

THOMPSON COBURN LLP

HEALTH CARE REFORM COVERAGE OF CHILDREN UNDER AGE 26

On May 10, 2010, the Departments of Treasury, Labor and Health and Human Services released an interim final rule on the provision of the Patient Protection and Affordable Care Act (the "Act") that requires plans that cover children of employees to cover those children until they are 26 years old. The new rule construes the statute's coverage mandate in the broadest possible manner. The following questions and answers cover the highlights of the new rule.

Q1. Who must a plan cover?

A plan that provides for coverage of dependent children of employees must provide for coverage of all children of participating employees who have not attained age 26. (It does not appear that the requirement applies to retiree-only plans, although the new rule does not address this explicitly.) Coverage for children under the age of 26 must be provided regardless of whether the child lives with the employee, is financially supported by the employee, is married or is a student. For example, subject to a limited temporary exception described in Question 2, a plan must offer coverage to a married twenty-four year old son of a participant who is being supported by the son's wife. Similarly, a plan must cover the twelve-year-old daughter of a participant who lives full-time with her other parent and is not financially dependent on the participant.

Q2. When must a plan comply?

A plan must comply with the Act and the new rule beginning with the first day of the plan year that begins on or after September 23, 2010. In the case of a calendar year plan, compliance is required beginning January 1, 2011.

Q3. Must the plan provide coverage to a child who is working and has coverage available through his or her own employer (or through a spouse's employer)

Yes, unless the plan is a grandfathered plan. Until the first plan year beginning on or after January 1, 2014, grandfathered plans may exclude adult children who have not attained age 26 only if the child is eligible to enroll in an employer-sponsored health plan other than a group health plan of a parent.

A grandfathered plan is a plan that was in effect on March 23, 2010. The effective dates for certain changes required by the Act are delayed for grandfathered plans and some changes will not apply at all. Regulations relating to grandfathered plans are expected to be published soon. The preamble to the new rule says that it is expected that the

grandfathered plan regulations will make clear that changes to a plan to comply the Act and the new rule (including voluntary early compliance) will not cause a plan to lose grandfathered status.

Q4. Does the plan have to cover the spouse or child of an employee's child?

No.

Q5. Can the plan exclude stepchildren from coverage or provide for additional requirements for coverage for stepchildren, e.g. require that a stepchild live in the same household as the employee or be financially supported by the employee?

The rule does not expressly say that "child" as used in the law includes stepchildren. Nonetheless, the breadth of the coverage required by the rule suggests that questions about whether or not any individual under the age of 26 must be covered will be resolved in favor of coverage and that there would be some risk in excluding stepchildren from coverage or imposing additional requirements for their coverage. A plan sponsor wishing to consider limiting coverage should consult counsel to assess the risk or await further guidance from the regulators.

Q6. Can the plan charge more for the coverage or offer a different benefit package to a child of an employee based on age?

No. The plan cannot charge more for the coverage to any child of an employee based on age, and cannot vary the terms of coverage based on age (except for a child age 26 or older). This means that a plan that has an Employee plus family rate cannot impose a surcharge because the family includes an adult child not previously required to be covered. A plan could have a fee structure that charges more for each individual covered regardless of age, e.g. Employee plus 1, Employee plus 2, Employee plus 3, Employee plus 4, etc.

Q7. What about children who have lost coverage or will lose coverage or do not have coverage because of age or loss of student status before the law is effective?

A plan must permit any child to enroll as of the first day of the first plan year beginning on or after September 23, 2010 if the child was previously denied coverage (or was not eligible for coverage) because of a plan term limiting the availability of coverage before the attainment of age 26. Note that in addition to applying to a child over the age of 18 who is not a full time student, or a child over the age of 24, the requirement to permit a child to enroll applies to any child under the age of 26 who lost coverage or was denied coverage because he or she was not a dependent. For example, a child of any age who was not eligible for coverage because she was married must be permitted to enroll. Similarly, a child of any age who was not eligible for coverage because he did not live with the employee and was not financially dependent on the employee must be permitted to enroll.

A plan must send a written notice to the child or the employee on behalf of the child. The notice must state that children whose coverage ended or who were denied coverage (or

were not eligible for coverage) because of the availability of dependent coverage of children ended before age 26 are eligible to enroll. The notice may be included with other enrollment materials if the foregoing statement is "prominent."

Q8. When does a plan have to provide the notice and opportunity to enroll?

The opportunity and the notice must be provided no later than the first day of the plan year beginning on or after September 23, 2010. The opportunity to enroll must continue for at least 30 days and the child must be permitted to enroll as of the first day of the plan year. A calendar year plan could satisfy this requirement by providing notice on or before January 1, 2011, and providing until January 31, 2011 for an eligible child to enroll with enrollment retroactive to January 1.

Q9. Must the notice and opportunity to enroll be provided to a child who lost coverage because of a plan term limiting the availability of dependent coverage before age 26 if the child elected COBRA continuation coverage?

Yes. The plan must offer the child an opportunity to enroll in coverage that is not COBRA coverage.

Q10. Must the notice and opportunity to enroll be provided to a child who lost coverage because of a plan term limiting the availability of dependent coverage before age 26 if the employee/parent is no longer a plan participant?

Yes, both the employee and the child must be permitted to enroll.

Q11. What should a plan sponsor consider in deciding whether to expand coverage based upon the new law before the plan is legally required to do so?

Some companies are considering (or being asked to consider) permitting children of employees who would otherwise lose coverage because of age or loss of student status to remain covered until the end of the plan year -- a limited voluntary early compliance to avoid dropping a child who will become eligible for coverage again at the beginning of the next plan year. Obviously, cost and administration are considerations. The possibility that early compliance could jeopardize a plan's status as a grandfathered plan appears remote given language in the preamble to the new rule about the expected grandfathered plan regulations.

Early implementation on a broader scale would raise other issues both legal and practical. It is unclear how the notice requirement would be implemented in the event of early compliance. Before implementation, companies may also want to evaluate possible plan design changes, or changes to its contribution strategy in response to the required expansion of coverage. It is not yet clear how such a changes might affect a plan's status as a grandfathered plan.

Q12. How does the Act affect Michelle's Law?

Because plans can no longer have a "student status" and cannot vary contributions by "student status," no plans are subject to Michelle's Law.

For additional information on anything discussed in this alert, contact any member of Thompson Coburn LLP's Employee Benefits Practice Group.

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