B alert

July 2, 2012

BENEFITS UPDATE

SUPREME COURT UPHOLDS AFFORDABLE CARE ACT

The Supreme Court Decision

On June 28, 2012 the United States Supreme Court rejected a Constitutional challenge to most of the Patient Protection and Affordable Care Act, as amended (the ACA), which Congress had enacted in 2010 to make significant changes to how health care is provided in America. The Court held that the "individual mandate," which requires most individuals to have health insurance coverage, and which 26 states had challenged, was a valid exercise of Congress's power to tax (referring to the penalty imposed on individuals who fail to obtain insurance as required).

The Court also held that the penalty could *not* be justified as a valid exercise of Congress's powers under the Commerce Clause of the Constitution. This distinction may not make a difference for purposes of implementation of the ACA, or it may mean that the sanction Congress and regulators may impose on individuals who fail to maintain health insurance coverage is limited, so that sanction continues to look like a permissible "tax" and not an impermissible "penalty." This may lead some individuals to pay the tax and delay buying coverage until they become ill or injured.

The Court limited the ACA only in restricting the sanction the federal government may impose upon states that do not expand their Medicaid programs as required by the ACA. The federal government may cut off the *additional* revenue-sharing funds attributable to the ACA's expansion of Medicaid, but may not cut off all Medicaid funds to noncompliant states.

What's Next for Employers?

Given the Court's decision, employers must act as though the currently effective provisions of the ACA will remain in effect, and the pending provisions will take effect as scheduled, unless Congress modifies the law or regulators postpone its implementation (as they have postponed some parts of the law pending further guidance). Employers who have not already modified their health plans to comply with all aspects of the ACA, including those not yet effective, may want to review their plans.

Let's begin with a brief review of the ACA provisions that are already effective for most employer-sponsored health plans and then go on to the provisions that are scheduled to take effect in the future.

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Provisions that Are Already Effective:

* Coverage for dependents may not be cut off before age 26.
* Lifetime limits on benefits are prohibited.
* Preexisting-condition limits for dependents under age 19 are prohibited.
* Non-grandfathered plans must cover preventive services without cost-sharing.
* Coverage may not be retroactively canceled, absent material misrepresentation or fraud.

Effective in 2012-13:

* Plan administrators must distribute an 8-page or shorter "Summary of Benefits and Coverage" (the SBC) at the first open enrollment or first "plan year" starting after September 22, 2012.
* Employers must report the aggregate cost of employer-sponsored health coverage of employees' W-2 forms for 2012 (due by January 31, 2013).

***Effective in 2013*:**

* Health flexible spending account contributions must be limited to $2,500 per employee per year.

***Effective in 2014*:**

* All preexisting-condition exclusions will be prohibited.
* Employers that maintain insured medical plans that discriminate in favor of highly compensated individuals (HCIs) may be subject to horrendous penalties, effective after the IRS issues guidance (perhaps in 2014).
* All annual limits on benefits will be prohibited (replacing restrictions on annual limits in prior years).
* Plans may not impose waiting periods for coverage that are longer than 90 days.
* Employers with more than 200 employees must automatically enroll full-time employees, effective after regulations are issued (perhaps in 2014).
* Employers will be subject to penalty taxes if they fail to offer coverage to all "full-time" employees, or if the coverage is not "affordable." These are the so-called "play-or-pay" penalties.
* Employers will be permitted to increase wellness incentives without violating HIPAA.

***Effective in 2018*:**

* Employers will be subject to a "Cadillac plan" penalty if they provide "excessive" health benefits.

So, employers' obligations under the ACA weren't changed by the Court's decision. But most employers have work to do to implement the ACA's new rules, even putting to one side the possibility of additional changes arising from Congress, the courts or regulators. We suggest these first steps:

* Speak with benefit brokers, consultants or attorneys about timely preparation of the SBC.
* Speak with payroll vendors about steps to include health care costs on W-2 forms for 2012.
* Look for potentially discriminatory provisions in your insured medical plans, if any, whether early entry, lower employee contributions, greater benefits or subsidized COBRA coverage for the HCIs.
* See whether your health plans cover all full-time employees or whether you will be subject, voluntarily or otherwise, to the play-or-pay penalties.

Bullard Law will be following developments affecting employers' benefit plans, and would be happy to help employers address these issues.

~THOMAS I. KRAMER

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