

# Kinloch Consulting Group

## Legislative Alert



### Summary of Key Federal Employee Benefits Legislation

The following summary provides highlights of benefit-related legislation that has been recently enacted or whose requirements are forthcoming. This summary is based on Kinloch's understanding of the legislation as of March 6, 2009, and may be subject to change as new guidance or analysis is issued. In addition, this is not a complete description of the following legislative acts, but an overview of key points. Please contact your Kinloch consultant for more information.

Legislation	Highlights	Effective Date
<b>Centers for Medicare and Medicaid Services (CMS) - Mandatory Insurer Reporting Law</b>	<p>Part of the Medicare, Medicaid and SCHIP Extension Act of 2007, this reporting mandate requires that responsible reporting entities (RREs) – e.g., health insurance carriers and third party administrators – provide quarterly electronic reporting on all active covered individuals for purposes of coordination of benefits between group health plans and Medicare. Specifically, social security number (SSN) and/or Medicare Health Insurance Claim Number (HICN) for covered employees and their dependents must be reported.</p> <p><b>Next Steps: Although the actual reporting will not likely be an employer's responsibility, health plans may be asking for the employer's assistance in collecting employee and/or dependent SSN or HICN.</b></p>	<p>Generally January 1, 2009, except:</p> <p>Reporting for dependent SSN/HICN is due in the Q1 2010 file submission</p>
<b>Emergency Economic Stabilization Act of 2008 – Amends Section 132(f) to Include Qualified Bicycle Commuting Benefits</b>	<p>Section 132(f) of the Internal Revenue Code allows employers to provide pre-tax benefits for qualified transportation expenses. This amendment added bicycle commuting benefits to the list of tax-favored fringe benefits. The maximum annual reimbursement equals \$20 multiplied by the number of "qualified bicycle commuting months" during the calendar year. These are months when the employee uses the bicycle regularly to commute to their job AND does not receive other qualified transportation benefits such as transit pass or parking. The employer can reimburse the employee's expenses for the purchase, improvement, repair and/or storage of the bicycle if it is used regularly for commuting to work (<i>note: this benefit cannot be funded with employee pre-tax compensation reductions</i>). There is a 15-month period for reimbursement, beginning on the first day of the calendar year.</p> <p><b>Next Steps: If the employer decides to offer this benefit, determine how and when the reimbursement will be administered.</b></p>	<p>Taxable years beginning in 2009</p>

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<b>Family and Medical Leave Act – revised regulations</b>	<p>Published on November 17, 2008, this represents the first set of revisions to the Family and Medical Leave Act of 1993 (FMLA). New regulations incorporate and clarify two new types of military leave (Qualifying Exigency Leave and Covered Servicemember Leave) and modify and clarify many other FMLA provisions. The Department of Labor issued revised FMLA forms and new forms that can be used for the military leaves.</p> <p><b>Next Steps: Ensure that FMLA policies, notices and procedures have been updated appropriately. For more information visit <a href="http://www.dol.gov/esa/whd/fmla/">http://www.dol.gov/esa/whd/fmla/</a></b></p>	January 16, 2009
<b>American Recovery and Reinvestment Act of 2009 (ARRA) – COBRA Subsidy</b>	<p>Provides for government-subsidized COBRA continuation coverage for an Assistance Eligible Individual (AEI). The subsidy is available for AEIs who were involuntarily terminated between the dates of September 1, 2008 and December 31, 2009, and may last for up to 9 months. The subsidy is equal to 65% of the AEI's cost for COBRA coverage for all elected group health plans (except for health care FSA). Income thresholds apply; it is not the employer's responsibility to determine income level eligibility. The 65% subsidy will be administered via a credit against the employer's federal payroll taxes (employee/employer FICA and wage withholding, but not FUTA). The subsidy can only be claimed upon receipt of the AEI's 35% payment. The IRS has issued an updated Form 941 incorporating the subsidy reporting.</p> <p>Individuals who qualify as AEIs but are not covered under COBRA as of February 17, 2009 must be given a second enrollment opportunity. If subsidized coverage is elected, the subsidy is <u>prospective</u> only. The COBRA maximum period will run from the original date of involuntary termination.</p> <p>Subsidized coverage can end earlier than the 9 month maximum period if the individual becomes eligible for other group health plan or Medicare coverage that is not standalone dental or vision, EAP, health care FSA or an on-site medical clinic (note: they do not have to be enrolled in, but merely eligible for other coverage). AEIs are required to notify the plan if they become eligible for other coverage or face a 110% penalty on premium subsidies received when ineligible.</p> <p>AEIs must be notified of their right to subsidized coverage or of their second enrollment opportunity, if applicable. In addition, all COBRA-eligibles must be notified about the availability of the subsidized coverage. The Department of Labor has not yet issued model notices.</p> <p><b>Next Steps: Coordinate with your COBRA administrator (if outsourced) and watch for the model notices to be issued, they are due by mid-March. Notices will generally need</b></p>	<p><u>Government Subsidy:</u> available for periods of coverage on or after February 17, 2009 (for most plans this will be March 1, 2009)</p> <p><u>DOL Issuance of Model Notices:</u> March 18, 2009</p> <p><u>Notice of subsidy to AEIs:</u> generally, April 18, 2009</p> <p><u>Notice of subsidy availability to all COBRA-eligibles:</u> due date is unclear; current notices should be updated upon issuance of model notices</p>

