



EMPLOYMENT, LABOR & BENEFITS LEGAL UPDATE

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May 11, 2010

Federal Agencies Issue Important Guidance on Health Care Reform's Extension of Health Coverage to Young Adults

Need a reason to start dealing today with the impact of health care reform on your group health plan rather than tomorrow? Are you so overwhelmed that you are looking for some discrete part of the new law to conquer so that you can tell the world that you are doing something to bring your group health plan into compliance? Well, Ruder Ware has something for you that needs to be dealt with now, and also is fairly manageable when compared to some of the other mandates.

What's it all about?

President Obama signed the Patient Protection and Affordable Care Act on March 23, 2010, and the Health Care and Education Reconciliation Act on March 30, 2010. These two laws ("Health Care Reform") impose requirements on employers (both those who sponsor group health plans and those who do not) and individuals. These new requirements are phased in over the next few years, but one requirement in particular is in our rear view mirror and is closer than it appears. For plan years beginning on or after September 23, 2010, group health plans (whether insured or self-funded) that offer dependent coverage must make such coverage available to children until attainment of age 26. So, for calendar year group health plans, this "new" definition of dependent is effective January 1, 2011. Group health plans include plans sponsored by for-profit entities and non-profit entities and governmental units.

Does my group health plan have to cover all adult children?

Interim final rules issued on May 10, 2010 by three federal agencies who are charged with issuing guidance on Health Care Reform (the IRS, the Department of Labor, and Department of Health and Human Services) have distilled the requirement to cover adult children to its bare essence. If a group health plan covers dependents, then the plan must extend coverage to any child of a participant who has not attained age 26. That's it. There can be no other conditions to this extension of coverage. This means that for children who have not attained age 26, the plan cannot condition eligibility on financial dependency on the participant or any other person, residency, student status, employment, marital status, or eligibility for other coverage. Also, the terms of the coverage cannot vary for children under the age of 26, meaning there can be no surcharge for coverage of such children.

There is a special rule for "grandfathered" group health plans, and then only for plan years beginning before January 1, 2014. Grandfathered group health plans are plans in existence on March 23, 2010. Grandfathered group health plans may exclude an adult child who has not

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attained age 26 from coverage if the child is eligible to enroll in an employer-sponsored health plan other than a group health plan of a parent. So, grandfathered group health plans can impose one additional condition on coverage of adult children, namely that the child not be eligible to enroll in an employer-sponsored group health plan.

Doesn't Wisconsin law already require coverage of adult children? Which law wins?

First, under Health Care Reform, if a plan extends coverage to children older than age 26, then the plan can condition coverage on other factors (such as financial dependency or residency). The wrinkle is that effective January 1, 2010 for insurance policies issued in Wisconsin, dependent coverage must be offered to an adult child if the child is over age 17 but less than 27 years of age, not married, and the child is not eligible for coverage through his/her own employment (or the coverage through that employment has a premium which is equal to or greater than the premium for coverage under the parent's plan). Because Health Care Reform preempts any state law which is less favorable to the employee, the Health Care Reform requirement for coverage of adult children will govern for children through age 26, and (with respect to insured plans in Wisconsin), the Wisconsin mandate will govern for adult children 26 or older through age 27.

Isn't employer-provided coverage on children who are not tax dependents taxable?

Yes, until Health Care Reform, employer-provided coverage of children who were not tax dependents of the employee was generally taxable. However, Health Care Reform brought about a change in the federal tax treatment of employer-provided group health plan coverage by removing the linkage to the child's dependent status. Effective April 1, 2010, employers may exclude from an employee's income the value of any employer-provided health coverage for an employee's child until the last day of the calendar year in which the child turns age 26. In order for this coverage to be non-taxable to the employee:

1. The child must be the employee's son, daughter, stepchild, legally adopted child (or placed for adoption), or an eligible foster child (i.e. placed with the employee by an authorized placement agency or by judgment, decree or court order); and
2. The child must not have attained age 27 during the calendar year.

Will the employer-provided coverage to adult children through age 26 be taxable for Wisconsin income tax purposes?

To date, Wisconsin has not yet revised its tax code to mirror the changes in tax treatment made by Health Care Reform. Unless and until Wisconsin does so, it is possible that coverage of adult children will not be taxable for federal income tax purposes, but will be taxable for Wisconsin income tax purposes (for example, if the adult child is not a tax dependent).

