MARCH 2009

# COMPLIANCE CHRONICLES

## Michelle's Law Update

Effective for plan years starting on or after October 9, 2009, a new federal law requires almost all group health plans to extend dependent coverage when a college student otherwise would lose eligibility because of a medically necessary leave of absence. Under the new law, dependent coverage during student medical leave must continue for up to a year, unless the child's eligibility ends earlier for another reason. Further, that dependent will still be entitled to a full 36 months of COBRA eligibility should he or she be unable to return to school on a full time basis.

For calendar year plans, this change will occur beginning January 1, 2010.

You can read the full text of Michelle's Law here: **http://tinyurl.com/bksk9k**

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MICHELLE'S LAW
Dedicated to Health Insurance for College Students
www.michelleslaw.com

### Frequently Asked Questions

**Under Michelle's Law...**

***Q:*** Who is covered by Michelle's Law?

***A:*** Seriously ill or injured full-time college students are covered, if their physician provides written documentation supporting the need for the medical leave. To be eligible, a student must already have been covered by the parent's health insurance policy.

***Q:*** How long is a student covered under the law?

***A:*** Students are able to take up to 12 months medical leave of absence without a reduction in their health care coverage and/or a COBRA premium.

*(Excerpt reprinted with permission of Annmarie Morse.)*

## Deadlines & Topics Discussed in this Issue

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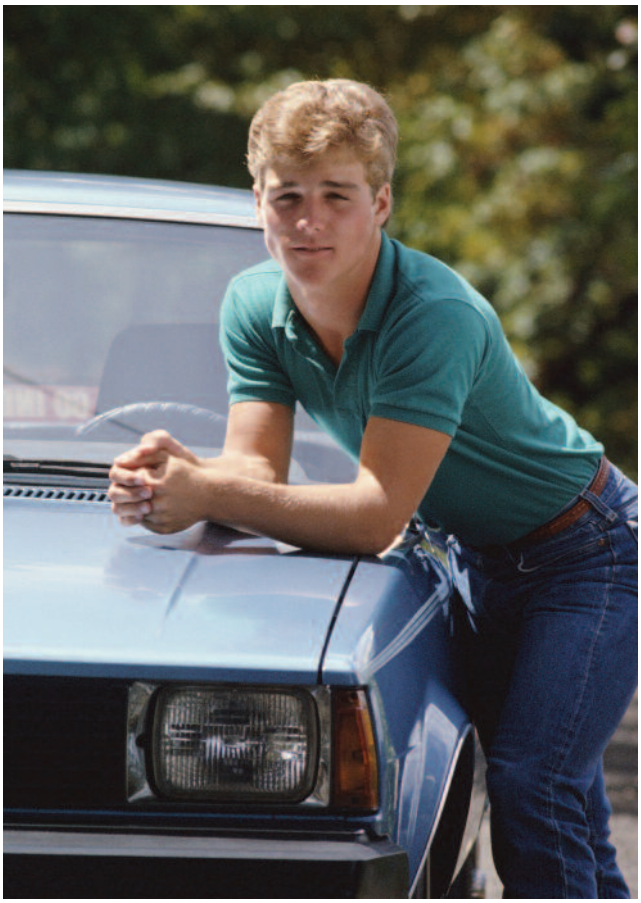
** If the Model Annual Notices are available sooner, then requirement to distribute them will begin with the first plan year after the Model notices are available.*

# Sick Dependent Students Lose Health Insurance Coverage - New Law Amends ERISA *(Effective 10/9/09)*

*continued from page 1*

**Situation:** 19-year-old dependent of an ABC Company employee is a registered full-time student and continues coverage under the plan as an eligible dependent. A month later, that student has a terrible car accident (or a serious illness) and is unable to continue her schooling. As such, she has lost eligibility under the plan and will be offered COBRA coverage for 36 months. COBRA rates vary greatly depending upon plan type. This cost would most likely be paid by the ABC Company employee who may already be paying a family rate for all other eligible family members.

**Discussion:** In New Hampshire, a family faced a similar situation when their daughter, Michelle Morse, became seriously ill. Michelle was a student at Plymouth State University when she was diagnosed with colon cancer (December 2003). Although her doctor suggested she take a leave of absence from school, Michelle maintained a full course schedule in order to keep her health insurance coverage. Despite her diagnosis, she stayed in school for the next four semesters. In 2005, she went to school in September and October and then passed away in November. (She attended classes while connected to a portable chemotherapy pump). In June of 2006, NH Governor John Lynch signed "Michelle's Law" to ensure that seriously ill college students can continue to receive health care insurance through their family's health insurance policy even if they are unable to maintain their full-time student status. That law applies to fully insured medical plans written in New Hampshire.



