

May 11, 2010

TO: Trion

RE: PPACA Extension of Dependent Coverage to Children Up to Age 26 – U.S.
Department of Health and Human Services (HHS) Interim Rules

Section 1001 of the Patient Protection and Affordable Care Act (PPACA) adds a new Section 2714 to the Public Health Service Act requiring group health plans and issuers of group and individual coverage that offer child dependent coverage to make such coverage available to children until attainment of age 26. The statute further directs the Department of Health & Human Services (HHS) to issue regulations defining “dependent” for these purposes. On May 10, HHS issued “interim final regulations” (IFR) to implement PPACA’s new dependent coverage provisions. This memorandum provides an overview of the new rule and explains how to comply with the new requirements.

Overview

For plan years beginning after September 23, 2010, the law requires group plans that are already providing dependent coverage for children to extend eligibility for that coverage to dependents up to 26 years of age. For purposes of this provision, HHS has defined an eligible “dependent” as a child who has not attained age 26. HHS has further specified (as explained in detail in the Analysis below) that:

- Eligibility criteria based on factors such as student status, financial dependency, or residency, can no longer be imposed by plans or carriers (the only exception being that grandfathered plans can exclude those children who are eligible for their own employer-sponsored coverage, until January 1, 2014). Rather, the IFR clarifies that, with respect to children who have not attained age 26, a plan or issuer may define “dependents” for purposes of eligibility for dependent coverage of children only in terms of the relationship between the child and the participant.
- Qualifying child-dependents must be offered all the same benefits as children who did not lose coverage because of loss of dependent status, and qualifying dependents cannot be required to pay more for coverage than similarly situated individuals who did not lose coverage due to loss of dependent status;

- A special enrollment period will be required, to provide un-enrolled eligible dependents with a chance to enroll. This enrollment period must be provided regardless of whether the plan offers an open enrollment period. Notices must be provided to employees about the special enrollment opportunity. The special enrollment period must start no later than the first day of first plan year beginning on or after September 23, 2010, and must last for at least 30 days. A plan may use its existing annual enrollment period and materials to comply if the annual enrollment period fits within the time parameters required by the regulation. Coverage for these newly enrolled dependents must begin no later than the first day of the first plan year after September 23, 2010, even if the request for enrollment is made after the first day of the plan year (in which case, coverage must be made effective retroactively to the first day of the plan year). In subsequent years, dependent coverage may be elected in connection with normal enrollment opportunities.
- The provision does not require plans that currently do not offer dependent coverage for children to start doing so.
- Although the new rule goes into effect 60 days after its publication in the Federal Register (i.e., on or around July 9, 2010 – the IFR has not yet been published in the Federal Register), the enrollment opportunity for eligible dependents is not immediate – it is not required to be provided until the first day of the first plan year beginning on or after September 23, 2010.
- No coverage is required for spouses or children of qualifying dependents. And,
- Separately, the IRS has issued guidance on the tax treatment of dependent coverage under the new provision.

Since HHS will allow plans to satisfy the special enrollment requirements with existing annual enrollment periods and procedures, plans with renewals in the near future should make an effort to ensure that they comply with the requirements for the special enrollment period to avoid the time and expense that would be involved in initiating a separate special enrollment period. As noted, these requirements generally require written notice of the special enrollment opportunity (which may be included with other enrollment materials distributed during open enrollment so long as the notice is “prominent”), an enrollment period that lasts at least 30 days from the time of the written notice, and commencement of coverage of these enrollees by the first day of the new plan year.

Also note that plans that elect to comply before being required to do so by PPACA, thereby allowing continued coverage of children who would otherwise age out between now and the first plan year after September 23, 2010, will not be required to provide the special enrollment opportunity for the children who retain their coverage.

Because HHS had very limited time in which to issue regulations for the dependent coverage provision, the agency is issuing these regulations as “interim final” ones while providing an

opportunity for public comment on the rules. Comments will be due 90 days from Federal Register publication of the IFR, i.e., the deadline will be on or about August 9, 2010. The IFR is currently available at: http://www.hhs.gov/ociio/regulations/pra_omnibus_final.pdf.

