



SITZMANN • MORRIS • LAVIS

Employee Benefits | Life Insurance | Risk Management

INSURANCE BRIEF

INSIDE THIS ISSUE:

Supreme Court— Oral Arguments	1
Summary of Bene- fits and Coverage	2
SF HCSO Annual Reporting	2
FMLA Proposed Rulemaking	4

Insurance Brief is provided as a courtesy to SML clients only. The newsletter is intended to provide accurate and authoritative information on legislative and market news. It is distributed with the understanding that Sitzmann Morris & Lavis Insurance Agency is not rendering tax or legal advice. Employers should consult their attorneys or tax advisors for specific compliance information and assistance.

Corporate Headquarters

One Kaiser Plaza, Suite 1101
Oakland, CA 94612
Toll Free: 800.733.3131
Tel: 510.452.0458
Fax: 510.452.1378

Santa Rosa Office

Fountaingrove Center
3554 Round Barn Blvd., Suite 309
Santa Rosa, CA 95403
Toll Free: 800.733.3131
Tel: 707.577.8300
Fax: 707.577.0609

Visit us on the web
www.smlinc.com

CA Insurance License #0D04053

Supreme Court Hears Oral Arguments

The Supreme Court of the United States (SCOTUS) heard oral arguments related to the constitutionality of the Patient Protection and Affordable Care Act (PPACA) on March 26—28th. This was a much anticipated event with people lined up since Friday to ensure a seat in the courtroom. SCOTUS is expected to provide their ruling on the case by the end of the current session in June. Until then, everyone will be analyzing the transcripts and audio recordings. (Links provided below). The Justices posed tough questions to both sides during each session. The nation's top constitutional lawyers are divided in their opinions on how the court should rule so all analysis is moot until the court delivers its decision in late June.

On the first day the court heard arguments on whether or not the case should even be heard before 2014 when the individual mandate and its tax penalty will begin. At issue is an 1867 tax law, the Anti-injunction Act, which prohibits lawsuits from going forward until someone actually pays a tax penalty.

Tuesday's session took up the question of whether Congress holds the constitutional power to require Americans to carry health insurance or pay a penalty, the "Individual Mandate."

The last day had two sessions of arguments. One addressing the states' objection to PPACA's expansion of Medicaid which would require additional expenditures by each state, and the other addressing the lack of a severability clause in the original PPACA bill. A severability clause allows legislation with multiple requirements to stand even if one part is ruled unconstitutional by the court. It is up to the court to decide how much, if any, of PPACA will remain in effect should the individual mandate be struck down.

[Read Monday's oral arguments](#)

[Listen to Monday's oral arguments](#)

[Read Tuesday's oral arguments](#)

[Listen to Tuesday's oral arguments](#)

[Read Wednesday's oral arguments on severability](#)

[Listen to Wednesday's oral arguments on severability](#)

[Read Wednesday's oral arguments on Medicaid](#)

[Listen to Wednesday's oral arguments on Medicaid](#)



Summary of Benefits and Coverage (SBC)

On February 9th the Departments of Health and Human Services, Labor and Treasury (Departments) released final guidance on the requirement for health plans and health insurance issuers to provide a summary of benefits and coverage to applicants and enrollees. These modify the proposed SBC guidance that was issued in August 2011.

In addition to the final regulations, the Departments also provided a final template for the SBC (along with instructions, samples and a guide for the coverage example calculations to be included in the SBC) and the uniform glossary explaining terms commonly used in health coverage.

Who must comply: This requirement applies to all sized groups, both fully insured and self insured policies, regardless of grandfathered status. For fully insured policies, the policy issuer is responsible for creating the SBC and providing it to the plan sponsor. For self insured policies, the plan sponsor is responsible for creating the SBC. The plan sponsor is responsible for distributing the SBC in all cases.

To date, carriers offering self insured policies have not responded to our inquiries regarding assisting clients with the SBC preparation. Since most of these carriers will be preparing them for fully insured plans, it is our hope that they will offer this service.

The final regulations, template and uniform glossary are available through the Department of Health and Human Services at: <http://cciiio.cms.gov/programs/consumer/summaryandglossary/index.html>.

Now that final guidance has been released, the Departments specified the following deadlines:

- Beginning on the first day of the **first open enrollment period** that begins on or after **Sept. 23, 2012**, plans must provide the SBC to participants and beneficiaries who enroll or re-enroll for coverage during the open enrollment period.
- Beginning on the first day of the **first plan year** that begins on or after **Sept. 23, 2012**, plans must provide the SBC to participants and beneficiaries who enroll for coverage other than through an open enrollment period, such as newly eligible individuals and special enrollees.
- Issuers must begin providing the SBC to plans on **Sept. 23, 2012**.

Cont'd next page

SF HCSO Annual Reporting

The 2011 HCSO Annual Reporting Form (ARF) is now available for on-line submission. To avoid penalties of \$500 per quarter, covered employers must submit the ARF by **April 30, 2012**.

Be aware that the 2011 ARF has been updated this year to reflect the November 2011 Amendment to the HCSO, which went into effect on January 1, 2012. So please read the [Instructions for Completing the 2011 HCSO Annual Reporting Form](#) before you fill out and submit the on-line form. The instructions and the ARF itself are now available at the Office of Labor Standards Enforcement (OLSE) [website](#).

If you have any questions about the 2011 ARF please visit the OLSE [website](#) to access the text of the HCSO, the implementing regulations, answers to "Frequently Asked Questions," and other helpful forms and notices. You can also contact the OLSE by phone at (415) 554-7892 or by email at hcsos@sfgov.org.