**United States Congress:** Michelle's Law was introduced in the U.S. Senate on January 25, 2007. This significant bill sought to amend ERISA and impose this requirement upon all self-funded health plans.

**Suggestion should an employer wish to implement these provisions before they become law on October 9, 2009:** Michelle's Law is effective for plan years starting on or after October 9, 2009. For calendar year plans, changes to your plan occur beginning January 1, 2010. Write up the plan specifications (very similar to Michelle's Law), seek reinsurance approval and have the amended specifications written into the SPD (Summary Plan Description), plan document and carrier certificate booklet. Suggested specifications would include:

1. Michelle's Law allows full-time college students to take up to 12 months of medical leave.
2. Michelle's Law applies to students who are already covered under their parent's health insurance plan.
3. "Medical leave" can mean that the student is absent from school or reduces his/her course load to part-time (to focus on getting well).
4. The date the "Medical leave" begins is determined by a student's physician.
5. The period of "Medical leave" does not affect the student's right to elect a full 36 month COBRA period should they not be able to return to school on a full-time basis at the end of their "Medical leave."

Please contact your Account Manager or Sales Executive should you wish to discuss this further.

# CHIP Reauthorization Act Expands Special Enrollment Rights

President Obama signed into law the Children's Health Insurance Program Reauthorization Act of 2009 (the "CHIP Reauthorization Act") on February 4, 2009.

The State Children's Health Insurance Program ("SCHIP") provides monies to the states to help provide health coverage to uninsured children who are not entitled to Medicaid. The Act makes it easier for states to provide SCHIP coverage by giving financial assistance to individuals to obtain coverage under employer-sponsored group health plans. It also allows states to provide similar financial assistance to individuals under age 19 who are entitled to Medicaid. The Act will require employer-sponsored group health plans to provide new special enrollment periods for eligible individuals and to make additional disclosures to participants and the states in which they operate.

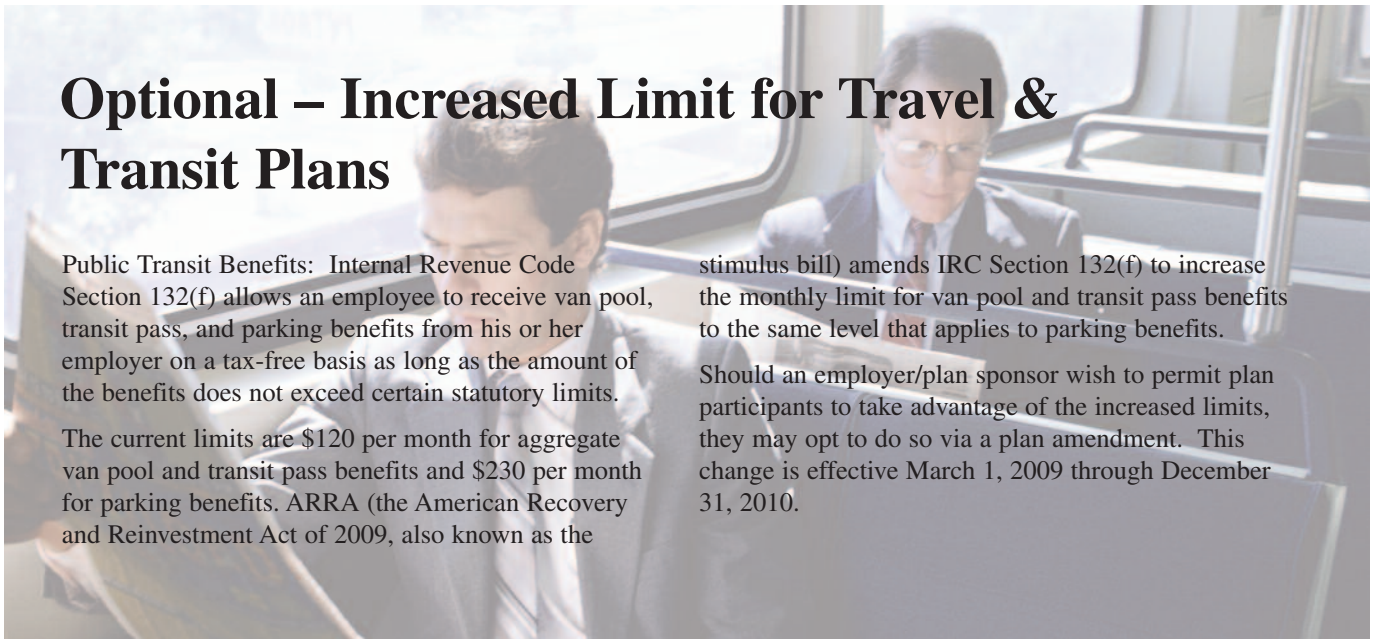
A. **Effective April 1, 2009:** The Act requires group health plans to permit eligible employees and their dependents who are eligible for coverage, but not enrolled, to enroll outside the usual enrollment period if they request coverage within sixty (60) days after:

   1. becoming ineligible for coverage under a Medicaid or SCHIP plan; or
   2. being determined to be eligible for financial assistance under a Medicaid or SCHIP plan with respect to coverage under the plan.

