

Health and Welfare Plans: 2009 Year-End Review

December 10, 2009

While our nation's eyes are focused on Washington, D.C. and the continuing debate about healthcare reform, another year is drawing to a close—and there are many other developments that must be addressed by health and welfare plan sponsors. The following summary provides a general overview of new guidance and legislation applicable to health and welfare plans. This summary is not intended to be an exhaustive list of all compliance requirements affecting health and welfare plans but is intended to provide a reminder of the significant issues facing these plans.

Federal Developments

- ***Mental Health Parity:*** The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 requires establishing full parity between mental health/substance abuse benefits and the medical/surgical benefits offered under a group health plan. Treatment limits and cost-sharing, such as deductibles, co-pays, co-insurance, and out-of-pocket expenses, cannot be more restrictive than the limits and amounts that apply to other medical benefits provided under the group health plan.

The new law requires parity when such benefits are offered but does not require plans to provide mental health or substance abuse benefits. This requirement generally becomes effective for large group health plans, including self-funded, fully insured, and governmental plans, on the first plan year on or after October 2, 2009 (January 1, 2010 for calendar year plans). The effective date for plans maintained pursuant to one or more collective bargaining agreement is the later of: (1) the date on which the collective bargaining agreement relating to the plan terminates (determined without regard to any extension) or (2) January 1, 2010. Although regulations have not yet been issued, group health plans are required to comply in good faith with the statute.

- ***Genetic Information:*** The Genetic Information Nondiscrimination Act of 2008 (GINA) bans the use of genetic information for health insurance and employment purposes. Title I of GINA prohibits group health plans and health insurance issuers from discriminating on the basis of genetic information with respect to eligibility, premiums, and contributions, and applies to group health plans for plan years beginning after May 21, 2009 (January 1, 2010 for calendar plan years). Title II of GINA also prohibits employers from discriminating on the basis of genetic information in

employment decisions and acquiring genetic information except in limited circumstances (which impacts wellness programs), and became effective on November 21, 2009.

Under GINA, a health-risk assessment coupled with premium discounts, credits, or additional care cannot include questions regarding the manifestations of a genetic disease or disorder of family members. Employers should strip all questions that relate to or might elicit genetic information out of health-risk assessments tied to an incentive or additional care. Group health plan amendments to comply with GINA should be adopted effective as of January 1, 2010 for calendar year plans. Morgan Lewis's October 16, 2009 LawFlash discusses this topic in greater detail, and is available at http://www.morganlewis.com/pubs/EB_GINARegulations_LF_16oct09.pdf.

- **Michelle's Law:** On October 9, 2008, President Bush signed H.R. 2851, commonly referred to as "Michelle's Law." Michelle's Law applies to both large and small group health plans, including self-funded and fully insured governmental plans, and requires group health plans to continue coverage for dependent college students who take medically necessary medical leave for up to one year or, if earlier, the date on which coverage would otherwise end under the plan. Michelle's Law is effective for plan years beginning on or after October 8, 2009 (January 1, 2010 for calendar year plans). Amendments to comply with Michelle's Law should be adopted effective as of January 1, 2010 for calendar year plans. Employers should also revise their full time student certification material to reflect the new law. Our October 14, 2008 LawFlash discusses this topic in greater detail, and is available at http://www.morganlewis.com/pubs/EB_LF_MichellesLaw_14oct08.pdf.
- **HEART Act:** The Heroes Earning Assistance and Relief Tax Act of 2008 (HEART Act) allows plans to offer "qualified reservist distributions" of unused amounts in health flexible spending accounts (FSAs) to reservists ordered or called to active duty for at least 180 days or on an indefinite basis. The relief applies to distributions on or after June 18, 2008. Employers that choose to accommodate these distributions must amend plan documents before making distributions. An employee must request a qualified reservist distribution *on* or *after* the date of the order or call to active duty, and before the last day of the plan year (or grace period, if applicable) during which the order or call to active duty occurred. The employer must receive a copy of the order or call to active duty (or extension thereof) to confirm compliance with the 180-day/indefinite requirement. The qualified reservist distributions (minus any after-tax contributions such as COBRA payments) are reportable as taxable wages.

In addition to document and reporting changes, plan sponsors offering these distributions will need to issue summaries of material modifications and update summary plan descriptions. Retroactive plan amendments are permitted through December 31, 2009 with respect to reservists called to active duty on or after June 18, 2008, so long as the request for withdrawal occurs within the grace period for the plan year in which the call to active duty occurred. Amendments are permitted at any time on a prospective basis.

- **HITECH Provisions:** The Health Information Technology for Economic and Clinical Health (HITECH) provisions of the American Recovery and Reinvestment Act of 2009 (ARRA), enacted on February 17, 2009, contain substantive amendments to the HIPAA Privacy and Security Rules. Among a number of changes, the HITECH provisions include a requirement that, in certain instances, affected individuals, the media, and/or the Secretary of the Department of Health and Human Services (HHS) must be notified in the event of a breach of unsecured protected health

information by the plan or a business associate. Plan sponsors should review and update the Health Insurance Portability and Accountability Act of 1996 (HIPAA) privacy and security materials, notices, policies and procedures, and business associate agreements for compliance with these new HITECH provisions. Our September 2, 2009 LawFlash discusses this topic in greater detail and is available at

http://www.morganlewis.com/pubs/EB_NewHIPAABreachNotificationReg_LF_02sept09.pdf.

