

ALERT

DON'T FORGET TO SEND OUT CHIPRA NOTICES!

September 30, 2010

Last year, Congress added another new notice requirement. This requirement was added under the Children's Health Insurance Program Reauthorization Act of 2009, which is also known as "CHIPRA."

The deadline for complying with this notice requirement is rapidly approaching for most employers. But, with all the attention that is being paid to health care reform, and with all of the other new notices that are required under that law, we are concerned that many employers do not seem to realize that they also need to be sending out CHIPRA notices.

Here, in brief, is what is going on:

CHIPRA Annual Notice Requirement. Under CHIPRA, employers are required to provide an annual notice if (1) they are providing any type of group health plan coverage to their employees (with very limited exceptions), and (2) they have employees who are residing in any of the 40 states that are currently offering a premium assistance program.

Notice Must be Provided to All Employees. Unlike most other notices, the CHIPRA notice must be provided to all employees in any of the 40 states that have a State Children's Health Insurance Program ("SCHIP"), not just those employees who are actually enrolled in a plan and not just those employees who are even eligible to enroll in a plan.

Deadline. The deadline for providing the first notice depends on a plan's calendar year:

- **Calendar Year Plans.** For group health plans with a calendar year, the first notice must be provided no later than **January 1, 2011**.
- **Fiscal Year Plans.** For group health plans with a fiscal year, the first notice must be provided by the first day of the first plan year beginning on or after May 1, 2010, or, if earlier, by January 1, 2011.

Employers who miss this deadline are subject to a civil penalty of up to \$100 per employee for each day that a notice is late.

Model Notice. The Department of Labor ("DOL") has developed a model notice that employers may use to satisfy the new CHIPRA notice requirement. This notice is available, in Word format, on the DOL website at: www.dol.gov/ebsa/chipmodelnotice.doc.

For More Information. The CHIPRA notice requirement is explained in more detail in the attached Memorandum. The Memorandum also discusses some of the different ways in which the CHIPRA notice may be distributed to employees, including the conditions that must be met to distribute the notice via e-mail.

If you have any questions regarding the CHIPRA notice requirement, please feel free to call Eric Namee, Steven Smith, Ruhe Wadud Rutter, or Brad Schlozman at (316) 267-2000.

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MEMORANDUM

CHIPRA: ANOTHER NEW EMPLOYEE NOTICE REQUIREMENT

September 30, 2010

With all of the attention that is being paid to Health Care Reform and to the new legal requirements that were added by that law, it's easy to lose sight of other legal requirements that have been added by other recent laws.

I. – CHIPRA

One of these “other” laws is the Children’s Health Insurance Program Reauthorization Act of 2009 (“CHIPRA”). CHIPRA adds yet another annual notice requirement to what seems to be an ever-lengthening list of notices that employers are required to provide to their employees.

Under CHIPRA, employers are required to provide an annual notice if (1) they are providing any type of group health plan coverage to their employees (other than a plan that is providing only “HIPAA excepted benefits”), and (2) they have employees who are residing in one of the 40 states that is currently offering a premium assistance program.

Before we explain this requirement in more detail, it might, however, be helpful to provide some background information about state children’s health insurance programs. Near the end of this Memorandum, we will also say a few words about “HIPAA excepted benefits.”

II. – THE STATE CHILDREN’S HEALTH INSURANCE PROGRAM

The State Children’s Health Insurance Program (“SCHIP”) allows uninsured children to receive medical coverage through state Medicaid programs, even though their family’s income might be too high for their family itself to qualify for Medicaid. The SCHIP program was originally created by Congress in 1997 and was extended in 2009 by CHIPRA.

Prior to the enactment of CHIPRA, the SCHIP program was administered by the states with no employer involvement and no employer mandates. As a result, it was not a law that employers needed to pay a lot of attention to. Under CHIPRA, however, this has changed in at least three different ways:

- (1) **State Subsidy for Coverage Under Employer Plans.** First, as an alternative to enrolling children in a state Medicaid program, states may choose to subsidize the cost of enrolling eligible children and their families in coverage provided under an employer group health plan. The subsidy can be provided to the employee-parent or, if the employer agrees, may be paid directly to the group health plan. This provision took effect on April 1, 2009.

- (2) **New HIPAA Special Enrollment Rights.** Second, if a child becomes eligible for such a subsidy, an employer group health plan must offer special enrollment rights to the child and the employee-parent. The special enrollment period begins when the determination is made that a subsidy is available and runs for 60 days. Additionally, CHIPRA also requires plans to offer special enrollment rights if a child loses coverage under a state SCHIP program. (These requirements also took effect on April 1, 2009, and should already be reflected in your plan documents. If they are not, please let us know and we will visit with you about preparing the required amendments to your plan documents.)
- (3) **Notice to Employees.** Third, if an employer maintains a group health plan in a state that provides a premium subsidy, the employer must provide a written notice to its employees in that state. The notice must provide information about the existence of the state premium subsidy program. The notice requirement is discussed in more detail below.

