



Health Insurance Bulletin

Number 2009-1

Cafeteria Plan Mandate

The Office of the Health Insurance Commissioner issued notice that it intends to adopt Health Insurance Regulation 10, Cafeteria Plans.

In 2007, the Rhode Island General Assembly established R.I. Gen Laws § 27-70-1 *et seq.*, the Health Insurance Tax Incentive statute (“HITI”). HITI requires employers with more than 25 employees to adopt and maintain a “cafeteria plan” (also referred to as a “Section 125 Plan”) through which employees and their dependents may purchase health insurance. A cafeteria plan is a tax-qualified plan under Section 125 of the Internal Revenue Code that allows employers to give their employees the opportunity to pay for benefits, such as health insurance, on a pretax basis. Pretax benefits lower payroll-related taxes for both the employer and employees. While HITI requires certain employers to establish a cafeteria plan, it neither requires employers to pay for or otherwise contribute to the cost of any health insurance purchased through the cafeteria plan, nor requires employers to set up or maintain a group health plan or take any action that affects an existing group health plan.

The HITI implementation deadline for Rhode Island employers is July 1, 2009. The Office of the Health Insurance Commissioner (“OHIC”) is responsible for promulgating rules and regulations that specify the requirements for the cafeteria plans mandated by HITI¹ and the Department of Labor and Training (“DLT”) has the discretion to promulgate rules and regulations for the implementation and administration of HITI.²

In the course of developing its regulations, OHIC has concluded that implementation of HITI may conflict with certain federal statutes, including the Employee Retirement and Income

¹ R.I. Gen Laws § 27-70-3.

² R.I. Gen Laws § 27-70-4.

Security Act of 1974 (“ERISA”),³ the Consolidated Omnibus Budget Reconciliation Act (“COBRA”)⁴ and the Health Insurance Portability and Accountability Act (“HIPAA”).⁵ Therefore OHIC is taking a cautious approach with respect to implementing HITI.⁶ OHIC has construed the requirements of HITI narrowly so as to minimize the possibility of conflicts with federal law and has proposed a regulation consistent with its narrow construction. If and when such conflicts are resolved by the federal government, OHIC will revise its HITI regulation.

OHIC will be consulting with federal officials and with insurance regulators in various states to identify the areas of conflict and work toward possible solutions to the problems. Until the conflicts are fully identified and resolved, OHIC has asked DLT to delay the promulgation of its rules and regulations until the potential conflicts between the HITI and the various federal laws have been resolved.

³ HITI may be viewed as preempted by ERISA either because it creates an “employee welfare benefit plan” within the meaning of ERISA or because it “relates to” employers’ ERISA employee welfare benefit plans within the meaning of ERISA. Section 514(a) of ERISA states that ERISA preempts “any and all State laws insofar as they . . . relate to any employee benefit plan” governed by ERISA. 29 U.S.C. § 1144(a). If applicable, the ERISA preemption would render HITI unenforceable. While some researchers have opined that ERISA preemption is not likely, see, e.g., Patricia Butler, “Employer Cafeteria Plans: States’ Legal and Policy Issues.” available from the California HealthCare Foundation at <http://www.chcf.org/topics/healthinsurance/index.cfm?itemID=133770>, preemption remains an open question because the U.S. Department of Labor has not provided any direct and formal guidance or opinion as to whether a state law that mandates a cafeteria plan would be subject to ERISA preemption and no court has directly addressed the issue.

⁴ COBRA requires employers with 20 or more employees offering health coverage to allow employees and their dependents who experience a “qualifying event” (e.g., job termination, employee death, dependent child aging out of group eligibility) to continue in the group health plan for 18 to 36 months by paying the full premium (plus up to 2 percent for administrative costs). The IRS definition of “group health plan” under COBRA is much broader than the common understanding of group health insurance and likely includes cafeteria plans, even cafeteria plans that only provide employees the opportunity to fully pay for individually purchased health insurance with pre-tax dollars and involve no employer subsidy of the health insurance premium. See Treas. Reg. 26 C.F.R. §54.4980B-2 (Q&A-1), (Q&A-8)(a).

⁵ HIPAA shares COBRA’s definition of a group health plan. Thus, Title I of HIPAA, which among other things includes restrictions on preexisting condition limitations and prohibits premium differentials within a group based on health status, could also apply to individual insurance purchased through a cafeteria plan. Such restrictions and limitations would make the purchase of individual insurance through a cafeteria plan unworkable.

⁶ Other states have expressed similar concerns. See, e.g., <http://www.insurance.mo.gov/laws/bulletin/07-08.htm> (The Missouri Department of Insurance, Financial Institutions and Professional Registration expressed concerns about the implementation of a similar Missouri law in its Insurance Bulletin 07-08).