

More Guidance Impacts Health Reform Implementation

If you have any questions, please contact your Vorys attorney or one of the following:

Anthony C. Ciriaco
acciriaco@vorys.com
614.464.6429

Jennifer B. Dunsizer
jbdunsizer@vorys.com
614.464.5631

Jolie N. Havens
jnhavens@vorys.com
614.464.5429

Linda R. Mendel
lrmendel@vorys.com
614.464.8218

Additional guidance continues to be released impacting implementation of the Patient Protection and Affordable Care Act. This alert will provide a brief overview of recent guidance including three sets of FAQs jointly by the IRS, Department of Labor (DOL) and Department of Health and Human Services (HHS).

A Reprieve for Form W-2 Changes

The IRS has given all employers a one-year reprieve on the requirement to report the cost of health benefits on the Form W-2. The IRS intends to issue guidance before the end of the year for the information that will now be required to be provided on the 2012 W-2s (generally issued in January 2013). Employers may want to voluntarily disclose the information on the 2011 W-2s (for example, if the new disclosure was described in your open enrollment materials).

Guidance on Coverage of Adult Children

Under regulations issued in May, employers that had a broad definition of eligible children were faced with a difficult choice: (1) narrow the list of eligible children; or (2) offer coverage to all eligible children to age 26 (and deal with the expanded coverage and the need to impute taxable income for the coverage of some of the adult children).

An FAQ now provides a third choice. Restrictions may be placed on the coverage of children other than an employee's children by birth, adoption, or placement for adoption, stepchildren and foster children. Therefore, an employer may offer coverage to an employee's children by birth, adoption, or placement for adoption, step-children and foster children up to age 26 and offer coverage to other children (e.g., grandchildren or children subject to a guardianship) to some lesser age and/or subject to additional restrictions such as financial dependency.

A Little Good News on Rescissions

The FAQs confirm that a retroactive cancellation of coverage back to the date of termination of employment, due to a delay in administrative record-keeping is not a prohibited rescission, as long as the employer did not receive any employee contributions for post-employment coverage.

In addition, if an employee does not report a divorce and the full COBRA premium is not paid by the employee or the ex-spouse, the FAQs confirm that the retroactive cancellation of coverage back to the date of divorce is not a prohibited rescission. Note that the former spouse may have a right to COBRA coverage if the plan discovers the divorce within the notification period.

Guidance on Definition of Grandfathered Health Plan

A series of FAQs address grandfathered status.

An FAQ clarifies that a plan with two tiers of coverage on March 23, 2010 (single and family) will lose grandfathered status upon the implementation of additional tiers of coverage (single + 1, single + 2, single + 3, etc.) if the subsidy for any of the new tiers of coverage is more than 5 percentage points less than the subsidy a family would have received under the original structure.

If your plan is insured, you will need to keep the insurer apprised of changes to employee contribution rates. An FAQ states that an insurance policy will remain grandfathered until the issuer knows that the rate of employer subsidy has been reduced by at least 5%, so long as the employer is required at renewal to provide the issuer with the contribution rate percentages at the time of renewal and on March 23, 2010, and the policy clearly indicates that the employer is required to notify the insurer of any change to the contribution rate. Similar rules apply to multiemployer plans.

Another FAQ confirms that changing the copayment rate for one category of service in the plan causes a loss of grandfathered plan status, even if all other copayments remain the same.

In two separate releases, the agencies have confirmed that they are considering circumstances that would allow an otherwise grandfathered plan to change insurers without giving up grandfathered plan status. We will continue to monitor this. Until further guidance is issued, employers planning to change carriers or policies should prepare for the loss of grandfathered status.

Guidance on New Claims, Appeals and External Review

The FAQs confirm that grandfathered plans are not required to make any changes to their claims and appeals provisions.

Between now and July 2011, non-grandfathered plans will have an enforcement grace period as they are given time to make the procedural and computer system changes necessary to comply with the new claims, appeals and external review standards.

As good news, the FAQs provide that a self-insured plan is not required to contract directly with independent review organizations (IROs), but may instead rely on contracts that the plan's third-party administrator has with IROs. In addition, the IROs are not required to be in the same state as the plan.

The FAQs also confirm that the shorter (24 hour) time-frame applies only to the initial decisions on urgent claims and does not affect any other time period.

Request for Comment on Discrimination Testing

The IRS has requested comment on the current rules for discrimination testing of self-insured benefits under Section 105(h) of the Internal Revenue Code and on suggestions for application of these rules to fully-insured plans. See IRS Notice 2010-63 at <http://www.irs.gov/newsroom/article/0,,id=227943,00.html> for instructions. Comments are due November 4, 2010.

Guidance on Early Retiree Reinsurance Program (ERRP)

HHS has issued guidance on claiming reimbursements under ERRP. If you have applied to participate in ERRP, you will want to review the guidance to ensure that you are properly tracking information so that your requests for reimbursement will be successful. HHS has published a model notice (available at http://errp.gov/faq_misc.shtml) that will have to be distributed to plan participants.

Guidance on Adoption Tax Credit

IRS Notice 2010-66 confirms that a taxpayer can deduct adoption expenses that were carried forward into 2010 and that any credit in excess of the taxpayer's 2010 tax liability is refundable. In addition, the notice describes the documents necessary to substantiate adoption expenses. Employers that reimburse adoption expenses may want to review the list of documents in connection with the administration of the program.

This client alert is for general information purposes and should not be regarded as legal advice.

IRS CIRCULAR 230 DISCLOSURE: In order to ensure compliance with requirements imposed by the U.S. Internal Revenue Service, we inform you that any federal tax information contained in this communication (including any attachments) is not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code; or (ii) promoting, marketing, or recommending to another person, any transaction or other matter addressed herein.