

Changes to New York State Health Coverage Rights Require Employer Coordination With Insurers

The New York State legislature recently enacted two laws which provide for continued health coverage under certain circumstances. The first law extends to 36 months the period during which individuals covered under a New York medical insurance policy are entitled to continuation coverage in connection with a qualifying event ("Extended Continuation Coverage"). The second law requires medical insurance policies to provide coverage to certain employees' dependents through age 29.

The laws apply to insurance policies issued pursuant to New York state insurance law, even if the policies cover employees who do not reside in New York. Conversely, New York employers or other employers who provide medical benefits to New York employees under an insurance policy issued pursuant to another state's law are not affected by these laws.

This Alert describes the changes to coverage rights and suggests actions employers should take to comply with the changes.

I. New York Extended Continuation Coverage Right

The New York Extended Coverage obligations are generally applicable to all insurance policies beginning November 1, 2009. (With respect to policies which are modified or renewed on or after July 1, 2009 and before November 1, 2009, the obligations were applicable at the time of the modification or renewal.) However, as described below, individuals who exhausted their continuation coverage rights on or after July 1, 2009 have continuation coverage rights under the Extended Coverage program, even if the Extended Coverage obligations don't apply to the policy under which they were covered until November 1, 2009.

A. Continuation Coverage Period Prior to NY Extended Continuation Coverage

The Extended Continuation Coverage program makes two significant changes to the provision of continued medical coverage following a qualifying event. First, as described below, it "wraps around" continuation coverage rights under the federal Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). Prior to Extended Continuation Coverage, individuals' continued health coverage rights were governed exclusively by either COBRA or New York State insurance continuation coverage requirements ("mini-COBRA"). COBRA covers employees (and their federally recognized spouses and dependents) of employers who employ 20 or more employees – whether the health plan is insured or self-insured. On the other hand, New York's mini-COBRA applies to individuals who are provided with medical benefits through an insured arrangement and who are (a) employees (and their spouses and dependents) of employers who employ fewer than 20 employees, or (b) not covered by COBRA, such as same-sex spouses. Individuals covered by COBRA will now have continuation coverage rights under New York law following the expiration 18-month (or 29-month) COBRA continuation coverage period.

The Extended Continuation Coverage program is also significant because prior to the program the period of continued health coverage to which an individual is entitled, under either COBRA or New York's mini-COBRA, depended on the nature of the event giving rise to the continuation coverage right. For example, an individual losing health coverage in connection with a termination of employment or reduction in hours was entitled to 18 months of continued health coverage – which could be expanded to 29 months in the event of a qualifying disability. In contrast, dependents who lost coverage because they were too old for the coverage were entitled to 36 months of continuation coverage.

B. Extended Continuation Coverage

The new Extended Continuation Coverage rules require insurers to provide up to 36 months of continued medical coverage in connection with every COBRA or mini-COBRA qualifying event. The coverage "wraps around" the COBRA coverage period so that the total continuation coverage an individual, covered by COBRA and Extended Continuation Coverage, receives cannot exceed 36 total months of continuation coverage. For example, if an individual receives 18 months of continued medical coverage pursuant to COBRA, the individual would only be eligible for up to 18 months of Extended Continuation Coverage. *Like New York's mini-COBRA, however, Extended Continuation Coverage is not available to individuals covered by self-insured plans or with respect to stand alone dental and vision plans.*

1. *Premium Issues*

While an individual is receiving continued coverage pursuant to the Extended Continuation Coverage program, the maximum premium that can be charged is 102% of the premium. It should be noted that COBRA allows employers to charge individuals covered by the 29-month disability extension 150% of the premium for months 19 through 29 of the coverage. Following the expiration of the 29th month, individuals could only be charged 102% of the premium for months 30 through 36. (Under New York's mini-COBRA provisions, individuals can only be charged 102% of the premium, even while on the 29-month extension.)

2. *Early End of Extended Continuation Coverage*

The Extended Continuation Coverage program merely extends the maximum period during which an individual is eligible to receive continued medical coverage. An individual's continuation coverage could still end before the expiration of the 36-month period for the reasons defined under COBRA and mini-COBRA. For example, if after electing COBRA, an individual becomes covered under a subsequent employer's health coverage, the individual's COBRA will terminate and he or she will not be eligible for Extended Continuation Coverage.

