



EMPLOYEE BENEFITS CLIENT ALERT

April 21, 2010

Health Care Reform What Changes Will We See This Year?

Last month, Congress passed and President Obama signed the Patient Protection and Affordable Care Act of 2010 and the Health Care and Education Reconciliation Act of 2010 (collectively, the "PPACA"). The PPACA is the most sweeping federal health care reform bill in a generation, imposing numerous reforms on the health care system and on health care plans. In this Client Alert, we focus on certain aspects of the law, applicable to employers and group health plans, that take effect between now and January 1, 2011. We will publish additional Client Alerts in the future focusing on these and other provisions of the PPACA.

Subsidies, Credits, Rebates, Penalties and More

- **Retiree Coverage Subsidies.** Effective June 21, 2010, an eligible plan may be reimbursed for a portion of the claims incurred by early retirees—retirees who are over age 54 but not yet eligible for Medicare—and their dependents who are covered by the plan. The plan must submit information to the Department of Health and Human Services ("HHS") showing the total amount actually paid for an individual during the plan year, including both the plan's share of the payment and the individual's share of the payment. If the total payment exceeds \$15,000, HHS will reimburse the plan for 80% of the excess, with the reimbursement capped at \$60,000 per plan year per eligible retiree or dependent. This "reinsurance program" will end on the earlier of January 1, 2014 or when the \$5 billion set aside to fund the program is exhausted.
- **Small Business Tax Credit.** Certain employers will receive a tax credit of up to 35% of the employer's contribution toward employee health benefits. To qualify for the credit, an employer must (i) have no more than 25 full-time employees; (ii) have average annual wages that do not exceed \$50,000; and (iii) contribute at least 50% of the cost of employees' premiums. The maximum credit is available to employers with under 11 employees and whose average annual wages do not exceed \$25,000. The credit is reduced for employers with between 11 and 25 employees and average annual wages between \$25,000 and \$50,000. The maximum amount of the tax credit increases to 50% in 2014.
- **Simple Cafeteria Plan.** In general terms, cafeteria plans allow employees to pay for certain benefits on a pretax basis. Cafeteria plans are subject to complex nondiscrimination rules. Under the PPACA, employers with fewer than 100 employees may be eligible to adopt a "simple" cafeteria plan, which automatically meets the nondiscrimination requirements.
- **Medicare Part D Rebate.** Under Medicare Part D, in 2010 a participant can be reimbursed for 100% of his or her prescription drug costs up to \$310 and 75% of the costs between \$311 and \$2,830. After that, enrollees enter the "donut hole," in which Medicare does not cover any costs. In 2010, the PPACA provides a \$250 rebate to any Medicare Part D enrollee entering the donut hole.

NOTE: As a result of health care reform, the donut hole is scheduled to close by 2020.



- **HSA and MSA Penalties.** An individual with a health savings account (“HSA”) or Archer medical savings account (“MSA”) is generally permitted to withdraw funds from the HSA or MSA for *non*medical purposes subject to a tax penalty equal to 10% or 15% of the withdrawal. Effective January 1, 2011, these penalties increase to 20%.

Tax Requirements

The following requirements apply for taxable years beginning after December 31, 2010.

- **W-2 Reporting.** Employers will issue W-2s for 2011 in early 2012. The W-2 for 2011 must include the cost of employer-sponsored health coverage. For these purposes, “cost” means the total cost, including both employer and employee contributions. Self-insured plans should use the cost as calculated for COBRA purposes.

NOTE: We include this item on the list to remind employers to establish recordkeeping procedures in 2011 in order to fulfill the W-2 reporting obligation in 2012.

- **Over-the-Counter Medication.** For HSAs, MSAs, health flexible spending accounts (“FSAs”) and health reimbursement arrangements (“HRAs”), the cost of over-the-counter medication (other than insulin) is not reimbursable as a medical expense unless prescribed by a physician.

