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SPECIAL FEATURE

Federal health care reform's impact on employers

By William E. Hannum III

Landmark federal health care reform signed into law last March will have a significant impact on employers and plans. While many important aspects of the law remain undetermined and won't be implemented for years, the federal government is now beginning to issue regulations to help clarify the Patient Protection and Affordable Care Act.

There are a number of key aspects of the new law, however, that are becoming clearer.

Small business tax credit

Effective Jan. 1, 2010, qualified small employers are eligible for a significant tax credit aimed at encouraging them to offer health insurance coverage to employees.

To be eligible, an employer must employ 24 or less Full-Time Equivalent employees; have average annual wages of less than $50,000 per FTE; and make a uniform contribution of at least 50 percent toward the cost of the health insurance.

For tax years 2010 through 2013, an eligible small employer can receive a tax credit of up to 35 percent. Qualified tax-exempt employers can receive a credit of 25 percent.

Beginning in tax year 2014, the tax credit can be claimed for two additional years and increases to as much as 50 percent (35 percent for tax-exempt small employers) of the employer's health insurance premium expenses.

William E. Hannum III is managing partner at Schwartz Hannum, a labor and employment firm representing management in Andover, Mass.

Protections for nursing mothers

The PPACA amends the Fair Labor Standards Act to provide certain protections for nursing mothers that went into effect on March 23, 2010, including a reasonable break time to express breast milk each time the employee needs to do so and a private place to do so other than a bathroom. These accommodations must be available to the nursing mother for one year after the child's birth.

Unfortunately, this new amendment contains numerous uncertainties and there is presently no guidance available. For instance, it neither limits the number of breaks nor specifies the permissible duration of breaks.

Also, although all covered employers are subject to this FLSA amendment, those with fewer than 50 employees are exempt if compliance would pose an "undue hardship." Unfortunately, the statute does not elaborate on when this standard is met.

Whistleblower protection

The PPACA also amends the FLSA to provide whistleblower protections. These prohibit employers from discriminating or retaliating against employees who apply for health benefits subsidies; from those who receive tax credits; from those who provide information or testimony about possible violations of the PPACA; and/or from those who object to activities that the employee "reasonably believes" to be in violation of the PPACA.

Large employer automatic enrollment

Employers with more than 200 full-time employees and that offer enrollment in one or more health benefits plans must automatically enroll new full-time employees in one of the plans offered.

A full-time employee under the PPACA is an employee who is regularly scheduled to work 30 or more hours per week. Covered employers must also provide automatically enrolled employees with adequate notice of the automatic enrollment program, including the employee's ability to opt out of participation in the plan. There is no explicit effective date for this provision.

Temporary reinsurance program for early retirees

The PPACA creates a Temporary Reinsurance Program for Early Retirees from June 23, 2010, to Jan. 1, 2014, to provide reimbursement to employment-based plans for a portion of the cost of providing health insurance coverage to "early retirees" — defined as an individual who is age 55 or older, no longer an active employee, and who is not eligible for Medicare — and their eligible spouses, surviving spouses and dependents.

To be eligible for the program, an employment-based plan must be approved by the program to the Department of Health and Human Services. If approved, the employment-based plan will be reimbursed for up to 80 percent of costs for health benefits.

Health insurance market reforms

The PPACA mandates certain changes to group health plans (including insured and self-insured employer-sponsored plans), which must be implemented by Sept. 23, 2010. A plan in existence on March 23, 2010, (a "grandfathered plan") is exempt from some, but not all, of these requirements.

Pursuant to the interim final regulations recently issued by the U.S. Treasury, the Department of Labor, and the Health and Human Services Department, a grandfathered plan can make certain routine changes and maintain grandfathered status.

A plan that adds new benefits, makes modest adjustments to existing benefits, voluntarily adopts new consumer protections under the PPACA, or makes adjustments to comply with other state or federal law can maintain the plan's status as a grandfathered plan.

