



## Final Regulations Issued on the Newborns' and Mothers' Health Protection Act

*The IRS, DOL and HHS recently issued final regulations providing guidance on the requirements for minimum hospital stays in connection with childbirth under the Newborns' and Mothers' Health Protection Act. The final regulations, which are substantially similar to the 1998 interim final rules, provide information on, among other things, how to measure the required hospital stay and how the law interacts with state law.*

### Background

The Newborns' and Mothers' Health Protection Act (NMHPA) prohibits group health plans and health insurance issuers from limiting hospital stays in connection with childbirth to less than 48 hours for vaginal deliveries or 96 hours for deliveries by cesarean section. In addition, NMHPA prohibits plans from providing incentives to mothers and attending providers to shorten the length of the stay or from penalizing attending providers for providing care consistent with the law. Interim final regulations were published in October 1998, and now [final regulations](#) have been issued.

### Final Regulations on NMHPA

The final regulations are not significantly different from the interim final rules.

**Start of Hospital Stay.** The final regulations specify that the hospital stay begins at the time of delivery (or the time of the last delivery for multiple births) if the delivery occurs at a hospital. For a delivery outside of a hospital, the hospital stay begins at the time of admittance as a hospital inpatient in connection with childbirth. The final regulations do not distinguish between a delivery planned for outside the hospital and other deliveries occurring outside of a hospital.

**In Connection with Childbirth.** Under the final regulations, whether a hospital stay is in connection with childbirth is a medical decision to be made by the attending provider. For example, a woman who gives birth at home, begins bleeding excessively and is then admitted to the hospital would be considered to have been admitted in connection with childbirth. On the other hand, the admission of a newborn (born outside of the hospital) who developed pneumonia sometime after birth would not be.

**Definition of Attending Provider.** The final regulations define an attending provider as an individual licensed under applicable state law to provide maternity or pediatric care to a mother or newborn child and who is directly responsible for providing such care. They do not contain a list of titles or positions that qualify as attending

providers. Instead, they use a functional approach to determine whether the caregiver is an attending provider, looking at state licensure rules and the actual performance of care. The final regulations specify that a plan, hospital, managed care organization or other issuer cannot be an attending provider.

**BUCK COMMENT.** *Given that titles may vary from state to state and from provider to provider, plan administrators will need to review each situation on an individual basis to determine whether the provider meets the definition of attending provider.*

**Incentives and Penalties for Attending Providers.** NMHPA prohibits group health plans from penalizing attending providers for providing care that is consistent with NMHPA or from providing them incentives to provide care that is inconsistent with NMHPA. However, NMHPA does not prohibit a plan from negotiating the level and type of reimbursement to the attending provider. Despite requests by many commenters for greater specificity relating to permissible compensation arrangements, the DOL declined to provide those specifics in the final regulations.

**BUCK COMMENT.** *In the preamble to the final regulations, the DOL provides examples of compensation arrangements that would not violate NMHPA. However, each compensation arrangement should be reviewed to determine whether it complies with NMHPA.*

**State Laws.** NMPHA and the final regulations specify that the NMPHA requirements will not apply to an insured plan in states that have similar mandates. NMPHA does not apply if a state law meets *any* of the criteria below –

- It provides for at least a 48-hour stay following a vaginal delivery and at least a 96-hour stay following a cesarean section.
- It requires coverage for care following childbirth in accordance with guidelines established by an established professional medical association, such as the American College of Obstetricians and Gynecologists.
- It requires that the hospital length of stay is left up to the attending provider in consultation with the mother.

Importantly, the DOL notes that NMPHA does not require state law to include all of the provisions in the federal law (e.g., the anti-incentive provisions) to be exempt from its requirements.

**Notice Requirements for Certain Governmental Plans.** Although they are not subject to ERISA, nonfederal governmental plans are subject to ERISA-like notice requirements. For these plans, the final HHS regulations require that an initial notice of post-childbirth hospitalization benefits be provided within 60 days of the first day of the plan year beginning on or after January 1, 2009 (except for self-insured plans that have already provided an initial notice). The notice of the maternity stay requirements may be provided either in the document that describes plan benefits to participants and beneficiaries or in the document that notifies them of plan benefit changes. After the initial notice is provided, the notice of post-childbirth hospitalization benefits must appear in one or both of these documents whenever distributed. The regulations include specific language that must be used to satisfy this notice requirement.

The regulations exempt self-insured plans that have elected exemption from NMHPA from the notice requirements. They also exempt insured plans under which benefits for hospital lengths of stay in connection with childbirth are provided and the coverage is regulated under a State law with requirements similar to those of NMHPA.

## Effective Date

The final regulations are effective December 19, 2008, and apply to group health plans and health insurers for plan years beginning on or after January 1, 2009.

## Conclusion

Although the final regulations do not vary significantly from the interim regulations, they make some clarifications such as when coverage in connection with childbirth starts, who is an attending provider and the notice requirements for nonfederal governmental plans. Buck's consultants are available to discuss these regulations with you.

---

*This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*