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Employer Considerations Concerning the HIPAA Special Enrollment Rule Temporary Extension

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On July 20th, CMS issued an open letter to employers, plan sponsors and insurers requesting that they extend the normal 60-day special enrollment period for Medicaid and CHIP terminations of coverage.

This stems from the unwinding of the COVID-19 public health emergency ("PHE"). During the PHE, most Medicaid coverage terminations were paused to minimize coverage loss during the pandemic. However, under the terms of the Consolidated Appropriations Act, 2023, this continuous enrollment practice expired on March 31, 2023. Thus, Medicaid agencies are currently in the process of resuming regular eligibility and enrollment operations, which includes renewing coverage for all individuals enrolled in Medicaid and the Children's Health Insurance Program (CHIP) and terminating coverage for individuals who are no longer eligible.

CMS is concerned that many individuals who are no longer eligible for Medicaid or CHIP coverage may not find out about their loss of eligibility for months. For example, individuals who have moved may not find out about their loss of eligibility until they go to a hospital or provider and the provider checks their coverage. By that time, these individuals will be beyond the special enrollment period for enrolling in Exchange coverage, as well as employer coverage, if available.

To combat this issue, CMS announced a temporary special enrollment period on HealthCare.gov, through which individuals who lose Medicaid or CHIP coverage and come to HealthCare.gov anytime between March 31, 2023 and July 31, 2024 will be able to enroll.

With respect to employers and other plan sponsors, CMS requests that they also adopt the above rule, given that CMS estimates that approximately 3.8 million individuals who lose Medicaid eligibility will be eligible for employment-based coverage.

The following are considerations for employers and plan sponsors in deciding whether to adopt the temporary extension of the HIPAA special enrollment period for Medicaid and CHIP terminations of coverage –

1. **CMS Requested Timeline**. The sixty-day window under the HIPAA special enrollment rules is simply a minimum, and there is no legal impediment to extending it further. The timeline requested by CMS in essence removes the 60-day requirement and allows anyone who lost coverage to enroll at anytime between March 31, 2023 and July 31, 2024. Of course, enrollment would not be retroactive. Rather, if an

employee or a dependent of an employee lost coverage on March 31, 2023, discovered the loss in August 2023 and desired to enroll at that time, an employer or plan sponsor could allow the enrollment prospectively.

2. SMM. Typically, the HIPAA special enrollment period requirements are set forth in the medical summary plan description. Thus, in changing the enrollment window, the employer or plan sponsor would need to issue a short one-page SMM detailing the new temporary rule. For most employers and sponsors, this SMM could be issued electronically under the DOL disclosure requirements. If the enrollment windows are also set forth in the actual plan document, the plan document could be amended retroactively at any time before December 31, 2023 to adopt the temporary rule.

3. COBRA Continuation Coverage. Substantially all of the individuals who take advantage of the temporary rule will either be employees or dependents of employees, seeking to enroll in active coverage. However, keep in mind that any change to the special enrollment window for employees automatically applies to individuals receiving COBRA continuation coverage as well under the IRS regulations for COBRA continuation coverage. A loss of Medicaid eligibility would not be a qualifying event, so former employees losing Medicaid would not be able to take a second bite at the apple and enroll in COBRA. However, if an employee is already enrolled in COBRA, an employee could enroll a dependent child mid-year in COBRA continuation coverage if the dependent lost Medicaid or CHIP coverage, just like an employee who had active coverage could do. Therefore, employers and plan sponsors who adopt the temporary enrollment waiver should inform their COBRA administrator.

4. What Happens if the Temporary Window is not Adopted? Currently, the 60-day special enrollment window for losing Medicaid and CHIP coverage has already passed. Therefore, if employers and sponsors do not adopt the temporary window, they should determine how they will respond to employees when they are asked by employees for an enrollment waiver.