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May 21, 2010

# Employee Benefits Briefing

## Health Care Dependent Coverage Regulations Issued

On May 10th, the Departments of Health and Human Services, Labor and Treasury jointly issued interim final regulations relating to the requirement under the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act (collectively, the "Act"), that health plans offering dependent coverage to children offer that coverage until the children attain age 26.

### *Background*

The Act addresses health care coverage for children in two ways. First, the Act requires health plans that offer dependent coverage to an employee's children to offer that coverage until the children attain age 26. Second, the Act provides that such coverage will be tax free to the employee, regardless of the child's dependent status, until the calendar year in which the child attains age 27. The Internal Revenue Service previously issued guidance (Notice 2010-38) regarding the impact of the Act on the taxation of coverage and the related impact on the operations of cafeteria plans.[1]

### *Regulations*

The joint regulations issued on May 10th become effective for plan years that begin on or after September 23, 2010 (i.e., January 1, 2011 for calendar-year plans). For ease of reference, the remainder of this Briefing discusses the impact of these regulations as if they begin in 2011.

The regulations address the following questions:

- How is the term "dependent child" to be defined?
- Can coverage or premiums costs vary within the category of dependent children?
- How must plans enroll newly eligible dependent children?
- What is the effect of voluntary compliance with the regulations prior to their effective date?

These questions are discussed below.

### *Definition of Dependent Child*

Health plans have historically defined eligible dependent children so as to parallel the general definition of dependent for income tax purposes. Thus, plans have included conditions in the definition of dependent relating not only to the child's age and relationship to the employee, but also to such items as the child's student status, residency, financial support and other factors indicating that the child may be reported as a dependent on the employee's tax return.

The regulations provide that these additional factors are no longer relevant for the vast majority of dependent children. Rather, the relevant

[1] Notice 2010-38 was discussed in a Vedder Price Employee Benefits Briefing dated April 30, 2010. *httpwww.vedderprice.com/Benefits043010*

factors are: (1) the parent/child relationship with the employee and (2) the age of the child. Thus, if a plan provides dependent coverage for children, it must *at a minimum* define an eligible child as the daughter, son, stepdaughter, stepson, eligible foster child, adopted child or child legally placed with the employee for adoption. In addition, with respect to children covered by the Act's definition of "child," the only other eligibility condition that the plan may impose (with a limited exception for grandfathered plans, discussed below) is that the child not have attained age 26. Thus, for example, a plan may no longer require such an eligible child to be an income tax dependent of the employee, reside with the employee, be a full-time student or be unmarried.

If a plan is a grandfathered plan under the Act (i.e., a plan in existence on March 23, 2010), a child under age 26 may be excluded from coverage only if the child is eligible to enroll in an employer-sponsored plan other than a group health plan of a parent. Thus, if the child is eligible to enroll in his/her own employer's plan, a grandfathered plan may exclude that child from coverage. A grandfathered plan may exclude such a child from coverage through the end of 2013.

Many plans contain a definition of dependent child that is more expansive than the definition under the Act. Most notably, plans commonly provide for continued eligibility beyond a particular age if the child is disabled and remains dependent on the employee for support. Similarly, some plans provide for coverage of grandchildren who reside with the employee or other children for whom the employee has been granted legal guardianship. Nothing in the Act or these regulations prohibits plans from retaining a more expansive definition of eligible dependent, nor do they prohibit the application of criteria beyond relationship and age to eligible children who are outside of the statutory definition of "child" under the Act. However, if the relationship of the child to the employee is covered by the statutory definition under the Act (and the vast majority will be), plans will not be permitted to impose any additional conditions (such as income tax dependency status) to limit continued eligibility under the plan.

As a final note, the regulations provide that plans are not required to cover children of children, and plans are not required to cover spouses of eligible children.

## *Uniform Coverage*

If an individual is covered by the definition of "child" under the Act, a plan may not vary coverage or charge different premiums based on the age of the child. Similarly, a plan may not vary coverage levels based on the age of the child. Thus, for example, a plan may not charge additional premiums for children who are above age 18 or charge separate premiums for adult children who become newly eligible as a result of the Act.

Plans may impose additional premium requirements that are applicable to all eligible dependents. For example, a plan may provide multiple premium tiers depending on the number of covered dependents. However, those tiers must apply regardless of the ages of the dependents.

## *Enrollment Logistics*

The regulations provide that a plan must give children who become newly eligible because of the Act a 30-day period to enroll in the plan. This 30-day enrollment period must begin no later than January 1, 2011 (for calendar-year plans), and any elected coverage must be effective as of January 1, 2011 (again, for calendar-year plans).

An employer may implement the 30-day enrollment period prior to 2011 (with coverage effective on January 1, 2011), and the regulations contemplate that this 30-day period will likely coincide with the Fall 2010 annual open enrollment

period. In any event, this 30-day enrollment period must be implemented regardless of whether a plan utilizes an open enrollment period or when that open enrollment period is scheduled.

The regulations require that notice of the opportunity to enroll because of the Act be provided to the child in writing, although this notice may be provided to the employee on behalf of the employee's child. In addition, the notice may be included as part of the annual open enrollment materials, provided that the statement about enrollment is prominent.

A newly eligible child who enrolls during this 30-day enrollment period must be treated as a special enrollee under existing HIPAA special enrollment rules. Accordingly, the child must be offered all the benefit packages available to similarly situated individuals who did not lose coverage by reason of dependent status. Similarly, as noted above, the newly eligible child cannot be required to pay more for coverage than a child who is currently covered under the plan.

The same special enrollment rules apply to other family members as well. For example, if the employee has elected not to be covered under the plan, upon the special enrollment for the newly eligible child, the employee (and other eligible dependents) may also enroll for coverage under the plan. Similarly, the employee parent may switch benefit packages in connection with such special enrollment.

Finally, a child who becomes eligible because of the Act and who is currently covered under COBRA (e.g., a child who had previously aged out of eligibility) must be given the opportunity to enroll as a dependent of an active employee. However, if the employee parent is no longer eligible for coverage under the plan (e.g., the employee is no longer employed by 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 child who enrolls under this provision subsequently incurs a COBRA qualifying event, he or she will again have the right to elect a full period of COBRA continuation.

## *Effect of Early Compliance*

Similar to Internal Revenue Service Notice 2010-38 (April 27, 2010), the interim regulations make it clear that voluntary adoption of these provisions ahead of the required date will not cause a plan to lose its grandfathered status under the Act or otherwise be adversely affected.

Also, if a plan offers continued coverage of adult children before being required to do so under the Act, the plan will not be required to offer such adult children the 30-day enrollment period.

If you have any questions regarding the dependent coverage regulations, please contact **Philip L. Mowery** (312-609-7642), **Paul F. Russell** (312-609-7740), **Jessica L. Winski** (312-609-7678) or any other employee benefits attorney with whom you have worked.

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