- **COBRA Subsidy:** ARRA, signed into law on February 17, 2009, provides for temporary premium assistance subsidy of 65% toward the cost of COBRA continuation coverage for eligible individuals who are involuntarily terminated from employment from September 1, 2008 through December 31, 2009. Although most plan sponsors have already reviewed COBRA administration and notices and made appropriate changes, plan sponsors should be aware that legislation has been proposed to extend the subsidy. Without an extension, there will be no new assistance eligible to individuals after December 31, 2009. You can find a copy of our most recent LawFlash discussing this topic in greater detail at the following link:
http://www.morganlewis.com/pubs/EconoStimulus_COBRAQ+A_LF_07apr09.pdf.
- **Health Coverage Tax Credit and COBRA:** ARRA, signed into law on February 17, 2009, expands the health coverage tax credit (HCTC) under the Trade Adjustment Assistance Act of 2002. Eligible individuals may use the HCTC to pay for a wide range of qualified health coverage, including COBRA continuation coverage, spousal coverage, state high-risk pool coverage, and other state-based programs. ARRA increases the HCTC to 80% of the premium for qualified health coverage (up from 65%) and extends the period that individuals may qualify for the HCTC. The expanded provisions are effective through 2010.
- **Form 5500 - Schedule C:** On November 16, 2007, the Department of Labor's Employee Benefits Security Administration published final form revisions and a final regulation, generally effective for plan years beginning on or after January 1, 2009, providing new requirements for reporting service-provider fees and other compensation on Schedule C of the 2009 Form 5500 Annual Return/Report of Employee Benefit Plan. The new Schedule C must be used to report certain direct and indirect compensation received by service providers in connection with services provided to employee benefit plans, subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA). Our November 9, 2009 LawFlash discusses this topic in greater detail and is available at http://www.morganlewis.com/pubs/EB_Form5500ScheduleCFee_LF_09nov09.pdf.

Medicare Mandatory Reporting: The Medicare, Medicaid, and State Children's Health Insurance Program (SCHIP) Extension Act of 2007 added new mandatory reporting requirements for group health plans. Group health plan insurers or third-party administrators, as well as plan administrators or fiduciaries of self-insured and self-administered group health plans, are required to electronically submit required data elements on a quarterly basis, to help the Centers for Medicare and Medicaid Services (CMS) identify when the group health plans are primary to Medicare. Plan sponsors should request adequate assurances in writing that their insurers or third-party administrators will assume responsibility for the data collection and reporting process. Plan sponsors currently in negotiations with service providers should negotiate the cost and responsibility for the data collection and reporting process, and ensure that the responsibility for the process is clearly stated in the service agreement.

The effective date for group health plan reporting was January 1, 2009. Plan sponsors should ensure that the group health plan is properly registered and has begun reporting with CMS. Our September 12, 2008 LawFlash on this topic discusses this in greater detail and can be found at http://www.morganlewis.com/pubs/EB_MedicareSecondaryPayer_LF_12sept08.pdf. Our November 2, 2009 LawFlash on the late reporting of payments to Medicare claimants can be found at http://www.morganlewis.com/pubs/XPLF_LitigatorsBeware-LateReportingtoMedicareClaimants_2nov09.pdf.

- **Expanded FMLA Leave:** The National Defense Authorization Act for Fiscal Year 2008 amended the Family and Medical Leave Act of 1993 (FMLA) and expands the leave entitlements for families of service members. Under the new provisions an employee who is the spouse, son, daughter, parent, or next of kin of a service member with a serious injury or illness is entitled to 26 weeks of protected leave to provide care for the service member. This provision went into effect on January 28, 2008. The Act also expands the reasons an eligible employee can take 12 weeks of FMLA-protected leave to include any “qualifying exigency” related to a spouse, son, daughter, or parent being on active duty or being called to impending active duty in the military. This second provision will technically go into effect once the DOL issues regulations, but until then, employers are encouraged to make a good faith effort to provide this type of leave to eligible employees.

In October 2009, President Obama signed into law the Department of Defense Conference Report which, among other things, amended FMLA to: (1) expand military caregiver leave entitlement to include veterans, who were not covered under existing law; (2) expand the exigency leave entitlement to include family members of the regular Armed Forces, who were not entitled to exigency leave under existing law; and (3) extend the availability of military caregiver leave where a preexisting serious injury or illness is aggravated by active duty service. These changes became effective immediately. Our November 2, 2009 LawFlash discussing this topic in greater detail can be found at http://www.morganlewis.com/pubs/LEPG FMLAServicememberLeaveProvisionsExpanded_2nov09.pdf.

