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Health Care Reform Informational Series

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Health Care Reform: What Employers Need to Know Now

As our clients and friends already know, two new acts (the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010) (collectively, the "Health Care Reform Law") were signed into law by President Obama in late March, ushering in a comprehensive restructuring of health insurance and employer provided health coverage. The Health Care Reform Law contains broad and sweeping changes to the present system which have been, and continue to be, covered in the general media, as well as myriad smaller but still critical changes. The Health Care Reform Law covers both the individual insurance market (including changes to Medicaid and Medicare) and employer provided health coverage. It also adds new taxes impacting employers and individuals.

The purpose of this Alert is to address the specific issues facing employers who have existing health coverage programs for their employees. Specifically, we want employers to understand what the Health Care Reform Law means for them, particularly in 2010 and 2011.

2010

Generally speaking, the earliest changes mandated by the Health Care Reform Law will not become effective until 2011 (as explained further in the next section), but a few changes that are effective immediately will impact many employers.

1. **The cost of health coverage of adult children is now excluded from gross income.** The Health Care Reform Law amended section 105(b) of the Internal Revenue Code to exclude from an employee's gross income amounts paid for medical care for any child of the employee who, as of the end of the taxable year, has not attained age 27. Although the requirement that a health plan cover an adult child until the child turns 26 does not become effective until 2011 (see below for more information), an employer whose plan already extends coverage to such adult children will no longer, after March 30, 2010, impute income to the employee for the value of that coverage. (Note that this change applies only to children of employees and not to others for whose coverage an employer may also impute income, such as a same-sex spouse or a domestic partner.) This change is especially important to employers with insured plans in states where such plans are currently required by state law to extend coverage to certain adult children of employees. (Connecticut is one such state.)

2. **Nursing mothers must now be given reasonable break time and private space.** The Health Care Reform Law requires an employer to provide reasonable break time for an employee to express breast milk. Such break time must be provided for one year after the child's birth each time the employee needs to express milk. It is currently unclear how long a "reasonable" break time is, although the employer is not required to compensate the employee for the time. The employer must also provide a place, other than a bathroom, for the

expression of breast milk, and the place must be shielded from view and free from intrusion. An employer with fewer than 50 employees will be exempt from these requirements only if they cause "significant difficulty or expense." To the extent state law currently provides greater protection to nursing mothers than required in the Health Care Reform Law, the state law will continue to apply.

3. **Certain small employers are eligible for a tax credit.** The Health Care Reform Law allows certain small employers to take a new tax credit equal to a portion of the employer's cost for providing health insurance. The credit is not described in detail in this Alert because it is aimed at employers with very few employees who have low annual wages and therefore it may not apply to most of our clients and friends. If you would like more information, you can visit a webpage created by the IRS to help small business owners determine whether and how the credit may apply to them. Click here to view that webpage or visit: http://www.irs.gov/newsroom/article/0,,id=220809,00.html?portlet=6. Of course, you may also contact any member of the Employee Benefits Practice Group with questions.

2011

Except as described above, the Health Care Reform Law's earliest changes generally become effective in the first plan year commencing after the six month anniversary of the passage of the first of the laws - in other words, the first plan year starting after September 23, 2010. For calendar year plans, this means January 1, 2011. (For a non-calendar plan year that begins after September 23 of this year, some of the changes described as 2011 changes will apply earlier, *i.e.* as of the first day of the plan year starting in 2010.)

All employer plans will have to comply with the following new rules in 2011:

1. **There can be no lifetime limits, and only certain annual limits, on what are called "essential health benefits."** The term "essential health benefits" includes the following general categories: (A) ambulatory patient services; (B) emergency services; (C) hospitalization; (D) maternity and newborn care; (E) mental health and substance use disorder services, including behavioral health treatment; (F) prescription drugs; (G) rehabilitative and habilitative services and devices; (H) laboratory services; (I) preventive and wellness services and chronic disease management; and (J) pediatric services, including oral and vision care. In these categories, a group health plan or a health insurance issuer: i) may not establish lifetime limits on the dollar value of essential benefits for any participant or beneficiary; and ii) can only have "restricted" annual limits, to be defined by future regulations.

2. **There can be no cancellation of coverage except for fraud or intentional misrepresentation.** Under the Health Care Reform Law, absent fraud, a group health plan or a health insurer generally may not rescind the plan or health coverage with respect to an enrollee once the enrollee is covered under such plan or coverage. Where a covered individual has performed an act or practice that constitutes fraud or makes an intentional misrepresentation of material fact, coverage may be cancelled. However, notice must be given to the enrollee prior to cancellation of the coverage.

3. **There can be no exclusion of coverage for pre-existing conditions of children under age 19.** While the Health Care Reform Law prohibits the exclusion of coverage for pre-existing conditions for all covered individuals beginning in 2014, the prohibition as it applies to children under 19 takes effect in 2011.

4. **If dependent coverage is offered, it must be expanded to include children who have not yet reached their 26th birthday.** For most existing plans ("grandfathered plans" - see below), this offer must only be made for children who do not themselves have an offer of employer-sponsored coverage. A group health plan or a health insurer which already provides dependent coverage of children must continue to make such coverage available for adult children up to their 26th birthday. The cost of such coverage is excluded from the employee's gross income – see paragraph (1) from "2010," above.

