

VI. Required Coverage for Adopted Children

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A. What Coverage Does ERISA Require for Adopted Children and Who Must Comply?

1. Overview

An ERISA group health plan that provides coverage for the dependent children of participants or beneficiaries must also provide coverage to dependent children who are placed with participants or beneficiaries for adoption. Such coverage must be provided under the same terms and conditions that apply to dependent children who are the natural children of participants or beneficiaries, regardless of whether or not the adoption has become final.¹

Comparison to HIPAA. Although HIPAA provides special enrollment rights and prohibits the application of certain preexisting condition exclusion (PCE) limitations for certain newly adopted children (or children placed for adoption), the ERISA § 609(c) mandate is much broader in that it requires coverage (a) to be provided for adopted children if coverage is provided for natural children; (b) to commence upon “placement” for adoption; and (c) to be the same as the coverage being provided for natural children.*

* HIPAA’s PCE rules are discussed in detail in *HIPAA Portability, Privacy & Security* (EBIA, 1997-present, updated quarterly).

2. Group Health Plans Subject to Adopted-Child Requirements

The definition of “group health plan” for purposes of the adopted-child provisions is “an employee welfare benefit plan providing medical care (as defined in section 213(d) of the Internal Revenue Code of 1986) to participants or beneficiaries directly or through insurance, reimbursement, or otherwise.”²

This broad definition picks up many arrangements that may be excepted benefits under some of the other federal mandates (e.g., certain dental and vision plans).³ The definition includes, for example, major medical plans, dental and vision plans, health FSAs, and HRAs. For an at-a-glance table indicating what plans are subject to various group health plan mandates, see Section IV.

¹ ERISA § 609(c).

² ERISA § 607(1). The definition further provides that it doesn’t include any plan substantially all of the coverage under which is qualified long-term care services (as defined in Code § 7702B(c)). “Medical care” (as defined in Code § 213(d)) includes the diagnosis, cure, mitigation, treatment, or prevention of disease and any other undertaking affecting any structure or function of the body. While prescription drugs are clearly included in the definition of “medical care” under Code § 213(d), over-the-counter (OTC) medications may also be included in that definition. In Rev. Rul. 2003-102, 2003-38 I.R.B. 559, the IRS ruled that OTC drugs qualify as “medical care” as defined in Code § 213(d) and therefore can be reimbursed by health FSAs, HRAs, and other employer-provided health plans on a tax-free basis (although Code 213(b) provides that such expenses may not be deducted). Of course, to qualify as “medical care,” OTC drugs must be for the purpose of diagnosis, cure, mitigation, treatment, or prevention of disease and not merely beneficial to the general health of an individual. For information about Code § 213(d) medical expenses, see *Cafeteria Plans* (EBIA, 1991-present, updated quarterly).

³ These “excepted benefits” are discussed in Section IV.

3. *Employers Subject to the Adopted-Child Requirements*

The adopted-child provisions were added to Title I of ERISA. The provisions of that title generally don't apply to church plans or governmental plans or plans covering exclusively self-employed individuals.⁴ Although Congress has enacted legislation that requires church plans and governmental plans to comply with the qualified medical child support order (QMCSO) requirements in ERISA § 609(a) and the national medical support notice (NMSN) requirements in ERISA § 609(b), it hasn't acted to require such plans to comply with the adopted-child requirements in ERISA § 609(c). As a result, the adopted-child mandate will not apply to such plans. Note that unlike some of the other federal mandates, the adopted-child provisions don't directly apply to health insurance issuers.

For an at-a-glance table indicating what employers are subject to various group health plan mandates, see Section IV.

Impact on Health FSAs. As group health plans, health FSAs are subject to ERISA's adopted-child provisions. However, because most health FSAs don't distinguish between benefits provided to natural and adopted children, this law shouldn't ordinarily impact plan design. For a detailed discussion of health FSAs, see *Cafeteria Plans* (EBIA, 1991-present, updated quarterly).