Group Health Plan Mandates

The PPACA mandates the terms of group health plans. Many of these mandates do not take effect until 2014 or later. Employers will need to understand those mandates for long-term planning. **In addition, a number of these mandates are effective almost immediately.** Below, we discuss the mandates that are effective for plan years beginning on or after September 23, 2010. **For employers with calendar-year plans, this means January 1, 2011.**

A group health plan may avoid this earlier effective date—for specific mandates—if it constitutes a “grandfathered health plan.” To be grandfathered, a group health plan must have been in effect on March 23, 2010. The PPACA suggests that grandfathered status can continue indefinitely, provided that the terms of the plan do not change.

The PPACA does not provide much guidance to explain what changes will cause a grandfathered health plan to lose grandfathered status. We do know that a plan does not lose grandfathered status by allowing new employees to enroll. Likewise, a plan does not lose grandfathered status by allowing participants’ family members to enroll, if family enrollment was permitted on March 23, 2010. However, it is unclear whether a plan loses grandfathered status by raising premiums or amending coverage. Hopefully, guidance being prepared by the Department of Labor (“DOL”) and HHS will shed light on this important topic.

NOTE: Health insurance coverage maintained pursuant to a collective bargaining agreement can also be a grandfathered health plan. In this instance, however, the PPACA specifies that grandfathered status ends when the collective bargaining agreement ends.

Unless otherwise indicated, the mandates described below apply to both insured and self-funded employer group health plans.

- **Preexisting Conditions.** Group health plans may not refuse to cover children under the age of 19 based upon preexisting conditions and may not refuse to cover expenses for the child’s preexisting condition.

- **Lifetime Limits.** Group health plans may not impose *lifetime* limits on the dollar value of essential health benefits for any participant or beneficiary.

NOTE for self-funded plans: Stop-loss coverage is generally not a “group health plan” and generally will not be bound by these reforms. If a plan cannot impose lifetime limits, but the stop-loss carrier can, the plan will have increased exposure for high-dollar claims.

- **Annual Limits.** Group health plans may not impose *annual* limits on the dollar value of benefits for any participant or beneficiary. There are two important exceptions. (1) In 2011, 2012, and 2013, a plan may impose annual limits on essential health benefits for participants and beneficiaries, but only to the extent permitted by HHS. (2) A plan may impose annual limits on specific nonessential health benefits for beneficiaries.
- **Rescissions.** Group health plans cannot rescind coverage for an enrolled individual, unless the individual committed fraud or made an intentional misrepresentation of a material fact.
- **Claims Appeals.** Group health plans must adopt and follow external review processes. For an insured plan, the external review process generally must comply with applicable state law. For a self-funded plan, the external review process generally must comply with guidance issued by HHS. *Grandfathered health plans are exempt from this requirement.*
- **Dependent Coverage.** Group health plans must treat children under age 26 as eligible dependents, even if the child is married or not a tax dependent of the parent. *Grandfathered health plans are exempt from this requirement until 2014, but only where the child is eligible for coverage under another employer’s group health plan.*
- **Nondiscrimination.** An insured group health plan must not discriminate in favor of highly compensated individuals with regard to either eligibility or benefits. (Self-funded group health plans have long been subject to this requirement.) A highly compensated individual is defined as an individual who is (i) one of the five highest-paid officers, (ii) a shareholder who owns more than 10% of the value of the employer’s stock, or (iii) among the highest-paid 25% of all employees. *Grandfathered health plans are exempt from this requirement.*
- **Preventive Care.** Group health plans must provide coverage for preventive care and recommended immunizations without any deductible, copayment, or coinsurance requirements. *Grandfathered health plans are exempt from this requirement.*
- **Patient Choice.**
 - If a group health plan requires enrollees to select a primary care physician, the plan must allow an enrollee to select any participating provider as his or her primary care physician. In addition, such a plan must not require women enrollees to seek an authorization or referral prior to obtaining obstetric or gynecological services from a participating provider. *Grandfathered health plans are exempt from this requirement.*
 - If a group health plan covers emergency services, the plan must cover in-network and out-of-network emergency services on the same basis. In addition, the plan must not require prior authorization for emergency services. *Grandfathered health plans are exempt from this requirement.*

