November 22, 2021

The Illinois Consumer Coverage Disclosure Act

New Employer Medical Coverage Disclosure for Illinois Employees

The Illinois Consumer Coverage Disclosure Act (the "Act" or "CCDA") became law on August 27, 2021, and is an addition to Illinois employment law under the jurisdiction of the Illinois Department of Labor (IDOL). The Act requires an employer to compare its medical coverage against Illinois' list of essential health insurance benefits and disclose this information to its Illinois workforce. The disclosure's purpose is to help employees make informed decisions about whether coverage through their employer or in the individual market will best meet their needs.

In collaboration with the Illinois Department of Insurance, the IDOL published a model disclosure form on November 17, 2021. This Alert addresses the Act's requirements and other related information.

When is the Act Effective?

While the Act was effective immediately as of **August 27, 2021**, we speculated the IDOL would not enforce the law prior to publishing its model disclosure form, which occurred on November 17, 2021. While IDOL never officially announced a delay of enforcement, we are not aware of any enforcement action prior to this date.

Now that the model disclosure tool and form is available, we expect enforcement will begin in the coming weeks. We recommend covered employers consider acting in November or December of 2021, which could occur in conjunction with open enrollment for calendar year medical coverage.

Act Requirements

Under the Act, employers offering medical coverage[1] must provide their *medical-eligible* Illinois employees with a disclosure identifying whether the employer's medical plan covers the essential health insurance benefits (EHBs) required by the State of Illinois for its individual health insurance market.[2] The disclosure must enable employees to easily compare and determine the EHBs covered – or not covered – by the plan. The disclosure does not require any cost or cost sharing information. A straightforward model disclosure tool and form is available.

The disclosure obligation belongs solely to Covered Employers without regard to whether the employer's medical coverage is fully insured or self-insured. Employers can – and we assume most will – seek the assistance of insurance carriers, third party administrators, and/or other third parties to complete the disclosure.

Each Plan Option: The Act does not address this, but the IDOL's FAQs and the model disclosure tool and form make clear that employers should prepare and deliver a separate disclosure for each medical plan option offered to Illinois employees.

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[1] The Act refers to group health insurance coverage, but the disclosure requirement effectively limits this to employer-provided group medical coverage.

[2] This includes coverage available through Get Covered Illinois. Additional information about the EHBs is available here.

Covered Employers

The Act defines a covered employer as follows:

> *"Employer" means an individual, partnership, corporation, association, business, trust, person, or entity for whom employees are gainfully employed in Illinois and includes the State of Illinois, any State officer, department or agency, any unit of local government, and any school district.*

This includes all private sector, state and/or local government, and church or church-affiliated employers that pay compensation for services rendered to one or more employees (i.e., "gainfully employed") in the State of Illinois.

Covered Employees

The Act's definition of a covered employee is below:

> *"Employee" means any individual permitted to work by an employer.*

This applies to all full-time, part-time, and seasonal/temporary employees employed in Illinois. Interestingly, the Act indicates an employer must pay compensation to one or more employees for services rendered (i.e., gainfully employed) to be a covered employer, but the definition of employee does not appear to require a covered employee to be compensated. This should be a moot point in most instances, since employers rarely offer medical coverage to unpaid workers.[3]

This definition obviously includes owners who are IRS Form W-2 employees, and we believe it also includes partners, LLC members taxed as partners, and other owners who perform employee functions for compensation on behalf of the employer.

Excludable Individuals

Employers do not have to provide the disclosure to the following individuals:

- Ineligible employees – The Act does not apply to employees who are ineligible for medical coverage.
- Staffing agency employees (with an exception) – A client employer does not have to provide the disclosure to staffing agency employees if they are ineligible for the client employer's medical coverage, which is usually the case. In those instances, the disclosure obligation belongs to the staffing agency if the employee is eligible for the staffing agency's coverage. If a staffing agency employee is eligible for the client employer's medical coverage, we believe the joint employer doctrine requires the client employer to provide the disclosure.
- Independent contractors – Unless misclassified, these should not qualify as a covered employer's employees under the Act. Employers also rarely offer medical coverage to independent contractors.
- Former employees – The Act's definition of employee excludes former employees, including former employees participating in retiree coverage, COBRA, or other forms of continuation coverage.

Remote Employees: The definition of employee obviously includes remote employees who are eligible to elect medical coverage. The question is whether remote employees assigned to and paid from a work location in another state while living and working in Illinois are covered employees under the Act? We recommend employers discuss this with their usual labor & employment counsel and/or HR advisors before excluding them from the Act's disclosure requirements.

[3] We cautiously recommend covered employers provide the required disclosure to all individuals working in Illinois who are eligible for medical coverage.

Illinois Model Disclosure Tool and Form

The IDOL and Illinois Department of Insurance collaborated to publish the Act's model disclosure tool and form. The Act and available guidance do not require covered employers to use the model, but the model is a compliance safe harbor and we strongly recommend employers consider utilizing it. The Act requires the disclosure to help employees easily compare and determine the EHBs covered – or not covered – by the employer's medical plan. We do not believe an employer can satisfy this requirement by providing a covered employee with the plan's summary plan description or summary of benefits and coverage (SBC) and a separate list of the EHBs.

