



**BURNING
BENEFITS
NEWS**

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IN THIS ISSUE:

1. GROUP HEALTH PLANS MUST SELF-REPORT AND PAY EXCISE TAXES FOR CERTAIN PLAN OPERATIONAL FAILURES;

Required Actions:

- A. Tighten up plan administration related to certain federal laws.
- B. Correct any violations within 30 days of discovering.
- C. Self-report violations on Form 8928 and pay any excise taxes.

2. REGULATIONS ISSUED FOR THE MENTAL HEALTH PARITY AND ADDICTION EQUITY ACT OF 2008 (“MHPAEA”); AND

Required Actions:

- A. Review group health plan design and insurance contracts.
- B. Amend plan design/documents as necessary.
- C. Self-report violations on Form 8928 and pay any excise taxes.
- D. Governmental employers who wish to opt out of the parity rules should take timely action to do so.

3. COBRA PREMIUM SUBSIDY EXTENDED TO INVOLUNTARY TERMINATIONS OCCURRING THIS MONTH (MARCH 2010), PLUS NEW CATEGORY OF ELIGIBLE INDIVIDUALS.

Required Actions:

- A. Extend COBRA premium subsidy eligibility to individuals involuntarily terminated through the end of this month (March 2010).
- B. Identify newly eligible individuals (i.e., reduction of hours followed by involuntary termination of employment).
- C. Send updated COBRA notice and provide second enrollment opportunity.

THIS NEWSLETTER FOLLOWS SKA POLICY OF COMMUNICATING SIGNIFICANT BENEFITS DEVELOPMENTS. WE TRY TO SELECT ONLY THE MOST PRESSING ISSUES TO PASS ALONG. THIS IS ONLY A BRIEF SUMMARY OF THESE LAWS/REGULATIONS. PLEASE CONTACT YOUR SKA ATTORNEY TO FOLLOW UP.

DETAILED DISCUSSION FOLLOWS:

1. GROUP HEALTH PLANS MUST SELF-REPORT AND PAY EXCISE TAXES FOR CERTAIN PLAN OPERATIONAL FAILURES

Effective with plan years beginning on or after January 1, 2010, IRS final regulations require group health plan sponsors to self-report and to pay related excise taxes for plan operational failures related to the following federal requirements:

- COBRA;
- HIPAA;
- Genetic Information Nondiscrimination Act (GINA);
- Mental Health Parity and Addition Equity Act (MHPAEA);
- Michelle’s Law (coverage of dependent students on medically necessary leaves of absences);
- Newborns’ and Mothers’ Health Protection Act (minimum hospital stays); and
- Health savings account (HSA)/Archer MSA comparable employer contribution rules.

REQUIRED FILING

Generally, operational failures must be reported annually on IRS Form 8928 (“Return of Certain Excise Taxes”) and payment remitted on or before the employer’s income tax return filing due date. An extension to file income taxes does not extend the date for filing Form 8928. Form 8928 is required **even when no excise taxes are due**.

EXCISE TAXES, INTEREST AND PENALTIES

- **Excise Tax for Noncompliance.** The excise tax is generally **\$100 per individual per day** of noncompliance, or for Archer MSAs/HSAs, **35% of the amount contributed by the employer for all employees within a calendar year**.
- **Interest.** Interest is charged on excise taxes not paid by the due date (even if an extension of time to file is granted) and may also be charged on any penalties imposed.
- **Penalty for filing Form 8928 late.** A penalty of **5% of the unpaid excise tax** may be assessed for each month the form is late (up to a maximum of 25%).
- **Penalty for late payment of tax (with timely filing of Form 8928).** A penalty of **½ of 1% of the unpaid tax** may be assessed for each month the tax is not paid up to a maximum of 25%.

The IRS may waive all or part of the excise taxes if an employer exercising reasonable diligence would not have known a plan operational failure existed, if a failure was due to reasonable cause and certain corrective actions were taken within 30 days, or if the amount of tax is deemed to be excessive relative to the failure involved.

ACTIONS REQUIRED

- A. Tighten up plan administration.
- B. Correct any violations within 30 days of discovering.
- C. Self-report violations on Form 8928 and pay any excise taxes.

2. FINAL REGULATIONS ISSUED FOR THE MENTAL HEALTH PARITY AND ADDICTION EQUITY ACT OF 2008 (“MHPAEA”)

Effective January 1, 2010 (for calendar-year based plans), MHPAEA requires **health insurance issuers** and **group health plans** that offer any mental health or substance use disorder benefits to have “parity” between **medical/surgical benefits** and **mental health/substance use disorder benefits**. The accompanying regulations are effective January 1, 2011 (for calendar year plans). Good faith compliance is required for the current 2010 plan year.

MHPAEA does not require group health plans to provide mental health or substance use disorder benefits. However, if these benefits are provided, they must be provided "in parity" with medical/surgical benefits.

PARITY REQUIRED IN THREE DISTINCT AREAS

(1) Aggregate lifetime and annual dollar limits;

The original MHPA parity requirements for “aggregate lifetime and annual dollar limits” now also apply to substance use disorder benefits.

(2) Financial requirements; and

Financial requirements (such as copays and deductibles) cannot be more restrictive for mental health/substance use disorder benefits than the “**predominant**” financial requirements for “**substantially all**” medical/surgical benefits. Parity is required and the “Predominant/Substantially All” test is applied on a classification-by-classification basis. The regulations identify six (6) classifications: inpatient/in-network, inpatient/out-of-network, outpatient/in-network, outpatient/out-of-network, emergency care and prescription drugs.

