

NYS INSURANCE LAW PROVIDES COVERAGE FOR OVER-AGE DEPENDENTS, EXTENDS COBRA

Employee Benefits Alert
August 28, 2009

Practices & Industries

Employee Benefits

On July 25, 2009, New York Governor David Paterson signed into law two bills designed to improve access to health insurance. One of the bills will permit an over-age child to continue health insurance coverage — or become covered — under a parent's individual or group health plan until the child's 30th birthday. The other extends New York's version of COBRA from 18 to 36 months for covered employees and their dependents.

The new requirements apply to group health plans that administer and pay benefits pursuant to group health insurance policies issued in New York; they do not apply to self-insured plans. In addition, the requirements apply only to insurance plans that offer medical and hospital benefits. So, for example, these requirements would not apply to insured vision and dental care plans.

This *Briefing* summarizes the principal features of these new developments.

Coverage of Young Adults Under 30

Many — if not most — employer-sponsored health plans do not cover dependent children once they reach age 19 unless they are enrolled in school on a full-time basis; full time students are generally covered through age 23. This leaves a potential gap in affordable coverage for a substantial number of young adults 19 and older even when COBRA is available.¹ To address this problem, New York State recently joined policy makers across the country in enacting legislation that, among other things, expands the availability of health insurance to children who would otherwise be too old to be covered under many employer-sponsored health plans.

These are the principal features of the new law:

Extended Dependent Coverage as Part of an Employer-Sponsored Plan

Group insurance policies that provide coverage for dependent children must, if requested by the employer,² cover unmarried children through age 29 without regard to student status or financial dependence (i.e., the child does not need to be

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economically dependent on the parent-employee or live in the same household with the parent-employee).

The group insurance policy may exclude otherwise eligible children who (a) are insured by or eligible for coverage under an insured or self-insured employer health benefit plan or (b) do not live, work, or reside in New York State or the service area of the insurer.

As noted, employers are not required to elect extended child coverage, but insurers must make such a policy available to an employer that requests it. If an employer does not elect extended dependent coverage, an eligible child may still be entitled to the coverage by virtue of a new COBRA-like provision available to children who age out of the employer's plan.

As noted, coverage is available without regard to financial dependence or status as a student. To ensure compliance with tax law, employers will need to monitor the tax status of any over-age child who is enrolled in the plan. If an eligible child under 30 does not qualify for tax-free health coverage,³ the child's health coverage cannot be purchased with pre-tax wage deduction contributions under a cafeteria plan. Furthermore, any employer contributions toward the cost of that coverage would need to be treated as taxable compensation (i.e., reported on Form W-2) and taxed accordingly (i.e., income tax withholding and payroll taxes will apply to the value of the coverage provided).

Extended Dependent Coverage Pursuant to a COBRA-Like Continuation Option

If an employer does not adopt the extended dependent coverage as part of its plan, an eligible child still may be entitled to coverage through age 29 under a new COBRA-like provision available to children who age out of the employer's plan.

Under the new law, group health insurance policies that provide benefits for dependent children through a specified age must, at the election of the employee, member, or child, provide coverage after the specified age through age 29 without evidence of insurability. This extension is in addition to COBRA.

An insurer must establish a distinct premium rate for this coverage to reflect the claims experience of the young adults who qualify for the coverage. (Similar legislation enacted in New Jersey in 2006 resulted in premiums for this group that were 20 to 40 percent below standard COBRA rates.) An insurer cannot require an employer to contribute toward the cost of this coverage.

The insurer does not need to extend continuation coverage to otherwise eligible children who (a) are insured by or eligible for coverage under an insured or self-insured employer health benefit plan, (b) do not live, work, or reside in New York State or the service area of the insurer, or (c) are eligible for Medicare.

To qualify for the continuation privilege, an employee, member, or dependent child must request the coverage in writing at the following times:

- When the child loses coverage as a result of attaining the age specified in the group insurance policy. The insurer must notify the child in writing at least 60 days before coverage is lost as a result of attaining the specified age.

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- Upon meeting the requirements for extended dependent child status under the new law when coverage for the dependent child previously terminated.
- If a child does not enroll at the times described above, he or she may enroll for coverage under the policy during a subsequent annual open enrollment period. The group insurance policy must specify an annual 30-day open enrollment period. The insurer must provide notice to the employee, member, or dependent child at least 60 days before the beginning of each period.

