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CMS Updates Regulations on Marketplace Special Enrollment

As part of final regulations on marketplace and insurance market standards for 2015 and beyond, CMS recently updated the rules governing marketplace special enrollment opportunities. These special enrollment periods allow individuals to enroll in marketplace coverage outside of the annual open enrollment period. Employers wishing to provide marketplace-related information to qualified COBRA beneficiaries, early retirees, employees on unpaid leave, and others who are about to lose, or have already lost, employer-sponsored coverage should pay attention to this guidance.

Background

The Affordable Care Act (ACA) required each state to establish a health insurance marketplace (also known as an exchange) by January 1, 2014 in order to facilitate the purchase of health insurance. States that did not establish their own marketplace participate in the federally facilitated marketplace (FFM) established by the federal government. Electing marketplace coverage is generally permitted only during an annual open enrollment period. The FFM open enrollment period for 2014 coverage ended March 31, 2014, and the FFM open enrollment period for 2015 coverage will run from November 15, 2014 through February 15, 2015. As a general matter, individuals who want to enroll in marketplace coverage must wait until the next marketplace open enrollment period to do so.

However, similar to employer plans, in addition to annual open enrollment, the marketplaces also offer "special enrollment" periods. A special enrollment period allows individuals to enroll in a marketplace plan or change from one marketplace plan to another following particular qualifying events that occur after the annual open enrollment period has concluded. Specifically, 2012 regulations provided for an FFM special enrollment opportunity where, for example:

- A qualified individual or dependent loses minimum essential coverage, such as employer coverage
- A qualified individual gains a dependent or becomes a dependent through marriage, birth, adoption, or placement for adoption

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- An individual who was not previously a US citizen, national, or lawfully present individual gains such status
- A qualified individual's enrollment or non-enrollment in a marketplace plan was "unintentional, inadvertent, or erroneous" and "the result of the error, misrepresentation, or inaction" of the marketplace or the Department of Health & Human Services (HHS)
- An individual is determined newly eligible or newly ineligible for advance payments of the premium tax credit or has a change in eligibility for cost-sharing reductions, regardless of whether the individual is already enrolled in a marketplace plan

  Comment. This special enrollment opportunity covers the scenario where an individual's existing coverage through an employer-sponsored plan becomes unaffordable, or no longer provides minimum value. In such situations, the individual may access the marketplace special enrollment period.

- A qualified individual or enrollee gains access to new marketplace plan options as a result of a permanent move
- A qualified individual or enrollee meets other exceptional circumstances, as defined by the marketplace

Under the 2012 regulations, the marketplace special enrollment period typically runs for 60 days from the date of the qualifying event. Generally, for elections made between the first and the fifteenth of any given month, marketplace coverage is effective on the first day of the following calendar month. For elections made between the sixteenth and the end of the month, marketplace coverage is effective on the first day of the second following calendar month. For example, if an individual elects marketplace coverage on June 1, the coverage is effective July 1. If an individual elects marketplace coverage on June 16, the coverage is effective August 1.

Marketplace Special Enrollment versus Mid-plan Year Cafeteria Plan Changes

Marketplace special enrollment opportunities are conceptually similar to, yet meaningfully different from, the IRS regulations that govern mid-plan year cafeteria plan election changes. Some qualifying events are common to both contexts, such as a change in the employee's marital or employment status — but there are also key differences. For example, whereas marketplace rules incorporate the concept of health coverage affordability by permitting special enrollment where an individual is newly eligible for advance payments of the premium tax credit or has a change in eligibility for cost-sharing reductions, the cafeteria plan regulations allow mid-plan year changes to elections in the case of status changes and coverage-based changes — but only for a significant increase in cost of the plan. Similarly, there are situations where an employee can change employer coverage, such as going on an unpaid leave, that may not result in a special enrollment opportunity to enroll in marketplace coverage.

Comment. State-based marketplaces do not have to follow the open and special enrollment rules that govern the FFM, and, therefore, rules may vary by state. Individuals should contact their state marketplaces to confirm effective dates.

New Guidance on Marketplace Special Enrollment

Minimum Essential Coverage, …

which includes employer-sponsored coverage, is the type of health coverage an individual needs to meet the ACA's individual responsibility requirement (also known as the individual mandate).

On May 27, 2014, the Centers for Medicare & Medicaid Services (CMS) published final regulations on marketplace and insurance market standards for 2015. These regulations — which were accompanied by a fact sheet, FAQs, and an HHS blog post — address a wide range of issues, including certain aspects of the marketplace special enrollment rules. The changes to special enrollment largely follow the proposed regulations released earlier this year.

