

Hamilton News

Extension of COBRA Premium Subsidy?

The 65% COBRA subsidy for laid-off workers is currently set to expire on December 31, 2009. Congress, however, is considering three variations to extend (and expand) the subsidy.

Senate Bill 2730 was introduced by Senator Brown (D-OH) with five co-sponsors. It is currently in the Health, Education, Labor and Pension Committee. It changes the current bill by:

- ◆ Lengthening the COBRA premium subsidy period by an additional six months, allowing recipients to receive the subsidy for up to 15 months, up from the current nine-month maximum;
- ◆ Extending the eligibility date from the end of this year to June 30, 2010;
- ◆ Increasing the subsidy amount from 65% to 75% of the applicable premium; and
- ◆ Expanding eligibility to include those who lose health coverage as a result of an involuntary reduction in work hours.

In the House, two bills have been introduced and are pending in committee.

HR 3930 was introduced by Representative Sestak (D-PA) without any co-sponsors and has been referred to the House Ways and Means Committee. Its key provisions are:

- ◆ Extending COBRA continuation coverage from 18 months to 24 months for those who are involuntarily terminated or have hours reduced between April 1, 2009 and December 31, 2009; and
- ◆ Adding six months to both the eligibility and assistance periods of subsidy.

HR 3966, sponsored by Rep. Carson (D-IN) with three co-sponsors, would extend the subsidy program for involuntary terminations and loss of coverage through June 30, 2010. This is currently under discussion by the House Energy and Commerce Committee.

Given the short time frame to act on these bills before the end of the year, employers and insurers should monitor activity on them and be prepared to respond quickly.

Swine Flu: Employer's Guide

This year's flu season is well underway and employers are asking how to best handle concerns about the health of their employees and customers. The Centers for Disease Control and Prevention (CDC) has released updated guidance for non-healthcare employers as part of a nationwide effort to limit the spread of the seasonal and H1N1 (swine) flu.

Can we require employees to get flu shots? In most workplaces, no. In the absence of a law or regulation authorizing mandatory vaccinations, employers face the potential for liability for certain types of discrimination for requiring employees to get flu shots.

If an employee exhibits flu-like symptoms, can I send him or her home? Yes. The CDC recommends that businesses advise all employees to stay home if they are sick with influenza-like symptoms until *at least 24 hours after* they no longer have fever or signs of a fever.

What can I do about a healthy employee who refuses to come to work, travel or perform other job responsibilities out of a professed fear of catching the flu? Under the Occupational Safety and Health Act (OSHA), the circumstances when an employee has the right to refuse work because of a perceived hazard are very limited. The employee only has a legally-protected right to refuse to perform a job assignment if there is (1) reasonable and good faith belief that (2) the work assignment would put them in real danger of serious injury or death, (3) they have asked the employer to address and eliminate the hazard and this has not occurred, and (4) there is not time to work through OSHA's regular inspection and enforcement process.

If an employee catches the flu at work, is that covered by workers' compensation? These laws vary by state, but typically an illness or injury is only covered by workers' comp if it arises out of and in the course of employment. Infections diseases can rarely be sufficiently traced to the workplace to qualify for coverage.

Does someone with the flu qualify for FMLA leave? In certain circumstances, it may. It would depend whether the worksite is subject to FMLA, the individual employee meets the eligibility criteria, and the symptoms suffered by the employee or immediate family member rise to the level of a "serious health condition."

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Complying with HIPAA Breach Notification Rules

Earlier this fall, health care providers, clearinghouses, and health plans that are “Covered Entities” under the Health Insurance Portability and Accountability Act (HIPAA) saw increased requirements related to certain types of breaches of their individually identifiable health information by themselves or a Business Associate. These rules went into effect September 23, 2009, but sanctions will not be imposed until after February 22, 2010.

1. If a breach involves encrypted or de-identified information, you do not have a notification requirement.

Since the Rule only applies to protected health information (PHI) that is “unsecured,” take steps to find out if you are using at least the minimum required level of encryption on your and your Business Associates’ systems:

- ◆ Encryption of electronic data per the National Institute Standards and Technology (NIST) standards (www.csrc.nist.gov);
- ◆ Destruction or shredding of electronic media, paper, film or other hard copy media according to these NIST standards.

For example, a stolen laptop containing NIST-level encrypted PHI would not trigger a notification obligation, but one requiring merely a user name and password to log on would. Also, Business Associates facing a notification requirement would notify the Covered Entity, not the individual, of the breach.

