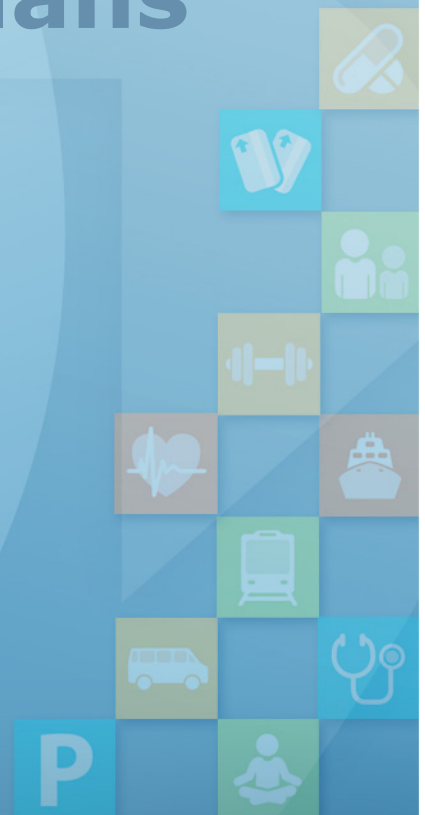


# CHIP Renewal Law Impacts Employer-Sponsored Group Health Plans



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In 1997, Congress established the State Children's Health Insurance Program under Title XXI of the Social Security Act, enabling states to provide health insurance to targeted low-income children with no coverage in families with income that is above the level of eligibility for Medicaid. All states and the District of Columbia have Title XXI programs.

Earlier in February, 2009, the President signed the Children's Health Insurance Program Reauthorization Act of 2009 (the "Act"), which provides continued funding after March 31, 2009 and makes various changes in the program, now known as "CHIP." Some of these changes affect employer-sponsored group health coverage.

### Premium Assistance

Effective April 1, 2009, the Act enables states to offer a premium assistance subsidy for qualified employer-sponsored coverage ("QESC") to targeted low-income children. QESC is health coverage offered through an employer:

- (i) that qualifies as "creditable coverage" as a group health plan under the Public Health Service Act;
- (ii) for which the employer contribution toward any premium for such coverage is at least 40%; and
- (iii) that is offered to all individuals in a manner that would be considered a non-discriminatory eligibility classification under Sec. 105(h) of the Internal Revenue Code of 1986 (the "Code"), which provides special requirements for self-funded employer health plans. QESC does not include benefits provided under a flexible spending arrangement or a high-deductible health plan.

In general, the amount of the subsidy equals the difference between the employee contribution required for enrollment only of the employee under the QESC, and the employee contribution required for enrollment of both the employee and the child.

A state may provide a premium assistance subsidy either directly to the employer or as a reimbursement to an employee for out-of-pocket expenditures. However, the employer may notify a state that it elects to opt out of being directly paid a premium assistance subsidy on behalf of an employee. If the employer opts out, it will withhold the total amount of the employee contribution required for enrollment of the employee and the child in the QESC, and the state will then pay the premium assistance subsidy directly to the employee.

States are required to establish a process for permitting the parent of a targeted low-income child receiving a premium assistance subsidy to disenroll the child from the QESC and to enroll the child in the state's CHIP. **IMPORTANT NOTE:** If the employee had been paying the premiums for coverage on a pre-tax basis under a Code Sec. 125 cafeteria plan, the Act does not address how the employee could stop paying premiums for the rest of the coverage year without violating the cafeteria plan requirements, as this would not be a **"change in status" under the current cafeteria plan regulations on revoking coverage elections.**

## Special Enrollment Rights

By amendments to the Code and the Employee Retirement Income Security Act of 1974 (“ERISA”), the Act creates several new obligations on the part of employers and administrators of employer-sponsored group health plans (“GHPs”). A GHP for this purpose is a plan (including a self-insured plan) of, or contributed to by, an employer (including a self-employed person) or employee organization to provide health care (directly or otherwise) to the employees, former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families. This definition is broad enough to cover a medical reimbursement feature of a cafeteria plan, although this was probably not intended and clarifying guidance will be needed from the Internal Revenue Service or the Department of Labor.

One new obligation involves special enrollment rights under a GHP. Effective April 1, 2009, a GHP must permit enrollment by an employee or dependent who is eligible, but not enrolled, in either of the following situations:

- The employee or a dependent is covered under a Medicaid plan or a CHIP plan and coverage of the employee or dependent under such a plan is terminated as a result of loss of eligibility for such coverage, if the employee requests coverage under the GHP not later than 60 days after the date of termination of such coverage.
- The employee or dependent becomes for eligible for premium assistance, as to coverage under the GHP under such Medicaid plan or CHIP plan, if the employee requests coverage under the GHP not later than 60 days after the date the employee or dependent is determined to be eligible for such assistance.

**IMPORTANT NOTE: This extension of the enrollment period WILL likely create the need for an amendment to Code Sec. 125 cafeteria plan documents and/or Summary Plan Descriptions.**

## Notification to Employees Regarding Availability of Premium Assistance

A second new obligation under the Act involves notices to employees. Each employer that “maintains” a GHP in a state that provides premium assistance under Medicaid or CHIP to purchase coverage under a GHP will have to provide each employee a written notice informing him or her of potential opportunities then currently available in the state in which the employee resides for such premium assistance. It is not clear under the Act whether an employer will be deemed to be “maintaining” a GHP in each state where an employee covered under the GHP, or eligible for coverage, happens to reside.

No later than February 4, 2010, the Secretary of Labor and the Secretary of Health and Human Services, in consultation with directors of state Medicaid agencies and CHIP agencies, must jointly develop national and state-specific model notices for this purpose.

Each employer sponsoring a GHP will have to provide the initial annual notices to its employees effective with the first plan year that begins after the date on which the initial model notices are first issued. Employers may provide the model notice applicable to the state in which an employee resides concurrently with (i) materials notifying him or her of GHP eligibility; (ii) materials provided to the employee in connection with open enrollment under the GHP; or (iii) the summary plan description for the GHP.

## Reporting Requirements

Finally, the Act will require GHP administrators to disclose to state governments, upon request, detailed information describing the benefits available under the GHP when it covers employees or dependents that are also covered by CHIP or Medicaid. State governments may not request this information until a model coverage coordination disclosure form has been developed and regulations have been issued in connection with it.

## Penalties

A violation of the Act's provisions on special enrollment rights, notification to employees of the availability of premium assistance for GHP coverage or disclosure of information to states can result in an excise tax under the Code equal to \$100 for each day in the noncompliance period as to the individual to whom the failure relates.

In addition, the Act gives the Secretary of Labor authority to assess a civil penalty under ERISA against any employer of up to \$100 per day from the date of the employer's failure to comply with the new notice provisions or disclosure requirements. Each violation as to any single employee is to be treated as separate violation.