

EMPLOYEE BENEFITS

Regulatory Agencies Encourage Plan Sponsors to Extend Special Enrollment Periods

August 2023

Under HIPAA, the loss of Medicaid or CHIP coverage eligibility is a special enrollment event. HIPAA requires group health plans¹ to provide a special enrollment right to eligible employees (and their dependents) when they lose Medicaid or CHIP coverage eligibility. In this situation, the eligible employee must be given at least 60 days from the date of loss of eligibility to enroll in the employer-sponsored group health plan.

Most Medicaid and CHIP coverage terminations were paused during the COVID-19 Public Health Emergency, and therefore a “continuous coverage” requirement applied to individuals covered under Medicaid or CHIP. This meant that individuals who wanted to remain enrolled in a Medicaid or CHIP program during the COVID-19 Public Health Emergency could not be removed from such coverage by the government unless the individuals voluntarily canceled such coverage. That continuous coverage requirement expired on March 31, 2023, and state Medicaid agencies were again allowed to terminate Medicaid coverage beginning April 1, 2023. This is expected to result in many people losing Medicaid and CHIP coverage.

The regulatory agencies appear to anticipate that many people losing Medicaid and CHIP coverage due to the expiration of the continuous coverage requirement will need more time to enroll in new coverage than afforded by the typical 60-day special enrollment window that applies following the loss of eligibility for Medicaid and CHIP coverage.²

Accordingly, in an [open letter](#) to plan sponsors dated July 20, 2023, the agencies “encourage” employers sponsoring group health plans to “amend their group health plans to extend the period of special enrollment” for individuals losing eligibility for Medicaid or CHIP coverage.³

¹ Because the HIPAA special enrollment rules do not apply to excepted benefits, special enrollment rights are typically available only under group medical plans.

² Note that the agencies acknowledge that individuals losing eligibility for Medicaid or CHIP coverage on or before July 10, 2023 already have an extended special enrollment period until at least September 8, 2023. See <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/losing-medicaid-or-chip-flyer.pdf>. This would generally be true only if eligibility was lost after July 10, 2022.

³ CMS has announced a temporary special enrollment period on HealthCare.gov for individuals who lose Medicaid or CHIP coverage. That temporary special enrollment period runs from March 1, 2023, through July 31, 2024.



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Some key questions and answers regarding the open letter include:

- Are plan sponsors **required** to extend the special enrollment period applicable under their group health plans for individuals losing eligibility for Medicaid or CHIP?
 - » **Answer:** The open letter only states that plan sponsors are encouraged, but not required, to provide the extended period.
- Is a plan amendment required if a plan sponsor would like to extend the special enrollment period applicable in this situation?
 - » **Answer:** Because this would be a voluntary change to the plan's terms and conditions, it would require a plan amendment. Such an amendment would be subject to or conditioned upon approval of the insurance issuer or stop loss carrier. And, if such an amendment is adopted, ERISA-covered plans would be required to issue a Summary of Material Modification/revised Summary Plan Description evidencing such change to the plan.
- If a plan sponsor amends its plan to provide an extended special enrollment period in this situation, to what time period would it be applicable?
 - » **Answer:** This would be subject to the preference/decision of the plan sponsor, as this is a plan design issue. Plan sponsors generally would have discretion (subject to issuer or stop loss carrier approval) to determine the time period during which the extended special enrollment period would apply, the length of the extended special enrollment period and the effective date of coverage if enrollment is requested during the extended special enrollment period. This is also subject to any tolled HIPAA special enrollment deadlines previously imposed on health plans during the COVID-19 Outbreak Period.

Note that if retroactive coverage is provided under the group health plan in this situation, the employee would not be able to pay for any period of retroactive coverage on a pre-tax basis because the Section 125 rules governing pre-tax elections allow only **prospective** changes to pre-tax premium elections.⁴ For example, an employee requesting enrollment into a health plan on August 31, 2023, for a coverage effective date of April 1, 2023, may have to pay for retroactive coverage with post-tax dollars for coverage from April 1, 2023, through August 31, 2023, and then may begin paying pre-tax dollars towards coverage beginning September 1, 2023.

⁴ Under the Section 125 regulations, an election or election change is effective prospectively only if it applies to coverage to be received in the future and compensation that is payable in the future. See Prop. Treas. Reg. §1.125-2.





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