Changes relating to the loss of minimum essential coverage

The aspects of the final regulations most relevant to employers are those relating to an individual's loss of minimum essential coverage, as these changes can affect categories of employees and former employees including qualified COBRA beneficiaries, early retirees, and employees on unpaid leave.

Guidance allows expanded time period for special enrollment. Under prior guidance, an individual had 60 days from the date that he or she loses minimum essential coverage in which to enroll in a marketplace plan. The new guidance broadens this window to allow individuals losing minimum essential coverage both 60 days before *and* after the loss of coverage to select a marketplace plan.

Comment. The chance to make an election within 60 days prior to loss of minimum essential coverage gives employers who wish to do so the opportunity to help employees losing coverage examine and understand marketplace options and avoid a potential gap in coverage.

The preamble to the final regulations notes that this change factors in the time period within which an employee must receive notice of continued coverage rights under COBRA — which can be as long as 44 days after the loss of coverage occurs. According to CMS, this change, in conjunction with recently updated model COBRA notices that provide information about the marketplace, will minimize gaps in coverage resulting from a loss of employment. (For detailed information about the updated model COBRA notices as well as the interaction between COBRA coverage and marketplace special enrollment, see our June 3, 2014 *For Your Information*.)

Recognizing that certain coverage gaps still remain despite the extended enrollment period, the preamble also mentions that an individual can enroll in COBRA coverage (which is effective on a retroactive basis) and enroll in prospective marketplace coverage as well, and then simply disenroll from COBRA coverage when marketplace coverage becomes effective.

Comment. For example, where a qualified beneficiary loses employer coverage on June 1, marketplace coverage will not be effective until July 1 even if the qualified beneficiary makes a marketplace election immediately. The qualified beneficiary could enroll in both COBRA and marketplace coverage and pay for

COBRA coverage retroactive to June 1 and then stop paying COBRA premiums starting July 1 when the marketplace coverage becomes effective.

Effective date of marketplace coverage is defined. Under the final regulations, where an individual makes a marketplace election on or before the day of loss of job-related coverage, the effective date of that coverage is the first day of the month following the loss of coverage — even if the plan election occurs during the second half of the given month. For example, if an individual loses job-related coverage on June 25 and makes a marketplace election that same day, coverage is effective on July 1.

Comment. In adding the option of enrollment 60 days before the loss of coverage, CMS declined allowing for mid-month coverage effective dates — as some commenters had requested.

If an individual makes a marketplace election after the loss-of-coverage date, the effective date of coverage is — at the option of each marketplace — either (1) the first day of the following month (regardless of which day during the month the election is made), or (2) the first day of the following month for elections made between the first and fifteenth of the month and the first day of the second following month for elections made between the sixteenth and the end of the month. For example, if an individual loses job-related coverage on June 25 and makes a marketplace election on July 20, coverage is effective either on August 1 or September 1, at the option of each marketplace.

Comment. Although there has not been formal guidance to this effect, the FFM appears to allow first of the following month coverage when an election is made following the date the individual loses coverage — even if the election occurs between the sixteenth and the end of the given month. Accordingly, in the FFM, if an individual loses job-related coverage on June 25 and makes a marketplace election on July 20, it appears that coverage will be effective August 1.

Regs confirm that voluntary termination of coverage is not a special enrollment opportunity. The final regulations clarify that "loss of coverage" does not include voluntary termination of coverage (including termination of COBRA coverage before that coverage expires), as the special enrollment rules are not designed to facilitate an individual switching from another form of coverage to marketplace coverage during the year when the other coverage remains available.

Other Special Enrollment Changes

In addition to changes that affect individuals who experience a loss of minimum essential coverage, the final regulations:

- Increase flexibility for coverage effective dates in the case of birth, adoption, placement for adoption, or placement in foster care to allow a choice by the individual for an effective coverage date of either the date of the triggering event or (and no later than) the first date of the month following that event
- Clarify that, in the case of marriage, marketplace coverage is available on the first day of the month following plan election
- Create other loss-of-coverage special enrollment opportunities, in addition to the loss of minimum essential coverage, and other limited exceptions relating to errors and misconduct

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In Closing

The provisions governing special enrollment affect an individual's transitions from an employer-sponsored group health plan to marketplace coverage, such as for COBRA beneficiaries and retirees. Employers should consider the costs and benefits of providing marketplace-related information to individuals who are about to lose or have already lost employer-sponsored coverage.

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