A plan may lose its grandfathered status, however, if the plan significantly cuts benefits or increases consumer costs by eliminating benefits to diagnose or treat a particular health condition; if it increases a percentage cost-sharing requirement; significantly increases co-payment charges; reduces employer contributions to premium costs by more than 5 percent; and either adds or tightens an annual limit.

Therefore, employers should proceed with caution when making changes to a grandfathered plan since such changes may jeopardize the plan's status.

Requirements for new and grandfathered plans

For plan years beginning on or after Sept. 23, 2010, new and grandfathered plans must comply with many reforms.

Plans are barred from rescinding or cancelling health care coverage of an enrollee except for instances of fraud or an intentional misrepresentation of material fact. This provision is aimed at preventing plans from dropping individuals from coverage when they become ill.

Generally, plans are prohibited from imposing lifetime or annual dollar limits on essential benefits. Prior to Jan. 1, 2014, plans may, however, impose an annual limit on certain essential health benefits as determined by regulations yet to be issued.

Plans are precluded from excluding from coverage children under the age of 19 with pre-existing conditions.

For "plan years" beginning on or after Sept. 23, 2010, new and grandfathered plans that provide dependent child coverage must continue to make coverage available for a participant's adult child through age 26. Similarly, group plans are prohibited from varying the terms for coverage for children.

Further, the interim final regulations have clarified that plans cannot use the following factors for defining adult child eligibility: financial dependency on the participating employee; residency with the participating employee; student status; marital status; or access to other coverage.

Under a special exception to this extended dependent coverage, for plan years beginning before Jan. 1, 2014, a grandfathered plan that provides dependent coverage of children may exclude from coverage an adult child who has not reached the age of 26 if the adult child is eligible to enroll in an employer-sponsored plan other than the plan of the child's parent, such as through the child's own job.

While the implementation of the PPACA is still in its infancy and employers should stay tuned for further developments, some employer and plan requirements for 2010 are relatively clear.

For plan years beginning on or after Jan. 1, 2014, grandfathered plans will be prohibited from having a waiting period in excess of 90 days; from denying health care coverage for pre-existing conditions; and from imposing annual dollar limits on coverage.

Requirements for new plans only

The PPACA has a number of requirements that apply only to new plans beginning on or after Sept. 23, 2010.

For example, if a plan requires an enrollee to designate a primary care physician, the enrollee can elect any participating primary care provider who is willing to accept the enrollee.

Also, plans cannot impose deductibles or other cost-sharing requirements for preventive care, which includes immunizations and mammograms and will be further defined by a task force created by PPACA.

Likewise, a plan is obligated to cover an enrollee's emergency health services, without prior authorization or in-network requirements.

Plans are also prohibited from imposing eligibility rules that discriminate in favor of highly compensated full-time employees.

There are many other health insurance reforms with implementation dates after 2010. For 2011, employers will be required to report the value of employer-sponsored coverage on each employee's Form W-2.

Effective Jan. 1, 2011, over-the-counter drugs will not be eligible for reimbursement from a Flexible Spending Account, health savings account, health reimbursement account or Archer medical savings accounts unless prescribed by a physician.

Effective Jan. 1, 2013, annual contributions to FSAs will be limited to $2,500.

Effective Jan. 1, 2014, large employers (one with 50 or more employees who work on average at least 30 hours per week) may be subject to a penalty if they do not offer affordable coverage that meets the minimum essential coverage. It is uncertain, however, whether some of these obligations will change before the scheduled implementation date.

While the implementation of the PPACA is still in its infancy and employers should stay tuned for further developments, some employer and plan requirements for 2010 are relatively clear.

For now, employers should: determine if they are eligible for the small business tax credit; implement the nursing mother accommodations; revise policies and procedures to reflect the new whistleblower protections; implement training for the nursing mother accommodation and new whistleblower protections; determine if the employer is eligible to apply for the temporary reinsurance program for early retirees; determine if the employer is required to implement the large employer automatic enrollment; document the terms of any plans in effect on March 23, 2010, and add the model disclosure language regarding grandfathered plans to any participant communications, if applicable; and carefully consider any changes to the plan that may jeopardize status as a grandfathered plan.

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