

Spousal Surcharges and Carve-Outs

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Questions: I'm a large employer and need to cut down on costs to my group health plan. Do I have to offer coverage to my employees' spouses? How can I limit the number of spouses on my group health plan?

Summary:

Employer sponsors of group health plans are often looking for tools with which to control health care costs. Imposing plan restrictions on spousal coverage or requiring additional premiums for spousal coverage can be powerful cost-savings tools, especially for employers who sponsor plans with generous dependent coverage or whose employee populations regularly elect family coverage. There are a couple of ways spouse-specific design changes can be structured: 1) spousal surcharges, and 2) spousal carve-outs. Spousal carve-outs can either come in the form of elimination of coverage for spouses who have coverage

through their own employers or the elimination of spousal coverage altogether.

There are a number of compliance concerns with spousal surcharges/carve-outs in areas like Affordable Care Act (ACA), Health Insurance Portability and Accountability Act (HIPAA), Employee Retirement Income Security Act (ERISA), and state law concerns, as well as important HR administration issues to consider. It's essential to work closely with your McGriff Benefits Consultant when designing these plans.

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Detail:

There are two main categories of spousal-specific restrictive plan design: spousal surcharges and spousal carve-outs.

Spousal Surcharges:

Spousal surcharges require an additional premium or contribution from an employee to pay for his or her spouse's coverage. This will generally apply if the spouse has an alternative source of health insurance coverage option available through his or her own employer, but chooses not to enroll in that coverage. Surcharges usually do not apply if the spouse is not employed or does not have access to employer coverage. Spousal surcharges can be an effective incentive for a spouse to enroll in his or her own employer's health plan.

Compliance Considerations:

Affordable Care Act (ACA)

Spousal carve-outs have gained popularity since the implementation of the ACA. The ACA provides that any Applicable Large Employer (ALE) who does not offer specific types of coverage to full-time employees and their dependents may be subject to a tax penalty. These rules are also known as the Employer Shared Responsibility mandate, or "Pay or Play." Spousal carve-outs and/or surcharge provisions will not have an impact on an employer's "pay or play" analysis because the law does not require employers offer coverage to spouses.

Spousal Carve-Out:

A more aggressive approach would be to eliminate coverage of spouses in certain circumstances.

Spousal carve-outs are plan provisions that restrict coverage for employees' spouses. Among the design options for carve-outs are:

1. A complete elimination of coverage for spouses without regard to whether the spouse has other coverage.
2. An elimination of coverage for spouses who have other employer-provided coverage available.
3. An elimination of coverage for spouses who have other employer-provided coverage available unless enrolled in that other coverage (presumably making coverage through the employee secondary).

In certain limited circumstances, a spousal exclusion can actually be beneficial to the employee where the additional cost to the employee to add the spouse is more than the spouse would pay on the Exchange with a premium tax credit (PTC). It is important to note here however, that if the employer provides an opportunity to enroll in coverage, this destroys the spouse's ability to receive a PTC as long as the coverage to the employee (and dependent) is considered affordable (the plan used to define affordability in this context is the lowest priced "self-only" plan the employer offers).

A spousal surcharge could also affect a plan's grandfathered status if the employer adds a surcharge and that surcharge reduces the employer contribution by more than five percent for any tier of coverage, as compared to what the employer contribution to coverage was on March 23, 2010.¹

HIPAA Special Enrollment

Generally, employers are only required to give ongoing employees one opportunity per plan year to enroll in a medical health plan. HIPAA special enrollment rights allow individuals who previously declined health coverage to enroll for coverage if certain special enrollment events occur, regardless of a plan's open enrollment period. Implementation of a spousal carve-out will be a HIPAA special enrollment opportunity for the spouse, allowing the spouse to enroll in the spouse's employer's plan mid-year. This is not the case for a surcharge, however. The employee could be stuck paying the higher spousal surcharge until the next enrollment opportunity for the plan sponsored by the spouse's employer.

COBRA

The Consolidated Omnibus Budget Reconciliation Act (COBRA) generally requires that group health plans sponsored by employers with 20 or more employees in the prior year offer employees and their families the opportunity for a temporary extension of health coverage (called continuation coverage) in certain instances where coverage under the plan would otherwise end. Loss of group health coverage eligibility due to a plan design change is not a COBRA-qualifying event for the spouse. Employers who are inclined to offer COBRA for the spouses affected by the carve-out should consider that the carrier for fully insured plans or the stop-loss carrier for self-funded plans may have an issue with providing coverage, as the carve-out was not a COBRA-qualifying event. Employers should consult with their carriers before extending coverage or they may risk being liable for claims.

