



## Society of Professional Benefit Administrators

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## Michelle's Law: Questions Remain

While the effective date of Michelle's Law (P.L. 110-381) is approaching, the agencies responsible for drafting guidance have not yet released any guidance. The law is effective for plan years beginning on or after October 9, 2009 (for calendar year plans, the provision takes effect on January 1, 2010). There is still a window of opportunity to pose additional questions and concerns to the regulation writers and have them addressed in future guidance. The regulation writers value questions from SPBA members and make great efforts to address your issues in guidance (about one third of the questions and answers in the IRS guidance on the ARRA COBRA subsidy were in direct response to questions from SPBA members).

### Basic Concept

Under Michelle's Law, a group health plan must continue to provide coverage to a dependent child who would lose coverage for failing to maintain fulltime enrollment in a post-secondary institution when the dependent takes a medically necessary leave of absence due to a serious illness or injury. The group health plan must continue the coverage as though the dependent child was still a full-time student up to a year or until the coverage would otherwise terminate under the plan.

### Details

**Which plans are subject to Michelle's Law?** – Michelle's Law amends ERISA, the Internal Revenue Code and the Public Health Service Act. Fully-insured group health plans as well as self-funded group health plans are subject to the law. Group health plans with at least two employees on the first day of the plan year are subject to the provisions. There are no exceptions for collectively bargained plans. The law also applies to individual insured policies.

**How is a medically necessary leave of absence defined?** A medically necessary leave of absence means a leave of absence from a post-secondary educational institution that commences while a dependent child is suffering from a serious illness or injury, is medically necessary, and causes the child to lose student status for purposes of coverage

under the terms of the plan. A medically necessary leave of absence also includes a change in the student's course load that results in the loss of student status under the terms of the plan. There is no requirement that there is a complete leave of absence: There could be a partial leave of absence. For example: A student lowers her course load from 16 hours to 8 hours to accommodate a serious illness or injury and consequently loses her eligibility for health coverage. Russ Weinheimer of the IRS clarified the partial leave of absence concept at the SPBA Spring Meeting last March.

**When may coverage be terminated?** A group health plan or a health insurance issuer that provides health insurance coverage in connection with a group health plan, may not terminate coverage of a dependent child under such coverage due to a "medically necessary leave of absence" before the date that is the earlier of: A) the date that is one year after the first day of the "medically necessary leave of absence"; or, B) the date on which such coverage would otherwise terminate under the terms of the plan or health insurance coverage.

**What is the definition of a post-secondary educational institution?** The statute references a post-secondary educational institution (including an institution of higher education as defined in section 102 of the Higher Education Act of 1965). SPBA reviewed section 102 the Higher Education Act of 1965 as well as section 101 of the same Act for the definition of a post-secondary educational institution.

We discovered that the Higher Education Act of 1965 does not use the term "post-secondary educational institution," instead it uses the term "institution of higher education." While we cannot be certain whether the regulation writers will use the definition of "institution of higher education," let's review this definition, as there is a high likelihood that it will be used.

The term "institution of higher education" in section 101 of the Higher Education Act of 1965 means an educational institution in any State that: 1) admits as regular students only persons having a certificate of graduation providing secondary education, or the recognized equivalent of such a certificate; 2) is legally authorized within such State to provide a program of education beyond secondary education; 3) provides an educational program for which the institution awards a bachelor's degree or provides no less than a 2-year program that is acceptable for full credit toward such a degree; 4) is a public or other nonprofit institution; and 5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted pre-accreditation status by such an agency or association that has been recognized by the Secretary of Education for the granting of pre-accreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

The term "institution of higher education" also includes any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation and that is a public or nonprofit private educational institution in any State that admits as regular students individuals who are beyond the age of compulsory school attendance in the State.

Section 102 of the Higher Education Act expands on the definition of an "institution of higher education" to include: 1) a proprietary institution of higher education that provides an eligible program of training to prepare students for gainful employment in a recognized occupation; 2) a post-secondary vocational institution that provides an eligible program of training to prepare students for gainful employment in a recognized occupation; an institution outside the United States that is comparable to an institution of higher education as defined in section 101.

**Is certification from a physician required?** The requirement to extend coverage during "medically necessary leaves of absence" applies only if the plan receives a written certification by a treating physician of the dependent child which states that the child is suffering from a serious illness or injury and that the leave of absence is medically necessary. Michelle's Law does not provide a deadline for the dependent child to provide certification and this raises some thorny administration issues. If no certification is provided and the dependent child loses student status, a COBRA qualifying event occurs.

**How long must a plan give a dependent child to come forward with a certification?** Is the plan still obligated to reinstate the dependent child after the COBRA election period has expired?

**What is the length of COBRA coverage?** If a dependent child takes a Michelle's Law leave of absence and he does not return to the educational institution after the leave ends, a COBRA qualifying event occurs. What is the length of the COBRA coverage? Is it 24 months or 36 months? When a dependent child loses dependent status, the COBRA law provides that plans must provide 36 months of COBRA coverage. Will the time spent on a Michelle's Law leave of absence count toward the 36 months of COBRA coverage? If Treasury and IRS take the position they took with respect to the Family and Medical Leave Act, the dependent child will be entitled to 36 months of COBRA after the end of the Michelle's Law leave of absence.

**Re-qualifying for leave of absence** – If a dependent child takes a 12-month leave of absence under Michelle's Law and then he re-enrolls in the educational institution but illness prevents him from attending school full-time, is he entitled to another 12 months of Michelle's Law leave? Russ Weinheimer of IRS said there is no answer right now.

**Is there a notice requirement?** If a plan requires an individual to certify their student status, the plan must notify individuals of their rights under Michelle's Law in any plan notice explaining the student status certification requirement. The wording must include a description of the terms for continued coverage during a medically necessary leave of absence.

**What benefits is the dependent child entitled to?** A dependent child taking a medically necessary leave of absence is entitled to the same benefits as if the dependent had continued to be covered as a student who did not take leave. Presumably, this covers the cost-sharing arrangements as well as the benefits.

**Changes in insurance arrangement** – The requirements of Michelle's Law continue to apply for the remainder of the period of the medically necessary leave of absence even if

the plan changes from a fully-insured arrangement to self-funded, or from self-funded to fully insured, or from one insurance carrier to another.

**Effective Date** - How are students impacted who began a leave of absence before the Law takes effect? The statutory language says Michelle's Law will apply to plan years beginning on or after October 9, 2009 and to medically necessary leaves of absence beginning during such plan years. It appears a medically necessary leave of absence occurring before the effective date of Michelle's Law will not be subject to the rule.

**Plan document changes for Michelle's Law as well as other new regulatory developments will be discussed at the SPBA Fall Meeting in Portland, Oregon, October 5 – 7. Plan to attend.**

**Update Issue:**

Thursday, July 30, 2009

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