- **Disclosures.** Group health plans must make certain disclosures to HHS, the insurance commission for the applicable state, and the general public. The PPACA provides a list of the disclosure topics, but no additional details. The topics are as follows: (i) claims payment policies and practices; (ii) periodic financial disclosures; (iii) data on enrollment; (iv) data on disenrollment; (v) data on the number of claims that are denied; (vi) data on rating practices; (vii) information on cost-sharing and payments with respect to any out-of-network coverage; (viii) information on enrollee and participant rights; and (ix) other information as determined appropriate by the Secretary. *Grandfathered health plans are exempt from this requirement.*
- **Automatic Enrollment.** Employers that have more than 200 full-time employees and offer employees enrollment in one or more health benefits plans must automatically enroll new full-time employees in one of the plans offered (subject to lawful waiting periods).

NOTE: *The effective date of this provision is unclear.* The law provides that automatic enrollment shall be “[i]n accordance with the regulations promulgated by the Secretary.”

There are many outstanding questions about these mandates. It is our understanding that DOL and HHS intend to publish additional guidance soon, possibly before the end of May.

Action Steps

- If you provide health coverage to early retirees, determine whether you will qualify and apply for the subsidy from HHS.
- Alert your employees to the availability of a Medicare Part D rebate and to the change in HSA and MSA penalties.
- Amend health FSAs and HRAs before the next plan year to provide that over-the-counter medications are reimbursable only if they are either insulin or prescribed by a physician.
- Adjust recordkeeping procedures and systems so that the cost of health care coverage can be tracked during 2011. For employers, this will mean discussions with the payroll department or payroll service provider. For multiemployer plans, this will mean implementing a procedure to advise participating employers of the cost each year.
- Determine whether you want to have a grandfathered health plan and if so, whether the insurer or vendor will be offering the same plan next year.
- If you design your own plan, have the plan reviewed by an attorney to ensure that the plan meets all applicable requirements of the PPACA.
- If you purchase a predesigned plan from an insurer, administrator, or other vendor, confirm that it will be responsible for ensuring that the design meets all applicable legal requirements of the PPACA.

This client alert is not meant to be an exhaustive explanation of the health care reforms. Rather it is meant to summarize and highlight some of provisions of the PPACA that apply to employers and group health plans. This alert is part of an ongoing Kutak Rock LLP series discussing the impact and implications of the health care reforms.

Additional Information

If you wish to visit with us about the latest health care reforms, please contact your Kutak Rock LLP attorney or a member of our Employee Benefits Practice Group listed below. For more information on our Employee Benefits practice and for recent Employee Benefits news and alerts, please visit us at www.kutakrock.com.



John E. Schembari
john.schembari@
kutakrock.com



Peter C. Langdon
peter.langdon@
kutakrock.com



Juliana Reno
juliana.reno@
kutakrock.com



Janis J. Winterhof
janis.winterhof@
kutakrock.com



Michelle M. Ueding
michelle.ueding@
kutakrock.com



Kathryn M. Magli
kathryn.magli@
kutakrock.com



William C. McCartney
william.mccartney@
kutakrock.com



Margaret A. Olsen
margaret.olsen@
kutakrock.com



Autumn Long
autumn.long@
kutakrock.com

Kutak Rock LLP | The Omaha Building | 1650 Farnam Street | Omaha, NE 68102-2186 | (402) 346-6000

This Employee Benefits Client Alert is a publication of Kutak Rock LLP. This publication is intended to notify our clients and friends of current events and provide general information about employee benefits issues. The Kutak Rock LLP Employee Benefits Client Alert is not intended, nor should it be used, as legal advice, and it does not create an attorney-client relationship.

To ensure compliance with requirements imposed by the IRS, we inform you that any federal tax advice contained in this communication should not be used or referred to in the promoting, marketing or recommending of any entity, investment plan or arrangement, and such advice is not intended or written to be used, and cannot be used, by a taxpayer for the purpose of avoiding penalties under the Internal Revenue Code.

©Kutak Rock LLP 2010

All Rights Reserved

This communication may be considered advertising in some jurisdictions.