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	<p>to be issued by April 18. Check policies for company subsidies (e.g., severance) – the employer can only take the subsidy credit for 65% of the AEI's cost. If a severance arrangement includes 100% employer-subsidized COBRA for a period of time for an AEI, no governmental subsidy applies during that time. Ensure that the payroll department is aware of the new Form 941 and the process for the subsidy credit. There are many unclear areas in this new legislation and additional governmental guidance would be welcome. For more information, visit the IRS and DOL websites:  <a href="http://www.irs.gov/newsroom/article/0,,id=204505,00.html">http://www.irs.gov/newsroom/article/0,,id=204505,00.html</a>  <a href="http://www.dol.gov/ebsa/cobra.html">http://www.dol.gov/ebsa/cobra.html</a></p>	
<p><b>American Recovery and Reinvestment Act of 2009 (ARRA) - Health Information Technology for Economic and Clinical Health Act (HITECH)</b></p>	<p>Enacted as part of the ARRA, HITECH expands the privacy and security provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).</p> <p>Previously, HIPAA was only applicable to “covered entities” (i.e., health plans, health care providers and health care clearinghouses) and not to “business associates” of covered entities. HITECH makes HIPAA’s privacy and security rules applicable to business associates as well, requiring updates to all business associate agreements.</p> <p>It also sets a floor for notification requirements (applicable to covered entities and business associates) in the event of a security breach of unsecured protected health information. Interim final regulations regarding the notification requirements are required no later than 180 days after enactment and the requirements will apply for security breaches discovered 30 days or more following the publication date of the interim regulations.</p> <p>HITECH expands the enforcement provisions and penalties applicable to HIPAA violations and tiers penalties based on “intent.” The increased penalties are effective for any violation on or after February 17, 2009. In addition, state Attorneys General will be allowed to bring civil actions in federal court against an individual if the violation is deemed to pose a threat to or harms a resident of that state.</p> <p>Other changes include the requirement that if a covered entity maintains an electronic health record with protected health information, an individual can request a copy of the record in electronic format. Also, an individual will be able to prohibit their health care provider from disclosing protected health information to their health plan if the individual pays for the services/supplies in full out-of-pocket.</p> <p><b>Next Steps: Watch for further guidance and review business associate agreements and policies.</b></p>	<p><u>Most provisions</u> are effective on February 17, 2010, with some exceptions:</p> <p><u>New enforcement provisions and increased penalties</u> are effective February 17, 2009</p> <p>Guidance on <u>unsecured protected health information</u> is due by April 18, 2009</p> <p><u>Interim final regulations regarding notification requirements</u> are due by August 16, 2009</p>

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<b>American Recovery and Reinvestment Act of 2009 (ARRA) – Qualified Transportation</b>	<p>The ARRA temporarily increased the maximum allowable monthly pre-tax election for Qualified Transit/Vanpool expenses from \$120/month to \$230/month (equal to the current monthly maximum for Qualified Parking expenses) through December 31, 2010.</p> <p><b>Next Steps: If Qualified Transportation benefits are provided, you may allow Qualified Transit/Vanpool participants to increase their contribution up to the new maximum. If employer-subsidized, may increase employer subsidy to new maximum. Update any plan documentation / communication materials with the revised maximum, if applicable.</b></p>	<p>March 1, 2009 (through December 31, 2010)</p>
<b>Children’s Health Insurance Program Reauthorization Act of 2009 (CHIP)</b>	<p>Continues funding for the existing State Children’s Health Insurance Program and modifies various provisions of the program, now known as “CHIP.” The Act allows states to offer premium assistance to low-income children for coverage under qualified employer-sponsored coverage (<i>note: this does not include health care flexible spending accounts or high deductible health plans</i>). An employer can opt out of receiving a direct subsidy from the state and require that the state pay the premium assistance to the employee directly.</p> <p>In addition, the following changes may impact employers:</p> <p><u>Special Enrollment Rights.</u> A group health plan must allow an employee or dependent who is eligible – but not enrolled – to enroll in the plan in two (2) circumstances.</p> <ul style="list-style-type: none"> <li>- Employee/dependent is covered under a Medicaid or CHIP plan and such coverage ends due to loss of eligibility for the coverage. The enrollment request must be made no more than 60 days after the date the Medicaid/CHIP coverage is terminated.</li> <li>- Employee/dependent becomes eligible for a premium assistance subsidy from the state, with regard to the employer’s group health plan. The enrollment request must be made no more than 60 days after the date the individual is determined eligible for premium assistance.</li> </ul> <p><u>Notification Requirements.</u> Employers who maintain a group health plan in a state that offers Medicaid/CHIP premium assistance will be required to provide a written notice to employees residing in that state informing them of the availability of the assistance. National and state-specific model notices will be developed by federal/state agencies no later than February 17, 2010. These notifications can be delivered in conjunction with materials notifying the employee of their eligibility for the group health plan, open enrollment materials or the plan’s summary plan description.</p>	<p>Although not clear in the law, it appears that <u>Special Enrollment Rights</u> are effective April 1, 2009</p> <p><u>Employer Notification Requirements</u> are effective on the first day of the plan year following the date when model notices are issued (model notices are due by February 17, 2010, which would mean a January 1, 2011 effective date for calendar year plans)</p> <p><u>Employer Reporting Requirements</u> are effective once model disclosure forms are developed and regulations issued (no date yet)</p>

