Health Care Reform Update

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Sue O. Conway, *April A. Goff*

Despite Court Ruling, Reforms Move Ahead

Even though a federal judge in Florida ruled in late January that Health Care Reform is unconstitutional, don't expect any changes in the immediate future. Until and unless the U.S. Supreme Court invalidates the law, you can expect that federal and state governments will continue to implement it.

U.S. District Judge Roger Vinson ruled that the Patient Protection and Affordable Care Act of 2010 is unconstitutional because it requires nearly all Americans to purchase health insurance by 2014 or face higher taxes. He said the failure to purchase health insurance is "inactivity," which Congress does not have the authority to regulate. However, Judge Vinson refused the plaintiffs' request to suspend the law. So Obama Administration officials have said the federal government and individual states should proceed without interruption to set up insurance exchanges and lay the framework for other sections of the law.

Justice Department officials have already commented that they will immediately appeal the decision to the 11th Circuit Court of Appeals. Given the conflicting court decisions on the issue, it is unlikely that the constitutionality of the law will be definitively resolved until it is brought before and decided by the U.S. Supreme Court in the next few years.

Nondiscrimination Rules Delayed

Some employers breathed a huge sigh of relief; for others the news came too late. The IRS announced in late December that the nondiscrimination rules for insured health plans, a feature of the Health Care Reform law, will be delayed until regulations are issued and plan sponsors have time to implement necessary changes. The nondiscrimination rules were originally scheduled to take effect beginning the first plan year on or after September 23, 2010. The date was January 1, 2011, for calendar year plans.

By way of background, under Health Care Reform, insured group health plans (other than "grandfathered" plans) may not discriminate with respect to eligibility or benefits in favor of highly compensated individuals -- generally the top-paid 25 percent of a company's employees. This presumably means that highly compensated employees cannot have better benefits, lower premium contributions or a shorter waiting period for coverage than employees who are not highly compensated. It would also appear to preclude post-employment health insurance or severance arrangements only for executives or other highly paid former employees. Previously, nondiscrimination rules applied to self-insured health plans but not to insured plans.

While the rules for insured health plans are supposed to be similar to those that apply to self-insured plans, the sanctions are quite different. For an *insured* plan, the potential penalty is $100 per individual for each day the violation continues. So

if a plan with 500 participants provides discriminatory benefits to the top three executives, the potential penalty is $100 a day for each of the other 497 employees. Compare this to the penalty for a discriminatory *self-insured* plan, which is loss of tax benefits for the highly compensated individuals who benefited from the discrimination.

Because of the potentially draconian penalties, many sponsors of insured health plans scrambled to remain "grandfathered" under the Health Care Reform law or changed their health plans to comply with the new requirements. Some refrained from increasing employee contributions and cost-sharing for 2011 in order to remain "grandfathered," others completely redesigned their offerings.

The IRS issued Notice 2011-1 delaying the application of nondiscrimination rules just days before the compliance deadline for calendar year plans. Unfortunately this last-minute notice came too late for those who had already made costly plan changes.

Plan sponsors should be aware that the delay applies only to insured health plans. Self-insured health plans (including HRAs) and cafeteria plans (including FSAs) continue to be subject to nondiscrimination requirements.

Other News

The Department of Labor's recent "Frequently Asked Questions – Part V" (FAQs) provide news concerning the effective dates of two other Health Care Reform requirements -- automatic health plan enrollment and the 60-day advance notice of health plan changes.

Automatic Enrollment: The Health Care Reform law requires employers with more than 200 full-time employees to automatically enroll new employees in their health plans and to continue the enrollment of current employees from year to year unless they opt out (similar to 401(k) automatic enrollment). While the law appeared to make this requirement effective immediately upon enactment, the new FAQs confirm that employers are not required to comply until the DOL issues regulations on how automatic enrollment will work. Furthermore, the DOL does not intend to complete this rulemaking until 2014.

60-Day Notice: Likewise, the new law requires group health plans to give enrollees at least 60 days' prior notice of any material modification to their health plan coverage, but there was some confusion on when this goes into effect. The FAQs indicate compliance will not be required until such time as health plans must provide enrollees with a summary of benefits and coverage. This summary does not need to be provided until March 23, 2012 (24 months after Health Care Reform was enacted), and is subject to future standards from federal agencies.