3. *Special Enrollment Opportunity For Individuals Who Exhausted COBRA or Mini-COBRA On or After July 1, 2009*

Individuals who exhausted their maximum COBRA or mini-COBRA coverage on or after July 1, 2009, and before the Extended Contribution Coverage program applied to the policy under which they were covered (i.e., generally, November 1, 2009) are also eligible for the Extended Continuation Coverage through a 60-day special enrollment opportunity. The special enrollment period begins after the individual receives notice of the special enrollment opportunity

(as described below). If no notice is provided, however, the special enrollment period ends May 19, 2009. The Extended Continuation Coverage provided with respect to the special enrollment opportunity will be effective, on a prospective basis, within 30 days of the individual's election of, and payment for, Extended Continuation Coverage.

4. *Notice Issues*

Guidance issued by the New York Insurance Department indicates that the Extended Continuation Coverage program does not change the general continuation coverage election notice requirements. In particular, no new notice is required once an individual becomes entitled to the extended coverage. The Department has directed insurers to work with employers to ensure that notices are properly amended to notify individuals of their rights.

With respect to the notice regarding the special enrollment opportunity, insurers are required to use "reasonable efforts" to provide notice of this opportunity by December 19, 2009.

C. Availability

Extended Continuation Coverage is only available to individuals who exhausted or will exhaust COBRA or mini-COBRA coverage on or after July 1, 2009.

This may mean that not all individuals with the same termination date will be able to take advantage of the program. For example, if two individuals both lost active employee health coverage in connection with a termination of employment on December 31, 2007, their 18-month continuation coverage period generally should have ended on June 30, 2009. If one of those individuals was entitled to the 29-month disability extension (and therefore, his or her continuation coverage was not exhausted on June 30, 2009), that individual will be eligible for the 36-month continuation coverage period under the program because he or she was covered under continuation coverage on July 1, 2009. The second individual will not be eligible because his or her continuation coverage was exhausted before July 1, 2009.

II. Extended Dependent Coverage Through Age 29

New York's extended dependent coverage obligations are applicable to New York medical insurance policies which are modified or renewed on or after September 1, 2009. This law will therefore begin to apply to individuals covered under policies which are renewed on a calendar year basis, no later than January 1, 2010.

Extended dependent coverage is not required for individuals covered by self-insured plans or with respect to stand alone dental, vision and prescription plans.

A. Eligibility

Eligibility for dependent coverage under a parent-employee's health coverage is typically tied to a dependent's age. For example, many policies provide that a dependent may be covered until the dependent reaches age 19 (if the dependent does not remain a full-time student) or 23 (so long as the dependent remains a full-time student until this age).

Under the extended dependent coverage program, a dependent will be eligible to remain covered under a parent's employer's policy so long as the dependent: (a) is unmarried; (b) is age 29 or younger; (c) is not insured, or *eligible* to be insured, under a group health plan providing medical and hospital benefits offered by the dependent's employer (including coverage under a self-insured plan), and (d) lives, works or resides in New York State or the insurance company's service area. In addition, a dependent will not be eligible to be covered under the young adult option (described below) if the individual is covered by Medicare.

A dependent need not be financially dependent on, or live with, the parent-employee in order to be eligible for the coverage. Dependents who are not students, and even dependents who have their own children, are eligible for the program (although the children of these dependents are not eligible for the program).

B. Options for Complying With Extended Dependent Coverage Obligations: Young Adult Option versus Make Available Option

The New York State Insurance Department issued guidance clarifying that employers could choose to provide extended dependent coverage through either of the following mechanisms: (x) "Young Adult" option, or (y) "Make Available" option. Each of these options is described below. Employers should consult with their insurers as to which option they would prefer.

1. *Young Adult Option*

Extended dependent coverage under this option does not extend coverage under the parent-employee's coverage. Rather, the young adult independently purchases coverage through the parent's employer's policy – and a separate premium is charged for this coverage. (The parent could also pay for this coverage on behalf of the young adult.) The only level of coverage the young adult may elect, however, is the level elected by the parent. For example, if a parent is covered by PPO coverage, the dependent could not elect HMO coverage. It should be noted that while this option does not affect the young adult's right to other continuation coverage under COBRA or mini-COBRA (e.g., due to a divorce), a child could not be simultaneously covered by COBRA (or mini-COBRA) and the young adult option.

