

ALERTS AND UPDATES

One Month After Healthcare-Reform Legislation: Update on the New Regulatory Guidance

May 11, 2010

It has been over a month since the passage of healthcare-reform legislation, and various government agencies are publishing noteworthy guidance on a near-daily basis. This *Alert* summarizes the first key developments, following the passage of the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010.

- **Early Retiree Reinsurance Program.** The U.S. Department of Health and Human Services published regulations on the \$5 billion Early Retiree Reinsurance Program on May 5, 2010. The program is designed to reimburse participating employers and plan sponsors for 80 percent of certain costs of providing health coverage to early retirees. We discussed the program in more detail in our *Alert*, [“Reimbursement Requests for Early Retiree Reinsurance Program May Exceed Funding.”](#)
- **Small-Employer Tax Credit.** Many impacted small employers—those with 25 or fewer full-time equivalent employees—have expressed concern about the application of the new small-business tax credit under section 45R of the Internal Revenue Code. The IRS has indicated that full guidance will be available soon, but recently issued Revenue Ruling 2010-13 to provide guidance for eligible small employers who make “nonelective” contributions toward their employees’ healthcare premiums. Section 45R was added to the Internal Revenue Code by section 1421 of the Patient Protection and Affordable Care Act. It provides that for taxable years beginning before 2014, the amount of the credit is based on a percentage of the lesser of: (1) the amount of nonelective contributions paid by the small employer on behalf of employees under the arrangement during the taxable year, and (2) the amount of nonelective contributions the employers would have paid if an employee were enrolled in a plan with a premium equal to the average premium for the small-group market in the state where the insurance is provided. IRS Revenue Ruling 2010-13 lists the average employee-only and family coverage premium for the small-group market in each state for the 2010 taxable year. While additional guidance is still anticipated on the new small-employer tax credit, the publication of Revenue Ruling 2010-13 is the first piece that has been released.
- **Temporary High-Risk Pools.** As of May 3, 2010, 46 states and the District of Columbia have announced their intent to participate in a temporary high-risk pool program, which is designed to provide affordable health-insurance coverage to people who are uninsured because of preexisting conditions. Funding will be available beginning July 1, 2010, and the program will end on January 1, 2014, when the individual state exchanges are operational. Participating states can choose any of the following options:
 1. Operate a new high-risk pool alongside a state’s current high-risk pool;
 2. Establish a new high-risk pool (in a state that does not currently have a high-risk pool);
 3. Build upon other existing coverage programs designed to cover high-risk individuals;
 4. Contract with a current Health Insurance Portability and Accountability Act carrier of last resort or other carrier, to provide subsidized coverage for the eligible population; or
 5. Do nothing, in which case the U.S. Department of Health and Human Services would carry out a coverage program in the state.
- **Tax Treatment of Coverage for Children Under Age 27.** IRS Notice 2010-38 provides guidance on the tax treatment of healthcare coverage for an employee’s adult children. Employees with children who will not have reached age 27 by the end of 2010 qualify for the new tax-free benefit from March 30, 2010, forward, if the children are already covered under the employer’s plan or are subsequently added to the plan. The exclusion from gross

income applies to an employee's child who has not reached age 27 as of the end of the taxable year. In addition, employers with cafeteria plans may permit their workers to begin making pre-tax contributions for coverage for such an adult child, even if the cafeteria plan has not yet been modified to cover children under age 27. However, a retroactive amendment to a cafeteria plan to cover such children must be made before January 1, 2011, and must be effective retroactively to the first date in 2010 when workers are allowed to make pre-tax contributions to cover adult children. Employers should communicate with their insurance providers to ensure compliance on this issue and may also wish to begin the process of amending their cafeteria plans, where appropriate.

- **Grandfathered Plans.** A plan is considered grandfathered if it provided coverage to participants on March 23, 2010. However, the current uncertainty over the value of the grandfathered status for group-health-insurance plans may result in employers' not making major changes until guidance has been issued. In general, a grandfathered plan does not lose its grandfathered status when new employees are hired and enrolled or when dependents are added to a plan under provisions in effect on March 23, 2010. However, there is currently no guidance about what kinds of changes could cause a plan to lose its grandfathered status. Therefore, plan sponsors should be cautious in making any changes, due to potentially significant financial and compliance consequences. For example, if a fully insured plan loses its grandfathered status, it would become subject to nondiscrimination rules, while fully insured plans with grandfathered status would be exempt from the nondiscrimination testing.
- **Creation of New Office.** On April 19, 2010, the Office of Consumer Information and Oversight became operational as a spinoff of the U.S. Department of Health and Human Services. The new office will be responsible for ensuring compliance with the new insurance-market rules, such as the prohibitions on rescissions and on preexisting-condition exclusions for children, among other changes. It is anticipated that many pieces of guidance will be issued from the new office in the coming months and years.

The changes outlined in this *Alert* highlight some of the key developments since the passage of the healthcare-reform acts. However, additional guidance is likely to be published in the coming months.

Duane Morris will continue to monitor and report on developments and the impact of changes on employers and their group-health plans.

For Further Information

If you have any questions about this *Alert*, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

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