B. Additional Annual Notices will be required beginning with the first plan year after the Model Notices are issued (by February 4, 2010). The Act also requires an employer to annually notify employees of any premium assistance that is available to them under a Medicaid or SCHIP plan with respect to coverage under the employer's group health plan. Also, should the state request plan information, the plan administrators must disclose enough information to the state about benefits under the plan for the state to determine whether it would be cost effective to provide premium assistance with respect to coverage under the plan, and to enable the state to provide any required supplemental benefits.

   Model Notices must be issued (by the DOL – Dept. of Labor and HHS-Dept. of Health and Human Services) by February 4, 2010. Employers will have to provide the initial annual notices to their employees beginning with the first plan year after the model notices are issued. [For calendar year plans: starting January 1, 2011.]

**Penalty for Non-Compliance.** Employers will face penalties of up to $100 a day for failure to comply with the notice and disclosure requirements of the Act. The $100 penalty applies for each violation per participant or beneficiary.



# Optional – Increased Limit for Travel & Transit Plans

Public Transit Benefits: Internal Revenue Code Section 132(f) allows an employee to receive van pool, transit pass, and parking benefits from his or her employer on a tax-free basis as long as the amount of the benefits does not exceed certain statutory limits.

The current limits are $120 per month for aggregate van pool and transit pass benefits and $230 per month for parking benefits. ARRA (the American Recovery and Reinvestment Act of 2009, also known as the stimulus bill) amends IRC Section 132(f) to increase the monthly limit for van pool and transit pass benefits to the same level that applies to parking benefits.

Should an employer/plan sponsor wish to permit plan participants to take advantage of the increased limits, they may opt to do so via a plan amendment. This change is effective March 1, 2009 through December 31, 2010.

# Mental Health Parity & Addiction Equity – the First Stimulus Bill

While there has been a great deal of focus on ARRA (the American Recovery & Reinvestment Act of 2009), and the $700 billion bailout of the financial industry, another law may have an even more significant impact on group health plans.

Deep within the Emergency Economic Stabilization Act, which was signed by President Bush on October 3, 2008, was the Paul Wellstone and Peter Domenici Mental Health Parity and Addiction Equity Act of 2008 (the "Act", P.L. 110-343). The Act seeks to correct the imbalance between the benefits afforded mental health and substance abuse disorders under group health plans and general medical and surgical benefits typically afforded under such plans. According to a report issued by the U.S. Government Accountability Office, the imbalance between the two is not insignificant. The report shows that 87 percent of the surveyed employers had a limit on mental health benefits lower than what is offered for other medical/surgical benefits. According to the National Institute of Mental Health, an estimated 26.2 percent of Americans 18 and older, or about 1 in 4 adults suffer from a diagnosable mental disorder in a given year. An imbalance in these benefits has wide-ranging impact. Alcoholism, depression, autism, schizophrenia, eating disorders and drug abuse will receive coverage on par with heart surgery, high-blood pressure treatment and diabetes.

## Not a mandate

The Act does not require group health plans to offer mental health or substance abuse disorder benefits. There is no mandate. However, the Act provides that group health plans that choose to offer such benefits must do so in parity with medical/surgical benefits.

Specifically, the Act provides that financial requirements and treatment limitations applicable to mental health/substance abuse must be the same. For example:

- deductibles;
- copayments;
- coinsurance;
- out-of-pocket expenses;
- frequency of treatment;
- number of visits;
- days of coverage;
- out-of-network providers
- or other similar limits on scope/duration of treatment;

can be no more restrictive than the requirements applied to medical/surgical benefit covered by the plan. The Act also precludes separate treatment limitations that are applicable only with respect to mental health or substance abuse disorder benefits.

## State Mandates not displaced

Although the Act creates a federal parity requirement, it does not serve to displace state laws containing stronger parity protections. Thus, plans must comply with their state's parity and protection measures if they provide greater protection than the Act.

## Cost Exemption

Employers that find compliance with the Act to be too costly will have the ability to opt out, although they may find the "opt out process" to be a cost as well. If a group health plan can show that the total costs of coverage (associated with mental health/substance abuse) increased by 2% during the first year of the Act's applicability, or 1% during each subsequent year, then the group plan can opt out. A qualified and licensed actuary (who is a member in good standing of the American Academy of Actuaries) must certify the increase in actual costs under a plan. However, a plan cannot claim this exemption until the plan has complied with the Act's requirements for a least the first 6 months of the plan year.