According to the United States Department of Labor, 40 states have established an SCHIP program¹. A list of those states – and contact information for each state – is included in the model notice at the link below.

III. – THE NEW CHIPRA NOTICE REQUIREMENT

Unlike most other notices, the CHIPRA notice must be provided to all employees who are living in a state that has an SCHIP program, not just those employees who are actually enrolled in a plan and not just those employees who are even eligible to enroll in a plan.

The deadline for providing the first notice depends on a plan’s calendar year:

- ***Calendar Year Plans.*** For group health plans with a calendar year, the first notice must be provided no later than **January 1, 2011**.
- ***Fiscal Year Plans.*** For group health plans with a fiscal year, the first notice must be provided by the first day of the first plan year beginning on or after May 1, 2010, or, if earlier, by January 1, 2011.

Employers who miss this deadline are subject to a civil penalty of up to \$100 per employee for each day that a notice is late.

IV. – MODEL EMPLOYEE NOTICE

The Department of Labor (“DOL”) has developed a model notice that employers may use to satisfy the new CHIPRA notice requirement. This notice is available, in Word format, on the DOL website at: www.dol.gov/ebsa/chipmodelnotice.doc.

¹ The states that do not currently have an SCHIP program are Connecticut, Delaware, Hawaii, Illinois, Maryland, Michigan, Mississippi, Ohio, South Dakota, and Tennessee. Additionally, Arizona has enacted legislation to repeal its SCHIP program; however, it is unclear whether this repeal will take effect since the new federal Health Care Reform legislation effectively prohibits the repeal of state SCHIP programs by taking away federal dollars from any states that do repeal their SCHIP programs.

V. – DISTRIBUTING THE NEW CHIPRA NOTICE

The following requirements apply to the employee notice that is required under CHIPRA:

- (1) **Notice Must Be Given to All Employees in Any State with an SCHIP Program.** As we have already noted, the CHIPRA notice must be provided to each employee in any state that has an SCHIP program. The notice must be provided to all employees in that state, even if an employee is not currently enrolled in a group health plan and even if an employee is not currently eligible to become enrolled in a group health plan.
- (2) **Annual Notice.** The notice must be provided annually.
- (3) **Deadline for Initial Distribution of the Notice.** For employers with calendar year plans, *the deadline for providing the notice is January 1, 2011.* An earlier deadline will apply if an employer has a fiscal year plan with a plan year beginning anytime between May 1, 2010, and December 31, 2010. For those plans, the deadline for providing the notice is the first day of the first plan year beginning on or after May 1, 2010. For any other employers with a fiscal plan year, the deadline will be January 1, 2011.
- (4) **Permissible Distribution Methods.** The employer notice may be combined with other materials as long as (quoting from the regulations) the notice “appears separately and in a manner which ensures that an employee who may be eligible for premium assistance could reasonably be expected to appreciate its significance.” It may be distributed using any combination of the following methods:
 - (a) **Enrollment Materials.** The notice may be included in a plan’s enrollment materials;
 - (b) **Summary Plan Description.** The notice may be included in a plan’s “summary plan description,” although, to satisfy the delivery requirements for the notice, the SPD would need to be distributed annually; and/or
 - (c) **Separate Distribution.** The notice may be distributed as a separate notice, for example, by sending it to employees via first class mail.

In choosing how the notice will be distributed, it is important, however, to remember that the notice must be provided to all employees who reside in any state with an SCHIP program, even if the employee is not enrolled in a group health plan and is not even eligible to enroll. Thus, if the notice is included in enrollment materials, an employer will need to make sure that the notice is also provided to those employees who do not receive enrollment materials because they are not eligible to enroll.

- (5) **Electronic Distribution.** The notice may be distributed electronically if the requirements for electronic distribution, as established by the DOL, are satisfied. (These requirements are summarized in more detail later in this Memorandum.)
- (6) **Annual Updates.** The DOL expects to provide updated information on its website on an ongoing basis. This could potentially include an updated notice. Consequently, an employer will need to check the DOL website before it distributes the required notice each year to make sure that it is using the most recent version.

VI. – REQUIREMENTS FOR ELECTRONIC DISTRIBUTION

Under the DOL “electronic distribution” regulations, a notice may be distributed electronically if certain conditions are met. These conditions may be summarized as follows:

- (1) Each person to whom the notice is being sent must either:
 - (a) Have access to e-mail (or other methods by which documents might be distributed electronically) at any location where he/she is reasonably expected to work, and such access must be “an integral part” of his/her employment duties; or
 - (b) Affirmatively consent to the electronic delivery of documents.
- (2) The electronic materials must be prepared and furnished in accordance with otherwise applicable requirements – in other words, the only thing that is different is that the materials are being provided electronically rather than in paper form;
- (3) At the time the electronic document is furnished, each recipient must be informed of the “significance of the document”; and
- (4) The recipient must also be informed that a paper version is available upon request and that the paper version will be provided at no charge.