B. Sources of Law

The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) created ERISA § 609(c), entitled "Group Health Plan Coverage of Dependent Children in Cases of Adoption."⁵ To date, the DOL hasn't issued regulations interpreting ERISA § 609(c).⁶

C. Key Terms

1. *Dependent*

The adopted-child requirements apply to "dependent" children of group health plan participants and beneficiaries.⁷ Although ERISA § 609(c) doesn't define "dependent," the DOL has indicated that plans are generally free to define the term for purposes of determining who is eligible for coverage. However, the definition mustn't apply terms and conditions for coverage to children placed for adoption that are different from those applied to natural children.⁸

2. *Child*

The term "child" means, in connection with any adoption of the child (or placement for adoption), an individual who hasn't attained age 18 as of the date of such adoption or placement for adoption.⁹ "Child" also includes children adopted or placed for adoption with retirees.¹⁰

3. *Placement for Adoption*

The term "placement for adoption," in connection with any placement for adoption of a child with any person (such as a participant or beneficiary of a group health plan), means the assumption and retention by such person of a legal obligation for total or partial support of the child in anticipation of adoption of such child. The child's placement with such person terminates upon the termination of the legal obligation.¹¹ According to the DOL, an agreement for full or partial support of a child will constitute a "legal obligation" only if the obligation is enforceable in a court of competent jurisdiction, which depends on the facts and

⁴ ERISA § 4(b) (church and government plans) and DOL Reg. § 2510.3-3(b) (plans covering no employees).

⁵ Pub. L. No. 103-66 (Aug. 10, 1993).

⁶ For more information, see the DOL's website, available at <http://www.dol.gov/ebsa/>.

⁷ ERISA §§ 609(c)(1) and (2).

⁸ DOL Advisory Opinion 95-18 (July 27, 1995), reproduced behind Appendix Tab 5.

⁹ ERISA § 609(c)(3)(A).

¹⁰ DOL Advisory Opinion 95-18 (July 27, 1995), reproduced behind Appendix Tab 5.

¹¹ ERISA § 609(c)(3)(B).

circumstances associated with the agreement.¹² Presumably, the employee must be party to the support agreement and the agreement must extend beyond the obligation to provide medical coverage.

Does an Agreement to Pay the Birth Expenses of the Mother Constitute an Agreement to Support the Child? Not if that's all it does. Although such an agreement may evidence one form of support, it needs to include the assumption and retention of legal obligations to support the child undertaken in anticipation of adoption.*

* DOL Advisory Opinion 95-18 (July 27, 1995), reproduced behind Appendix Tab 5.

D. Plan Terms and Conditions

DOL Advisory Opinion 95-18 (reproduced behind Appendix Tab 5) provides additional guidance regarding the obligations of group health plans under ERISA § 609(c) relating to coverage of dependent children in connection with adoptions.¹³ Here are a few highlights of the guidance:

- A plan may not impose a waiting period for coverage of a child adopted or placed for adoption unless it also imposes a waiting period for coverage of natural children.
- If the adoption is never finalized and the support obligation ends, the plan may not require the employee to reimburse the plan for expenses incurred on behalf of the child.
- Birth expenses of the child, but not the mother's hospital expenses, must be covered on the same basis and at the same time as for natural children. (No coverage is required for birth expenses incurred prior to adoption or placement for adoption.) Whether any expense is attributable to the child, rather than to the mother, should generally be determined by reference to the plan.
- A plan providing benefits through an HMO isn't required to cover a child's birth or other expenses incurred outside the HMO's service area if the plan applies the same out-of-service-area rule to natural children.
- If a plan requires employees to furnish at least 50% of a child's support in order for a natural child to be a covered dependent, the same rule can apply to adopted children or children placed for adoption. For example, a plan may deny coverage if government assistance provides more than 50% of the support of an adopted child or child placed for adoption, but only if the plan also denies coverage for natural children similarly supported by the government.¹⁴

Does a Plan Have to Provide Coverage for Adopted Children Born Prematurely or With Medical Conditions Requiring Special Care and Long Hospital Stays? Yes, if the plan is obligated to provide such coverage to natural children in like circumstances.*

* DOL Advisory Opinion 95-18 (July 27, 1995), reproduced behind Appendix Tab 5.

