

HEALTH and WELFARE PLAN CHECK-UP

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CAPLAW Seminar



A Legislative Update

- American Recovery and Reinvestment Act of 2009
 - COBRA
 - HIPAA
- Michelle's Law
- Cafeteria Plan Proposed Regulations
- Dependent Care Spending Account Final Regulations
- Children's Health Insurance Program Reauthorization Act of 2009 ("CHIPRA")
- State Insurance Law: Definition of Dependent New
- Domestic Partner Benefits



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American Recovery and Reinvestment Act of 2009 An Overview

- COBRA
 - Second-Chance COBRA election rights
 - COBRA Premium assistance
- HIPAA Privacy and Security Law
 - New definitions
 - New Business Associate liability



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COBRA in CRISIS

The Economic Context

- National Unemployment Rate
8.9 in April (8.5 in March)
- 8.9 million unemployed in April
- 6.0 million additional unemployed in last 12 months
- 1% increase unemployment = 1.1 million increase in uninsured



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ARRA 2009: COBRA

Which Employers?

- Employers with group health plans subject to COBRA through Tax Code, ERISA or PHS (Public Health Service Act):
 - Private companies with 20 or more employees
 - State and local government employers
- Federal government
- Other employers with group health plans subject to COBRA "comparable coverage" (such as state "mini-COBRA")



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ARRA 2009: Which Plans?

- The Act focuses on "group health plans"
 - Includes dental-only and vision-only plans
 - Includes health reimbursement arrangements (HRAs) and some employee assistance plans (EAPs)



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ARRA 2009: Exempt Plans?

- Health spending accounts (HSAs)
- Health flexible spending account (FSAs) under a Code Section 125 cafeteria plan
- Church group health plans may be excluded (i.e., free from ERISA, Tax Code or state mini-COBRA laws)



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ARRA 2009: Effective Dates

- Effective February 17, 2009, but applicable for any "period of coverage" after that date
- If "period of coverage" = monthly, then March 1, 2009
- Special effective dates for premium subsidy eligibility (September 1, 2008 through December 31, 2009)
- Extended COBRA election period also tied to date of notice



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ARRA 2009: Failure to Comply

- Legislative history suggests violation of new notice rules is a violation of COBRA notice rules
- ERISA attaches \$110/day penalties for COBRA notice violations
- Tax Code \$100/day excise tax for COBRA violations
- Potential lawsuits under ERISA and Public Health Service Act
- "Other relief" for COBRA notice failures?



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ARRA 2009: Who Is Covered?

“AEI” – Assistance Eligible Individuals

AEI is a Qualified Beneficiary who:

- Eligible for COBRA at any time for the period of 9/1/08 – 12/31/09 is;
- Elects COBRA; and
- Involuntary terminated between 9/1/08 – 12/31/09



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ARRA 2009: Who is a QB?

- AEI must be a QB
 - Spouse of the covered employee who was a beneficiary under the plan on the day before the QE
 - Dependent child who was a beneficiary under the plan on the day before the QE
 - Child born to or adopted by the covered employee during the period of COBRA coverage



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What is “Involuntary Termination”?



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What is “Involuntary Termination”? Notice 2009-27

- Definition: Key phrases
 - Independent exercise of unilateral authority of employer
 - Other than due to employee’s implicit or explicit request
 - Employee willing and able to continue
- Based on facts and circumstances



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Involuntary Termination: Passive Forms

- Failure to renew contract at expiration
- Employer causes material negative change in employment relationship for the employee



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“Involuntary Termination” Notice 2009-27

- Lay-off, Furlough, Suspension of employment
- Termination of Employment while on a leave
- Retirement
- Termination for Cause
- Resignation as Result of Material Change in Geographical Location
- Termination with Severance Package




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**ARRA 2009:
Expanded COBRA Election Rights**

- The Act provides assistance eligible individuals (AEIs) a second opportunity to elect COBRA
- Election right available even if AEI did not previously elect, or prematurely ended COBRA
- Election right begins February 17, 2009 and continues for 60 days following notification
- AEI has 90 days after notice of plan enrollment option to elect
- Additional election right does not extend to "COBRA-comparable coverage" plans


