

## 2009 Year-End Health and Welfare Issues

2009 is quickly coming to a close and health and welfare plan sponsors should address several recent legal developments and ongoing compliance requirements before year-end. In particular, calendar year plans should be amended (and SPDs updated) to reflect the new requirements that will be effective January 1, 2010, including Michelle's Law, expanded mental health parity requirements and GINA. Plan Sponsors should also ensure that plan changes needed for CHIPRA and the COBRA subsidy are implemented and documented. More summary details about these and other legal developments are in the chart below. Following the chart, we provide some reminders about some ongoing compliance requirements, as well as key health and welfare developments to watch for in the coming months.

Legal Development	Significance	Action Required
<b>Michelle's Law</b>	For plan years beginning on or after October 9, 2009, group health plans (insured and self-funded) that provide dependent child coverage to full-time college students must continue that coverage for up to one year if the student takes a medically necessary leave of absence.	Amend group health plan documents and update SPDs. Any request for certification of student status must describe the exception for medically necessary leave under Michelle's Law.
<b>Mental Health Parity</b>	For plan years beginning on and after October 3, 2009, group health plans that provide mental health and substance abuse coverage will be required to satisfy more stringent parity requirements. Many common limitations ( <i>e.g.</i> , limits on number of days of treatment and out-of-network limitations) will no longer be allowed. Although regulations have not yet been issued, plans are required to comply in "good faith" with the statute.  NOTE: IRS and DOL officials have recently commented that creating separate plans or options (one for mental health/substance abuse benefits, the other for major medical/surgical benefits) would violate the "anti-abuse" provisions in the 2004 proposed regulations (which are likely to be issued in final form soon).	Review group health plan terms to determine amendments needed and associated cost implications. Ensure SPDs and related materials describe the criteria used for medical necessity determinations and the claim and appeals process.
<b>Genetic Information Non-Discrimination Act (GINA)</b>	Under GINA, group health plans and insurers are prohibited from: (1) using, requesting, requiring or purchasing genetic information for any underwriting purposes at any time ( <i>e.g.</i> , restricting enrollment or adjusting premium or contribution amounts); (2) requesting or requiring individuals or family members to undergo genetic tests; and (3) requesting, requiring or purchasing genetic information prior to or in connection with enrollment. The new requirements are generally effective for plan years beginning after May 21, 2009 (certain provisions relating to employers are effective November 21, 2009).	Review plan documents and administrative practices. Pay particular attention to wellness programs and HIPAA privacy policies and notices. To read our client alert on wellness programs, click <a href="#">here</a> and to read our client alert on HIPAA privacy changes, click <a href="#">here</a> .

Legal Development	Significance	Action Required
<b>Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA)</b>	CHIPRA was enacted February 4, 2009 to extend and expand the State Children's Health Insurance Program, including provisions to allow states to offer premium assistance for children eligible to participate in an employer-sponsored group health plan. Among other things, there are new special enrollment rights and notice and disclosure obligations for group health plans.	Implement the new special enrollment provisions by April 1, 2009. Open enrollment materials, plan documents and SPDs should be updated to reflect these changes.
<b>COBRA Premium Assistance Subsidy</b>	<p>The American Recovery and Reinvestment Act of 2009 (ARRA), signed into law on February 17, 2009, provides for a temporary premium assistance subsidy toward the cost of COBRA continuation coverage for eligible individuals who are involuntarily terminated from employment during the period of September 1, 2008 through December 31, 2009. Please note that to be eligible for the subsidy, the individual must lose coverage and become eligible for COBRA continuation on or before December 31, 2009.</p> <p>Employers should be aware that legislation has been proposed to extend the subsidy. Without an extension, there will be no new assistance eligible individuals after December 31, 2009. Note, however, that the subsidy is provided for up to nine months of COBRA coverage (even if that nine-month period runs into 2010).</p>	Most employers have already reviewed COBRA administration and notices and made appropriate changes. Be on the look out for possible developments relating to an extension. If an extension is not enacted, then employers will need to revert to their pre-ARRA administrative practices and COBRA notices in 2010.
<b>Expansion of HIPAA Privacy and Security Rules</b>	ARRA also includes comprehensive changes to the health information privacy and security rules under the Health Insurance Portability and Accountability Act (HIPAA). ARRA imposes new obligations on group health plans and providers as HIPAA covered entities and, for the first time, directly regulates HIPAA business associates that provide services to covered entities and have access to patient or health plan participant information in performing services for covered entities. It also includes new requirements to notify participants, the Department of Health and Human Services and in some instances, the media, if there is a breach. Penalties are also significantly higher and the government's enforcement authority is expanded.	Review and revise existing HIPAA privacy and security materials, including notices, policies and procedures, and business associate agreements. Please click <a href="#">here</a> to see our more detailed HIPAA alert for more information.
<b>Trade Adjustment Assistance (TAA) Health Care Tax Credit and COBRA</b>	ARRA also expands the health coverage tax credit (HCTC) under the Trade Adjustment Assistance Act of 2002 (TAA). Eligible individuals may use the HCTC to pay for a wide range of qualified health coverage, including COBRA continuation coverage, spousal coverage, state high-risk pool coverage and other state-based programs. ARRA increases the HCTC to 80 percent of the premium for qualified health coverage (up from 65 percent) and extends the period that individuals may qualify for the HCTC. The expanded provisions are effective through 2010.	Employers who may be impacted by TAA should prepare to respond to questions on the expanded benefits.

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## Ongoing Compliance Items to Note:

- > Medicare Part D Notice of Creditable (or non-Creditable) Coverage – Employers must provide Part D eligible individuals with the annual notice indicating whether or not their plan coverage is “creditable” for Medicare Part D purposes prior to November 15, 2009. Note that CMS issued new model notices for use after January 1, 2009, so if you haven’t updated your notice since last year’s annual notice was sent, you should have your notice reviewed and updated now.
- > Open Enrollment Materials – Review open enrollment materials and include, as appropriate, annual notices for pre-existing condition exclusions, special enrollment rights (including the new CHIPRA rights described above), and the Women’s Health and Cancer Rights Act (WHCRA).
- > HIPAA Notice of Privacy Practices – HIPAA requires that, at least once every three years, a reminder of the availability of the HIPAA Notice of Privacy Practices (and how to obtain a copy of the Notice) be provided to health plan participants. You should review your plan records and confirm the last time the notice (or a description of the availability of the notice) was distributed to all plan participants.

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## What’s on the Horizon

- > Health Care Reform – We are continuing to monitor legislative developments in this area and will issue client alerts in the future when proposals become more definitive.
- > Cafeteria Plan Regulations – The final regulations still have not been issued. Recently, IRS representatives have made informal comments indicating that the earliest effective date for the final regulations will be January 1, 2011.
- > CHIPRA Guidance – CHIPRA requires group health plans to notify participants about the availability of state premium assistance programs and to make disclosures to states about the group health plan’s benefits. Notices will not be due until after the DOL issues model notices. Look for regulatory guidance on these required notices in early 2010.
- > Mental Health Parity – Look for regulatory guidance in the coming months to provide additional details on how group health plans must apply the new statutory requirements. The statute has left many open questions, including how to determine the “predominant” limits and apply plan deductibles and how to apply the rules to EAPs and pre-authorization (medical management) programs.

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