VENABLE LLP

employee benefits &
executive compensation alert

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Looking Toward 2010—Key Legal Changes to Keep in Mind While Designing Your 2010 Health Plans

As the summer of 2009 hits full swing, most employers are taking steps to finalize the design of their 2010 group health plans and preparing for this fall's open enrollment season. In doing so, we recommend keeping in mind the following legal developments:

Additional Mental Health Parity Requirements

Additional mental health parity requirements will be effective for calendar year plans beginning January 1, 2010. Specifically, in addition to the existing parity requirements regarding annual and lifetime dollar amounts, these new rules:

- Expand parity to include substance use disorder benefits as well as mental health benefits;
- Prohibit applying financial requirements or treatment limitations that are more restrictive than the predominant financial requirements or treatment limitations that apply to substantially all medical and surgical benefits;
- Prohibit the use of separate cost-sharing requirements or treatment limitations that apply only to mental health and substance use disorder benefits; and
- Require plans to make available to participants the standards for medical-necessity determinations and reasons for any denial of benefits relating to mental health and substance use disorder benefits.

Regulatory guidance on how to apply these rules has not yet been issued—and, although such guidance may be issued by year end, this may be too late for many plan sponsors of self-insured medical plans who are making design decisions now. These plan sponsors will need to use their best efforts to comply with the expanded rules for the 2010 plan year.

Michelle's Law and Its Notice Requirement

Michelle's Law applies to calendar year plans beginning January 1, 2010. It provides that a group health plan may not terminate the coverage of a full-time student covered under the plan as a result of that individual ceasing to meet the definition of a full-time student due to a medically necessary leave of absence. In such a situation, the plan is required to continue the individual's coverage for up to a year while he or she is on a medically necessary leave of absence (unless coverage would otherwise terminate sooner under the terms of the plan). Plans are also required to include an explanation of Michelle's Law along with any notice regarding a requirement for certification of student status. Therefore, we recommend including information on Michelle's Law in any certification of student status used in the 2010 open enrollment materials.

Additional Special Enrollment Rights under CHIP

The Children's Health Insurance Program Reauthorization Act of 2009 ("CHIP") added two new special enrollment rights. Specifically, effective April 1, 2009, a group health plan is required to permit otherwise eligible individuals (1) who lose eligibility under Medicaid or the State Children's Health Insurance Program or (2) who become eligible for premium assistance through Medicaid or the State Children's Health Insurance Program, to enroll in the group health plan within 60 days of such qualifying event. In addition to operational compliance, these new special enrollment rights will need to be included and explained in health plan and cafeteria plan documentation, including summary plan descriptions and enrollment materials that discuss special enrollment rights.

ARRA's Waning Influence on Your COBRA Obligations

The Federal COBRA subsidy provided under the American Recovery and Reinvestment Act of 2009 ("ARRA") applies only to individuals losing coverage between September 1, 2008 and December 31, 2009 due to an involuntary termination. Thus, absent further guidance indicating otherwise, you will no longer need to provide ARRA-compliant COBRA election notices for losses of coverage occurring after December 31, 2009. Keeping this in mind, now is a great time to ensure that your "old" COBRA notices are in good shape and will keep you compliant going forward.

Medicare Mandatory Reporting Requirements

The Medicare Secondary Payer (MSP) provisions were amended by Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 to require the reporting of certain information regarding participants in group health plans. The information will enable the Centers for Medicare & Medicaid Services to better determine primary and secondary payment responsibilities. Health insurers and third-party administrators ("responsible reporting entities") are generally responsible for providing the required information. As such, most employers are not directly responsible for complying with these reporting requirements with regard to their group health plans. (The exception is that employers who self-administer self-insured plans are responsible reporting entities.) Nevertheless, insurers and third party administrators are likely to seek employer assistance in preparing the required filings. In particular, employers may be asked to provide information (such as dates of birth, social security numbers, and Medicare health insurance claim numbers) to help determine whether their employees and their employees' spouses and dependents are eligible for Medicare. These reporting requirements may also be raised when negotiating 2010 agreements with responsible reporting entities.

New State Cafeteria Plan Requirements

Following Massachusetts' lead, a number of states, including Connecticut, Minnesota, Missouri and Rhode Island have enacted legislation requiring employers to provide plans under Internal Revenue Code Section 125 (known as "cafeteria plans") in certain circumstances. These plans are the mechanism through which employees are able to pay their health insurance premiums on a pre-tax basis. Other states throughout the country are considering such similar legislation. These state-based efforts at health care reform underscore the need for employers to track local reform efforts in the jurisdictions in which they operate.

Things to Come…

New laws and guidance, which may have a significant impact on your group health plans, are expected in the near future. Among other items, we are currently awaiting finalized regulations from the IRS under Section 125 of the Internal Revenue Code as well as guidance relating to the new HIPAA privacy and security rules under ARRA. And, of course, Congress and the President may enact health reform measures later this year—only time will tell how dramatically these reform efforts will affect employer-sponsored health plans.

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