

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



July 27, 1995

95-18A

Michael S. Melbinger, Esq.
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Chicago, IL 60606-6473

Dear Mr. Melbinger:

This is in response to your request, on behalf of Adoptive Families of America, Inc., for guidance concerning the obligations of group health plans under section 609(c) of the Employee Retirement Income Security Act, as amended (ERISA), relating to coverage of dependent children in connection with adoptions.¹ Specifically, you have requested the views of the Department of Labor (the Department) on a number of issues, discussed below, relating to the application of section 609(c) to group health plans.

In general, section 609(c)(1) requires group health plans that provide coverage for dependent children to provide such coverage to children who are placed for adoption with participants or beneficiaries, with coverage being effective upon such placement.² Benefits must be provided under the same terms and conditions that apply to dependent children who are natural children of participants or beneficiaries under the plan, irrespective of whether the adoption has become final. Section 609(c)(2) provides that a group health plan may not restrict coverage under the plan of any dependent child adopted by or placed for adoption with a participant or beneficiary solely on the basis of a preexisting condition of such child at the time the child would otherwise become eligible for coverage under the plan, if the adoption or placement for adoption occurs while the participant or beneficiary is eligible for coverage under the plan.

Section 609(c)(3)(A) defines "child", for purposes of subsection (c), to mean, in connection with any adoption or placement for adoption, an individual who has not attained age 18 as of the date of such adoption or placement for adoption. Section 609(c)(3)(B) defines the term "placement" or "being placed" for adoption, in connection with any placement for adoption of a child with any person, to mean the assumption and retention by such person of a legal obligation for total or partial support of such child in anticipation of adoption of such child.

Section 609(c) establishes, in effect, a minimum standard applicable to the group health plan coverage of children adopted by or placed for adoption with plan participants or beneficiaries. In this regard, Title I of ERISA does not preclude a group health plan from providing for coverage of children that have been adopted by or placed for adoption with a participant or beneficiary under circumstances where such coverage is not mandated by section 609(c).

Specific questions presented in your correspondence and our responses thereto follow:

¹ Section 609 was added to ERISA by section 4301 of the Omnibus Budget Reconciliation Act of 1993, P. L. 103-66, (OBRA) and, under section 4301(d), became effective on enactment, August 10, 1993.

² The term "group health plan" is defined in section 607(l) of ERISA to mean "an employee welfare benefit plan providing medical care (as defined in section 213(d) of the Internal Revenue Code of 1986) to participants or beneficiaries directly or through insurance, reimbursement, or otherwise."

Scope and effective date issues

Your correspondence sets forth a number of questions concerning the plans subject to section 609(c) and the effect of section 609(c) on adoptions or placements for adoption occurring prior to the August 10, 1993, effective date of that section. Specifically, you inquire, assuming the adopted child and the adoptive parent(s) otherwise satisfy the requirements for "family" or "dependent" coverage under a group health plan: (a) whether section 609(c) requires coverage as of August 10, 1993, for any and all children adopted or placed for adoption who were denied coverage prior to that date; (b) whether section 609(c) invalidates, as of August 10, 1993, preexisting condition exclusions of children adopted or placed for adoption prior to that date; (c) whether a group health plan may apply a waiting period for coverage to otherwise eligible children adopted or placed for adoption beginning on August 10, 1993; (d) whether there is an exception to the August 10, 1993, effective date for plans maintained pursuant to collective bargaining agreements; and (e) whether a group health plan may deny coverage to a child adopted by or placed for adoption with a retired participant?

Section 609(c) applies to any group health plan subject to Title I of ERISA that provides coverage for dependent children of participants and beneficiaries.³ The provisions of section 609(c) apply to any such plan as of August 10, 1993, without regard to whether the plan is maintained under or pursuant to a collective bargaining agreement. Section 4301(d) of OBRA, which contains the effective date of ERISA section 609, does not provide any deferred effective date for plans maintained under or pursuant to collective bargaining agreements.

