



60-Day Advance Notice of Plan Changes: Effective Date Issues

Client Bulletin Provided by HUB International

June 7, 2010

Overview of Effective Date “Controversy”

Under a provision in the new federal health reform law, a plan sponsor must provide persons covered by the plan with notice of modifications at least 60 days prior to the date the change becomes effective. There has been some confusion regarding the effective date of this provision. While the new law provides specific deadlines for many similar rules, this provision lacks an explicit effective date. Knowing the exact date is not crucial at this time, however, as discussed below. It is important to note that the first renewals affected by the new rule and requiring a 60-day advance notice of changes will be October 1, 2011 renewals. Even that advance disclosure obligation is more than 12 months away. Plans with later plan years will have even longer to comply, until later in 2011 through the fall of 2012.

While this discussion focuses on the first renewal, be aware that once the law is effective for a plan, any mid-year changes after that date also will be subject to the prior disclosure rule, even before that first renewal.

Possible Effective Dates & Conservative Approach to Compliance

Two possible effective dates might apply to this notice provision, either:

1. The effective date for the mini plan summary, described in related sections of the law, taking effect for plan years starting in April 2012, or
2. The effective date that serves as the effective date for other legal requirements in the surrounding sections, taking effect for plan years on or after October 1, 2010.

Under statutory construction concepts applied by attorneys interpreting a new law, if Congress had intended the April 2012 deadline to apply, they likely would have referred to that deadline in the same paragraph, as they did for the related rules on the mini plan summary. This analysis would suggest Congress intended use of the default effective date – that date which applies to all other provisions of health reform where no effective date is stated, resulting in an effective date of the first plan year on or after October 1, 2010. The most conservative date to select, which allows plan sponsors to be most prepared, is the earlier date: for plan years on or after October 1, 2010. On the other hand, perhaps Congress simply neglected to include a reference to the April 2012 effective date in the paragraph on the 60-day advance notice. Congress allowed similar errors in other sections of the new law, such as for the rule on automatic enrollment (which is presumed by most attorneys to be 2014). That later effective date may be correct, but we will not know for certain without additional federal agency guidance. The later effective date does work in a carrier’s favor, of course, and, while we would like the effective date to be delayed, it simply is not clear at this time which date applies.

For purposes of this discussion, we assume the renewal date is the same as the group health plan's plan year, and use those terms interchangeably.

When Do Plan Sponsors Need to Worry About Prior Disclosure of Plan Changes?

Regardless of which date is selected by the agency as its interpretation and as its enforcement position, the new rule will not affect a group health plan at its next renewal. Remember, the provision becomes effective at that renewal -- it would not be effective 60 days prior to that renewal, thus not requiring prior notice. Since the law does not become effective (at the earliest) until the plan's next plan year on or after October 1, 2010, the 60-day advance notice rule simply cannot apply to a plan before that date.

Examples:

- For an October 1 plan year, the provision becomes effective as of October 1, 2010, and so it is not effective for that particular plan in early August 2010 (60 days prior to October 1, 2010). The plan sponsor will not need to issue a 60-day advance notice for any changes at that 2010 renewal. However, if changes are made during the plan year after the rule takes effect, the plan will then have to issue a 60-day advance notice.
- For the next following renewal, on October 1, 2011, the plan would have to issue the 60-day advance notice in early August 2011 if there are any changes.
- For a January 1 plan year, the provision becomes effective as of January 1, 2011, and so it is not effective for that particular plan in early November 2010 (60 days prior to January 1, 2011). Advance notice will not be required for any changes at that 2011 renewal. However, if changes are made during the plan year after the rule takes effect, the plan will then have to issue a 60-day advance notice).
- For the next following renewal, on January 1, 2012, the plan will need to issue the 60-day advance notice in early November 2011 if there are any changes.

If a plan cannot issue a required 60-day advance notice of changes due to timing, the plan sponsor should delay the effective date of those changes until the 60-day notice has been given. Not only would a court not treat the plan changes as valid, but also the new law subjects the plan sponsor to a \$1,000 per enrollee penalty.

Conclusion

Given the delay in the application of the new law, under either interpretation of the effective date, plan sponsors have some time to await agency guidance. Hub International's Legal Compliance Service will be monitoring this issue closely and once it is effective, your Hub professionals will work closely with carriers and state insurance regulators to make sure renewals are provided in a timely manner.