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**ARRA 2009:
Expanded COBRA Election Rights**

- If elected, new COBRA coverage begins with first period of coverage on or after February 17, 2009
- New coverage opportunity does not reach back to earlier periods
- New coverage does not extend period of COBRA coverage beyond what otherwise available
- Second right to other coverages


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**ARRA 2009:
Expanded COBRA Election Rights and HIPAA**

- Special HIPAA rules on pre-existing conditions apply if AEI elects coverage during extended period
- Interim period disregarded for purposes of 63-day break in credible coverage rules under HIPAA



**ARRA 2009:
Other Plan Enrollment Option**

- If permitted by employer, AEI may elect to enroll in different coverage
- Plan administrator has 60 days to give notice
- Eligible qualified beneficiary has 90 days after notice to elect



**ARRA 2009:
Other Plan Enrollment Option**

- Different coverage must be coverage offered to active employees
- Different coverage may not have higher premium
- Different coverage cannot be restricted coverage (i.e., dental only, vision only, flexible spending arrangement, on-site medical facility, or wellness plan)



COBRA Premium Assistance



ARRA 2009: Who Is Eligibility for COBRA Premium Assistance?

- Qualified beneficiaries are eligible for COBRA assistance if:
 - Eligible for federal or state COBRA at any time between September 1, 2008 and December 31, 2009; and
 - Elects COBRA (when first offered or during extended election period); and
 - Involuntarily terminated between September 1, 2008 and December 31, 2009

COBRA Premium Assistance

- AEI pays only 35% of COBRA premium
- Employer or insurer picks up remaining 65% and is later reimbursed by the federal government
- Premium subsidy continues for up to 9 months
- Subsidy treated as payment of payroll tax

ARRA 2009:
Details of COBRA Premium Reimbursement

- 102% of applicable premium still allowed
- AEI pays 35% of what plan charges
- AEI's 35% can be paid by third party, but employer payment alters benefit
- Credit or repayment if AEI pays full premium
- Issues arise if employer helps out AEI
 - Premium of \$500, but employer pays \$100
 - AEI pays 35% of \$400/subsidy 65% of \$400



ARRA 2009:
Periods for COBRA Premium Assistance

- Subsidy begins on first day of first month of the period of coverage beginning on or after February 17, 2009
- Subsidy ends on the earliest of:
 - 9 months after the first day of the first month of coverage
 - The date following expiration of the maximum COBRA coverage period
 - If the individual becomes "eligible" for coverage under other group health plan or Medicare (other than dental, vision, counseling, referral services, flexible spending arrangements under Tax Code § 106(c)(2) or through an onsite medical clinic)



ARRA 2009:
Premium Assistance

- Eligibility for Subsidy does not terminate if GHP coverage is:
 - Only dental, vision, EAP
 - FSA
 - On-site medical clinic



**ARRA 2009:
Income Limits COBRA Premium Assistance**

- If taxpayer's income exceeds \$145,000 (\$290,000 for joint filers), then amount of the premium reduction must be repaid
- If taxpayer's income is between \$125,000 and \$145,000 (or \$250,000 and \$290,000 for joint filers), the amount of the premium that must be repaid is reduced proportionately
- High-income individuals can waive assistance



**ARRA 2009:
New Notice Requirements**

- Plan sponsors must send additional "premium assistance notice"
- New notice to anyone who became eligible to elect COBRA between September 1, 2008 and December 31, 2009:
 - Notice of the availability of premium reduction
 - Notice of extended election rights
 - Notice of ability to enroll in different coverage (if employer permits)
- May satisfy notice requirements by amending existing election notices or including a supplement
- April 18, 2009



