HUNTON& WILLIAMS

CLIENT ALERT

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More Changes For Group Health Plans: GINA, Michelle's Law and CHIP

The welfare benefit plan arena has experienced a flurry of regulatory activity over the past year.

- The expansion of the Mental Health Parity rules to include substance abuse benefits and provide additional protections for mental health benefits is effective for plan years beginning on or after October 3, 2009 (January 1, 2010 for calendar year plans) (covered in our July 2009 client alert).
- The new breach notification rules under the Health Insurance Portability and Accountability Act ("HIPAA") privacy rules enacted earlier this year became effective in September, and a number of other HIPAA privacy and security rule changes will go into effect early next year (covered in our August 2009 client alert).
- The new 60-day enrollment rights enacted in the Children's Health Insurance Program Reauthorization Act of 2009 became effective on April 1, 2009.
- Weeks ago, the Department of Health and Human Services ("HHS") issued regulations under the Genetic Information Nondiscrimination Act of 2008 ("GINA"), which will take effect for plan years beginning on or after December 7, 2009 (January 1, 2010 for calendar year plans).
- Lastly, Michelle's Law, which extends medical coverage for full-time students who lose coverage due to a serious illness or injury, is effective for plan years beginning on or after October 9, 2009 (again, January 1, 2010 for calendar year plans).

Set out below is a brief overview of the more important aspects of these changes (other than the HIPAA and the Mental Health Parity changes, which were covered in prior client alerts).

GINA: New limits on health risk assessments and disease management programs

In general, GINA prohibits group health plans from collecting or using "genetic information" (which includes *family medical history*) in certain circumstances. Among other things, it prohibits a group health plan from collecting genetic information prior to or in connection with enrollment — which, according to HHS, bars the collection of any such information prior to the date the employee or beneficiary becomes *covered* under the plan.

GINA also prohibits group health plans from (i) increasing premiums or employee contributions based on genetic information or (ii) requesting/collecting genetic information for "underwriting" purposes. The new regulations define "underwriting" broadly to include any "rules for, or determination of, eligibility (including enrollment and continued eligibility) for benefits under a plan (including changes in deductibles or other cost-sharing mechanisms in return for activities such as completing a health risk assessment or participation in a wellness program)." However, the incidental collection of an individual's genetic information with other information does *not* violate GINA *unless* it can reasonably be anticipated that genetic information might be provided, in which case, the affected individuals must be told that they need not provide such information.

GINA obviously will have a significant impact on the use of health risk assessments. Thus, group health plans cannot refuse to enroll eligible employees or charge them a higher premium for the failure to provide family medical history or other genetic information. For example, a group health plan cannot require as a condition of eligibility that participants complete a health risk assessment that includes questions about the participant's family medical history. However, employees may voluntarily provide that information (by answering optional health questions that clearly are identified as such) *after* enrollment.

GINA also prohibits a group health plan from providing incentives (*e.g.*, premium reductions, different deductible levels and special contributions) and/or additional plan benefits that would not otherwise be available if an employee *voluntarily* provides genetic information. For example, it is not permissible to use family medical history information obtained through a health risk assessment to determine eligibility for a disease management program. However, it is okay to collect genetic information to the extent it is "medically appropriate" in determining whether a participant is eligible for a benefit he or she has requested.

To avoid running afoul of these restrictions, a group health plan could either

- cease requesting information on family medical history in health risk assessments, or
- eliminate any incentives or benefits tied to the provision of such information.

It may also be possible (in some circumstances) to give incentives for providing such information outside the plan on a taxable basis (which should not violate GINA since that law only applies to group health plans), but the usefulness of such an option would appear to be very limited.

Michelle's Law: Extended dependent coverage for seriously ill or injured students

Under Michelle's Law, medical coverage must be continued for dependent children (over the age of 18) who cease to be full-time students due to serious illness or injury and will, as a result, lose group health coverage. Thus, this law will have no impact on those group health plans that provide coverage to dependent children without regard to student status.

In general, Michelle's Law applies to both a leave of absence or reduction to part-time student status. If applicable, group health plan coverage must continue until the earlier of (i) one year after the first day of the leave (or schedule reduction) or (ii) the date on which the dependent child's coverage would otherwise terminate under the plan. For example, a group health plan that generally provides dependent coverage for full-time students up to age 25 may terminate coverage for a student on a medical leave no earlier than one year after the leave began unless the student turns 25 in the interim, in which case, the coverage would terminate on his or her 25th birthday. To qualify for the extended coverage, the participant (or dependent) must provide a doctor certification that the dependent is suffering from a serious illness or injury, the treatment/care of which will require that the student take a leave of absence or go to a part-time school schedule.

There are, however, several important aspects of Michelle's Law coverage for which government guidance is needed. First of all, it is unclear whether COBRA coverage can run concurrently with Michelle's Law coverage. It is also uncertain whether the law modifies the income tax treatment for coverage provided to an adult child who does not otherwise qualify as a "dependent" for federal income tax purposes (although it appears that it does not, which means that the cost of such coverage would be taxable to the parent to the extent the premium cost is not paid for with after-tax dollars). It is hoped that the government will soon issue guidance addressing these issues.

Children's Health Insurance Program: New midyear election rights

As mentioned above, new special enrollment rights relating to Medicaid and Children's Health Insurance Program (CHIP) benefits are now in effect for group health plans. If an employee loses Medicaid coverage or an employee's child loses coverage under a state's CHIP, the employer's group health plan must permit the employee and/or his or her dependent child to enroll in the plan. This special enrollment right also applies to employees who become eligible to receive a CHIP premium subsidy to help pay for employer-provided health benefits. In general, these rights extend not only to medical but dental and vision coverage as well (to the extent the dental and vision coverage are included in the medical component and do not require separate elections and contributions). An employee has 60 days from the date he or she receives notice regarding the loss of Medicaid/CHIP coverage, or subsidy eligibility, to enroll or make changes to prior benefit elections.

Although the new law also requires that group health plans issue a separate participant notice on the new CHIP rules, this requirement will not go into effect until the first plan year following the date on which HHS issues a model notice (the statutory deadline for which is February 2010). Nevertheless, to ensure that plans meet their obligations to notify employees of material health plan changes, it would be advisable to include a description of these new enrollment rights in any applicable summary plan description updates or other general employee communications regarding the plan.

We welcome the opportunity to answer any questions you may have regarding the new health plan rules described above or assist you in complying with these rules.