2. There are three narrow exceptions where a breach does not require notification.

The burden of demonstrating that one of these exceptions applies falls on the Covered Entity, which must document that notification was not required.

- ◆ Unintentional acquisition, access, or use of PHI by workforce members acting under authority of a Covered Entity or Business Associate, if done in good faith and provided that the PHI is not further used or disclosed in any manner that violates the Privacy Rule.
- ◆ Inadvertent disclosures of PHI from a person authorized to access PHI at a Covered Entity or Business Associate to another person authorized to access PHI at the same Covered

Entity or Business Associate, provided the PHI is not further used or disclosed in any manner that violates the Privacy Rule.

- ◆ Unauthorized disclosures where the Covered Entity or Business Associate has good faith belief that the unauthorized person to whom PHI is disclosed would not reasonably have been able to retain the information.

3. If the breach does not pose a risk to the individual, there is not a requirement to notify them.

Be sure to change your privacy and security policies to include this risk analysis and document the risk determination for each breach that is not covered by the first two types of breaches discussed. A Breach is the “acquisition, use or disclosure of PHI in a manner not permitted under HIPAA’s Privacy Rule that compromised the security or privacy of the PHI.” Health and Human Services (HHS) recommends considering the following factors:

- ◆ Who impermissibly used the PHI or to whom was it impermissibly disclosed?
- ◆ What immediate steps were taken to mitigate the use or disclosure?
- ◆ Was the PHI returned prior to being accessed for an improper use?
- ◆ What type and amount of PHI was involved in the impermissible use or disclosure?

4. If there is a reportable breach, you must notify HHS and the individuals.

Individuals must be notified in writing (if you can find them), on your web site, and, if more than 500 individuals are impacted, through a prominent media outlet. Be sure to create, implement and maintain a breach notification plan before you need to use it. It should include keeping a log of all breaches, whether they require notification or not.

Contact HR Business Solutions for more information on HIPAA compliance.

EEOC — Inflexible Leave Plans and ADA

The Equal Employment Opportunity Commission (EEOC) is focusing on employers’ medical leave policies, charging that those policies that provide for the termination of an employee who has been out on leave for a specified amount of time violate the Americans with Disabilities Act (ADA) if they do not contemplate the possibility of a reasonable accommodation.

In September 2009, Sears, Roebuck and Company paid \$6.2 million in penalties associated with a consent decree to resolve a class action suit about their leave plan. The EEOC alleged that Sears violated the ADA by maintaining an “inflexible” workers’

compensation leave exhaustion policy, where Sears automatically terminated employees after 12 months of leave instead of making a case-by-case determination whether a reasonable accommodation might have allowed employees to return to work.

In addition to the significant monetary penalty, the three-year consent decree includes an injunction against violating the ADA and retaliation. Sears must provide written reports to the EEOC, train its employees regarding the ADA, and post a notice of the consent decree at all locations. It also requires Sears to amend its workers’ compensation policy by:

- ◆ Notifying affected employees of their right to request a reasonable accommodation at least 45 days before their leave expires; and
- ◆ Giving employees examples of reasonable accommodations, including part-time work, reassignment, and additional leave.

Sears did not admit any wrongdoing or liability and the consent decree did not address the legality of Sears’ policy. The EEOC’s Chicago office has recently filed federal suits against other employers with similarly “inflexible” or “arbitrary” 12-month leave policies, including United Parcel Service, SuperValu, Inc., and Jewel-Osco.

Employers Response to Health Reform... So Far

In September 2009, Towers Perrin published the results of their *Health Care Reform Pulse Survey*, reflecting the perspectives of mid-sized and large U.S. employers on pending health care reform. The poll found that 73% of employers expect health care costs to increase if health care reform legislation is passed. In general, employers say “they will not absorb any additional costs that result from health care reform and plan to reduce benefits, raise prices for customers and cut head count” to accomplish this financial goal. Companies are already struggling to manage rapidly escalating health care costs, which have risen more than 150 percent in the last ten years. Nearly all employers (89%) plan to re-examine their health benefit strategies for active employees in response to the passage of any health care legislation. Employers stated that they were “very likely” or “likely” to take the following actions to mitigate increased costs associated with health care reform:

Employer Actions	Percent
Reduce benefits	87%
Increase prices for customers	38%
Reduce employment	30%
Reduce salaries / direct compensation	27%
Accept reduced profits	11%
Other	6%