**ARRA 2009:
DOL MODEL NOTICES**

- Four Model Notices
 - General Notice (Full version)
 - General Notice (Abbreviated version)
 - Notice in Connection With Extended Election Periods
 - Alternative Notice
- Each model notice is designed for a specific group and includes applicable disclosures, such as:
 - Summary of ARRA's premium reduction provisions
 - Form to request the premium reduction (referred to as a Request for Treatment as an Assistance Eligible individual)
 - Form for an individual to notify the plan that the individual is eligible for other group health plan coverage or Medicare



ARRA 2009: EXPEDITED REVIEW

- DOL/HHS will provide for expedited review of the denial
 - Individual must make application to the DOL
 - Employer input requested
 - Application to be provided by DOL:
<http://www.dol.gov/ebsa/COBRA/main.html>
- DOL/HHS has 15 business days after receipt of application to make a determination of individual's "eligibility"
- Review is de novo
- Reviewing court must grant deference to the DOL's determination



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ARRA 2009: Notice Obligations of AEs

- AEs must notify plan (in writing) when no longer eligible for premium assistance
- DOL to specify time and manner of providing this notice
- Penalty for violating individuals—110% of premium reduction after termination of eligibility



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ARRA 2009: COBRA Compliance Checklist

- Are you an affected employer?
- If so, determine eligible qualified beneficiaries
- Satisfy new notice requirements
- Establish administrative procedures for 65% premium subsidy
- Establish administrative procedures for federal reimbursement
- Additional guidance can be found at:
www.dol.gov/ebsa/cobra.html



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ARRA 2009:
HIPAA PRIVACY and SECURITY RULES

▪ HIPAA PRIVACY RULE 101

- Key Definitions
 - Covered Entity
 - Business Associates
 - ePHI
- The Rule
- Core Concepts

▪HIPAA SECURITY RULE 101



ARRA 2009:
HIPAA PRIVACY and SECURITY RULES

- New Definitions
- New Obligations for Business Associates
- What does it mean for covered entities?



New Legislation – Michelle’s Law

- Effective Date: 2010
- Relates to College Students
- How will it be coordinated with COBRA?



COBRA 101: Notices

- Initial Notice
- Election Notice
- Notice of Unavailability
- Notice of Termination



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COBRA BASICS: Notices Employee and Spouse

- Follow DOL rules for delivery of required forms, notices, SPDs, SMMs, SARs
 - Includes delivery via electronic media
- Single notice addressed to covered employee and spouse is allowed if:
 - Spouse resides at same location as covered employee
 - Spouse's coverage commences before date that administrator must provide initial notice to covered employee



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COBRA BASICS: Notices to Dependent Children

- Notice to dependent children residing at same location as covered employee or spouse
 - Based on most recent information available
 - Single notice addressed to covered employee or spouse
- Follow DOL rules for delivery of required forms, notices, SPDs, SMMs, SARs
 - Recommended: first-class (with declaration of mailing) or certified mail (without return receipt requested)



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Unavailability Notice



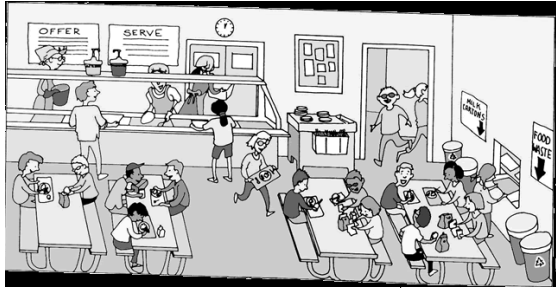
COBRA Notices: Unavailability

- Receives notice of qualifying event that is divorce or legal separation or child's loss of dependent status; and
- Determines that an individual is not entitled to COBRA coverage
- Why?
 - No Qualifying Event
 - Not a Qualified Beneficiary
 - No Previous Coverage

COBRA Notices: Early Termination

- Failure to Pay Premium on Time
- Other Group Health Plan coverage (subject to preexisting condition rules as limited by HIPAA portability requirements)
- Medicare Entitlement
- Employer Ceases to Maintain Any Group Health Plan
- For Cause

Get Your Cafeteria In Order



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New Proposed Regs – Cafeteria Plans

