Effect of New Michigan Health Insurance Claims Assessment Act on Group Health Plans

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The new Michigan Health Insurance Claims Assessment Act imposes a 1-percent tax on “paid claims” for health-related services of employer-sponsored health and welfare plans.

Employer plan sponsors with employees in Michigan may see their administration fees increase due to a new tax on third-party administrators (TPAs) that became effective on January 1, 2012. Under the Health Insurance Claims Assessment (HICA) Act, which was signed into law in September 2011, TPAs, insurance carriers and HMO providers are required to pay an assessment on health care claims paid for Michigan residents who received health-related services in Michigan. This law is being challenged on Employee Retirement Income Security Act (ERISA) preemption grounds.

Who Must Pay?

The HICA tax affects insurance carriers (including HMOs and stop loss insurers), TPAs and group health plan sponsors. Certain plans are exempt from the tax, including Medicare Advantage plans, Medicare prescription drug plans and plans covering federal employees, but Medicare supplemental insurance is not exempt. In addition, the tax is not assessed on services provided in Michigan to non-Michigan residents or to claims paid for services to Michigan residents that are rendered outside of the state. Under HICA, TPAs are directly responsible for paying the tax on behalf of self-insured group health plans. A TPA is not prevented from passing the tax assessment on to its plan sponsor clients. However, in the FAQ issued by the Michigan Department of Treasury make it clear that a TPA is liable for paying the tax and will be assessed a penalty for failing to pay the tax, even if the TPA cannot recover those amounts from the plan sponsor. If a TPA fails to pay the tax, HICA indicates the plan sponsor could ultimately be liable for the tax and any penalties, but it is unclear at what point the tax and penalties would be levied against the plan sponsor.

For insured plans, the insurance carrier is directly responsible for the tax. Plan sponsors with insured plans may see a premium increase to offset the cost of the HICA tax.

How Much Is the Tax?

HICA imposes a 1-percent tax on “paid claims” for health-related services provided to Michigan residents and performed in Michigan on and after January 1, 2012. All such payments made by an insurance carrier, TPA or stop loss carrier are subject to the tax. The tax applies to claims paid by traditional group health plans, including medical, dental, vision and prescription drug plans. Mail-order pharmaceuticals delivered to a Michigan resident in Michigan would be subject to the tax. Wellness programs providing health screenings, risk assessments and other health care services are also subject to the tax if administered by a TPA. Health care flexible spending accounts and health savings accounts are specifically excluded from the tax. There is an annual cap on the amount of the HICA tax liability equal to $10,000 per insured individual. The Michigan Department of Treasury has interpreted the $10,000 limitation to apply on a per insurer or TPA basis.

HICA tax payments must be paid quarterly; the first payment of the tax is due on April 30, 2012. A penalty equal to 5 percent of the tax applies for the first two months the tax is unpaid. After two months, an additional 5-percent penalty applies for each month of non-payment, up to a maximum penalty of 25 percent of the unpaid tax. Interest penalties also apply. Currently, the HICA tax is set to expire on January 1, 2014.

ERISA Preemption

Generally, state laws do not affect ERISA-covered benefit plans. The “supremacy clause” of the U.S. Constitution allows state laws to be preempted (*i.e.*, blocked from enforcement) by federal laws like ERISA. However, certain state laws that have an indirect impact on ERISA plans are expressly “saved” from preemption by the ERISA “savings clause.”

In December 2011, the Self-Insurance Institute of America (SIIA) filed a complaint in Federal Court challenging the Michigan health care tax as preempted by ERISA. SIIA also sought an injunction against the implementation and enforcement of HICA as it

relates to self-insured group health plans that are subject to ERISA, or their business partners.

Historically, courts have not consistently held that ERISA preempts state insurance law relating to surcharges imposed on medical claims and services. For example, the Supreme Court of the United States held that ERISA preemption did not apply to a New York law that imposed a surcharge on the medical bills of patients covered under ERISA welfare benefit plans [*New York State Conference of Blue Cross & Blue Shield Plan v. Travelers Ins. Co*., 514 U.S. 645 (1995)]. The U.S. Court of Appeals for the Third Circuit reversed a lower court and held that a New Jersey law requiring benefit plans to bear hospitals' costs of treating indigent patients was not preempted by ERISA [*United Wire, Metal and Machine Health and Welfare Fund v. Morristown Municipal Hospital*, CA 3, No. 92-5317, (3rd Cir. 1993)]. (Interestingly, this challenged New Jersey law has been superseded by a new state law, the Health Reform Act of 1992.)

Action Steps

Employer plan sponsors with Michigan employees should discuss payment of the HICA tax with their medical, dental, vision, prescription drug and wellness TPAs. Plan sponsors may want to review their service agreements with their TPAs to determine whether the plan sponsor has any obligation to reimburse the TPAs for the tax. Given the SIIA challenge noted above, employer plan sponsors may want to take a wait-and-see approach pending the outcome of this case.

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