Documents that are delivered electronically can be included in the text of an e-mail message itself or may be included as an attachment to an e-mail message. Alternatively, an e-mail message may contain a link that will allow the recipient to view the document on a website or intranet site.

The DOL “electronic distribution” regulations are more complicated than this summary might make them appear. Before you decide to distribute the CHIPRA employee notice electronically, you need to check with an experienced employee benefit attorney to make sure that you will be able to satisfy all of the conditions in these regulations.

VII. – PLANS THAT WILL TRIGGER THE CHIPRA NOTICE REQUIREMENT

The CHIPRA employee notice requirement is triggered, as noted above, if an employer (1) is providing any type of group health plan coverage to its employees (other than a plan that is providing only “HIPAA excepted benefits”), and (2) the employer has employees who are residing in one of the 40 states that is currently offering a premium assistance program.

A “group health plan,” for this purpose, is a plan that provides or pays for the cost of medical care for employees and/or their family members. It includes “major medical” plans, prescription drug plans, dental and visions plans, and health flexible spending accounts (“Health FSAs”).

There is an exception for plans that provide only “HIPAA excepted benefits.” As a result of this exception, the notice requirement will not be triggered if the only “group health plans” that are being offered by an employer are dental and vision plans. Based on our experience, we question whether there are very many employers that are offering dental and/or vision plans to their employees while not also offering any other type of group health plan.

On the other hand, the CHIPRA employee notice requirement will be triggered if the only group health plan an employer is offering is a Health FSA. Although most Health FSAs will normally be viewed as providing only “HIPAA excepted benefits,” one of the conditions that must be satisfied by a Health FSA in order to be a “HIPAA excepted benefit” is that the Health FSA cannot be the only “group health plan” offered by an employer. If the employer is not offering some other group health plan, a Health FSA by itself will technically trigger the CHIPRA employee notice requirement.

VIII. – THOUGHTS AND RECOMMENDATIONS

The CHIPRA employee notice requirement is a new requirement and there are different ways that employers will be able to satisfy this requirement. Alternatives that might work for most employers would appear to include the following:

- (1) **E-mail Message to Employees.** Many employers may be able to satisfy the employee notice requirement by sending an e-mail message to all (or most) of their employees.
 - (a) A copy of the notice could be included as an attachment to the e-mail or the e-mail message could include a link that would point to where the notice is located on an employer’s website or intranet site.
 - (b) This would appear to be a low-cost method of distributing the notice and would have the advantage of including employees who might not be enrolled in your group health plan(s) or who might not be benefits-eligible, such as part-time employees.

Please note, however, that notices may not be distributed to an employee via e-mail unless the employee has access to e-mail as part of his/her normal work duties or the employee consents in advance to receive notices via e-mail. For those employees for whom these conditions are not satisfied, an employer will have to distribute the notice using some other method.

- (2) **Enrollment Materials.** An employer may also be able to satisfy the notice requirement by including the notice in the enrollment materials that are provided to employees when they enroll in the employer’s plan(s), either during the employer’s open enrollment period or at some other time. In this regard, please note the following:
 - (a) First, as noted above, the notice must be provided “separately” within those materials. Presumably, this means that the notice must, at a minimum, appear on a separate page or pages from any other materials. If materials are bound together, it may also make sense to provide the notice as a separate enclosure (rather than including it in bound materials).
 - (b) Second, if an employer has employees who do not receive enrollment materials – for example, if an employer has part-time employees who are not eligible to enroll in its plans – an employer will need to find some other way of distributing the notice to them.

For some employers, it may make sense to rely on e-mail as the primary method of distributing the notice while also including the notice in enrollment materials as a “back up.” This would reduce the risk that an employee might be overlooked when the e-mails distributing the notice are sent out.

- (3) **Enclosure to Employee Paychecks / Paystubs.** Some employers may be able to distribute the employee notice by putting it in the same envelope as employee paychecks or paystubs when they are distributed to employees.

Employers choosing this option will need to make sure that no one is “missed” or overlooked. For example, if an employee is on unpaid leave, it is possible that the employee might not receive a paycheck in a given week. If so, the notice will need to be distributed to that employee in some other way.

- (4) **Mailing the Notice to Employees.** Although it could entail a significant expense for some employers, an employer could also distribute the employee notice by mailing it to its employees.

Employers may also be able to use this option as their “fallback” option. If they are not able to deliver the notice to particular employees via e-mail or via an enclosure to their paychecks, they could ensure that these employees receive the notice by mailing it to them.

As with any distribution of a required notice, we would note that it is important for an employer to keep records showing what was provided, how and when it was provided, and to whom it was provided.

Finally, we would also note that the obligation to send out this notice falls squarely on employers. It is possible that third party administrators and/or insurance companies will offer assistance, but the ultimate responsibility for sending out the notice falls on employers.

If you have any questions regarding the CHIPRA notice requirement, please feel free to call Eric Namee, Steven Smith, Ruhe Wadud Rutter, or Brad Schlozman at (316) 267-2000.

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