- Issued August 6, 2007
- Effective for Plan Years beginning on or after January 1, 2009
- New Final Regulations - DCAPs



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Effect of the Proposed Regs – Cafeteria Plans

- Living with old rules
- Not many substantive changes, incorporates IRS guidance
- Nondiscrimination rules
- Changed treatment of GTL
- Problem: Disqualification



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Overview Proposed Regs- Cafeteria Plans

- Impact on existing guidance
- Plan document requirements
- Benefits that can and cannot be offered
- New GTL taxation rules



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Overview Treatment of Existing Guidance

- Eligibility and Dual Status
- Election rules for New Hires
- Debit Card Rules
- Nondiscrimination Testing
- Operational Failures



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Plan Document

- Must have Written Plan Document
- Written Document
 - Prior Guidance
 - List of specific items
- No Nonqualified Benefits may be offered
- Amendments prospective only



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Proposed Regulations Clarification: Qualifying Benefits

- Lists of Permitted and Prohibited Benefits
- Prohibited Benefits can disqualify the entire cafeteria plan



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Qualified Benefits

- List of Qualified Benefits
- COBRA premiums
- Individual policies
- HSA election changes



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Qualified Benefits What are “Taxable Benefits”?

- Cash
- After-tax purchase of taxable benefits (LTD)
- After-tax payment for health coverage, e.g. domestic partners



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Nonqualified Benefits?

- Cannot be offered, even after-tax
- List of Nonqualified Benefits
 - Scholarships
 - Employer-provided meals and lodging
 - Educations Assistance
 - Fringe Benefits
 - Long term care insurance
 - HRAs
 - Dependent GTL
 - Archer MSA
 - Contributions to 403(b)



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Nonqualified Benefits-Deferred Compensation

- Deferred compensation – generally prohibited
- Statutory Exceptions
 - Contributions to 401(k) plans, HSX, PTO Buying and Selling
 - Certain Insured Benefits
- New Rule: Allowable 2 year “lock-in” for dental and vision
- Health FSA rules – Clarify Orthodontia



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Group Term Life (GTL) New Rule

- All premiums for GTL may be paid on a pre-tax basis, *but*
- deemed income is now only
- Table 1 cost of all GTL coverage
- over \$50,000,
- less premiums paid on an after-tax basis over \$50,000



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Cafeteria Plans Enrollment and Election Changes

- New Hires: auto-enroll or 30 day rule
- Changes of Election
 - Irrevocable election – still the rule
 - Clarification of Election Issues



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Substantiation

- Given a lot of attention
- Debit cards – phase out of merchant codes
- Inventory based system



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Nondiscrimination Testing

- New definition of HCI
- Eligibility – use 410(b)
 - Underlying benefits?
- Contribution and Benefits
 - Disproportionate usage
- Safe harbor – premium only



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Operational Failures

- Total disqualification rule
- Long list of small mistakes
- Correction procedure?



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Actions to Take

- Update plan document
- Remove nonqualified benefits



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Final Regulations Dependent Care Expenses

- Final Regs – Effective August 14, 2007
- What was clarified?
 - When does an expense “enable employment?”
 - When is an expense for “care?”
 - Who are “qualifying dependents?”



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Dependent Care Expenses Timing Issues

- When must the DCAP expense be incurred?
- When must the care be provided?

- What issues arise with prepayment for services?
- What about "spend down" provisions?



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Administering **HIPAA** Special Enrollment Rights and **CHIPRA**



Special Enrollment Rights

- Group Health Plans
- Loss of Coverage
- Acquisition of a New Dependent
- Disclosure Requirements
- Cafeteria Plan Issues



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Group Health Plans

- Insured and Self-insured
- Two or More Current Employees
- Special Exception for HFSA's



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Loss of Coverage

- Other Coverage When Offered Enrollment
- Coverage Lost Because of Triggering Event
- Request Enrollment Within 30 Days
- Who Has Special Enrollment Rights?
- Effective Date of Enrollment
- All Benefits Available at Special Enrollment



