

Group Health Plans: Federal Mandates Other Than COBRA & HIPAA



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What's New in the 4th Qtr. 2011 Edition

This What's New section highlights the changes made in the last quarter to *Group Health Plan Mandates*—the authoritative group health plans resource for employers, administrators, and advisors.

Also see the 4th Qtr. 2011 *Current Developments* newsletter, which can be accessed under the Bookmarks tab. The *Current Developments* newsletter summarizes important legal developments that occurred during the quarter.

Below are some highlights of the substantive changes that we made to the Outline and Appendix.

Substantive Changes to the Outline:

- **Section IV—*What Employers and Plans Are Subject to Federal Group Health Plan Mandates?*** We have updated and refreshed this entire section, including improved coverage of excepted benefits, retiree-only plans, and many other exceptions.
- **Section V—*Qualified Medical Child Support Orders.***
 - **V.G—*Coverage, Premiums, and Cafeteria Plan Issues.*** We have updated the discussion of what preexisting condition exclusions (PCE) can apply to alternate recipients under a QMCSO to reflect health care reform rules prohibiting PCEs for individuals under age 19. We also updated the discussion of who can be an alternate recipient to reflect the health care reform age 26 coverage mandate, and we revised the discussion of whether an alternate recipient's coverage can be paid pre-tax to reflect health care reform rules on the tax treatment of children under age 27.
 - **V.J—*National Medical Support Notices.*** We've updated the discussion of National Medical Support Notices (NMSNs) that name an employee who has not met a plan's waiting period to reflect health care reform rules that will prohibit waiting periods in excess of 90 days.
 - **V.K—*Treatment of Alternate Recipients for ERISA Reporting and Disclosure Purposes.*** We have added a discussion about providing health care reform's Summary of Benefits and Coverage (SBC) to alternate recipients.
- **Section VII—*Required Coverage for Children Under Age 26 and Dependent Students.***
 - **VII.B.2—*Sources of Law and Enforcement.*** We renamed this subsection to highlight that it is now where we address enforcement mechanisms for noncompliance with the age 26 mandate. This quarter, we added a new discussion in Section XIII that details the noncompliance consequences that may come into play for certain health care reform mandates, including the age 26 mandate. We refer readers of our age 26 mandate coverage to this deeper enforcement coverage in Section XIII.
 - **VII.B.3.c—*Which Categories of "Children" Under Age 26 Are Subject to the Mandate?*** We have expanded our discussion of the mandate's applicability to children of domestic partners to mention recent IRS guidance for registered domestic partners in the community property states of California, Nevada, and Washington (and same-sex spouses in California), which seems to take the position that state law should control the determination of who is a stepchild.
 - **VII.B.3.d—*When Can Dependent Coverage of Children Vary Based on Age?*** We added a new subsection explaining that an adult child may lose HSA eligibility if a parent's health FSA or HRA could reimburse that child's qualified medical expenses. This loss of eligibility will occur unless the health FSA or HRA is specially designed to be HSA compatible (e.g., by reimbursing only limited types of expenses or by allowing employees to exclude certain family members from coverage).

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- **Section XIII—Patient Protections, Preventive Health Services, and Clinical Trials.**
 - XIII.A—*Overview and Enforcement.* The three group health plan mandates covered in this Section XIII were all added to the PHSA as part of health care reform, but they were also incorporated into ERISA and the Code. This subsection A has been renamed and expanded to include details about the potential consequences for noncompliance with these mandates. ERISA, the Code, and the PHSA have different enforcement mechanisms. We explain potential DOL and private actions that can be taken under ERISA, excise taxes that may arise under the Code and the requirements for self-reporting to the IRS when noncompliance occurs, and the civil money penalties that may be imposed by HHS under the PHSA.
- **Section XVII—Family and Medical Leave Act (FMLA).**
 - XVII.H.6—*Potential Disputes With Insurers (Including Stop-Loss Carriers).* We have added this new subsection that discusses the disputes that can arise when COBRA is not provided in accordance with the terms of the insurance contract (including contracts with stop-loss carriers). Failure to provide timely notice, or continuing an individual’s coverage beyond what COBRA would require, may leave a plan or employer (rather than an insurer) on the hook for medical expenses that are incurred by the employee. Our new discussion includes coverage of a recent case in which an employer with a self-insured health plan sued its stop-loss carrier to cover medical expense claims paid outside the terms of its plan and lost.
- **Section XIX—Age Discrimination in Employment Act (ADEA).**
 - XIX.D.1.a—*Medicare Coordination Is Exempt From ADEA.* We added mention of a recent EEOC Informal Discussion Letter confirming that the exemption from ADEA for eliminating health benefits for retirees who become eligible for Medicare does not apply for current employees. The EEOC notes that since workers typically become eligible for Medicare at age 65, eliminating group health plan eligibility for current employees when they become Medicare-eligible is an age-based action that would violate the ADEA unless it satisfies the statute’s “equal benefit or equal cost” defense.
- **Section XX—Americans with Disabilities Act (ADA).**
 - XX.H—*Discrimination Based on Relationship or Association.* We reorganized the discussion of the ADA’s association provision in subsection H for ease of use and updated it to mention a recent court case, *Bideau v. Beachner Grain, Inc.*, in which a federal court held that an employee who was terminated following his wife’s diagnosis with end-stage renal disease could pursue a claim that his employer terminated him due to the cost of her health plan claims, in violation of this provision of the ADA.
 - XX.L—*Table of Cases Addressing ADA and Health Benefits.* We reorganized this table to group the cases into two categories for easy access: Circuit Courts and District Courts. Within each category, the newest cases are listed first, including a new district court case, *Bideau v. Beachner Grain, Inc.*, which is discussed in subsection H.
- **Section XXIV—Medicare Secondary Payer (MSP) Requirements.**
 - XXIV.G.4—*What Plans Are Subject to the Section 111 Reporting Requirements?* Our discussion of the MMSEA reporting requirements for HRAs has been updated to reflect an alert from CMS that significantly alters the scope of that reporting by raising the annual benefit threshold for HRA reporting from \$1,000 to \$5,000 for new or renewing coverage. We also note CMS’s reversal of its position regarding the exhaustion of HRA benefits, which previously did not trigger a notice of termination, but now will trigger such a notice if no additional HRA benefits will accrue to the participant for the remainder of the plan year.
- **Appendix Tab 10.**
 - *Sample QMCSO Procedures.* We have updated the sample QMCSO procedures to consider the health care reform changes affecting the application of PCEs to alternate recipients.
- **Appendix Tabs.** Changes have also been made to the Appendix Tabs. Those are highlighted in the second table below.

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Substantive Changes to the Appendix:

- **Tab 1—Qualified Medical Child Support Orders (QMCSOs)**
 - Updated TOC
 - Updated National Medical Support Notice
- **Tab 2—Mental Health**
 - Updated TOC
- **Tab 3—WHCRA & NMHPA**
 - Updated TOC
- **Tab 5—Other Health Mandates**
 - Updated TOC
- **Tab 10—Sample Documents**
 - Updated TOC
 - Updated Sample QMCSO Procedures

Lots More to Come! From the feedback we've received, we know that our manuals are the premier group health plans resources in the country. But here at EBIA we're not satisfied. We are constantly striving to make the manual even better. In upcoming editions, look forward to complete coverage of all legal developments affecting federal group health plan mandates other than COBRA and HIPAA, and to our further analysis of existing law, with more examples and Q/As, etc.

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