



As health care costs continue to rise there has been an increasing number of employers considering the implementation of a spousal carve-out or spousal surcharge as a strategy to reduce costs. In its simplest form, an employer will either impose a surcharge for a spouse's coverage, or make that spouse ineligible for the plan when the spouse is eligible for their own employer-sponsored coverage.

The impact on costs will vary obviously from employer to employer. For example, fully-insured plans may see little or no rate reduction from the insurance carrier depending on the size of the group, and how the group's claims experience is factored into the final rate calculation. In contrast, self-funded plans tend to experience a more direct benefit since removal of a spouse from the plan means that the employer will no longer be liable for claims incurred by that individual. Before implementing this strategy, employers should carefully consider a number of design and compliance issues.

Design Considerations

An employer should first consider what form of spouse eligibility rules the employer wishes to implement. There are three basic approaches, each of which raises different design and implementation issues:

1. Complete Spousal Carve-Out

With this approach, the employer defines plan eligibility so that spouses are ineligible to participate if they are eligible for other employer-sponsored coverage. Some issues to consider are:

- Will eligibility for any type of employer-sponsored coverage make the spouse ineligible? What if the spouse is only eligible for an employer-sponsored "mini-med" plan or other limited plan coverage?
- Is the cost of the other employer-sponsored coverage a factor in determining eligibility? One common approach is to make the spouse ineligible for the plan only if the spouse's cost of the other employer-sponsored coverage is less than a certain dollar amount.

2. Spousal Surcharge

Charging a surcharge for spouses who are eligible for other employer-sponsored coverage provides an incentive for spouses to choose to enroll in the other coverage, while still allowing eligibility in the employer's plan for those who need it. However, this approach may create an extra level of complexity in the communication and administration of benefits and payroll.

3. Eligibility restricted to when other coverage is also elected

Some employers define eligibility so that if a spouse has other coverage available, they must enroll in that coverage to be eligible for the plan. Allowing spouses to enroll in the plan only if they also enroll in other available coverage makes the employer plan the secondary payer for claims purposes. This strategy can potentially reduce plan costs while still allowing spouses to enroll in the employer's plan when necessary. Spouses are also less likely to enroll in the employer's plan if they already have other coverage.

Administrative Issues

Employers must determine how to verify the information necessary to provide coverage to a spouse when spouse eligibility is affected by other employer-sponsored coverage. Here, the employer must weigh time and cost considerations with the potential for plan savings.

Employee Affidavits

A common approach is to require a signed affidavit from the employee which certifies that the spouse is not eligible for other employer-sponsored coverage. In the case where other criteria are involved, such as the cost of the other coverage, the affidavit would also request that information. Clearly the success of this approach depends on the employee providing accurate information. Compliance can be increased by making it clear that there are significant consequences, such as loss of eligibility for the employee, if accurate information is not provided.

Eligibility Audits

Some employers perform periodic eligibility audits to ensure only eligible individuals are enrolled on the plan. In addition to reviewing spouse eligibility, these audits often review other issues such as dependent eligibility.

Certification from Spouse's Employer

A few employers even require the spouse to obtain a signed form or certification from their employer which provides the information necessary to make an eligibility determination. While this approach assures that the employee and/or spouse is providing accurate information, it also increases the administrative burden on the employer. Some common difficulties employers experience using this approach include:

- The spouse's employer is under no legal requirement to provide the information. If they refuse, the employee and spouse are put in a difficult position.
- The spouse's employer may be prohibited from providing plan enrollment information directly to another employer due to HIPAA privacy rules. To avoid this problem, the certification process should require that the spouse obtain the certification from their employer and then provide it to the plan.

Other Compliance and Employee Relations Issues

Health Reform and Grandfathered Plan Status

A spousal surcharge could affect a plan's grandfathered status under the Patient Protection and Affordable Care Act (the ACA). To retain grandfathered status, an employer may not reduce the percentage of premium paid by the employer by more than 5% for any tier of coverage, as compared to what the employer contributed on March 23, 2010.

For example, if the employer paid 75% of the family premium for a plan on March 23, 2010, it must continue to pay at least 70% of family premiums in the future in order to retain grandfathered status. If the imposition of a spousal surcharge reduces the employer contribution below that level, the plan would lose grandfathered status even if it only affects a small number of employees.

HIPAA Special Enrollment Rules

Employers also should consider how their rules will impact the spouse's ability to enroll in the spouse's employer-sponsored plan. Loss of coverage triggers a HIPAA special enrollment, so in the case of a loss of eligibility due to a spousal carve-out, HIPAA would require the spouse's employer-sponsored plan to allow the spouse to enroll in that plan mid-year. However, implementation of a surcharge is not a HIPAA special enrollment and would not require the spouse's employer to allow a mid-year enrollment. The spouse's plan may allow it based on their own eligibility rules, but would not be required to. In this case, the employee may be forced to pay the higher spouse surcharge amount until the spouse has an opportunity to enroll in their own plan.

COBRA

Loss of eligibility due to a plan change is not a COBRA qualifying event for the spouse. While some employers may be tempted to offer COBRA in this situation, an insurance carrier or stop-loss provider may not provide coverage since it is not an actual COBRA event. When the event is not clearly required by the law, employers should check with their carrier before offering COBRA to avoid the risk of being directly liable for the coverage.

Section 125 Cafeteria Plan Issues

Employers should also be aware that the ability for the spouse to make election changes in their employer sponsored plan will depend on that plan's definition of allowable status change events. As described above, health plans are required to allow mid-year election changes in the case of HIPAA special enrollment events, however, other Section 125 status changes are optional and can vary from plan to plan.



Interaction with State Laws

States may have conflicting laws which also must be considered. For example, a state's insurance law may define certain spouse or dependent coverage. Some jurisdictions may also have marital discrimination laws that could be interpreted to prohibit a spousal carve-out or surcharge. However, ERISA preemption rules should protect most plans subject to ERISA from most state laws' ability to regulate health plan eligibility. State laws are a bigger problem for employer plans not subject to ERISA such as church plans and public entities such as cities, counties and school districts. Employers should consult with legal counsel to make sure their strategy does not violate any state or local laws.

Plan Documentation

Finally, employers that implement a spousal carve out or surcharge must have plan document(s) and summary plan description(s) updated to reflect the new enrollment rules. Proper plan documentation is particularly important where state insurance laws conflict with plan eligibility rules. Employers should also carefully and clearly describe the eligibility requirements in all employee communications in order to minimize confusion that may occur.

Summary

Spousal carve-out or surcharge strategies can be an effective way to reduce plan costs, but employers should first carefully consider the different approaches and make sure compliance related issues are properly addressed.