

**Employee Benefits Compliance Update: February 2010
CHIPRA, GINA and Excise Taxes for Compliance Failures**

Children’s Health Insurance Program – Employer CHIP Notices

The Children’s Health Insurance Program Reauthorization Act of 2009 (CHIPRA) requires group health plans to permit employees and dependents who are eligible, but not enrolled for coverage, to enroll in the plan within 60 days of (1) the employee’s or dependent’s Medicaid or Children’s Health Insurance Program (CHIP) coverage being terminated as a result of loss of eligibility; or (2) if a premium assistance subsidy is offered by the state, a determination of eligibility for the subsidy under Medicaid or CHIP. CHIPRA became effective April 1, 2009. (See our February 2009 *Briefing*, “Children’s Health Insurance Program Expanded by New Law” at http://www.keenan.com/news/brief/2009/0220_childrenhealth.pdf)

CHIPRA requires employers to notify each employee of potential opportunities currently available in the state in which the employee resides for premium assistance under Medicaid and CHIP. Each employer must provide an Employer CHIP Notice to employees, regardless of enrollment status, at the same time open enrollment materials are provided to employees, or by including such notice in the summary plan description. If the employer wishes to provide the notice within the summary plan description, it should be amended and provided to employees by the delivery dates described below.

The Departments of Labor and Health and Human Services have developed a model notice to cover an array of situations where employees may be entitled to notice and may reside (or their families may reside) in states outside of California. Use of the model notice will fulfill the employer’s notice disclosure obligation under CHIPRA. The model notice is brief and relies on the state to provide state-specific program descriptions. Employers are permitted to tailor notices to reflect additional state-specific information but it is likely that state information will continue to evolve. Our recommendation is to use the model notice.

Notices are required to be delivered by the later of (1) the first day of the first plan year after February 4, 2010; or (2) May 1, 2010. The model Employer CHIP Notice can be downloaded from <http://www.dol.gov/ebsa/pdf/chipmodelnotice.pdf>

Genetic Information Nondiscrimination Act Part II – Privacy

The Genetic Information Nondiscrimination Act (GINA) was signed into law on May 21, 2008 and regulations were issued on October 7, 2009. (See our July 2008 *Briefing*, “Genetic Information Nondiscrimination Act Extends HIPAA Provisions for Group Health Plan” located at http://www.keenan.com/news/brief/2008/0729_genetic.pdf, and our October 2009 *Briefing*, “Genetic Information Nondiscrimination Act Part I: Impacts to Wellness Programs” at http://www.keenan.com/news/brief/2009/1013_gina_pt1.pdf).

The Department of Health & Human Service’s Office of Civil Rights issued proposed regulations to modify the HIPAA Privacy rule to clarify that genetic information is health information and to prohibit the use and disclosure of genetic information by covered health plans for underwriting purposes, which include

eligibility determinations, premium computations, applications of any pre-existing condition exclusions, and any other activities related to the creation, renewal, or replacement of a contract of health insurance or health benefits.

Health plans that use or disclose protected health information (PHI) for underwriting must include a statement in their Notice of Privacy Practices making clear that they are prohibited from using or disclosing PHI that is genetic information for such purposes. Currently, HHS is reviewing its standards regarding the ways that health plans may use to inform individuals about their privacy practices and will provide guidance on this issue in the future.

Excise Tax Reporting for Compliance Failures

Final Treasury regulations have been issued to require plan sponsors to self-report failures to comply with specified federal mandates related to group health plans and pay excise taxes in respect of those failures. Plan sponsors will need to become vigilant in identifying violations and ensuring their resolution.

The Internal Revenue Code imposes an excise tax for compliance failures including failures to comply with the (i) continuation coverage requirements under COBRA; (ii) portability, access and renewability requirements under HIPAA; (iii) prohibitions against discrimination based on a health factor (including genetic information) under HIPAA and GINA; (iv) Mental Health Parity and Addictions Equity Act; (v) Newborns' and Mothers' Health Protection Act; and (vi) required coverage under Michelle's Law.

In general, the excise tax is \$100 per day per individual for each day the failure remains uncorrected. However, the excise tax is not due if it can be demonstrated to the Internal Revenue Service that the responsible party did not know, or exercising reasonable diligence would not have known, that the failure existed. Moreover, no excise tax is imposed if, upon discovery of the failure, it is corrected within 30 days of discovery and the failure was due to reasonable cause and not willful neglect. Depending on the statute, the maximum excise tax imposed can range from \$2,500 to \$500,000.

The plan sponsor must report the excise tax by filing IRS Form 8928 on or before the due date for filing the employer's income tax return. Notably, an extension to file the employer's income tax return does not extend the date for filing Form 8928.

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