5. **The only drugs that may be re-imbursed from flexible spending accounts (FSAs), health savings accounts (HSAs) and healthcare reimbursement accounts (HRAs) will be: i) drugs that have been prescribed (without regard to whether such drug is available without a prescription) and ii) insulin.** (Through 2010, non prescription medicine costs can still be reimbursed.) The reimbursement rules for other medical expenses, such as co-pays fordoctor visits, remain unchanged. This limitation on drug reimbursement may make it more challenging for individuals to use up (rather than lose) their FSA balances at the end of 2011 or early 2012.

6. **The 2011 Form W-2 (to be issued in early 2012) will have a new box to report the value of employer provided health coverage.** Specifically, the employer will report on the W-2 the aggregate cost of the employer provided health coverage.

7. **A safe harbor cafeteria plan will become available which might be of interest to employers who have difficulty passing the current nondiscrimination tests.** The Health Care Reform Law creates and defines a "simple cafeteria plan." An eligible employer who maintains such a plan shall be treated as meeting any applicable nondiscrimination requirement during such year. This new option will not impact employers who already have cafeteria plans and are not experiencing difficulties satisfying nondiscrimination tests.

8. **Health savings accounts (HSAs), which are currently subject to a 10% penalty, in addition to income tax, on withdrawals not used for health care, will be subject to a 20% penalty in 2011.** This change does not directly impact employers.

The above eight changes appear to be the only 2011 changes for grandfathered plans. Grandfathered plans are existing health plans that do not make material changes. Right now, there is no guidance on what types of changes will take plans out of grandfathered status, although it is logical to assume that the kinds of minor adjustments in coverage, co-pays and deductibles that typically are made in existing plans from time to time should not destroy grandfathered plan status. It is not yet clear how important the distinction between grandfathered and non-grandfathered plans will be after 2011 and, accordingly, that issue is not covered here. More information and guidance will be provided when we have more details.

Non-grandfathered plans will be subject to the following requirements in 2011 in addition to the eight changes discussed above.

9. **If dependent coverage is offered, it must be expanded to include children who have not yet reached their 26th birthday, without regard to whether they have an offer of employer-sponsored coverage.** This is in contrast to grandfathered plans (see paragraph (4) above), which need not provide coverage if there is an offer of employer-sponsored coverage.

10. **Non-grandfathered plans must provide first dollar coverage with no deductibles or co-pays for certain preventive care services.** This includes immunizations and screenings for infants, children and adolescents.

11. **Certain additional patient protections, such as prohibiting a pre-authorization requirement for certain physicians and certain care, will become applicable to non-grandfathered plans in 2011.** For example, group health plans and insurers that cover emergency services, as defined in the Health Care Reform Law, must do so without the need for prior authorization and without requiring the health provider to be a "participating provider." In addition, group health plans and insurers that cover ob/gyn care may not require an authorization or referral for such care, and group health plans and insurers that require the designation of a primary care provider must allow a participant to designate any participating primary care provider, including a pediatrician for children.

12. **Nondiscrimination rules that are currently in effect for self-funded plans under Section 105(h) of the Internal Revenue Code will become applicable to non-grandfathered insured plans in 2011.** Specially designed insured plans that do not cover all employees at the same level will be subject to nondiscrimination rules for the first time.

13. **A new appeals process with additional patient protections will become applicable to non-grandfathered plans in 2011.** Group health plans and health insurers will be required to implement effective processes for appeals of coverage determinations and claims. Enrollees must be provided with notice, in a culturally and linguistically appropriate manner, of the available internal and external appeal processes. Additionally, providers will have to comply with applicable state external review processes that meet minimum standards.

COLLECTIVELY BARGAINED PLANS

There is a special provision in the Health Care Reform Law that addresses the issue of whether, and to what extent, a collectively bargained plan will be treated as a grandfathered plan. Some commentators have interpreted this provision to mean that, like all other grandfathered plans, collectively bargained plans must comply with the changes set forth in paragraphs (1) through (8) for 2011. Other commentators have interpreted the same provision to mean that no changes required by the Health Care Reform Law, including paragraphs (1) through (8), apply until the end of the existing collective bargaining agreement. Hopefully, this important issue will be resolved soon.

CONCLUDING COMMENTS

Some may be surprised that the changes with respect to health plans for the immediate future appear less monumental than the media may have suggested. In fact, most of the significant changes will not occur until 2014, and even then there may be many ongoing employer plans that will not be seriously impacted.

However, we must add words of caution. Regulations and other guidance will be forthcoming over the next few months and years, and we have found from experience that the full impact of a new law often cannot be assessed until regulatory guidance begins to fill in the blanks. There is also the possibility of changes to the Health Care Reform Law in future congressional sessions. Our goal is to keep our clients and friends up to date on major developments. In addition, we expect to offer a more comprehensive overview of the law, as part of our workshop series, or a longer communication, when more details become available. For now, we wanted to share with you our current assessment of the immediate and near term impact of the Health Care Reform Law on employer provided coverage.

QUESTIONS OR ASSISTANCE

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