropriate and detailed substantiation of business use is provided.</p> <p>The IRS is seeking comments on simplifying the substantiation procedures.</p>	<p>Review current cell phone and other technology substantiation procedures, tax reporting.</p> <p>Consider implementation of a taxable “technology allowance” rather than the burdensome substantiation process.</p> <p>Stay tuned for more IRS guidance in 2009.</p>

Cher E. Wynkoop is a partner in the Employee Benefits Group. *Cher was formerly the Deputy Practice Group Leader for the Employee Benefits Group of Reed Smith in Pittsburgh. She has more than 13 years of experience helping clients design, implement and maintain complex employee benefits programs, including retirement, health and welfare and executive compensation programs. She also regularly counsels clients on complicated ERISA issues related to mergers, acquisitions, collective bargaining agreements and retiree health plans. Cher’s clients include both tax-exempt and for-profit entities.* She can be reached at cwynkoop@wilsav.com or at (757)628-5581.