In addition, a group health plan may not restrict coverage under the plan of any dependent child adopted by a participant or beneficiary, or placed with a participant or beneficiary for adoption, solely on the basis of a preexisting condition of the child at the time that such child would otherwise become eligible for coverage under the plan, if adoption or placement occurs while the participant or beneficiary is eligible for such coverage.¹⁵ Note also that HIPAA prohibits a plan from imposing a PCE on a child adopted or placed for adoption, so long as the child is enrolled within 30 days after the date of the adoption or placement. (See the textbox in subsection A.) HIPAA's PCE rules are discussed in detail in *HIPAA Portability, Privacy & Security* (EBIA, 1997-present, updated quarterly).

¹² DOL Advisory Opinion 95-18 (July 27, 1995), reproduced behind Appendix Tab 5.

¹³ DOL Advisory Opinion 95-18 (July 27, 1995), reproduced behind Appendix Tab 5.

¹⁴ DOL Advisory Opinion 95-18 (July 27, 1995), reproduced behind Appendix Tab 5.

¹⁵ ERISA § 609(c)(2).

Example of Special-Needs Adoption. This case involved a dispute about liability for the substantial medical expenses of a newly born, newly adopted child who suffered from severe birth defects. Prior to the initiation of adoption proceedings, the child's treatment at a hospital was covered by his birth parents' health insurance policy. Several months after birth, the child was adopted and enrolled in the ERISA health plan of the adoptive father's employer (employer's plan). However, the employer refused to guarantee the child's coverage until it could determine how benefits under the plan should be coordinated with the birth parents' policy. The plan's administrators later denied coverage for certain medical expenses incurred after the child's enrollment on the basis that the birth parents' insurer was liable as the child's primary insurance provider. When the birth parents' insurer also denied the claims, the adoptive parents sued the employer's plan and the birth parents' insurer.

The Utah Supreme Court found that the employer's plan was liable for coverage from the date that the birth parents' parental rights were terminated. It first determined that the birth parents' policy excluded from coverage any service that a subscriber wasn't legally obligated to pay, and that when the birth parents' parental rights were terminated, the birth parents had no further legal obligation to pay for the child's care. This exclusion also eliminated any benefits that might have been available under the policy's one-year extension of benefits provision for totally disabled individuals. Because the birth parents' policy didn't cover the child's expenses after the termination of parental rights, the coordination of benefits (COB) provisions in the employer's plan didn't excuse the plan's obligation to pay for medical care during the year after adoption. Given its ruling on the COB argument, the Court found it unnecessary to consider an alternative argument that ERISA's "adopted-children" mandate overrode the plan's COB provisions. However, a concurring opinion discussed the mandate in detail, expressing the view that its purpose was to allow individuals to pursue adoptions without the need for "legal opinions concerning health benefits."^{*}

* *Quaid v. U.S. Healthcare, Inc.*, 2007 UT 27, 158 P.3d 325 (Utah 2007).

ERISA § 609(c) establishes a minimum standard for group health plan coverage of children adopted or placed for adoption by participants or beneficiaries. It doesn't preclude a plan from providing for coverage of such children that isn't mandated. Further, the adopted-child rules apply without regard to whether the plan is subject to a collective bargaining agreement.¹⁶

Are the Adopted-Child Rules Different for Domestic vs. Foreign Adoptions? No. ERISA § 609(c) makes no distinction. DOL Advisory Opinion 95-18 notes that the support agreement requirements apply to both domestic and foreign adoptions.* However, for group health plan sponsors providing adoption assistance to their employees, certain rules are different for domestic than for foreign adoptions. For information about adoption assistance, see *Fringe Benefits* (EBIA, 2004-present, updated quarterly).

* DOL Advisory Opinion 95-18 (July 27, 1995), reproduced behind Appendix Tab 5.