Important details regarding implementation of the dependent coverage provision and compliance are discussed below.

Analysis

Implementation of the New Dependent Coverage Requirements

A. Criteria for Eligibility

One of the biggest changes made by the new regulation is the elimination of many of the criteria commonly imposed by plans for child-dependent coverage eligibility. Factors such as student status, residency, financial support, dependent status for tax purposes¹, marital status, or other criteria, may no longer be used to deny coverage to dependent children. Now, the only determining criteria are age and relationship to the participant.

An exception applies to grandfathered plans (those in existence on the date PPACA was enacted, March 23, 2010), which are permitted to exclude coverage of children who are eligible for their own employer-sponsored health plan other than a group health plan of a parent. This exception applies until January 1, 2014, at which point all plans, grandfathered or not, must extend coverage to children up to age 26.

In the case of a child who is eligible for coverage under the plans of both parents, neither plan may exclude the child from coverage based on the fact that the child is eligible to enroll in the plan of the other parent's employer.

Significantly, however, the IFR clarifies that this new dependent coverage is not required to be extended to spouses or children of eligible dependents. Nor does it require plans that currently do not offer coverage to children to begin doing so.²

Finally, with respect to the status of state laws with more liberal coverage requirements than PPACA (e.g., requiring coverage of children up to age 30), the IFR generally advises that state laws imposing stricter requirements than those imposed by PPACA are not superseded by PPACA, so long as the state law does not prevent application of a requirement of PPACA. In other words, the federal law sets a "floor" that states are free to exceed so long as they do not prevent issuers from also complying with PPACA. An issuer that complies with a state law

¹ Keep in mind that this regulation does not alter the definition of "dependent" for tax purposes; it only governs for coverage eligibility purposes.

² Although HHS has not directly addressed the issue in the present regulation, it is anticipated that the employer mandate will be interpreted to require all plans and issuers to offer dependent coverage starting in 2014.

requirement to cover children older than age 26 would also be in compliance with PPACA. Accordingly, if a state requires dependent coverage to be extended to children for a longer period than PPACA, that state law governs issuers under that state's jurisdiction.

B. Benefits and Cost of Coverage

The IFR specifies that dependents who are eligible for coverage under this provision cannot be offered benefits³ or coverage options that differ from what is offered to other similarly situated individuals who did not lose coverage due to loss of dependent status, nor can they be charged more than other similarly situated individuals who did not lose coverage due to loss of dependent status. It follows that applying a surcharge to enrollees who come onto their parent's plan because of this new law is not permitted. Nor can plans impose any surcharge that is tied to a child's age up to 26 (e.g., charging one amount for children up to age 18 and a different amount for children age 19-26). Surcharges are only permitted if they apply uniformly to children of all ages up to 26.

Thus, the IFR suggests that surcharges and variations in benefits for children over 26 are permitted.

C. Special Enrollment Period

Plans must pay close attention to the special enrollment procedures required by the IFR to ensure that they are in compliance. This requirement is being imposed to allow children who previously were not eligible for dependent coverage (or lost coverage) due to their age to enroll in short order. The opportunity to enroll under this special procedure must be extended to eligible dependents regardless of whether or when the child was enrolled in the plan, and regardless of whether the plan offers an open enrollment period, or when the open enrollment period occurs. The key procedural requirements to be aware of are:

Written Notices. A written notice must be provided about the special enrollment opportunity. The notice must be provided no later than the first day of the first plan year beginning on or after September 23, 2010. Notice may be provided to an employee on behalf of the employee's child. And in the case of insured plans, if a notice satisfying the IFR's requirements is provided to an employee whose child is entitled to an enrollment opportunity, the notice obligation with respect to that child is satisfied for both the plan and the issuer.

The notice itself must include a statement that children whose coverage ended, who were previously denied coverage, or who were not eligible for coverage, because eligibility for such coverage ended before attainment of age 26, are now eligible to enroll in the plan.

³ The IFR notes that any difference in benefits or cost-sharing requirements constitutes a different benefits package.

Timing. The special enrollment period must start no later than the first day of first plan year beginning on or after September 23, 2010, and must last for at least 30 days from the time notice is provided.

