



# Benefit Trends

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## Health Care Reform: Rescissions

### LEGISLATIVE BRIEF

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The Health Care Reform law (Affordable Care Act or ACA) prohibits group health plans and carriers from rescinding coverage except in cases of fraud or intentional misrepresentation of a material fact. Additionally, it requires plans and carriers to give all affected individuals at least 30 days written notice prior to rescinding coverage. Now that these and other HCR provisions have been in effect for four months for calendar year plans, we have seen various instances where problems have arisen because employers terminate coverage for what they consider valid reasons and do not realize that the termination constitutes a “rescission” under Health Care Reform and thus requires 30 days prior written notice. This Bulletin attempts to clarify the distinction. It also includes a matrix that outlines several typical examples of when coverage can be terminated retroactively and when termination must be prospective only.

The prohibition on rescissions applies to insured and self-funded group health coverage, to individual health insurance, and to both grandfathered and non-grandfathered group health plans, but it is not applicable to “excepted benefits” such as dental or vision coverage that is offered under a separate contract from the medical benefits. The prohibition is effective as of the first day of the plan year beginning on or after September 23, 2010 (i.e., January 1, 2011 for calendar year plans).

### What Constitutes a “Rescission”?

“Rescission” is defined by the HCR law as a *retroactive* cancellation or discontinuance of coverage, after a participant has obtained coverage due to fraud or intentional misrepresentation of a material fact, as prohibited by the plan terms. So, be sure your plan and summary plan description (SPD) say that coverage may or will be rescinded if it was obtained as a result of fraud or material misrepresentation. Some examples of the types of fraud or intentional misrepresentation for which the carrier or plan may consider rescinding coverage are:

- For group health plans: Claiming a non-spouse as a spouse, or an ineligible individual as an eligible dependent.
- For individual policies: Omitting relevant information about prior medical history.

## What is Not a “Rescission”?

Rescission does not include prospective cancellation or discontinuation of coverage. Additionally, guidance from the federal agencies (HHS, IRS & DOL) has specified that in the following circumstances, coverage may be terminated retroactively and will not be deemed to be a “rescission” (so the 30-days-prior-written-notice requirement does not apply):

### **1. Retroactive terminations in the “normal course of business.”**

If an employer covers active employees (and COBRA continuees who timely pay for coverage) and terminates coverage as of the date employment terminates, and the employer’s normal business practice is to reconcile lists of eligible individuals with their plan’s or carrier’s data feed only once a month, it is permissible for the employer to retroactively terminate coverage back to the date employment terminated- without providing a 30-day notice of intent to terminate – if the premiums have not been paid since that date.

### **2. Retroactive terminations for failure to notify (or timely notify) the plan of divorce.**

If a plan does not cover ex-spouses (except those who timely elect and pay for COBRA), and the plan is not timely notified of a divorce but discovers it at a later date (perhaps when an employee attempts to enroll his new spouse), the plan may terminate coverage retroactive to the date of divorce unless the COBRA premium has been paid for coverage since that date, and it will not be deemed a rescission. Thus, the plan is not required to give 30 days prior notice, nor is it required to show that the participant committed fraud or intentional misrepresentation of a material fact.

*(Both examples are from Frequently Asked Questions” (FAQs) about health care reform, Q/A 7 of FAQs Part II, issued October 8, 2010.)*

## How the Advance Written Notice Requirement Applies

The interim final regulations clarify the application of the 30-days-prior-notice rule set forth in the law. As an example, if a plan or carrier discovered on April 29th that a participant had intentionally lied and claimed his girlfriend as his wife, and this intentional misrepresentation had occurred at enrollment on March 1st, the plan could give 30 days prior written notice on April 29th, that as of May 28<sup>th</sup> it intended to terminate coverage for him and his girlfriend retroactive to March 1st. Unless the plan or carrier determined during the 30-day period that the rescission was made in error, the plan would not have to cover claims incurred since March 1st, for the individual or his girlfriend. The plan, SPD and/or policy also should state that fraud or intentional misrepresentation by the employee—about another individual’s status or other material fact—are grounds for rescission of coverage for the employee as well as for the other individual about whom the intentional misrepresentation was made.

The reason for the 30-day prior notice requirement, according to the preamble to the interim final regulations, is “to provide individuals and plan sponsors with an opportunity to explore their rights to contest the rescission, or look for alternative coverage, as appropriate.”

Some carriers have recently notified plan sponsors that they believe the obligation to provide 30 days advance written notice is an employer obligation (not a carrier obligation), because the carrier will not know whether a termination or discontinuance of coverage meets the definition of a rescission. If you terminate coverage for a participant in your group health plan, check with your carrier or TPA to clarify who will send the Rescission Notice if one is needed.

## Action Steps for Employers

- Make sure your plan document (or wrap document) and summary plan description provide that coverage will be rescinded if it was gained due to fraud or intentional misrepresentation of a material fact.
- If you want a sample Rescission Notice, contact your Jenkins benefits consultant.
- Under an ERISA plan, a “rescission” is considered an “adverse benefit determination” and will trigger the ERISA claims procedures. Thus, when you give the 30-day Rescission Notice, you also must inform the participant of his or her ERISA claims and appeals rights.

## Some Practical Applications of the Rules

The following matrix illustrates the termination options for several typical scenarios.

Circumstances	Termination Option(s)
Correction of plan errors, such as mistakenly continuing to cover an employee who switches from full-time to part-time status, where the plan covers only full-time employees.	Can terminate coverage prospectively, not retroactively
Discovery during an eligibility audit that certain covered dependents actually do not meet plan criteria for eligibility; and plan or carrier does not show that the ineligible dependent was enrolled as a result of fraud or intentional misrepresentation of a material fact.	Can terminate coverage prospectively, not retroactively
Discovery during an eligibility audit that certain covered dependents actually do not meet plan criteria for eligibility; plus the plan or carrier does show that the ineligible dependent was enrolled as a result of fraud or intentional misrepresentation of a material fact.	Can terminate coverage retroactively, but must give 30 days prior written notice of intent to terminate coverage.
Employer’s “normal course of business” is to reconcile its list of eligible individuals against the plan’s or carrier’s data feed only once a month, and at that time to retroactively terminate coverage back to the date employment terminated, if the premiums have not been paid since that date and if the terminated individual has not timely elected COBRA.	Can terminate coverage retroactively, and not required to give 30 days prior written notice
A plan does not cover ex-spouses (except those who timely elect and pay for COBRA), and the plan discovers that a participant and his/her covered “spouse” actually were divorced at some time in the past. Coverage for the ex-spouse has not been paid for at the COBRA rate since the date of divorce; and the plan or carrier does not show that the participant committed fraud or intentional misrepresentation of a material fact.	Can terminate coverage retroactively to date of divorce, and not required to give 30 days prior written notice

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