In the view of the Department, a group health plan that provided dependent coverage prior to August 10, 1993, is required by section 609(c) to provide coverage as of that date to any dependent child previously adopted by or placed for adoption with a participant or beneficiary under the same terms and conditions as coverage was provided to natural dependent children of participants and beneficiaries under the plan. Under section 609(c), therefore, a group health plan may not impose or apply a waiting period for coverage of dependent children who were adopted by or placed for adoption with a participant or beneficiary prior to, on, or after August 10, 1993, unless such waiting period applies to coverage of dependent natural children of participants and beneficiaries. Moreover, section 609(c)(2) specifically provides that, as of August 10, 1993, a plan may not, regardless of the date of adoption or placement, restrict coverage of any dependent child adopted by or placed for adoption with a participant or beneficiary who is eligible for coverage under the plan, solely on the basis of a preexisting condition of such child at the time that the child would otherwise become eligible for coverage under the plan.

Finally, a group health plan subject to Title I of ERISA which provides coverage for dependent children of retired participants may not, without contravening the requirements of section 609(c), deny such coverage to children who are adopted by or placed for adoption with a retired participant solely on the ground that the child has been adopted or placed for adoption.

Placement for adoption issues

Your correspondence presents several questions relating to when a child will be treated as placed for adoption, i.e., when a participant or beneficiary will be treated as having assumed and retained a legal obligation for total or partial

³ Pursuant to section 4(b) of ERISA, the provisions of Title I of ERISA do not apply to "governmental plans", as defined in ERISA section 3(32), or certain "church plans", as defined in ERISA section 3(33). Reference should be made to applicable state law regarding what, if any, requirements may apply to such plans with respect to the provision of health or medical benefits.

support of a child in anticipation of adoption of such child. Assuming that the adoptive parent(s) is otherwise eligible for family coverage under a group health plan, you present the following questions:

(a) Does an agreement to pay the birth expenses of the child and the birth mother constitute "a legal obligation for total or partial support of such child in anticipation of adoption" under section 609(c)?

An agreement to pay the birth expenses of the mother is not, by itself, an agreement to support the child, and thus is not a legal obligation of the type contemplated by section 609(c). Moreover, it is the view of the Department that an agreement which provides only for the payment of birth expenses of a child would not, in and of itself, be sufficient to evidence the assumption and retention of a legal obligation for support of a child in anticipation of adoption. While an obligation to pay birth expenses of a child may evidence a form of support, section 609(c) specifically contemplates the assumption and the retention of a legal obligation for support of the child that is undertaken in anticipation of adoption.

(b) Does an agreement to provide full or partial support for a child born and resident outside the United States in anticipation of his or her adoption and immigration to the United States constitute "a legal obligation for total or partial support of such child in anticipation of adoption" under section 609(c)?

It is the view of the Department that, in the case of either a domestic or foreign adoption, an agreement for full or partial support of a child will constitute a "legal obligation" only if the obligation that has been assumed or retained by a participant or beneficiary of a group health plan is one that can be enforced in a court of competent jurisdiction. Whether any particular agreement for the full or partial support of a child is enforceable is a question of the facts and circumstances associated with the agreement. The Department notes that, because section 609(c) is, in effect, a minimum standard, Title I of ERISA does not preclude a plan from extending coverage to a child placed for adoption with a participant or beneficiary without regard to whether any agreement for support of such child meets the requirements of section 609(c).

(c) Whether a group health plan may, upon termination of a participant's or beneficiary's legal support obligation, require the participant or beneficiary to reimburse the plan for expenses incurred on behalf of a child during the child's placement for adoption with the participant or beneficiary?

Section 609(c)(1) requires that a group health plan extend coverage to children placed for adoption irrespective of whether the adoption has become final. Section 609(c) makes no provision for the reimbursement of the plan for any benefits provided during the placement if the placement does not ultimately result in an adoption. Accordingly, it is the view of the Department that any requirement for reimbursement of otherwise legitimate plan expenses incurred during the period a child is placed for adoption with a participant or beneficiary solely because of the termination of the placement (i.e., legal obligation for support in anticipation of adoption) would be tantamount to a retroactive denial of coverage in contravention of section 609(c)(1).

Plan coverage issues

Your correspondence presents the following questions relating to what benefits must be provided by a group health plan in the case of a child placed for adoption. For purposes of these questions, it is assumed that the participant or beneficiary seeking dependent coverage otherwise is eligible for family medical coverage under a group health plan and has a legal obligation for support of the child in anticipation of adoption.