A plan may use its existing annual enrollment period and materials to comply if the annual enrollment period fits within the time parameters required by the regulation. Thus, if a plan's open enrollment period can allow for 30 days to elapse before or starting with the first day of the first plan year to accommodate the special enrollment period, plans should take advantage of this opportunity to comply with the special enrollment procedure without having to initiate a separate enrollment process for new eligible dependents. The caveat is that if notice of the special enrollment opportunity is provided with other open enrollment materials, the notice must be "prominent," a term that is not defined by the IFR.

There is an exception to the special enrollment requirement for plans that elect to comply before being required to do so by PPACA and that allow continued coverage of children who would otherwise age out between now and the first plan year after September 23, 2010. Those plans will not be required to provide the special enrollment opportunity for the children who have retained their coverage.

In plan years subsequent to the first one beginning after September 23, 2010, dependent coverage may be elected in connection with normal enrollment opportunities.

Commencement of Coverage/Retroactivity. Coverage for these newly enrolled dependents must begin no later than the first day of the first plan year after September 23, 2010, even if the request for enrollment is made after the first day of the plan year. This means that coverage must be made retroactive to the first day of the plan year if the enrollment request is made after the first day of the plan year.

Other Special Enrollment Requirements. The IFR imposes several other requirements as a part of the special enrollment procedure that may require plans to extend more flexibility regarding enrollment than they otherwise would, specifically:

- if a child qualifies for an enrollment opportunity under this provision and the parent is not enrolled but is otherwise eligible for enrollment, the plan must provide an opportunity to enroll the parent, in addition to the child. It follows, however, that if the parent is no longer eligible for coverage under the plan (for example, if the parent has ceased employment with the plan sponsor) as of the first date on which the enrollment opportunity would be required to be given, the plan would not be required to enroll the child;
- if a plan has more than one benefit package option, a child qualifies for enrollment under this provision, and the parent is enrolled in one benefit package option, the plan must provide an opportunity to enroll the child in any benefit package option for which the child is otherwise eligible, thus allowing the parent to switch benefit package options;

- a child who qualifies for an enrollment opportunity under this section and who is covered under a COBRA continuation provision must be given the opportunity to enroll as a dependent of an active employee (i.e., other than as a COBRA-qualified beneficiary). Note that in this situation, if the child loses eligibility for coverage due to a later qualifying event (including aging out of coverage at age 26), the child has another opportunity to elect COBRA continuation coverage; and,
- keep in mind that an employee who joined a plan prior to the applicability of the new dependent requirements, and who has a child who never enrolled because the child was too old under the terms of the plan but has not yet turned 26, must now be provided an opportunity to enroll the child under this new rule even though the child was not previously covered under the plan. The opportunity need not be made immediately – the obligation is imposed as of the first day of the first plan year after September 23, 2010.

D. Penalties

PPACA made the new dependent care coverage provision a part of the Public Health Service Act. While the IFR does not address the specific subject of penalties, be aware that the PHS Act generally provides penalties of up to \$100 per day per beneficiary with respect to whom a plan is not in compliance.

E. IRS Guidance on Tax Treatment of Dependent Coverage Under the New Rules

Employers should be aware that the IRS has issued separate guidance on the tax treatment of dependent coverage under the new law. PPACA amended the tax code to provide favorable tax treatment of coverage of adult dependents, specifically providing for example, that accident or health coverage under an employer-sponsored plan (or employer-provided medical care reimbursements) for a child under age 27 as of the end of the employee's taxable year are excludable from an employee's gross income.

The tax code amendments have generated some confusion because they apply to children under age 27, whereas the required extension of dependent coverage applies only up to age 26. The distinction is made to provide more flexibility and ease administrative burdens. Thus, when a child turns 26 in the middle of a plan year, the plan may opt to continue to extend coverage to that child until the end of the calendar year without incurring adverse tax consequences for the employee. This may be less of an administrative burden than having employees drop dependent coverage throughout the course of the year as their dependents age out.

The IRS guidance, IRS Notice 2010-38 (available at <http://www.irs.gov/pub/irs-drop/n-10-38.pdf>), provides that employers may rely on the employee's representation as to the date of the child's birth.

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