- **Children’s Health Insurance Program:** The Children’s Health Insurance Program Reauthorization Act of 2009 (CHIP) expanded special enrollment rights effective April 1, 2009. Group health plans must now permit employees and dependents who are eligible but not enrolled for coverage under an employer plan to enroll in two additional circumstances: (1) the employee’s or dependent’s Medicaid or CHIP coverage is terminated as a result of loss of eligibility; and (2) the employee or dependent becomes eligible for a subsidy under Medicaid or CHIP. The employee or dependent must request coverage within 60 days after the employee or dependent is terminated from, or determined to be eligible for, such assistance. Plan administrators should note that this 60-day period is longer than the existing special enrollment rules under HIPAA, as those rules provide for only a 30-day period in which to request coverage due to a change in status. Plan documents should be reviewed and if necessary, amended to reflect these new rules.
- **Cafeteria Plans:** In August 2007 the IRS published proposed cafeteria plan regulations with a January 1, 2009 effective date. The IRS has informally indicated that because of the delay in issuing the final regulations, the regulations will instead apply to plan years beginning no earlier than January 1, 2011. Plan sponsors may rely on the proposed regulations until final regulations are issued or continue to use the prior proposed regulations. Absent any formal guidance from the IRS,

plan sponsors should review their existing cafeteria plan design, administration, and documentation to ensure current compliance and identify those issues that will likely require attention when the final rule is in place. Our October 14, 2008 LawFlash discussing suggested next steps employers should take to position their cafeteria plans for the final cafeteria plan regulations is available at http://morganlewis.com/pubs/EB_LF_CafeteriaPlan_14oct08.pdf.

Selected State Developments

- ***New York Health Care Reform:*** New York passed legislation amending its state insurance law by expanding coverage for unmarried dependents covered under insured group health plans through age 29 (effective on September 1, 2009, and applies to contracts issued, renewed, modified, altered, or amended in New York on or after that date) and extending New York's state continuation coverage from 18 months to 36 months (effective July 1, 2009, and applies to policies and contracts issued, renewed, modified, altered or amended in New York on or after that date). These changes present challenges for employers related to plan design and coordination with self-insured group health plans (which are not subject to these new rules). Employers will be challenged to properly communicate and administer these new rules for employees covered by insured arrangements and must also establish New York-specific continuation coverage notices for such employees.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Chicago

David Ackerman	312.324.1170	dackerman@morganlewis.com
Andy R. Anderson	312.324.1177	aanderson@morganlewis.com
Brian D. Hector	312.324.1160	bhector@morganlewis.com
Sage Fattahian	312.324.1744	sfattahian@morganlewis.com

Dallas

Riva T. Johnson	214.466.4107	riva.johnson@morganlewis.com
John A. Kober	214.466.4105	jkober@morganlewis.com
Erin Turley	214.466.4108	eturley@morganlewis.com

New York

Craig A. Bitman	212.309.7190	cbitman@morganlewis.com
Gary S. Rothstein	212.309.6360	grothstein@morganlewis.com

Philadelphia

Robert L. Abramowitz	215.963.4811	rabramowitz@morganlewis.com
I. Lee Falk	215.963.5616	ilfalk@morganlewis.com
Amy Pocino Kelly	215.963.5042	akelly@morganlewis.com
Robert J. Lichtenstein	215.963.5726	rlichtenstein@morganlewis.com
Joseph E. Ronan, Jr.	215.963.5793	jronan@morganlewis.com
Steven D. Spencer	215.963.5714	sspencer@morganlewis.com
Mims Maynard Zabriskie	215.963.5036	mzabriskie@morganlewis.com
David B. Zelikoff	215.963.5360	dzelikoff@morganlewis.com

Pittsburgh

Lisa H. Barton	412.560.3375	lbarton@morganlewis.com
John G. Ferreira	412.560.3350	jferreira@morganlewis.com
Lauren Bradbury Licastr	412.560.3383	llicastro@morganlewis.com
R. Randall Tracht	412.560.3352	rtracht@morganlewis.com

Washington, D.C.

Jessica R. Bernanke	202.739.5447	jbernanke@morganlewis.com
Althea R. Day	202.739.5366	aday@morganlewis.com
Benjamin I. Delancy	202.739.5608	bdelancy@morganlewis.com
David R. Fuller	202.739.5990	dfuller@morganlewis.com
Mary B. (Handy) Hevener	202.739.5982	mhevener@morganlewis.com
Gregory L. Needles	202.739.5448	gneedles@morganlewis.com

Palo Alto

S. James DiBernardo	650.843.7560	jdibernardo@morganlewis.com
Zaitun Poonja	650.843.7540	zpoonja@morganlewis.com

About Morgan, Lewis & Bockius LLP

With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—more than 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. For information about why we are required to include this legend in emails, please see <http://www.morganlewis.com/circular230>.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states.
Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2009 Morgan, Lewis & Bockius LLP. All Rights Reserved.