Potential State Law Issues

Employers who wish to implement a spousal carve-out or surcharge should always consult with counsel on state law implications. Certain states have marital discrimination laws prohibiting employment discrimination on the basis of marital status, which could be interpreted to prohibit a spousal carve-out or surcharge. If a self-insured ERISA plan is involved (e.g., if the employer is not a church or government employer), such state laws will generally be preempted by ERISA, meaning that the state law will not prevent an ERISA plan from excluding spouses or imposing a surcharge. Employers should consult with counsel to



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confirm there are no state insurance laws prohibiting marital status discrimination with respect to health insurance.

ERISA and Section 125 Plan Documents

ERISA requires a plan's eligibility provisions be reflected in both the plan document and Summary Plan Description (SPD). The employer should amend plan documents in advance of the effective date of the change. For example, if the carrier documents indicate that spouses are covered, then that document would need to be amended; if it is silent, then the wrap document certainly would want to describe the spousal carve-out. Any plan document that is amended would require a corresponding amendment to the SPD or the issuance of an SMM (summary of material modifications). When reducing benefits, the SMM must be provided within 60 days of the change.²

Also, amendments to an employer's Section 125 (cafeteria) plan may be required under the Internal Revenue Code if the document promised medical benefits to spouses.

Medicare Secondary Payer Rules

The Medicare Secondary Payer (MSP) rules are designed to shift costs from the Medicare program by making Medicare the secondary payer to other sources, such as employer-sponsored coverage. If the surcharge or carve-out targets not only spouses eligible for other employer-provided coverage, but also spouses eligible for Medicare, counsel should be consulted for unresolved issues under the MSP provisions. These rules require employers with 20 or more employees to offer employees aged 65 and older and their spouses aged 65 and older the same group health coverage they offer younger employees. It's possible that providing certain incentives to not take the plan may violate these rules.

HR Administrative and Employee Relations Issues

Employers must consider the administrative burden on HR before implementing any spousal carve-out or spousal surcharge. From an HR perspective, it can certainly be challenging to administer this type of conditional enrollment, determine which spouses are truly ineligible and stay on top of changing eligibility throughout the year.

There are several details that an employer should determine proactively when implementing a spousal surcharge or carve-out:

- Employers should determine what coverage will suffice for the spousal surcharge or carve-out. For example, if the spouse's employer only provides a "preventive only" minimum essential coverage (MEC) plan, will that be

enough to trigger the carve-out?

- Employers should also decide how they plan to verify if the spouse has other coverage, as well as how often the verification should occur. Many employers require employees and their spouses to sign an affidavit, indicating whether or not the spouse is employed, eligible, and enrolled in a health plan through their employer.
- Finally, employers need to decide whether or not there will be a disciplinary outcome if an employee misrepresents their spouse's eligibility for coverage.

Many employers provide details about insurance benefits in their employee handbooks and HR policies/procedures. These documents must be revised as necessary to reflect any spousal coverage restrictions. Also, employers should insure the payroll department/vendor is kept up to date on eligibility changes so they can adjust their procedures accordingly.

Clear communication is critical. In communicating a spousal carve-out, employers should take care to clearly describe the eligibility requirements, along with any verification procedures and potential consequences. Implementing a spousal surcharge or carve-out is a significant change and, as an employee relations matter, it is essential to provide employees with adequate time to find coverage elsewhere. In addition, inadequate communication about plan eligibility changes could lead to employee complaints to the Department of Labor (DOL), which can trigger a DOL investigation/audit.

Conclusion:

As health care costs continue to rise, more employers are considering implementing spousal carve-outs or spousal surcharges as a way to reduce their health plan costs.

Employers must consider the various federal and state law implications of these plan design tools. Employers should also consider the HR impacts and be sure to communicate the changes clearly to provide employees sufficient time to procure spousal coverage elsewhere.

References

1 - Under the ACA, grandfathered plans do not have to comply with certain provisions of the law. Plans lose their grandfathered status if they choose to make significant changes that reduce benefits or increase costs for participants.

2 - The ACA requires all health insurance sponsors to provide a Summary of Benefits and Coverage (SBC) to all plan participants. If any changes are made mid-plan year that affect the content of the SBC, the SBC must be amended and participants be provided with advance notice of 60 days. The SBC generally does not require eligibility language, however, this should be confirmed when making significant changes to the plan.