(a) Must a group health plan cover the birth expenses of a child adopted or placed for adoption to the same extent that such expenses would be covered if the child were born to the plan participant?

Section 609(c)(1) requires that a group health plan that provides dependent child coverage must provide benefits to dependent children placed for adoption with participants or beneficiaries under the same terms and conditions as apply in the case of dependent children who are natural children of participants or beneficiaries under the plan. Accordingly, to the extent that a group health plan designates certain covered expenses attendant to birth as expenses of a dependent child, the group health plan would be required to extend the same coverage to children who have been adopted by or placed for adoption with a participant or beneficiary at the time such expenses are incurred. Whether any particular expense is attributable to the child, rather than the mother, generally must be determined by reference to the terms of the plan.

(b) Must a group health plan cover the birth expenses of the birth mother as if the birth mother was a covered participant or beneficiary?

No. Section 609(c) imposes no obligation on group health plans to cover expenses attributable to the birth mother of a child that has been placed for adoption with a participant or beneficiary.

(c) If, as a condition of the adoption, the adoptive plan participant or beneficiary is required to pay certain birth and other expenses of a child incurred prior to the assumption of a the support obligation, is the group health plan of the participant or beneficiary required to reimburse those expenses?

No. Section 609(c) only requires a group health plan to provide coverage to a child upon "placement for adoption" of that child with a participant or beneficiary. As discussed above, "placement for adoption" is defined, in section 609(c)(3)(B), to mean the assumption by a participant or beneficiary of a legal obligation for total or partial support of the child in anticipation of adoption of such child. Accordingly, a group health plan would not be required under section 609(c) to extend coverage to a child or reimburse expenses attendant to such child's health care prior to the child's placement for adoption.

(d) When must the group health plan of the adoptive participant or beneficiary begin to provide coverage for a child born prematurely or with other medical conditions that require special care and an unusually long hospital stay?

It is the view of the Department that under section 609(c) a group health plan would be obligated to provide coverage to the child under the circumstances described at the same time and under the same terms and conditions that the plan would be obligated to provide coverage to a natural child of a plan participant or beneficiary in like circumstances.

(e) In the case of a group health plan which provides coverage through a health maintenance organization (HMO), is the plan required to cover or reimburse otherwise non-covered birth expenses outside the HMO service area or to cover emergency or non-emergency medical expenses for accidents or illnesses occurring before or during transit to the HMO service area?

Section 609(c)(1) only requires group health plans to provide benefits to dependent children placed with participants or beneficiaries for adoption under the same terms and conditions as apply in the case of dependent children who are natural children of participants and beneficiaries under the plan. Section 609(c) does not require group health plans to cover or reimburse medical expenses of children placed for adoption if those benefits are not otherwise available to the natural children of participants or beneficiaries under the plan. Whether any given expense is covered under a particular plan will depend on the terms of the plan.

(f) Can a group health plan deny coverage to a child adopted by, or placed for adoption with, a participant or beneficiary on the basis that the child does not meet the Internal Revenue Code definition of "dependent" because governmental assistance to help maintain the child equals or exceeds 50% of the child's support?

It is the view of the Department that plans are generally free to define the term "dependent" for purposes of determining who is eligible for plan coverage, so long as such definition does not serve to apply terms and conditions for coverage to children placed for adoption that are different than those applied to natural children of participants and beneficiaries in contravention of section 609(c).⁴ Thus, if a plan provides coverage to a natural child of a participant or beneficiary in cases in which governmental assistance equals or exceeds 50% of the child's support, the plan may not deny coverage to a child adopted by or placed for adoption with a participant or beneficiary solely because governmental assistance equals or exceeds 50% of the child's support.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (41 Fed. Reg. 36281, August 27, 1976). Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 relating to the effect of advisory opinions.

Sincerely,

ROBERT J. DOYLE
Director of Regulations and Interpretations

⁴ Section 609(c)(3)(A), for instance, defines the term "child" for the purposes of that subsection to include an individual who has not attained age 18 as of the date of adoption or placement for adoption. Accordingly, a plan may not deny dependent coverage to a child within the meaning of section 609(c)(3)(A) who has been adopted by or placed for adoption with a participant or beneficiary on the basis of an age that is different from that at which it denies dependent coverage to natural children.