Either the young adult or the parent may elect coverage for the child under the young adult option. There are four opportunities during which extended dependent coverage may be elected:

- Within 60 days of when the dependent would otherwise lose coverage (e.g., due to age) – coverage is retroactive to the date that coverage would otherwise be lost;
- Within 60 days of newly meeting the eligibility requirements (e.g., if the dependent loses his/her employer-sponsored health coverage) - coverage is effective within 30 days of when the employer/insurer (as applicable) receives the election and payment;
- During the 30-day open enrollment period - coverage is effective within 30 days of when the employer/insurer (as applicable) receives the election and payment; or
- During the initial open enrollment period - coverage is effective within 30 days of when the employer/insurer (as applicable) receives the election and payment.

The Insurance Department has indicated that the initial open enrollment period will be 12 months, beginning on September 1, 2009. Because dependents covered under policies which are renewed on a calendar year basis will have less than 12 full months to elect coverage during the initial open enrollment period, however, the Department encouraged insurers to provide for a 12-month open enrollment period, measured from the policy's renewal.

Insurers, not employers, are obligated to provide the following notices of the young adult extended dependent coverage: (a) notice in the certificate of coverage; (b) notice to group members at least 60 days prior to the date dependents will lose eligibility due to age; and (c) notice to group members within 30 days of the effective date of the law of the opportunity for an open enrollment period to elect the young adult option.

A dependent's eligibility for young adult coverage will end before the individual reaches age 29, however, if: (a) the individual voluntarily terminates coverage, (b) the individual fails to timely (within the 30-day grace period) pay the premium for coverage, (c) the dependent's parent loses coverage (including COBRA or mini-COBRA coverage), (d) the individual no longer satisfies the eligibility conditions described above, or (e) the policy is terminated and not replaced. The Insurance Department has indicated that termination of this coverage does not constitute an event triggering a COBRA or mini-COBRA right.

2. Make Available Option

If an employer chooses to provide extended dependent coverage through the "Make Available" option, the child is considered to be a dependent under the parent-employee's coverage until age 29. Consequently, the option may not require the dependent to pay a separate premium.

Insurers must provide notice of the make available option before the renewal of the policy annually (including the renewal of the policy since the effective date of the law). In addition, insurers must provide notice of the option prior to the inception of a policy.

III. Next Steps

We suggest that employers whose group policies are subject to the Extended Continuation Coverage and the Extended Dependent Coverage programs take the following steps to ensure compliance with the new New York insurance requirements:

1. Employers who use third party administrators to administer COBRA may need to notify their administrators of the new Extended Continuation Coverage obligations.
2. Employers should check with their insurers about whether they are notifying individuals currently receiving COBRA or mini-COBRA of the extended continuation coverage right.
3. Employers should confirm with their insurers that the insurers are providing the required notices regarding eligibility for a special enrollment opportunity for Extended Continuation Coverage and should discuss with their insurers responsibility for modifying election notices which go to individuals newly eligible for COBRA or mini-COBRA so that the notices include a notice of the Extended Continuation Coverage rights.

4. Employers should consult with their insurers regarding whether they should offer the "Young Adult" extended coverage option or the "Make Available" extended coverage option.
5. Employers choosing the "Young Adult" option should work with their insurers regarding the setting of the Young Adult premium and notifications of, and open enrollment with respect to, this option. In particular, employers should ask insurers whether they will allow an open enrollment period of 12 months, measured from the policy renewal date.

Members of the Employee Benefits and Executive Compensation Practice Group at Patterson Belknap Webb & Tyler LLP, listed below, are available to discuss any questions you may have regarding New York's new extended health continuation coverage rights.

David M. Glaser	212.336.2624	dmglaser@pbwt.com
Bernard F. O'Hare	212.336.2613	bfohare@pbwt.com
Bruce L. Wolff	212.336.2959	blwolff@pbwt.com
Jessica S. Carter	212.336.2885	jcarter@pbwt.com
Meridith Bogart Krell	212.336.2361	mkrell@pbwt.com
Carrie L. Mitnick	212.336.2415	cmitnick@pbwt.com

IRS Circular 230 disclosure: Any tax advice contained in this communication (including any attachments or enclosures) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication. (The foregoing disclaimer has been affixed pursuant to U.S. Treasury regulations governing tax practitioners.)

This alert is for general informational purposes only and should not be construed as specific legal advice.

To subscribe to any of our publications, call us at 212.336.2329, email info@pbwt.com, or sign up on our website, www.pbwt.com/resources/publications. To unsubscribe, please send an email to info@pbwt.com with the subject: **unsubscribe**.