



Employee Benefits Broadcast
The Benefits News You Need in 60 Minutes or Less

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Employee Benefits Broadcast

**“The Benefits News You Need
in 60 Minutes or Less”**

**Tuesday, July 28, 2009
12:00 p.m. – 1:00 p.m. CST**

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Employee Benefits Broadcast

Housekeeping Issues

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Employee Benefits Broadcast

Today's Topics

- **Headline News:** Partial Plan Terminations — The Effect of Layoffs and Plant Closures on Your Retirement Plans
- **In the Spotlight:** The New Mental Health Parity Provisions for Group Health Plans
- **Cram Session:** Michelle's Law — Required Extended Coverage Under Group Health Plans



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Headline News



Partial Plan Terminations: The Effect of Layoffs & Plant Closures on Your Retirement Plans

Leigh C. Riley



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Headline News

Not Real Termination

- We normally think of a plan termination as the complete cessation of the plan, followed by a distribution of its assets
- A “partial plan termination” is simply an event that will result in the vesting of certain participants



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Headline News

The Vesting Rule

- A qualified retirement plan is required to provide that, upon its partial termination, all affected employees must be fully vested in their plan benefits to the extent funded (pension) or in their account balances.
- If a plan does not fully vest affected employees upon a partial termination, it will lose its “qualified” status.
- The purpose of this rule is to deter employers from terminating non-vested employees and to prevent a windfall to the employer through a reversion of money on which the employer has paid no federal income tax.



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Headline News

Plans Subject to Rule

- All tax qualified plans
 - 401(k) and profit sharing
 - Defined benefit pension
 - Money purchase
- Other than governmental and church plans (which are exempt from vesting rules)
- There is no counterpart in ERISA, so 403(b) plans are also exempt



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Headline News

When Does a Partial Termination Occur?

Two kinds:

- Horizontal – when plan amended to cease accruals, exclude group of participants or other event which will result in (or increase the likelihood) of reversion to employer
- Vertical – when a significant number of participants are terminated



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Headline News

When Does a Partial Termination Occur?

- Regulations provide scant guidance. Until 2007, relied on case law and old IRS rulings.
- In 2007, the IRS issued Revenue Ruling 2007-43 which stated that:
 - whether a partial termination has occurred depends on the facts and circumstances
 - if the “turnover rate” is at least 20 percent, there is a presumption that a partial termination has occurred
 - the presumption can be rebutted by showing that the turnover is routine for the employer



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Headline News

What is the “Turnover Rate”?

$$\text{Turnover Rate} = \frac{\text{number of plan-eligible employees who had an “employer-initiated” severance of employment during the “applicable period”}}{\text{number of plan-eligible employees at the start of the “applicable period”} + \text{number of employees who became plan-eligible during the “applicable period”}}$$



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Headline News

When is a Severance from Employment Considered “Employer-Initiated”?

- A severance from employment is considered employer-initiated unless it is on account of death, disability, or retirement on or after the plan’s normal retirement age.
 - A severance is employer-initiated even if caused by an event outside of the employer’s control, such as an economic downturn.
- An employer may be able to prove that a severance was purely voluntary through personnel files, employee statements, and other records.



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Headline News

Exception: Certain Transferred Employees Do Not Count

- Employees who are transferred to another employer within the controlled group do not get counted because they will continue to earn vesting service under the plan.
- Employees who are transferred to an employer outside of the controlled group do not get counted if there is a spin-off of the existing plan to the new employer and the transferred employee will continue to be covered under the spun-off plan.



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Headline News

What is the “Applicable Period”?

- The applicable period is the plan year in which the severances occur or a longer period if there are a series of “related” severances.
- Severances that span over multiple plan years may be related depending on the particular facts and circumstances.
 - The IRS has not provided any guidance regarding when severances are considered to be related.
 - No rules that layoffs in connection with one period of economic downturn must be aggregated.
 - Several courts have held that severances that occur over multiple plan years in connection with corporate reorganizations that resulted from merger and acquisition activity are related severances.
 - With a series of lay-offs, one factor to consider is whether later rounds of lay-offs were contemplated at the time of earlier rounds.



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Headline News

Example

Company ABC has 1,000 plan-eligible employees at the beginning of the plan year. During the course of the year, Company terminates 300 of those individuals, but then hires 50 new employees. Company ABC's turnover rate is $300/1,050$ or 28.5%. Company ABC's plan has experienced a partial plan termination.