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	<p><b>Reporting Requirements.</b> Group health plan administrators will be required to disclose detailed information about the plan's benefits and costs if requested by a state government that also covers the plan's employee/dependent under that state's Medicaid/CHIP program. This information can only be requested once regulations and model disclosure forms are issued.</p> <p>Violation of the Children's Health Insurance Program Reauthorization Act's provisions can result in excise taxes and/or civil penalties.</p> <p><b>Next Steps: Plans must already comply with HIPAA's special enrollment requirements. Plans should amend their documentation/procedures/communications to expand those special enrollment rights to include the Medicaid/CHIP enrollment opportunities. Note that HIPAA's special enrollment rights allow a 30-day window for requesting the enrollment; however, the CHIP provisions require a 60-day window for requesting enrollment.</b></p> <p><b>Further action will not be required until the applicable federal and state agencies provide additional guidance on the notices and disclosure requirements.</b></p>	
<p><b>Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (part of the Emergency Economic Stabilization Act of 2008)</b></p>	<p>Makes the Mental Health Parity Act permanent and expands the parameters of the current Act. There is still no requirement that a plan offer mental health or substance abuse benefits. However, the following requirements apply for any plan (insured or self-insured) that does offer mental health benefits:</p> <ul style="list-style-type: none"> <li>- Parity provisions must apply to mental health AND substance abuse benefits</li> <li>- Mental health and substance abuse benefits must be equivalent to benefits available for substantially all other covered medical/surgical benefits. Plans can no longer have different mental health/substance abuse deductibles, copayments, coinsurance, out-of-pocket limits or visit/day limits. <i>(Note: it is acceptable to either increase the level of mental health/substance abuse benefits to match medical/surgical benefits OR to decrease the level of medical/surgical benefits to match the mental health/substance abuse benefits.)</i></li> <li>- If out-of-network coverage is available for medical/surgical benefits, then out-of-network coverage must be available for mental health/substance abuse benefits.</li> </ul> <p><b>Next Steps: Evaluate mental health / substance abuse benefit provisions in anticipation of compliance date.</b></p>	<p>Plan years beginning on or after October 3, 2009 (for calendar year plans, January 1, 2010)</p>

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<p><b>Michelle’s Law</b></p>	<p>Allows the continuation of health insurance coverage for up to one year for full-time college students in the event of a medically necessary leave of absence. The leave must be certified in writing by the student’s physician and the certification must be provided to the health plan. Coverage can end earlier than the one year extension if coverage would otherwise end under the plan (e.g., the employee’s coverage is terminated). The health plan must include a description of the terms under which coverage could continue as well as a notice describing the certification requirement.</p> <p>Outstanding questions: Who pays for the cost of coverage – the employer or the employee? How does Michelle’s Law interact with COBRA – does the extension run concurrently with COBRA or is COBRA offered when the extension period ends?</p> <p><b>Next Steps: Additional guidance is hoped for as the effective date gets closer. Plans that offer dependent coverage contingent on student status may need to update eligibility language in their plan documents and summary plan descriptions, as well as in other communication materials (including student status certifications).</b></p>	<p>Plan years beginning on or after October 9, 2009 (for calendar year plans, January 1, 2010)</p>
<p><b>Genetic Information and Non-Discrimination Act (GINA)</b></p>	<p>Signed into law on May 21, 2008, GINA prohibits health plans and employers from discriminating against individuals based on their genetic information or that of their family members. GINA restricts group health plans and employers from requesting, requiring or purchasing genetic information, with limited exceptions.</p> <p>Title I of GINA, applicable to group health plans, restricts health plans from using genetic information in underwriting policies and setting rates. Title II of GINA, applicable to employers, employment agencies, labor organizations and joint labor-management committees, makes it an “unlawful employment practice” for any of the entities subject to Title II to take discriminatory employment actions against an individual based on genetic information.</p> <p><b>Next Steps: Watch for additional guidance in the form of final regulations and evaluate employment practices in anticipation of the November 2009 Title II effective date.</b></p>	<p>Title I is effective May 21, 2009</p> <p>Title II (employers) is effective November 21, 2009</p> <p>Proposed regulations were recently published by the EEOC (final regulations are required by May 21, 2009)</p>

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