Summary of Benefits and Coverage (SBC) *cont'd*

Thus, calendar year plans with an annual open enrollment period that takes place after Sept. 23 will need to start providing the SBC on the first day of the open enrollment period for the 2013 plan year.

The Departments issued another set of FAQs (Part VIII) on March 19, 2012, available [here](#). The following is clarification on when to provide an SBC.

- if a plan (including a self-insured plan) or an insurer distributes written application materials for enrollment (in paper or electronic form), the SBC must be provided as part of those materials. But if a plan or insurer does not distribute written application materials for enrollment, the SBC must be provided no later than the first date on which the participant is eligible to enroll in coverage.
- if a plan or insurer requires participants and beneficiaries to actively elect to maintain coverage during open enrollment, or provides them with the opportunity to change coverage options during that time, the SBC must be provided at the same time the open enrollment materials are distributed
- if there is no requirement to renew (often referred to as an “evergreen” election), and no opportunity to change coverage options, renewal is considered to be automatic and the SBC must be provided no later than 30 days prior to the first day of the new plan year.
- if a policy renews without a new application, no later than 30 days prior to the first day of the new plan year. In the event that the benefit decisions have not been finalized by that time, the Final Regulations provide some relief. The absolute deadline is no more than seven business days after the policy is issued/renewed.

The guidance reminds us that during an open enrollment period, any COBRA-qualified beneficiary who is receiving COBRA coverage must be given the same rights to elect different coverage as are provided to similarly situated non-COBRA beneficiaries. Therefore, an SBC must be provided to a COBRA-qualified beneficiary who has elected coverage.

Distribution Methods

FAQ Q/A-10 summarizes the circumstances in which an SBC may be provided electronically. To distribute electronically to current plan participants and beneficiaries, the plan sponsor must meet the DOL’s more stringent electronic guidelines (see our July 2011 issue). To distribute the SBC to others who are eligible, but not enrolled, the Departments will permit electronic distribution only if the format is readily accessible and a paper copy is provided upon request, free of charge. If the sponsor intends to use an Internet posting, the Issuer or Sponsor must advise these same individuals in paper form (e.g. postcard) or by email that the documents are available electronically or by paper, with instructions (e.g. Internet address).

In Q/A-12, the Departments provide model language (which can be tailored by plans and insurers) to meet the requirement to provide an e-card or postcard in connection with evergreen website postings to inform employees of the availability of an SBC. Importantly, the Departments also note that unless the plan or insurer has knowledge of a separate address for a beneficiary, the SBC may be provided to the participant on behalf of the beneficiary (including by furnishing the SBC to the participant in electronic form).

What’s Next

During the first year the Departments will not impose penalties on plans and issuers that are working diligently and in good faith to provide the required SBC content in an appearance that is consistent with the final regulations. Once they begin enforcement, penalties accrue at \$100/per day per affected participant.

FMLA Proposed Rulemaking

On January 30, 2012, the U.S. Department of Labor (DOL) issued a [notice of proposed rulemaking](#) (NPRM) to implement new statutory amendments to the Family and Medical Leave Act (FMLA) that would expand military family leave provisions and incorporate a special eligibility provision for airline flight crew employees.

Background: The National Defense Authorization Act for Fiscal Year 2010 (Act) expanded the FMLA's military family leave provisions. Most of the Act's changes became effective on Oct. 28, 2009. Under the Act, qualifying exigency leave was expanded to include members of the Regular Armed Forces, in addition to members of the National Guard and Reserves. Also, a requirement was added that for all qualifying exigency leave, the military member must be deployed to a foreign country. The Act extended military caregiver leave to eligible employees whose family members are recent veterans with serious injuries or illnesses. The FMLA's definition of "serious injury or illness" was also broadened to include serious injuries or illnesses that result from preexisting conditions.

In addition, the Airline Flight Crew Technical Corrections Act (Flight Crew Act) established a special FMLA eligibility requirement based on hours of service for airline flight crew members. This special provision was added to take into account the unique scheduling requirements of the airline industry. The Flight Crew Act's FMLA changes became effective on Dec. 21, 2009.

Proposed Regulations: The major provisions of the NPRM include:

- implementation of the extension of military caregiver leave to eligible family members of recent veterans with a serious injury or illness incurred in the line of duty;
- a flexible, three-part definition for serious injury or illness of a veteran;
- expanding the amount of qualifying exigency leave an eligible employee may take to spend time with a covered family member during rest and recuperation leave to up to 15 days (currently, this leave is limited to five days);
- inclusion of a foreign deployment requirement for qualifying exigency leave for the deployment of all servicemembers (National Guard, Reserves, Regular Armed Forces);
- the addition of a special hours of service eligibility requirement for airline flight crew employees; and
- the addition of specific provisions for calculating the amount of FMLA leave used by airline flight crew employees.

In the proposed regulations, the DOL states that it intends to update the following model forms:

- The FMLA poster (WHD publication 1420);
- The Notice of Eligibility and Rights and Responsibilities (Form WHD-381);
- The Certification for Qualifying Exigency Leave for Military Family Leave (Form WHD-384); and
- The Certification for Serious Injury or Illness of a Covered Servicemember for Military Family Leave (Form WHD-385).

Meanwhile, an employer can continue to use the current model forms available on the DOL's website at: www.dol.gov/whd/fmla/index.htm.

Effective Date: The regulations are in proposed form; they **will not take effect** until the DOL issues a final rule. Interested parties are invited to submit written comments on the proposed rule on or before April 16, 2012 at www.regulations.gov. Based on the comments submitted, the DOL may make revisions to the proposed regulations before they are issued in final form.