## Effective Date

Beginning with the first plan year after 10/03/2009, group health plans must comply. For calendar year plans, you will need to comply with the Act as of January 1, 2010.

## Regulations Pending

Before 10/03/2009 is here, regulations, specifications and clarifications are due from the DOL, HHS and Treasury. Their regulations must be issued no later than one year after enactment.

## Medical Need

Plan Administrators must be prepared to make the criteria for "medical necessity" determinations available, upon request, to any current or potential participant, beneficiary or service provider. Further, the reason for any coverage denial (under the plan for mental health/substance abuse) must also be made available. Plan Administrators can expect to receive such requests from out-of-network providers, participating spouses and the like.

## Links

Full law-Federal Register link (shortened): http://tinyurl.com/cszuou
Mental Health begins on page 117-129 of 169 [in the electronic file, pages 3881-3893].

APA - American Psychological Association Practice Organization's 5 Page Q&A
http://tinyurl.com/6owq2t

# Update - Genetic Information Nondiscrimination Act

You may recall reading about GINA in our May 2007 Compliance Chronicle when it was a bill ripe for passage, and again in July 2008 when Congress passed it and President Bush signed it.

GINA bans insurers (and others) from basing health care coverage on genetic information. GINA prohibits group health plans or issuers of individual health care policies from basing eligibility determinations or adjusting premiums or contributions on the basis of genetic information. The law bans health plans and insurers from requesting, requiring or purchasing the results of genetic tests and from disclosing genetic information.

The law prohibits employers from firing, refusing to hire or otherwise discriminating against workers with respect to compensation and other terms of employment on the basis of genetic information. Like insurers, employers are banned from requesting, requiring or buying genetic information.

While additional guidance is still expected from the Department of Labor (related to fines/penalties) and from the Department of Health and Human Services (related to additional privacy measures under GINA), we now have guidance from the EEOC (the Equal Employment Opportunity Commission). Title II prohibits the use of genetic information in employment, prohibits the intentional acquisition of genetic information about applicants and employees, and imposes strict confidentiality requirements.

GINA requires the Equal Employment Opportunity Commission (EEOC) to issue regulations implementing Title II of the Act by May 21, 2009 (one year after the law's enactment). The EEOC's proposed rules to implement Title II of GINA were released on March 2, 2009.

## Terms Clarified

Some of the terms used in the Act have been made more tangible by virtue of this new guidance. For example, the regulations define "employee" to cover not just current employees but also applicants and former employees. The proposed regulations define "genetic information" as information from genetic tests, the genetic tests of family members, family medical history, and genetic information of a fetus carried by an individual or an individual's family member receiving assistive reproductive services. The proposed regulations also clarify that drug and alcohol tests are not "genetic tests."

## Six Exceptions

GINA provides six exceptions to the statutory sections prohibiting employers from acquiring genetic information. The proposed regulation addresses each of the exceptions, which are:

(1) where the employer inadvertently obtains genetic information (sometimes referred to as the "water cooler" exception);

(2) where the employer offers qualifying health or genetic services, including such services offered as part of a voluntary wellness program;

(3) where the employer requests family medical history to comply with the certification provisions of the Family and Medical Leave Act (FMLA) or state or local family and medical leave laws;

(4) where the employer acquires genetic information from documents that are commercially and publicly available, including print and Internet publications, except that an employer may not research medical databases or court records for the purpose of obtaining genetic information about an individual;

(5) where the employer acquires genetic information for use in the genetic monitoring of the biological effects of toxic substances in the workplace, provided that the employer complies with monitoring restrictions provided in the proposed regulation; and

(6) where an employer that conducts DNA analysis for law enforcement purposes requires genetic information of its employees, apprentices, or trainees for quality control purposes to detect sample contamination.

The EEOC, with the proposed rule, is seeking comments on three of these exceptions: (1) what constitutes "voluntary" with respect to the employer-provided wellness program exception; (2) what should be included in the "commercially and publicly available" exception, particularly with respect to blogs and social networking sites; and (3) how the law enforcement exception should be applied.

## Retaliation is still on the EEOC's radar.

First, for any individual that files a charge of discrimination, or gives testimony in connection with a charge (allegations about acts made unlawful by GINA), the proposed regulations remind employers that the statutory prohibition against retaliation remain. Second, the proposed regulations make it clear that employers may not "limit, segregate, or classify" employees because of genetic information. Third, Title II limits an employer's ability to obtain genetic information after making a job offer. So, even though the ADA (Americans with Disabilities Act) currently allows an employer to obtain family medical history of employees to whom it has offer a particular job, such action will be prohibited upon GINA's effective date.