

## Blue Plate Special - Ohio Joins States Mandating Cafeteria Plans

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Wednesday, December 9, 2009

With the passages of H.B.1 on July 17, 2009, Ohio joined a growing number of states using cafeteria plans as a means for expanding health insurance coverage. The new law will go into effect in stages, based on the size of the employer. Its implementation is contingent on receiving certain favorable determinations from the Internal Revenue Service ("IRS") and the Department of Labor ("DOL") regarding the application of federal law to the actions required under the statute.

### First: What is a Cafeteria Plan?

A cafeteria plan is a creature of Internal Revenue Code (IRC) § 125. It allows an employee to elect between current taxable cash and non-taxable qualified benefits, like health insurance. There is panoply of requirements that must be met to obtain this tax benefit. Among them are:

- There must be a written plan document;
- Employee elections must be made before the period to which the elections apply, which is generally a 12 month plan year (most often a calendar year); and
- Employees' elections must be irrevocable for the period to which they relate, except under very limited circumstances.

A cafeteria plan itself is not necessarily an ERISA covered plan. A cafeteria plan is a funding mechanism through which qualified benefits may be purchased with pre-tax dollars.

### Second: What Does the New Law Require?

The new Ohio law will apply to employers of 10 or more employees who do not otherwise offer health insurance coverage in a permitted manner to their employees. A covered employer will have to adopt a cafeteria plan under IRC § 125 to allow its employees to pay for health insurance coverage through a salary reduction agreement. This does not, however, mean that the covered employer must obtain group health insurance. Instead, the new law contemplates that the employees could obtain their own individual health insurance policies and make premium payments for them on a pre-tax basis through the mandated cafeteria plan. Such a paradigm raises questions under federal law governing benefit plan arrangements, but more on that later.

The new law will apply in stages as follows:

- For employers with more than 500 employees, by the later of January 1, 2011 or 6 months after the superintendent of insurance adopts rules.
- For employers with 150-500 employees, by the later of July 1, 2011 or 12 months after the superintendent of insurance adopts rules.
- For employers with 10-149 employees, by the later of January 1, 2012 or 18 months after the superintendent of insurance adopts rules.

The logo for Dinsmore & Shohl LLP, featuring the word "Dinsmore" in a blue serif font with a small blue triangle above the letter 'o'.

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### Third: What are the Legal Issues Anticipated by the Statute?

Provisions in the new law itself anticipate there could be federal legal issues associated with its implementation. In fact, implementation of the new statutory rules is contingent upon the superintendent of insurance receiving a written confirmation from relevant government authorities (like the IRS and DOL) that employers will be able to establish cafeteria plans in accordance with federal law consistent with the requirements of the Ohio statute and that individual policies purchased by employees through the cafeteria plans will not have to comply with the group market rules under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

The authors of this new Ohio law may have read the preamble to final and temporary Treasury regulations on HIPAA that provide:

If an employer provides coverage to its employees through two or more individual policies, the coverage may be considered coverage offered in connection with a group health plan and, therefore, subject to the group market provisions under HIPAA. A determination of whether there is a group health plan depends on the particular facts and circumstances surrounding the extent of the employer's involvement.

There could also be issues regarding coverage under ERISA, other tax code provisions affecting group health plans and the HIPAA privacy and security rules. It is beyond the scope of an article such as this to provide detailed analysis regarding the issues raised. Suffice it to say that the drafters of this legislation were aware there were issues and wanted to get them settled from the relevant federal authorities before implementation of the new cafeteria plan requirement goes live. It will be interesting to see how all of this develops and I am sure we will all gain new insights from the responses the Ohio superintendent of insurance receives from the federal government to its inquiries under this new law.

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