The model includes both the list of the EHBs and the ability for employers to confirm whether their medical plan covers them. The model merely requires employers to confirm by indicating Yes or No[4] for each EHB and does not require any further detail. Remember, we believe the available guidance indicates employers must prepare and provide a separate disclosure for each medical plan option offered to Illinois employees. This is similar to the requirement for summaries of benefits and coverage (SBCs).

A sample screenshot of the model is below. The page numbers refer the reader to the respective pages in Illinois' benchmark plan for additional information.

- Preventive and wellness services and chronic disease management
- Rehabilitative and habilitative services and devices (services and devices to help people with injuries, disabilities, or chronic conditions gain or recover mental and physical skills)

2020-2022 Illinois Essential Health Benefit (EHB) Listing (P.A. 102-0630)				Employer Plan Covered Benefit?
Item	EHB Benefit	EHB Category	Benchmark Page # Reference	
1	Accidental Injury -- Dental	Ambulatory	Pgs. 10 & 17	Yes
2	Allergy Injections and Testing	Ambulatory	Pg. 11	Yes
3	Bone anchored hearing aids	Ambulatory	Pgs. 17 & 35	Yes
4	Durable Medical Equipment	Ambulatory	Pg. 13	Yes
5	Hospice	Ambulatory	Pg. 28	Yes
6	Infertility (Fertility) Treatment	Ambulatory	Pgs. 23 - 24	No

In many instances, we believe insurance carriers and/or TPAs will assist with the disclosure's preparation, and they will frequently be in the best position to do so. An insurance carrier issuing coverage sitused in another state may be reluctant to participate, but the employer's insurance broker or consulting firm may be able to help. Please contact your MMA client service team for more information.

Note: Although the Act requires employers to disclose EHBs covered by their medical plans, self-insured ERISA plans and large group fully insured plans do not have to actually cover them (these plans may use Illinois as a benchmark plan to define essential health benefits for Affordable Care Act purposes). Under Illinois insurance law, a large group is an employer that averaged 51 or more employees during the prior calendar year and employed at least two employees at the start of the current plan year. By contrast, small group fully insured plans (<51 employees) and individual health insurance coverage subject to Illinois insurance law must cover the EHBs.

Delivery Requirement and Methods

Employers must provide the disclosure to medical-eligible employees in three situations:

[4] The model is not explicit about confirmation. It appears an employer could also use a check mark or an "X" to indicate the EHBs covered by the plan, but we believe using a Yes or No for each EHB will best avoid confusion.

1. To new hires –The Act does not specify a timing requirement, but an employer should be able to include the disclosure as part of a new hire packet or related communications.

2. Annually – An employer can satisfy this in connection with open enrollment, through a separate packet of legal notices, or separately.

3. Upon request – Again, the Act does not specify a timing requirement, but we recommend an employer provide the disclosure within 30 days of the request (sooner is better). The Act does not address whether an employer must provide the disclosure to an authorized representative requesting a copy on behalf of the employee, although we believe employers should be prepared to honor these requests. Employers may wish to discuss this with their labor & employment counsel and/or HR advisors.

The Act generously allows for electronic delivery via email or by posting a copy of the disclosure on a website as long as employees can regularly access the information. Presumably, employers relying on website delivery will need to notify employees how to access the disclosure and be prepared to address this upon hire, annually, and upon request. The Act does not indicate the employer must host the disclosure on its own website, and hosting it on an insurance carrier's or TPA's web portal appears to satisfy the requirement.

ERISA Preemption Defense (but is it worth it?)

An ERISA plan may generally claim preemption from any state law that relates to it (i.e. affects it), such as a law requiring or prohibiting coverage for a particular service or treatment. However, ERISA does not preempt state laws regulating insurance [for fully insured coverage], banking, or securities. This is why state insurance law mandates or restrictions apply to fully insured ERISA coverage while self-insured ERISA plans can choose to ignore them.

While Illinois clearly believes the disclosure requirement is not subject to ERISA preemption, the Act may be vulnerable to ERISA preemption claims by both self-insured and – in an unusual twist – fully insured ERISA plans. An Illinois law requiring employers to compare their ERISA plans with Illinois' EHB requirements and disclose the results to employees should fit within ERISA's preemption protection as relating to an ERISA plan. In theory, a fully insured ERISA plan can claim ERISA pre-emption, because the Act is part of Illinois employment law and is not an insurance, banking, or securities law.

Claiming ERISA preemption will require one or more employers to survive a legal challenge in court (i.e., take one for the team). This may not be worth the effort or expense given how little employers must do to comply with the Act.

Enforcement

The Act provides for the following civil penalty schedule, enforced by the IDOL:

Employer Size	1st Offense	2nd Offense	3rd Offense
<4 employees	up to $500	up to $1,000	up to $3,000
4 or more employees	up to $1,000	up to $3,000	up to $5,000

The Act appears to base employer size upon an employer's total workforce[5] and not just its Illinois employees. The IDOL confirmed to us that all related disclosure violations for a single year count as a single offense. For example, failing to provide 34 covered employees with an annual disclosure for 2022 is a single offense.

[5] There may be an argument to limit this to the total number of covered employees.

The IDOL will consider mitigating penalties for good-faith compliance efforts and the overall seriousness of the situation.

Additional Resources

Illinois Dept. of Labor CCDA Web Page

Illinois Consumer Coverage Disclosure Act

Illinois Dept. of Labor CCDA FAQs

Model CCDA Disclosure Tool and Form

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