

McGohan Brabender ERISA & Compliance Update

BY PAUL ROUTH

WEPRIN, FOLKERTH & ROUTH LLC *Attorneys At Law*

2009 was a busy year from a compliance standpoint. However, 2010 promises to be even more challenging from a compliance standpoint. This is especially true with health care reform at the forefront of every HR Manager's mind. Therefore, it seems most appropriate to start off with two articles. The first article titled "2009 Health & Welfare (H&W) Benefit Roundup" talks about significant developments for last year. The second article titled "Health care reform legislation: The coming compliance tsunami" discusses some of the more important (and difficult) compliance issues employers will face if and when health care reform passes. The following is short introduction to both articles plus four other items.

"2009 Health & Welfare (H&W) Benefit Roundup"

This article is written by Alton + Bird LLP a large law firm with offices throughout the United States. Some of the more important development in 2009 were:

1. Medicare Secondary Payer Reporting Rules: In an attempt to better coordinate Medicare with private employers, insurance companies and third party administrators are required to report the Social Security Numbers of people participating in employer sponsored health plans to the government. This way the government will be able to instantaneously determine if the individual is participating in an employer sponsored health plan. If so, the government will then be able to determine if Medicare or the group health plan is primary. Under the current rules, Medicare often pays the claim as primary and then chases the employer to recoup the money. Under the new system the government hopes to eliminate (or at least reduce) the number of times Medicare pays the claims incorrectly. The bulk of the new reporting requirements falls on the insurance company and third party administrators. However, the carriers and third party administrators may ask employers to help gather the data.

2. COBRA Subsidy: The Federal government, as part of the Stimulus Package, implemented a 65% subsidy. This subsidy helps involuntarily terminated employees (and their family members) pay the COBRA premiums. The subsidy also applies to small employers who are exempt from COBRA but are required to offer terminated employees continuation coverage under state law. (See other article below discussing the subsidy and Ohio law).

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- 3. The Children Health Insurance Program (“CHIPs”):** Another part of the Stimulus Package was an enhancement to the Children’s Health Insurance Program or CHIPs. The Federal government is giving the states money that can be distributed to help provide health coverage to children of low income families. The part that can impact employers is that the states now have the ability to provide financial assistance to individuals to help pay the premiums for employer sponsored health plans. Previously, the states provided coverage to the children through Medicaid. Under the new program, the states will have the option to give the parent money so that the parent can then pay the premiums under the employer sponsored health plan associated with the child.
- 4. Mental Health Parity and Addiction Equity Act of 2008:** Precludes health plans from imposing different treatment or financial limitations on mental health and substance abuse benefits. Small employers (i.e. those with less than 50 employees) are exempt from the new rules. Larger employers can apply for an exemption but only if the cost of compliance for the health plan increases by at least 2% the first year and by 1% in subsequent years.
- 5. The Gina Information Nondiscrimination Act of 2008 (“GINA”):** GINA precludes employers and group health plans from discriminating based on genetic information. As a practical matter, GINA will limit the type of information individuals will be required to provide during the enrollment process. GINA also will require employers and insurance companies to modify health risk assessments.
- 6. Michelle’s Law:** The statute requires group health plans to extend coverage for certain full time students that drop out of school due to a serious accident or illness.
- 7. HIPAA.** The Stimulus Package modified the HIPAA Privacy rules. Most notably, the new rules require employers to notify individuals if there is a breach in security. The changes also require business associates to comply with more procedural safeguards.
- 8. American Disability Act (“ADA”):** The EEOC (Equal Employment Opportunity Commission) adopted regulations that expanded the definition of disability. This, in turn, can impact group health plans. Unfortunately, the impact on group health plans is not totally clear. For example, hearing loss may now be considered a disability. Therefore, one interpretation is that group health plans must now cover hearing aids.

9. EFAST 2: ERISA imposing reporting requirements on most employers. Generally speaking if there are 100 or more participants (i.e. employees) in a “welfare benefit plan” on the first day of the plan year, the employer must file an annual report (i.e. Form 5500) with the government for that plan for that plan year. Beginning with the 2009 plan year, all forms must be submitted electronically. That is, employers will no longer be allowed to mail the Form 5500s to the Department of Labor.