Additionally, as employers express their concerns about the legislation moving through Congress, most (80%) are closely monitoring

developments but have not been as outspoken as other stakeholder groups, relying instead on industry groups. The American Benefits Council, a national trade association, issued a statement expressing its concern about “certain key aspects” of the measure and the HR Policy Association, representing senior HR executives from large U.S. employers, see the measure as containing provisions that “would significantly raise the cost of employer-provided health care.” Many employers (65%) are concerned that reform fails to address some the fundamental drivers of health care costs, particularly changing consumer behaviors. Nearly half of survey participants have focused on this as their key cost-containment opportunity. There is continued concern about the “pay or play” mandate, with 47% believing it will hurt business and expect to respond by:

- ◆ Providing company-sponsored health coverage that substantially exceeds the standard (37%);
- ◆ Discontinuing company-sponsored health coverage and paying the assessment if the per-employee cost of payments to the federal government were substantially lower than their current costs (29%); and
- ◆ Providing company-sponsored health coverage at the minimum standard level (26%).

Even with these wide-ranging concerns, 53% of employers do see that research on effectiveness of alternative treatments will have a positive long-term impact on the quality of care available and 44% see the insurance market reform to ensure guaranteed access to coverage regardless of health status as a positive move.

Look for updates as Congress acts on this legislation.

DOL Backs Paid Sick Leave Mandate

Department of Labor officials told lawmakers recently that the Obama administration is a strong supporter of legislation that would require employers to provide paid sick leave to employees. In testimony before the Senate Health, Education, Labor and Pension Subcommittee on Children and Families, the Labor Department cited a Bureau of Labor Statistics report that found nearly 40 percent of private sector workers receive no paid sick leave.

Deputy Secretary of Labor Seth Harris argued that many sick workers go to work and many working parents send sick children to school because they have no paid sick leave. He said this can pose a threat to public health, the nation’s economic future and a social system that depends heavily on people

caring for themselves and their family members.

The DOL is backing legislation that would require employers to allow each employee to earn at least one hour of paid sick time for every 30 hours worked. Under the proposed Healthy Families Act, employers would be allowed to cap the amount of paid sick leave an employee can accrue at 56 hours per year. Of course, employers may adopt more generous sick leave policies.

Secretary of Labor, Hilda Solis, repeated the department’s commitment to making “good jobs for everyone” a reality and believes that workplace flexibility is critical to ensuring workers and families are healthy and safe.

DEFINED...

Delegate: To entrust to another or to appoint as one’s representative. Synonyms include designate, assign, or authorize.

Think about it—by definition, you can delegate authority, but not a task. When you delegate, you entrust a person to act as your representative.

Sources: Dictionary.com and Merriam-Webster.com

Identify Theft Red Flag Rules—Delayed Until June 2010

On October 30, the Federal Trade Commission (FTC) announced that it is delaying, for the third time, its enforcement of the Identity Theft Red Flag Rules until June 1, 2010. The Rule, which has been issued jointly by six federal agencies, requires financial institutions and creditors with “covered accounts” to implement written identity theft prevention programs designed to detect warning signs (“red flags”) of identity theft in their day-to-day operations and reduce the risk of it occurring. More information will be provided as the broad definitions are defined for appropriate utilization.



Hamilton Insurance Agency

4100 Monument Corner Drive
Suite 500

Fairfax, VA 22030

Phone: 800.275.6087

Fax: 703.359.8108

www.HamiltonInsurance.com

Marketing@HamiltonInsurance.com

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Editor: Elizabeth Martin

elizabeth@hrbsolutions.com

Contacts

Alan J. Zuccari
Joe Zuccari
Jackie Moyer

President & Chief Executive Officer
Chief Operating Officer
Director of Marketing & Communications

COMMERCIAL LINES

Keith Parnell
Ken Sze
Norwood McElveen
Patti Mauck
Rob Schumann
Geoff Shisler

kparnell@hamiltoninsurance.com
ksze@hamiltoninsurance.com
nmcelveen@hamiltoninsurance.com
pmauck@hamiltoninsurance.com
rschumann@hamiltoninsurance.com
gshisler@hamiltoninsurance.com

HEALTH & WELFARE BENEFITS

Dave Larson
Mary Ann Foster
Mike Ghanem
Greg Yost
Linda Skolnik

dlarson@hamiltoninsurance.com
mfoster@hamiltoninsurance.com
mghanem@hamiltoninsurance.com
gyost@hamiltoninsurance.com
lskolnik@hamiltoninsurance.com

PERSONAL LINES

Lani Evans

levans@hamiltoninsurance.com