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Headline News

Who Must be Fully Vested Upon a Partial Termination?

- Statute says affected employees
 - In the past, we have thought that this means employees who experienced the employer-initiated severance
- Rul. 2007-43 says that **all** plan-eligible employees who had a severance from employment during the applicable period must be fully vested
 - IRS has verbally confirmed that this includes employees whose severance was employer-initiated and those who voluntarily quit. [Does this make sense?]



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Headline News

What Must Be Vested?

- For defined contribution plans, account balances
- For defined benefit plans, benefits “to the extent funded” as of the date of the partial termination
 - There is no guidance regarding how to interpret the “to the extent funded” limitation.
 - Believe it means funded on a termination basis (applying ERISA 4044 priority categories).



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Headline News

Practical Considerations of Full Vesting

- When does partial termination occur?
 - DB plan, affected employees vest in benefit to the extent funded on the date of termination
 - DC plan, affected employees vest in their plan account balances
- If single event results in 20% threshold, then date of partial termination is clear
- If multiple layoffs over time result in 20% threshold, does partial termination occur when the 20.0001% employee is terminated or at the date of the first layoff?
 - Treas. Reg. states “a plan is terminated when, in connection with the winding up of the employer’s trade or business, the employer begins to discharge his employees.”



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Headline News

Practical Considerations of Full Vesting

- This matters because we believe that if an affected participant has been “cashed out” by the date of the partial termination, vesting is not required for that person (similar to regular plan termination rules)
- If conclude partial termination occurred at the beginning of the period, then terminated employees who have already taken a distribution (or been deemed cashed out) will be owed back their forfeited amounts



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Headline News

Practical Considerations of Full Vesting

- Also matters for pension plans because only vest to the extent funded on the date of partial plan termination
- As of what date are the plan’s assets valued and the PBGC priority categories determined?



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Headline News

Plan and SPD Language

- Plan document required to state that upon partial termination all accounts/benefits of affected participants fully vested
- SPD should state this, as well
- Note: Court has held that if SPD says simply “vested” and not “vested to the extent funded” then for pension plan must provide for 100% vesting



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Headline News

Steps to Take When a Partial Termination Occurs

- Notify your plan’s recordkeeper/actuary
- Consider documenting, through action of administrator, that a partial termination has occurred and the date of that termination
- Notify affected participants



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In the Spotlight



Mental Health Parity and Addiction Equity Act of 2008

Robert E. Goldstein



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In the Spotlight

Effective Dates

- 1st plan year beginning after date of enactment (Oct. 3, 2008)
- For group health plans maintained under collective bargaining agreements ratified before October 3, 2008, the mental health parity provisions won't apply to plan years beginning before the *later* of: (a) the date on which the last of the collective bargaining agreements relating to the plan terminates (ignoring extensions agreed to after October 3, 2008), or (b) January 1, 2010.



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In the Spotlight

Prior Law

- The new law is an expansion of 1996 legislation (the Mental Health Parity Act of 1996 (“MHPA”), the first legislation ever enacted to provide parity between mental health benefits and medical/surgical benefits.
- MHPA required a group health plan with annual dollar limits or aggregate lifetime dollar limits for medical/surgical benefits to apply those same (or higher) dollar limits for mental health benefits
- Didn’t achieve parity, but a reasonable first try



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In the Spotlight

Why the need to expand MHPA?

- Statistics from recent US Government Accountability Office:
- 87% of surveyed employers have a lower limit on mental health benefits than medical/surgical benefits
- 44% of the plans are without an out-of-pocket spending cap for addiction treatment



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In the Spotlight

Why the need to expand MHPA? (cont.)

- Cost-sharing for addiction benefits is 46% higher than for medical/surgical benefits
- 26% of Americans 18 and older suffer from a diagnosable mental disorder (National Inst. Of Mental Health)



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In the Spotlight

What does the Act *not* require?

- There is no requirement that qualifying group health plans must offer mental health or substance use disorder benefits; but, if they do offer them, these benefits must be in parity with the medical/surgical benefits offered by the plan



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In the Spotlight

Coverage

- In general, the Act covers all group health plans of employers who average 50 or more employees during the preceding calendar year
- Employer plans not subject to the Act still need to satisfy applicable state law parity requirements
- New law does not apply to Medicare patients nor to those with individual health insurance policies



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In the Spotlight

Coverage (cont.)