[Follow the this link to the Alton + Bird LLP article.](#)

“Health care reform legislation: The coming compliance tsunami”

Ceridian has prepared this article discussing some of the more important potential administrative issues employers will face if health care reform passes. The article is interesting but, since health care reform is really a “work in progress,” it is premature to devote a substantial amount of time to what may happen. [<<click here to view entire article>>](#)

“Small Business Endangered by Health Insurance Reform”

Another interesting article by the Citizen’s Council on Health Care. As previously noted, no one knows for sure how the health care reform process will end. As a result, it is not prudent to put too much stock into these types of articles but they do provide insight as to what the “lay of the land” might be some day. [<<click here to view entire article>>](#)

“New Excise Tax Reporting Procedures”

The Groom Law Group has written an excellent article on the new IRS Form 8928. Employers are required to use this form to report violations and pay the excise tax for those violations. The excise taxes are nothing new. That is, the Internal Revenue Code imposes penalties on employers that fail to comply with COBRA, HIPAA and other laws. However, this is the first time the IRS has issued a form employers must use to report the violations and pay the excise tax. This move on the part of the IRS shows an intent to take a more active enforcement role. In the past, these areas have not been a high enforcement priority for the IRS. However, this may signal a change and employers should certainly increase their compliance efforts. [<<click here to view entire article>>](#)

COBRA (and State Continuation) Subsidy Extension

The subsidy was originally scheduled to end December 31, 2009. However, President Obama signed the Department of Defense Appropriations Act for Fiscal Year 2010 on December 19, 2009, extending the eligibility period and the length of the subsidy. The subsidy is available to employees (and their family members) who are involuntarily terminated on or before February 28, 2010. (Note, under the old rules the qualifying event **and** the continuation coverage had to start on or before December 31, 2009.) Under the new rules, only the qualifying event (i.e. the involuntary termination of employment) has to occur on or before February 28, 2010. The continuation coverage can start after that date.

Also, the subsidy can last up to 15 months (previously the subsidy could only last up to 9 months). Under COBRA the qualified beneficiary can receive up to 18 months of COBRA coverage if the qualifying event is a termination of employment. This means the person can receive the subsidy for up to 15 months. In Ohio a person can receive up to 12 months of continuation coverage if the person is involuntarily terminated. This means a person in Ohio receiving continuation coverage under Ohio law (rather than COBRA) will receive the subsidy for 12 months (i.e. the maximum period of continuation coverage under Ohio law).

The amount of the subsidy remains at 65% of the amount the person is required to pay. The Subsidy Extension imposes new notice requirements on employers and gives individuals the opportunity to retroactively reinstate their coverage if they dropped their coverage because the subsidy ended. It is anticipated that the government will issue sample notices employers can use to comply with the new rules. Employers should, however, be prepared to act quickly once the sample notices are released.

The government has started releasing additional guidance on the premium subsidy extension. For example, the Department of Labor has issued 15 new questions and answers on the premium extension. The Department of Labor also has released sample notices. However, the sample notices are in draft format. The Department of Labor is expected to finalize the sample notices by the middle of this month. Therefore, we encourage employers to wait until the forms are finalized before sending them.

Finally, there is talk about extending the subsidy even more. We will keep you posted. In the meantime, the following is a link to an article by Seyfarth Shaw discussing the new rules.

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Ohio Developments

Although this has been a busy year for the Federal government, Ohio had some significant developments in 2009.

Mini-COBRA

Most importantly the Ohio rules governing health continuation was substantially modified. COBRA, a Federal statute, requires employers with 20 or more employees to allow certain individuals to continue their health coverage when certain enumerated events occur. Ohio has somewhat similar rules for employers with less than 20 employees. Stated another way, COBRA applies to employers with 20 or more employees and the Ohio law applies to employers with less than 20 employees.

The Ohio law used to allow former employees who were eligible for Ohio unemployment compensation to continue their coverage for up to six months. Under the new rules, former employees who are involuntarily terminated for reasons other than gross misconduct can continue their coverage for up to one year. This rule applies to health plans that are first started or renewed on or after April 1, 2009.

Note that the premium subsidy for involuntarily terminated employees and their family members does not extend the coverage period under Ohio law. That is, the premium subsidy can last for up to 15 months. However, under the Ohio Mini-COBRA, the coverage only lasts 12 months. This means that someone receiving continuation coverage under Ohio will only receive the subsidy for 12 months which is the maximum period under Ohio law.

Dependents Age 28

Beginning July 1, 2010, all insured health plans in Ohio must give parents the opportunity to continue health coverage for unmarried children up to age 28. The law states the employer may require the parent to pay for the coverage.

Premium Only Plans

Beginning January 1, 2011, Ohio employers with 10 or more employees will have to offer employees a premium only plan, also called a POP. A POP allows employees to pay their portion of the health plan premiums on a pre-tax basis. Most employers already have POPs.

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Learn More About Ohio Developments: The Ohio Department of Insurance has developed a couple of articles discussing the new rules. Those articles are available at the following links. [<<Click here to view>>](#)

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