

# Rescind Developments

Rescissions under PPACA



**THERE** have been quite a few questions on the new rescission rule under PPACA and how the rule applies in many practical situations, such as a plan terminating an individual's coverage back to the date of termination of employment (a fairly typical occurrence).

Technically, this is a retroactive change, but is it a "rescission" under the new rules?

## What is a "rescission"?

The PPACA regulations broadly define a "rescission" as a cancellation or discontinuance of coverage that has a retroactive effect. The regulations say a cancellation is not considered a rescission if it is prospective only or is due to a failure to

timely pay required premiums or contributions toward the cost of coverage.

## Are there any circumstances in which rescission will be permitted?

The regulations provide that a rescission will be permitted only if the individual has performed an act, practice, or omission that constitutes fraud, or the individual has made an *intentional* misrepresentation of a material fact as prohibited by the terms of the plan or coverage.

## Can a plan rescind coverage retroactively if there has been a mistake?

This may depend on who made the mistake and how much time has elapsed. The regulations include an example where a plan mistakenly failed to termi-

nate an employee who went from full-time to part-time, which normally would not have been covered under the plan. The mistake went on for several months, with the employer continuing to deduct premiums for coverage. The example says that the plan could not terminate coverage back to the date the employee went to part-time status because there was no evidence of fraud or intentional misrepresentation. Later Q&A guidance explains that, in the example, the employee may have "relied" upon the coverage "for some time," suggesting that if the mistake was caught earlier or if no premiums had been deducted, giving the employee a reason to rely on the coverage, perhaps the plan would have been able to cancel coverage retroactively.

## Our plan reconciles our eligibility feed once a month and retroactively terminates coverage back to the date of an employee's termination. Is this a rescission?

The Q&A guidance says that, where a human resources department reconciles lists of eligible individuals via data feed once per month, and the employee has not paid premiums, this would not be considered a rescission, even if the termination is retroactive to date of termination of employment. It is not clear whether the guidance is limited to these particular facts, or whether the Q&A also would permit a reconciliation that extends beyond a month or where an employee may have paid premiums.

## May a plan terminate coverage retroactively to the date of a participant's COBRA qualifying event?

COBRA generally says that, when someone elects COBRA, COBRA is

counted from the date of the qualifying event, meaning the active coverage ends as of that date. However, for some events, such as divorce or death, the participant may not notify the plan of the qualifying event until well afterward (the participant has 60 days to notify the plan and elect COBRA). So, under COBRA, plans would terminate the individual's coverage retroactively back to the date of the qualifying event. The Q&As clarify that the agencies do not consider this to be a rescission of coverage.

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## Employer Requirements Under PPACA: Automatic Enrollment Issues

**PPACA** included a new requirement that employers automatically enroll full-time employees for coverage and give them the opportunity to opt out.

As employers are moving to the next stage of health-care reform, they are asking more questions about this new rule.

### What is the automatic enrollment requirement?

PPACA requires employers with more than 200 full-time employees that offer one or more health benefit plan options to automatically enroll new full-time employees in one of these plans (subject to any legally permissible waiting periods). The provision also requires employers to continue the enrollment of current employees. The employer must give "adequate notice" to employees of their automatic enrollment and the

opportunity to opt out of coverage.

### When does the automatic enrollment requirement apply?

The statute says that employers must offer automatic enrollment "in accordance with regulations promulgated by the Secretary [of Labor]." The Department of Labor has issued a Q&A that clarifies that the automatic enrollment provision is not effective until the Secretary has issued regulations and that the Secretary has delegated this responsibility to the Employee Benefits Security Administration (EBSA) within the Department of Labor.

The Q&A goes on to say that, "until such regulations are issued, employers are not required to comply with [automatic enrollment]." The Q&A says that the Department "expects to work with stakeholders to ensure that it has the necessary information and data it needs to develop regulations in this area that take into account the practices employers

currently use for auto-enrollment and to solicit the views and practices of a broad range of stakeholders, including employers, workers, and their families." The Department does not estimate a date for regulations, other than to say it intends to issue rules by 2014.

### Who will be considered a full-time employee?

The PPACA statute does not answer that question, so we also are waiting for regulations to define "full-time employee." The Department of Labor's Q&As did say that it would coordinate with the Department of Treasury, since the definition of "full-time employee" also is important to the employer "pay or play" requirements that are governed by Treasury. In addition, Treasury issued a Notice and request for comment on the definition of "full-time employee" (Notice 2011-36) and noted that it is coordinating with the Department of Labor. Comments were due on the Treasury Notice by June 17, 2011.

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