¹⁶ DOL Advisory Opinion 95-18 (July 27, 1995), reproduced behind Appendix Tab 5. For an example of such a situation, see *Quaid v. U.S. Healthcare, Inc.*, 2007 UT 27, 158 P.3d 325 (Utah 2007).

E. Effect of State Laws Regarding Adopted Children

Many states have enacted statutes requiring policies of insurance to include provisions providing coverage to adopted children. These statutes are generally based on ERISA § 609(c) and make it easier for a fully insured plan to offer coverage that complies with ERISA § 609(c).¹⁷ To the extent that such state-law mandates purport to apply to self-funded ERISA plans (as opposed to insurance companies), however, they will generally be preempted under ERISA § 514 (discussed in Section I).

F. SPD Disclosures and Notices

Although there are no express notice requirements under the adopted-child provisions of ERISA, the general summary plan description (SPD) requirements to inform participants and beneficiaries of their rights and obligations under a group health plan and to disclose plan eligibility provisions probably include disclosure of information in the SPD regarding coverage for adopted children. See Section XXVIII for more information about SPD requirements and Section XXIX for a checklist of participant disclosure requirements (other than SPDs).

G. Enforcement

ERISA § 609(c) doesn't contain any special enforcement provisions. However, an affected participant would invoke the ERISA Part 5 civil enforcement rules to compel compliance. ERISA § 502 allows an affected party to recover benefits, interest, and attorneys' fees. The DOL has broad investigative authority in addition to its authority (in consultation with the Health and Human Services (HHS)) to prescribe regulations.¹⁸

H. Red Flags: Adopted-Child Problems to Watch Out For

The plan designs and features described below are some potential red flags to consider when reviewing a group health plan for compliance with the adopted-child requirements of ERISA:

- the plan fails to provide coverage for adopted children;
- the plan provides for payment of the adopted child's expenses of birth but only after the adoption has been finalized;
- the plan imposes more stringent support or residence requirements on adopted children than on natural children; or
- the plan imposes preexisting conditions on adopted children while the adoption is pending.

We recommend that a plan sponsor of a group health plan that has any of the plan designs described above consult with its benefits advisors to determine whether the plan is in compliance with the adopted-child requirements of ERISA and to take any actions that may be appropriate to put the plan in compliance.

I. Employer/Plan Administrator Roadmap

As previously discussed, the adopted-child requirements of ERISA raise various plan design, administrative, and compliance issues. These include the following.

1. Plan Design/Administrative Decisions

After consulting with legal counsel and insurers (including stop-loss carriers), plan sponsors should consider whether to restrict or limit dependent coverage as a result of the requirements applicable to adopted children (most plans don't).

¹⁷ See, e.g., Minn. Stat. § 62A.27 (2006), available at http://ros.leg.mn/bin/getpub.php?pubtype=STAT_CHAP&year=2006§ion=62A#stat (as visited Oct. 15, 2008). Note that some statutes patterned on ERISA § 609(c) may turn out to be broader than the federal statute in some respects. For example, the Kansas statute requires group policies to provide coverage for an adopted child that is retroactive to the child's date of birth if a petition for adoption is filed within 31 days after birth. See Kan. Stat. Ann. § 40-2, 102 (2006), available at <http://www.kslegislature.org/legsrv-statutes/getStatute.do> (as visited Oct. 15, 2008). This is broader than ERISA § 609(c), which doesn't require coverage to begin until the child is actually placed for adoption with the adoptive parents.

¹⁸ ERISA §§ 504 and 609(c)(2).

2. Plan and SPD Amendments

The plan and SPD should include provisions that:

- extend coverage to children who are adopted (or placed for adoption) under the same terms and conditions as natural children;
- take into account the special HIPAA enrollment rights for adopted children and the prohibition of PCEs with respect to such individuals; and
- comply with the applicable notice requirements.

3. Administrative Procedures

The plan should have a procedure to receive and review adoption orders. The plan also should have a policy to set forth the documentation necessary to prove that the employee provides the requisite level of support.

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| <p>Do QMCSOs Apply to Adopted Children? Yes, QMCSOs apply to adopted children and children placed for adoption. For details, see Section V.</p> |
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