

## CLIENT ALERT

### Children's Health Insurance Law Amends ERISA To Impose New Special Enrollment Periods And Notice Requirements

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The Children's Health Insurance Program Reauthorization Act of 2009 ("CHIPS Act") (H.R. 2, Pub. Law 111-3) was signed into law by President Obama on February 4, 2009. The CHIPS Act, which takes effect on April 1, 2009, extends health coverage to millions of uninsured children. In addition, the CHIPS Act also amends ERISA, the Internal Revenue Code, and the Public Health Service Act to require a new special enrollment period under group health plans, as well as to impose new disclosure requirements on group health plans.

Historically, group health plans and policies have permitted current employees to enroll only during certain open enrollment periods or upon occurrence of certain specified events (such as marriage, birth or adoption of a child, divorce, etc.). The CHIPS Act adds two new enrollment events by requiring group health plans, as well as insurers offering group health insurance coverage in connection with a group health plan, to permit employees and their dependents who are eligible (but not enrolled) for coverage under the terms of the plan to enroll for coverage under the terms of the plan if one of two conditions is met: (1) If the employee or dependent was covered under a Medicaid plan or state child health plan and that coverage terminated due to a loss of eligibility; or (2) if the employee or dependent becomes eligible for assistance, from a Medicaid plan or state child health plan, with respect to coverage under the group health plan. The employee or dependent must request coverage under the group health plan not later than 60 days after, as applicable, the termination of coverage or the date they are determined to be eligible for assistance.

In concert with this special enrollment period, the CHIPS Act also imposes two new reporting and disclosure requirements. The first applies to employers that maintain a group health plan in a state that provides medical assistance under a state Medicaid plan or child health assistance under a state child health plan. These employers are required to provide written notice to each employee informing the employee of potential, currently-available opportunities in the employee's state for premium assistance for health coverage for the employee and/or their beneficiaries. This notice may be provided in any one of three ways: (1) with materials provided to employees when they become eligible under the employer-sponsored health plan, (2) with materials provided to employees during a health plan open season or election process, or (3) as part of the plan's Summary Plan Description ("SPD"). The Department of Labor ("DOL") and the Department of Health and Human Services are tasked under the CHIPS Act with developing, within one year of the enactment of the CHIPS Act, both national and State-specific model notices. These model notices are required to contain information regarding how an employee may receive additional information from the state regarding potential opportunities for premium assistance, including how to apply for such assistance. The DOL will provide these notices to employers, and employers are responsible for providing this notice to their employees beginning with the first plan year that begins after the date on which the initial model notices are first issued. If the employer fails to meet this notification requirement, the DOL may assess a civil penalty against the employer of up to \$100 per day, starting from the date of the failure to meet the notification requirement, with each violation with respect to any single employee treated as a separate violation.

The second new requirement applies to plan administrators of group health plans, provided that these group health plans have participants or beneficiaries who are covered under a state Medicaid plan or child health plan. If the group health plan meets this condition, the plan administrator must report to the state, upon request, information about the benefits available under the group health plan in sufficient specificity so as to permit the state to make a determination concerning the cost-effectiveness of the state providing medical or child health assistance through a premium assistance program. The CHIPS Act establishes a working group, composed of various federal and state officials as well as representative employers and plan sponsors and administrators, to develop a model form for such disclosures and deliver it to Congress for adoption no later than August 4, 2010. This model form will apply to requests made by states beginning with the first plan year that begins after the date on which the model form is adopted. If a plan administrator fails to timely provide this information to any state, the DOL may assess a civil penalty against the plan administrator of up to \$100 per day, with each violation with respect to any single participant or beneficiary treated as a separate violation.

The statute contains the seeds for significant confusion in plan administration going forward. For example, employers, group health plan administrators and insurers, all of whom may have previously had only limited involvement with Medicaid or state child health assistance programs, will now have to account for the existence and operation of those programs when permitting group health plan enrollment. Further, although the model notices described above have delayed effective dates, the other provisions of the Act, including the special enrollment periods and the actual reporting and disclosure requirements, all appear to be subject to the Act's general effective date of April 1, 2009. Employers, plan sponsors and insurers therefore will have to bear the immediate burden of informing employees not only about their new enrollment rights, but also about the terms and operation of Medicaid and state child assistance programs, with no firm idea of the acceptable format for or content of such notices. Similarly, there does not appear to be any impediment to state requests for information even before the working group has developed model reporting forms. Ideally, the agencies will act quickly to provide the model notices and forms, but employers, plan sponsors and insurers need to be aware that the absence of such model forms will not excuse a failure to comply with these requirements.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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