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LAMB & BARNOSKY, LLP
ATTORNEYS AT LAW

MEMORANDUM

TO: OUR PUBLIC SECTOR EMPLOYER CLIENTS

FROM: LAMB & BARNOSKY, LLP

DATE: APRIL 20, 2012

RE: NYSHIP BUYOUTS

The New York State Department of Civil Service, Employee Benefits Division has issued a policy memorandum that “clarifies” the circumstances pursuant to which employees who drop their employer-sponsored coverage in the New York State Health Insurance Plan (“NYSHIP”) to participate in a health insurance buyout program may enroll in a NYSHIP plan before the end of the buyout period. Specifically, the new policy expressly prevents an employee taking a buyout from a NYSHIP plan from obtaining health insurance coverage pursuant to NYSHIP; e.g., through a spouse’s family plan, during the buyout period. This change was made effective March 7, 2012.

This policy applies to employees of all agencies and employers, including school districts and local governments, which offer an employee health insurance buyout program. (These programs permit an employee to decline health insurance enrollment in exchange for a cash payment or other benefit, while eliminating the employer’s obligation to pay health insurance premiums for a plan the employee is not using).

The purpose of the new policy, as articulated in the memorandum, is to “protect the Plan from the adverse selection of those who would take the buyout while healthy and seek to immediately enter the Plan when benefits would be advantageous to them.” Thus, the State is seeking to maximize NYSHIP revenues while minimizing projected increases in NYSHIP costs. However, by discouraging buyouts, this policy will generate significant additional insurance contribution costs for participating employers who will now have to pay for unneeded and unwanted Plan memberships.

NYSHIP Buyout Policy Requirements

A policy memorandum issued in September 2011 required that any health insurance buyout offered by an employer or agency participating in NYSHIP had to be implemented on an annual basis and for only those employees having “other employer-sponsored health insurance coverage.” The new memorandum “replaces” the September 2011 policy guidance and now

explicitly explains that “other employer sponsored coverage” refers to coverage in a plan other than NYSHIP. Accordingly, an employee will not be permitted to take a buyout from a NYSHIP plan and yet continue to participate in NYSHIP through a second job or as a dependent through coverage held by a family member or domestic partner.

NYSHIP continues to require that the end of the buyout period must coincide with the annual health insurance option transfer period so that employees who choose to participate in a buyout may enroll in a NYSHIP plan or another employer-sponsored plan at the end of the buyout period. However, employees cannot enroll in NYSHIP before the end of the buyout period unless they experience a “qualifying event” such as marriage, divorce, the birth of a child or death of a spouse. The policy memorandum also reiterates previous guidance that an employee who seeks to enroll in NYSHIP before the end of the buyout period must provide the employer with adequate documentation in order to show that a qualifying event actually occurred.

In addition, the memorandum reaffirms the September 2011 policy that retirement during the buyout period will be considered a qualifying event for NYSHIP purposes. Accordingly, as before, an otherwise eligible employee who took a buyout may either immediately enroll in NYSHIP upon retirement or defer enrollment in NYSHIP as a retiree until a later date, subject to normal late enrollment waiting periods and any applicable buyout program rules.

What Employers Need to Do

NYSHIP participating agencies and employers should review any buyout programs currently offered to employees to ensure compliance with this new State policy. This review should include checking all collective bargaining agreement provisions, employment agreements and policies regarding health insurance buyout programs to ensure that: (1) employees who may enroll in buyout programs have other employer-sponsored health insurance (*i.e.*, through a plan other than NYSHIP’s Empire Plan or its approved HMOs); and (2) the end of the buyout period coincides with the yearly option transfer period (which varies among employers). If a collective bargaining agreement contains buyout provisions which are inconsistent with the new NYSHIP requirements, you and your affected employees and/or unions may need to collectively bargain for modifications to the existing agreements to bring them into compliance with these requirements. Because compliance could affect an employer’s eligibility to continue to participate in NYSHIP, you should also review your collective bargaining agreements for provisions allowing immediate reopening of negotiations for health insurance in these circumstances.

We have been in contact with the Employee Benefits Division of the New York State Department of Civil Service and have been advised that further guidance is likely to be issued in response to policy implementation questions that have been raised. Based on our discussions with them, we believe that employers with collectively negotiated buyout programs which do not comply with the new requirements, but which have no applicable reopener provisions in their CBAs, will not be subject to immediate NYSHIP sanctions. In any event, for the time being, we

do not recommend that you seek to alter or eliminate any buyout programs for periods during which you have already paid the buyout amounts to employees, as that would require you to also pay the employer's contribution for their insurance premiums. However, if additional policy clarifications are issued, we will continue to provide you with updated information.

It should also be noted that the memorandum reiterates the existing requirement that “[e]mployers must ensure that adequate documentation is maintained for those who participate in the buyout program and establish eligibility to continue coverage in retirement.” In this regard, employers should document that buyout participants have other employer-sponsored health insurance, what it is and the source of that information.

In order to offset the potential adverse financial impact of the policy change, employers may consider changing their buyout provisions to eliminate dual family health insurance coverage; i.e., only permitting one dependent and one individual coverage per eligible family unit. Employers may also wish to explore the feasibility of offering new or additional non-NYSHIP health insurance options. If employees enrolled in non-NYSHIP plans participate in future buyouts, they would not be affected by the new NYSHIP policy.

If you have any questions regarding this new policy or methods to ensure compliance, please do not hesitate to contact us.

THIS MEMORANDUM IS MEANT TO ASSIST IN GENERAL UNDERSTANDING OF CURRENT LAW AND POLICY. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. THOSE WITH PARTICULAR QUESTIONS SHOULD SEEK THE ADVICE OF COUNSEL.