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Loss of Coverage

- Triggering Events
 - COBRA: Exhaust Coverage
 - Non-COBRA: Loss of Eligibilityor
 - Non-COBRA: Employer Contributions Terminated



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Loss of Coverage

- Other Coverage When Offered Enrollment
- Coverage Lost Because of Triggering Event
- Request Enrollment Within 30 Days
- Who Has Special Enrollment Rights?
- Effective Date of Enrollment
- All Benefits Available at Special Enrollment



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Acquisition of New Dependent

- Triggering Events
 - Marriage, Birth, Adoption, Placement for adoption
- Who Can Enroll?
- Length of Special Enrollment Period
- Effective Date
- All Benefits Available at Special Enrollment



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Disclosure Requirements

- Notice of Special Enrollment Rights
- Content Requirements (model language)
- Provide When Offered Opportunity to Enroll
- Provide to Eligible Employee
- Employer Requirement



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Cafeteria Plan Issues

- Election Changes Permitted for Special Enrollment
- Including Additional Family Members
- Retroactive Changes (where required)
- Prospective Changes (where allowed)



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Mid-Year Election Changes

- 14 Permitted Changes
 - Change in status
 - Cost/coverage change
 - Other cons/rules
- Consistency
- Documentation




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CHIPRA: NOW WHAT?


- Compliance Effective Date: April 1, 2009
- Special Enrollment Rights for dependents who lost coverage from a state plan (SCHIP), or Medicaid, or if they become eligible for state-provided health care premium assistance
- Enrollment right up to 60 days after they either lose coverage or become eligible for the health care premium assistance. (*Not 30 days, as under HIPAA*)
- Amend plan documents by end of 2009 Plan Year (if ERISA plan)



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Status of Law for Domestic Partner Benefits




Overview

WHO must receive benefits under federal, state and local law?

WHAT benefits must be provided and what tax consequences arise?



HOW should administrative procedures be adapted?



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Legislative Scheme

- Federal Law
- Defense of Marriage Act ("DOMA")
- ERISA preemption

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Same-Sex Marriage and Domestic Partner Benefits

- Status "Same-Sex Marriage" in state law: Vermont, Iowa, Rhode Island, Connecticut, Oregon, California
- What are the implications of changing Same-Sex marriage law on employee benefits?



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Group Health Plans

- Taxation of benefits
- Definition of "spouse" under the Defense of Marriage Act ("DOMA")
- Definition of "dependent" under Code Section 152



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Group Health Plans (cont'd)


- In order for a domestic partner to qualify for dependent benefits, Code Section 152 requires that the partner:
 - 1) Have a principal place of abode in the home of the taxpayer/participant and be a member of the taxpayer/participant's household; and
 - 2) Receive over half of his or her support from participant/taxpayer



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Group Health Plans (cont'd)

- Non-dependent benefits are imputed income
- Cafeteria plan "change in status"
- COBRA
- HIPAA
- FSAs, HSAs
- Voluntary Employees' Beneficiary Associations ("VEBAs")




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Summary Checklist

- ✓ Identify options under federal, state, and local laws


- ✓ Define operative terms
 - "Spouse"
 - "Partner"
 - "Dependent"



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Summary Checklist (cont'd)

- ✓ Develop documentation procedures
 - Affidavit for domestic partnership
 - Declaration of tax status
 - Informing participants of tax consequences



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Summary Checklist (cont'd)

- ✓ Make appropriate plan amendments to:
 - Group Health Plans
 - Retirement Plans
 - Summary Plan Descriptions

- ✓ Stay informed of the developing law in this area and work with counsel to ensure ongoing compliance



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Health and Welfare Plan Update

- American Recovery and Reinvestment Act of 2009
 - COBRA
 - HIPAA
- Michelle's Law
- Cafeteria Plan Proposed Regulations
- Dependent Care Spending Account Final Regulations
- Children's Health Insurance Program Reauthorization Act of 2009 ("CHIPRA")
- State Insurance Law: Definition of Dependent New
- Domestic Partner Benefits



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Thank You!



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