The employee, member, or child must request coverage within 60 days after his or her coverage terminates or after regaining eligibility, as the case may be. Insurers are required to furnish advance written notice of this option, although some insurers may attempt to assign this responsibility to employers through contract. It appears that this option is to be offered side by side with COBRA and the individual conversion option available under New York State law.

There is a special rule for young adults whose coverage terminated under the terms of the group policy prior to the initial effective date of this provision, September 1, 2009. These individuals have 12 months after the effective date to request coverage, which would be prospective. The insurer is required to notify employers of this enrollment opportunity, in writing, no later than October 1, 2009.

Effective Dates

This new feature applies to policies issued on or after September 1, 2009, and all policies renewed, modified, altered or amended on or after that date. The new rules do not apply to group policies that do not provide for the enrollment of dependents.

Extension of COBRA Coverage From 18 to 36 Months

Under New York insurance law, group insurance policies that are not subject to COBRA (i.e., generally those of employers with fewer than 20 employees) must permit covered individuals the right to continue coverage if coverage is lost due to job loss, reduction in work hours, or loss of eligibility. Like federal COBRA, the period of coverage is limited to 18 months.

Under the new law, insurers are now required to offer group policies that extend the period of New York's version of COBRA from 18 months to 36 months. In addition, a group insurance policy that funds a plan subject to federal continuation benefits under COBRA (i.e., that of employers with 20 or more employees) must afford a covered individual the opportunity to maintain coverage for up to 36 months if the individual's federal COBRA benefits period is shorter than 36 months.

Accordingly, qualified beneficiaries who are eligible for federal COBRA because of the covered employee's termination of employment or reduction of hours and who have the opportunity to receive 18 months of coverage under federal COBRA will have an opportunity to elect an additional 18 months of continuation coverage under the group insurance policy. Spouses and dependent children who are already offered 36 months of federal COBRA because of the death of the employee, divorce, legal separation, or cessation of dependent status are not eligible for the extension. The maximum

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coverage period is 36 months from the original federal COBRA commencement date.

The new law applies to group insurance policies issued, renewed, modified, altered, or amended on or after July 1, 2009.

Are ERISA Plans Required to Comply With the New Requirements?

As a practical matter, we think the answer to this question is yes.

In general, the Employee Retirement Income Security Act of 1974 (ERISA) preempts (i.e., renders unenforceable) any state law that relates to employee benefit plans that are covered by ERISA. However, state laws that regulate insurance are "saved" from ERISA preemption and, accordingly, are enforceable.

The new requirements applicable to group insurance policies are directed at insurers. Therefore, one might argue they are not preempted by ERISA.

In any event, a plan sponsor that contracts with a New York health issuer to provide fully insured medical and hospital benefits will be required to follow the terms of the policy, which, for ERISA plans, will form part of the ERISA plan document.

While it may be possible to argue that ERISA preempts these rules, until there has been a definitive court case declaring that the new laws are preempted, we suggest employers monitor compliance with them.

Action Steps

The first step employers must take is to determine when the new laws affect their plans. The new 18-month COBRA extension (effective July 1, 2009) already applies to some plans (i.e., plans with July 1st, August 1st, or September 1st renewal dates).

Employers will also need to determine how their insurers intend to implement and administer the new mandates, including the notice provisions.

An ERISA group health plan that funds benefits through a group insurance policy issued in New York is well advised to be sure the new mandates are disclosed in the plan's SPD and COBRA notices.

As noted, the new mandates do not directly impact self-insured plans. However, employers that sponsor both self-insured and fully insured arrangements that cover employees who reside or work in New York will need to decide whether the new mandates should be added to the terms of the self-insured plan (subject, of course, to the prior approval of the stop-loss carrier).

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¹ According to a recent study, over 13 of the 47 million estimated uninsured Americans are between the ages of 19 and 29.

² The bill refers to all group policyholders. This Briefing focuses on employers who provide major medical and prescription drug benefits through a fully insured group contract.

³ The value of health plan coverage provided on behalf of an employee's child is tax-free only if certain requirements are satisfied. Most unmarried children under 19 (24 in the case of a child who is a full-time student) and children who are permanently and totally disabled will qualify for tax-free coverage. Children who do not fall into either category will qualify for tax-free coverage only if the employee provides more than 50 percent of the child's support.