- The Act also exempts group health plans if compliance is too costly (cost increase of 2% or more during the 1st year; 1% or more in subsequent years)



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In the Spotlight

Summary of New Provisions

- If a group health plan includes medical/surgical benefits and mental health benefits, the financial requirements (e.g., deductibles and co-payments) and treatment limitations (e.g., number of visits or days of coverage) that apply to mental health benefits must be no more restrictive than the predominant financial requirements or treatment limitations that apply to substantially all medical/surgical benefits



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In the Spotlight

Summary (cont.)

- Mental health benefits and substance use disorder benefits may not be subject to any separate cost-sharing requirements or treatment limitations that only apply to such benefits
- If a group health plan includes medical/surgical benefits and mental health benefits, and the plan provides for out-of-network medical/surgical benefits, it must provide for out-of-network mental health benefits



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In the Spotlight

Summary (cont.)

- Standards for medical-necessity determinations and reasons for any denial of benefits relating to mental health benefits and substance use disorder benefits must be made available upon request to plan participants



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In the Spotlight

Next Steps

- None of the federal agencies with jurisdiction (IRS, DOL, or Health and Human Services) have issued guidance yet. Therefore, new rules should soon be forthcoming (required by the end of 2009)
- Group health plans will need to be amended by next year
- Summary Plan Descriptions will also have to be updated next year to include these provisions
- Review your situation with your carriers and brokers to redesign coverage, if needed, to come into compliance



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Cram Session



Michelle's Law — Required Extended Coverage Under Group Health Plans

Lloyd J. Dickinson



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Michelle's Law

- ERISA §714
- IRC §9813
- PHSA §2707



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Essential Elements

Group Health Plan may not terminate coverage

- Of a dependent child
- Due to a medically necessary leave
- Before the earlier of:
 - one year after the leave began or
 - The date coverage would otherwise terminate



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Cram Session

What Is Protected

- The child is entitled to the same benefits as if the child was not on leave; and
- Any changes in coverage must apply to the child



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Protected Category

A protected dependent child is:

- A dependent child ***under the terms of the plan*** of a participant or beneficiary; and
- Was enrolled in the plan
 - On the basis of being a student
 - At a post-secondary educational institution
 - Immediately before the leave began



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Qualifying Institutions

- Post-secondary educational institution is defined in §102 of Higher Education Act of 1965
 - Essentially, any accredited institution



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Qualifying Leaves

- The leave protected is one that:
 - Commences while the child is suffering from a serious illness or injury
 - Is medically necessary; and
 - Causes loss of student status for coverage under the plan

“Leave” also includes other change of enrollment



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Physician's Certificate

- Plan may require the written certification of a treating physician that:
 - The child is suffering a serious illness or injury
 - The leave is medically necessary



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Notice Requirement

- Notice of the law must be supplied with any request for certification of student status



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Effective Date

- Effective date:
 - First Plan Year following October 9, 2009



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Plans Affected

- Essentially all plans with dependent child coverage based upon student status
- “Group Health Plans” are those subject to HIPAA preexisting condition exclusions and nondiscrimination rules. Exceptions:
 - Electing self-funded State and Local Governmental Plans
 - Less than two people
 - Excepted benefits



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Potential Penalty

- \$100 per day per individual
 - Code §4980D



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Action required

- Generate new notice form
- Generate new application form
- Generate new physician's certificate
- Revise SPD
- Revise procedures manual



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EBIA List of Statutes

- Mental Health Parity Act
- Women's Health & Cancer Rights Act
- Newborns' and Mothers' Health Protection Act
- Family & Medical Leave Act
- USERRA
- Age Discrimination in Employment Act
- Age Discrimination Act
- Pregnancy Discrimination Act
- Genetic Information Nondiscrimination Act
- Medicare Secondary Payer
- Medicare Part D
- HMO nondiscrimination
- TRICARE
- COBRA
- HIPAA



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Questions and Answers



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Mark Your Calendar

- Foley will be hosting the remaining session of the 2009 Employee Benefits Broadcast on:

– October 20, 2009



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Thank You

- A copy of the PowerPoint presentation and a multimedia recording will be available on Foley's website within 24 to 48 hours:
http://www.foley.com/news/event_detail.aspx?eventid=2739
- We welcome your feedback. Please take a few moments before you leave the web conference today to provide us with your feedback:
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