

# Is Michelle's Law Still Relevant After Health Care Reform?

By Constance L. Gilchrest

The purpose of Michelle's Law was to avoid dependent children losing group health coverage through a parent if they drop out of school because of illness. This law became effective Jan. 1, 2010, for calendar year group health plans.

However, due to the enactment of health care reform, the provisions for coverage of adult children were expanded. The question begs to be asked: has Michelle's Law become irrelevant or will it become so in the near future?

Michelle's Law requires employer health plans to continue coverage for an employee's dependent child who is a college student when they take a "certified medically necessary leave of absence." The extension of eligibility is to protect group health coverage of a sick or injured dependent child up to one year. This law applies regardless if the plan is fully insured or self insured.

## A Refresher

First, we should have a refresher on Michelle's Law (also see ¶1285 of the *Guide*):

- 1) Group health plans must maintain existing group health coverage up to one year for full-time student dependents who are age 18 or older who are enrolled in a post-secondary educational institutions and whose leave has been certified by a physician to be a medically necessary leave.
- 2) If the student's parents or caregiver changes coverage, a successor ERISA plan that covers dependents would have to approve and accept the leave of absence.
- 3) Summer or semester breaks do not qualify.
- 4) The group health plan cannot terminate coverage for a covered dependent child

due to a medically necessary leave of absence before the earlier of:

- 12 months (one year) after the first day of the medically necessary leave of absence; or
- the date which the plan coverage would otherwise terminate.

## Unresolved COBRA Issues

The interaction of Michelle's Law with COBRA is not clear. Four areas need clarification:

- 1) **Length of COBRA coverage.** When dependent children lose dependent status, they can elect COBRA for up to 36 months. Most employer plans require full-time student status for dependent children. Therefore, when the student graduates, reduces his or her schedule or drops out of college, there is a COBRA qualifying event. Due to Michelle's Law, there would not be a loss of coverage if the reason was certified by a doctor to be medically related. The question that arises is whether the COBRA loss of coverage occurs when the Michelle's Law period starts (that is, the two laws run concurrently for a total of up to 36 months) or ends (that is, the two laws run consecutively for up to 48 months).
- 2) **Alternative coverage.** COBRA allows employers to offer alternative coverage to COBRA. If the individual elects the alternative coverage, the COBRA obligation ceases once the COBRA election period ends. It is unclear whether an employer could treat Michelle's Law coverage (up to one year, at the active employee premium rate) as alternative coverage to COBRA coverage (up to 36 months, at 102 percent of the applicable premium).

See *Michelle's Law*, p. 10



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- 3) **Timing issues.** There are not any deadlines for the college student to provide the certification of medical reason for the leave. Therefore, the documentation could be provided after the COBRA election period expires. Would this allow retroactive reinstatement of coverage? What if the qualified beneficiary did elect COBRA and later provided the medical certification, would he or she be entitled to a reimbursement equal to the cost difference between the employee rate and the COBRA rate? Also, if there was an intervening COBRA qualifying event during the Michelle's Law leave (for example, termination of employment of the student's parent), does Michelle's Law leave continue or does COBRA coverage take over?
- 4) **COBRA notices.** Both the general notice and election notice have content requirements for a general description of the continuation coverage under the plan. It is unclear whether both these notices should be updated to include a description of Michelle's Law.

#### Does It Matter?

We have been waiting for further guidance on these unresolved issues. Recent comments by a Treasury official indicated that workload and other priorities make it doubtful that guidance will be issued very soon.

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It may no longer matter.

Under health care reform, for plan years starting after Sept. 23, 2010, group health plans that provide coverage for dependent children must continue to do so for unmarried and married children until age 26 regardless of student status. For plans already in existence on March 23, 2010, the age 26 limit only applies if the child is not eligible for other group coverage. This exception ends in 2014. Thereafter, dependents that are eligible for other coverage could still remain on their parent's plan until age 26.

As a further complication, IRS Notice 2010-38 makes it clear that plans can be amended before September to allow adult children, because the tax exclusion for them until age 27 took immediate effect on March 30, 2010.

So what should employers do?

- 1) For employers to remain compliant, they need to follow the terms of their group health plan and adhere to the provisions under Michelle's Law until the age 26 rules go into effect for plan years after Sept. 23, 2010. The conservative approach is to consider Michelle's Law and COBRA to be consecutive (not concurrent) coverage and to now view Michelle's Law as alternative coverage to COBRA.
- 2) When the reform mandate becomes effective, student status will largely be irrelevant.
- 3) Prepare for future scenarios where an employee wants to add back an adult child to active employee coverage as a dependent when they are currently on COBRA because of the qualifying event of a dependent ceasing to be a dependent.

In the final analysis, we can envision few scenarios where Michelle's Law will provide more coverage to adult children than health care reform. 🏠

### Notice Burden

 (continued from p. 8)

#### Implications

Notice issues are probably the number one litigated issue under COBRA. Notices are the key to establishing qualified beneficiaries' rights to continued coverage so this is not really a surprise. Also, when you factor in that each subsequent change in the law (like the American Recovery and Reinvestment Act, as amended three times) brings in a whole new set of notice obligations, plan administration becomes that much more complicated. Therefore, the clear lesson for employers and plan administrators is to save all proof of compliance with COBRA's notice rules. 🏠

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