

GROUP HEALTH PLAN BENEFITS ALERT

Year-end changes in the law will require administrative and document revisions for group health plans, including cafeteria plans and flex plans. A flurry of recent regulations clarifying several statutory requirements should be considered by employers and HR staff *now* in advance of year-end open enrollment periods.

The applicable statutes include the Genetic Information and Non-discrimination Act (GINA), the Health Information Technology for Economic and Clinical Health Act (HITECH), Michelle's Law, and the Mental Health Parity and Addiction Equity Act of 2008.

Not to be overlooked are rules currently in effect under the Children's Health Insurance Program Reauthorization Act (which grants special enrollment rights to employees and their dependents who lose Medicare or Children's Health Insurance Program coverage or become eligible for premium subsidies under either of those programs) and under the American Recovery and Reinvestment Act of 2009, which provides (among other components of the economic stimulus package) a COBRA premium subsidy for employees and dependents of employees who are involuntarily terminated between September 1, 2008 and December 31, 2009.

Here are the highlights:

GINA

GINA Interim Final Rules were published October 7, 2009 and are effective for plan years beginning on or after December 7, 2009 (that is January 1, 2010 for calendar year plans). GINA generally prohibits the collection of genetic information (which includes information related to genetic testing, genetic services, genetic counseling or genetic diseases as well as family medical history) by a group health plan for "underwriting" purposes or prior to or in connection with enrollment for *any* purpose. "Underwriting" includes granting rewards for completing health risk assessment (HRA) forms and assessing eligibility for disease management programs, so genetic information cannot be collected for either of those purposes. Consider adding an appropriate disclaimer to any open-ended questions on HRA forms such as this language from the Interim Final Rules:

In answering this question you should not include any genetic information. That is, please do not include any family medical history or any information related to genetic testing, genetic services, genetic counseling, or genetic diseases for which you believe you may be at risk.

HITECH

This Act is effective in 2010 (for transition purposes, the regulations which took effect September 23, 2009 will not be enforced until mid-February, 2010) and changes the HIPAA privacy rules to require mandatory reporting of the accidental disclosure of individually identifiable health information by covered entities or their business associates to the affected individuals as well as to the Department of Health and Human Services (“HHS”). A breach involving more than 500 individuals in a particular state or jurisdiction also must be reported to the news media. The reporting requirement does not apply to disclosures of health information which is encrypted in accordance with prescribed standards. Although there is no private right of action under the HIPAA privacy rules, the new mandatory disclosure rules may give rise to claims under state law for accidental privacy breaches that, until now, could have gone unnoticed by the affected individuals.

Michelle’s Law

Michelle’s Law, named after similar state statutes, requires subject group health plans to maintain coverage for a dependent child who ceases to satisfy a full-time student eligibility requirement as a result of a medical leave for a serious illness or injury. The required coverage extends for up to a one-year period and is effective for plan years beginning on or after October 9, 2009. Notice of this additional coverage entitlement must be included in any plan communications relating to verification of full-time student status.

Mental Health Parity and Addiction Equity Act

The new legislation, which is generally effective for plan years beginning after October 3, 2009 (a later effective date may apply to collectively bargained plans), expands the provisions of the prior act and extends the parity requirement to substance abuse treatments. Prior legislation required parity between medical and hospitalization benefits and any benefits provided for mental health coverage (such coverage is not mandated), but the parity rules applied only to annual and lifetime benefit maximums. The new law also requires parity as to all “financial requirements” (deductibles, co-payments and out-of-pocket expense limits) as well as “treatment limitations” (including limits on frequency of treatment or number of office visits per year). Subject group health plans will have to be revised to delete impermissible limits on mental health treatment and any exclusions for substance abuse treatment. “Small” plans covering an average of 50 or fewer employees during the prior calendar year are exempt from this requirement.

State laws may impose additional coverage requirements for fully insured and governmental plans. For example, Illinois requires coverage of certain adult dependents until age 26 under subject group health plans (see “Illinois Extension of Group Health Coverage for Dependents” http://www.benefitslawgroupofchicago.com/HTML/Illinois_extension_of_health_coverage_for_dependents.htm).

Recommendations: Start now to assess the operational and document compliance of your group health and cafeteria plans with all of the above requirements. The first step could be revising

open enrollment forms and any health risk assessment forms, but plan documents, summary plan descriptions, summaries of material modification, and other participant communications will also require attention before the end of this year.

Andrew S. Williams
330 N. Wabash Avenue, Suite 1700
Chicago, IL 60611
(312) 755-3145
awilliams@agdglaw.com
www.benefitslawgroupofchicago.com

Andrew S. Williams has practiced in the employee benefits and ERISA arena since ERISA was passed in 1974. He has been recognized by his peers through a survey conducted by Leadings Lawyers Network as among the top 5 percent of Illinois lawyers in Small, Closely and Privately Held Business Law and Employee Benefits Law. He maintains a website at www.benefitslawgroupofchicago.com with additional updates, commentary and analysis of benefits and employment topics. The above material is intended for general information and promotional purposes, and should not be relied on or construed as professional advice. Under the Illinois Rules of Professional Conduct, the above information may be considered advertising material. The transmission of this information is not intended to create, and receipt of it does not create, a lawyer-client relationship.

537853.1