My employees will be happy not to be taxed on the coverage of their adult children, but isn't there a gap between the federal tax rules on taxation of coverage and the Wisconsin requirement of coverage through age 27?

Yes there is. Again, the Wisconsin definition (through age 27 with certain other requirements) only applies to insured group health plans. For those plans, any coverage of an adult child after the last day of the calendar year in which the child turns 26 will be taxable for federal income tax purposes (and state tax purposes). For example, if an insured group health plan pursuant to the Wisconsin mandate covers a participant's adult child through May 2011 (the month in which the child turns age 27), then the participant must have imputed income for the months of January through May of 2011, equal to the value of the coverage. The value of the coverage must be determined on a reasonable basis, preferably by using an actuarial determination of that value, or the single COBRA premium.

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How do my employees find out about this benefit being available to their adult children?

Each group health plan must extend an open enrollment opportunity to adult children who are not yet age 26. This open enrollment must be offered for at least 30 days, and if the adult child is enrolled then coverage must be effective the first day of the plan year beginning on or after September 23, 2010 (i.e. January 1, 2011 for calendar year plans). Written notice of the open enrollment must be provided no later than the first day of the plan year beginning on or after September 23, 2010. This open enrollment must be offered even if the group health plan does not otherwise offer an open enrollment to active employees.

There may be adult children who lost eligibility or coverage under the group health plan due to age prior to age 26, or who never became eligible for coverage because at the time of the employee's initial eligibility for dependent coverage the dependent was already too old. These adult children must also be offered the opportunity to either resume coverage or elect coverage for the first time, during the open enrollment discussed above. Adult children whose coverage terminated due to loss of dependent status who are now on COBRA must also be allowed to return to coverage as a dependent of an active employee rather than as a COBRA qualified beneficiary.

Finally, the interim rule provides that even the parent/employee may have an opportunity during this open enrollment. If the parent/employee has a child which qualifies for this open enrollment, then the parent as well must be offered the opportunity to enroll even if coverage was previously rejected by the parent, and also must be offered the opportunity to switch coverage options to another option for which the adult child would be eligible.

My insurance carrier is implementing the Health Care Reform coverage of adult children requirement prior to January 1, 2011? Can they do that?

Yes, federal agencies are encouraging insurers and self-insured plans to implement these changes as soon as possible. In fact, the Department of Labor on its Web site has listed a number of insurers which have agreed to implement the new rules in advance of the September 23, 2010 effective date. A list of these insurers can be found at <http://www.dol.gov/ebsa/newsroom/fsdependentcoverage.html>. The interim rules issued on May 10, 2010 make it clear that a "grandfathered" plan will not lose its grandfathered status due to voluntary compliance with the coverage of adult children to age 26 requirement in advance of the actual effective date of the requirement.

Anything else I should know about Health Care Reform?

There is a lot to know, and we plan on continuing to bring you these e-alerts over the next few weeks, in easy to manage pieces, so that you can make informed choices as you bring your group health plan into compliance with Health Care Reform.

Please contact Attorney Mary Ellen Schill at (715) 845-4336 with any questions you have concerning this legal update.

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Ruder Ware's Employment, Labor & Benefits practice group works in tandem with private and public employers providing counsel on all aspects of human resource management. The breadth of services offered, unique for a law firm headquartered in Wausau, Wisconsin, includes counsel on highly sensitive issues such as workplace harassment, employee privacy, drug and alcohol testing, and disciplinary issues. In addition, attorneys design and assist with the development, implementation, and enforcement of policies and procedures relating to benefits, hiring practices, employee handbooks, state and federal discrimination laws, FMLA, FLSA, ADA, OSHA, and workers' compensation.

Attorneys in the group regularly represent public and private sector employers in collective bargaining, negotiations, union elections, unfair labor practices, and grievance arbitration matters in addition to guiding nonunion clients on maintaining their union-free status.

Actively involved in organizations with human resource professionals as the primary member base, our attorneys are in tune with the various sensitivities and complexities of the profession. Our attorneys often present seminars and in-house training on employment law topics both across the state and nationwide.

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