(3) Treatment limitations.

Parity tests similar to those applicable to financial requirements also apply to treatment limitations. This pertains to both "Quantitative" limits (e.g., limit on number of visits) and "Nonquantitative" limits (e.g., medical management standards).

A plan cannot “carve out” mental health/substance use disorder benefits to get around the rules. Separate but equal is not permitted (i.e., separate deductible for medical/surgical benefits and mental health/substance use disorder benefits). ADA may prohibit plans from excluding benefits for a particular disability. States may mandate coverage for certain benefits for insured plans.

EXEMPTIONS /EXCEPTIONS TO THE PARITY RULES

MHPAEA does not apply to:

- Small employers who have between 2 and 50 employees;
- Group health plans which can demonstrate claims will increase by at least 2% in the first plan year and 1% thereafter; and
- Self-funded group health plans maintained by governmental employers other than the federal government. An opt-out election is required to be filed with CMS prior to the beginning of each plan year and written notice must be provided to participants.

ACTIONS REQUIRED

1. Review plan design and insurance contracts for compliance with regulations.
2. Amend plan design/documents as necessary.
3. Self-report violations on Form 8928 and pay any excise taxes.
4. Governmental employers who wish to opt out of the parity rules should take timely action to do so.

The Mental Health Parity regulations are unusually complex. We strongly suggest that you contact your SKA attorney on this issue. Also, your third party administrators and insurers will need to take action immediately in order to have sufficient lead time to comply with these complicated regulations.

3. COBRA PREMIUM SUBSIDY EXTENDED TO INVOLUNTARY TERMINATIONS OCCURRING DURING MARCH 2010, PLUS NEW CATEGORY OF ELIGIBLE INDIVIDUALS

On March 2, 2010, President Obama signed the Temporary Extension Act of 2010 (“TEA”). TEA extends the eligibility period for the COBRA premium subsidy to involuntary terminations occurring through March 31, 2010; expands the category of COBRA qualified beneficiaries eligible for the premium subsidy; and expands enforcement provisions for violation of the COBRA subsidy provisions.

BACKGROUND

The COBRA premium subsidy was initially available to those who were involuntarily terminated between September 1, 2008 and December 31, 2009, and was available for nine months. The Department of Defense Appropriations Act for Fiscal Year 2010 extended the program to involuntary terminations occurring through February 28, 2010 and increased the subsidy period from nine months to 15 months. *See our March 20, 2009, December 30, 2009 and January 11, 2010 newsletters for further details.* Contact your SKA attorney if you'd like to receive another copy of these.

ELIGIBILITY PERIOD EXTENDED TO MARCH 31, 2010

TEA extends the eligibility period to include involuntary terminations occurring through March 31, 2010. The maximum premium subsidy period remains at 15 months.

NEW GROUP OF ELIGIBLE INDIVIDUALS AND NOTICE REQUIREMENT

An individual whose COBRA qualifying event is a reduction of hours (e.g., transfer from full-time to part-time status) that occurs during the period September 1, 2008, through March 31, 2010, followed by an involuntary termination of employment that occurs during the period March 2 - 31, 2010, is now eligible for the premium subsidy on account of the involuntary termination of employment. (This is significant, because a reduction-in-hours COBRA event was not eligible for the COBRA premium subsidy.) An individual in this situation who did not elect

COBRA on account of the reduction in hours, or who elected COBRA coverage and then stopped making premium payments, will have a second opportunity to elect COBRA coverage and to receive the premium subsidy based on his or her termination of employment.

The 18-month COBRA continuation period runs from the date of the reduction in hours. The COBRA premium subsidy period begins with the date of the involuntary termination of employment. The qualified beneficiary does not have to retroactively elect and to pay for coverage for the period between the reduction in hours and the involuntary termination of employment.

Persons in this newly eligible group must be notified regarding the second opportunity to elect COBRA coverage within 60 days of the date of involuntary termination of employment.

MODEL COBRA NOTICES ARE AVAILABLE

The Department of Labor (“DOL”) created model notices to help plans and individuals comply with COBRA notice requirements including those recently added by TEA. Each model notice is designed for a particular group of qualified beneficiaries. The notices are available on the following internet website:

[HTTP://WWW.DOL.GOV/EBSA/COBRAMODELNOTICE.HTML](http://www.dol.gov/ebsa/cobramodelnotice.html)

PENALTIES

TEA authorizes the Department of Labor (“DOL”) or the Department of Health and Human Services (“HHS”) to assess a \$110 per day per person penalty against a plan sponsor for a violation of the COBRA subsidy requirements. TEA also includes expanded enforcement provisions, allowing the DOL, HHS or an affected individual to bring a civil action for violation of the COBRA subsidy requirements.

ACTIONS REQUIRED

- Extend COBRA premium subsidy eligibility to individuals involuntarily terminated by March 31, 2010.
- Update (future) COBRA notices.
- Identify newly eligible individuals (reduction in hours followed by termination of employment); send updated COBRA notice and provide second enrollment opportunity.

Burning Benefits News is a communication designed to provide timely information regarding current employee benefits issues. It does not constitute legal advice, as we must address your specific facts in rendering legal opinions. As required by tax regulations, any tax information contained in the communication is not intended to be and cannot be used for the purpose of avoiding tax penalties.