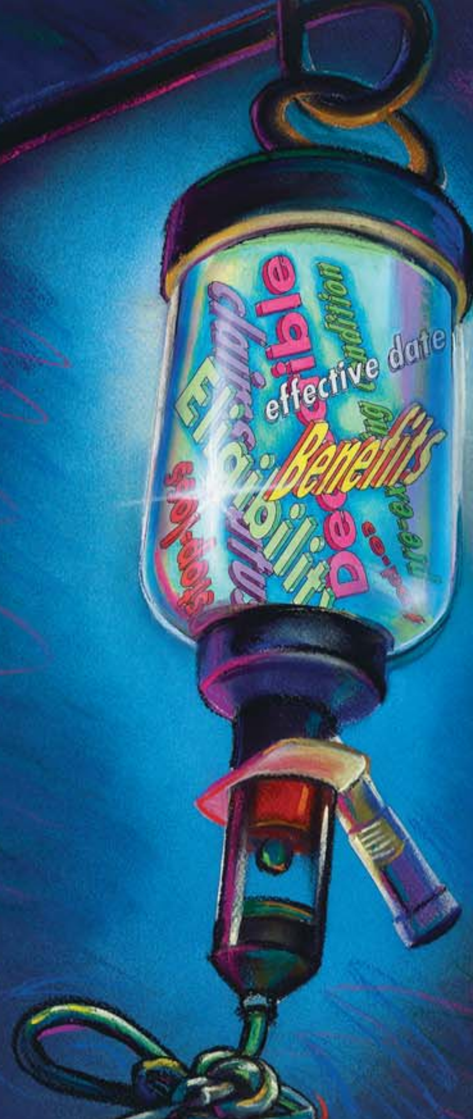

WILL HEALTHCARE REFORM PUT EMPLOYERS IN THE HOSPITAL?

An Overview of Healthcare Reform and Its Potential Impact on Employers

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The ultimate fate of the healthcare reform bill(s) which the U.S. House of Representatives passed on March 21, 2010, is now clear. The House has passed the Senate bill and President Obama signed it into law on March 21, 2010. That same day, the House *also* passed a "fix-it" bill (formally titled a Reconciliation bill) to be sent to the U.S. Senate proposing to modify some of the provisions in the Senate bill which the House had passed. With minor exceptions relating to student loans, the Senate and the House approved the "fix-it" bill on March 25, 2010 (the "fix-it" bill was necessary because many House Democrats disliked the Senate bill, especially the "luxury tax" on so-called "Cadillac" health insurance policies, which the now-approved fix-it bill, well, fixes). This article looks at how healthcare insurance reform, in its final form, will impact employers, and what steps employers can take now to minimize potential adverse impact.

To summarize the order of battle: There were two healthcare reform bills introduced in 2009, one in the House and another in the Senate. To make matters more complex, when healthcare reform bogged down in early 2010, President Obama proposed his own version of health care, an admixture of the two bills. Although the Senate bill was the version that the House passed on March 21, 2010, the House also passed a "reconciliation act" along with it—a fix-it bill, with a number of changes to the Senate bill. The understanding was that the reconciliation bill would be passed by the Senate, modifying some of the Senate bill provisions voted into law and signed by President Obama. On March 25, 2010, the Senate passed the fix-it bill with minor changes, which were then approved by the House and sent on to President Obama for signature. What follows is an attempt to sort through the new legislation to identify and discuss employer-related issues.

A. DIRECT EMPLOYER MANDATES

The proposed House bill and the proposed Senate bill in 2009 each imposed a "pay or play" mandate on employers. This means that if covered employers (a) fail to provide their employees with health insurance, or (b) fail to provide health insurance meeting certain government-imposed qualifications, including cost to employees and identified benefits levels, the federal government will impose a tax or penalty on the employer to cover the costs associated with providing adequate health insurance to those employees through insurance "exchanges" to be set up in each state (under the Senate bill) or through one nationwide exchange (under the House bill).

So what's the cost to employers who elect to "pay" as opposed to "play"? The Senate bill, which the House approved in March 2010, required covered employers to make a minimum standard of coverage available to employees or pay an assessment of $750 per month per full time employee who is not offered adequate health care insurance through the employer. If the employer-offered health care is not deemed to be "affordable" and a full time employee insures through an Exchange, the employer will be assessed $3,000 annually for each such employee. (The House bill, by contrast, set "pay or play" rates in an annual amount equal to 8% of payroll to a national exchange that will provide those employees affordable health care.)

President Obama's version of health care reform, as announced in late February, was a little more employer-generous. It proposed not to require non-conforming employers to pay the fines for the first 30 workers (e.g., a firm with 51 workers that does not offer coverage will pay an amount equal to 51 minus 30, or 21 times the applicable per employee amount). The Obama plan also dropped the annual penalty for not offering employees insurance coverage from $3,000 to $2,000. The Reconciliation bill contained both of these Obama modifications. In this one respect, the reform became slightly more employer-friendly.

B. BATTLEGROUND: FULLTIME VS. PART-TIME OR SEASONAL EMPLOYEES

Employers wary of becoming trapped into more health care coverage will need to pay close attention to what that might trigger an obligation to insure part-time or seasonal employees, and plan accordingly. The Senate bill applies only to full time employees but beware: your U.S. Senate defines "full time" as an average of **30** or more hours per week measured on a monthly basis, not 40 hours per week (this is *not* your father's "full time"). President Obama's latest version of healthcare reform tracks this aspect of the Senate's version. This aspect of the Senate bill was not modified in the Reconciliation bill.

The issue of seasonal employees may also turn out to be a difficult one. The now-enacted Senate bill arguably applies to "seasonal" employees who work in excess of an average of 30 or more hours per week—at least those who work for more than 60 days (the maximum "waiting period" employers' health insurance can impose before group coverage must be offered). One possible strategy for both "part time" and seasonal employees, depending on the relative costs of social security and other non-health benefits versus pay or play: hire more employees who work less than an average of 30 hours per week, rather than hiring fewer employees to work between 30-39 hours per week average.

C. BATTLEGROUND: SIZE MATTERS—BUT HOW DO YOU MEASURE IT?

Both bills claimed to exempt "small" employers from the "pay or play" mandate (although the bills did give small employers tax credits as incentives for them to provide adequate health insurance). But the House and the Senate disagreed as to how to measure employer size. The House bill defined "small" in relation to payroll size, imposing no penalty on employers with annual payrolls of less than $500,000, and reducing it for non-compliant employers with annual payrolls between $500,000 and $750,000. By contrast, the Senate bill applied only to employers employing an average of at least 51 employees on business days during the preceding calendar year. President Obama's own proposal adopted the Senate version, i.e. a small employer is 50 or less employees. The Reconciliation bill makes no change to the Senate bill, so "small employers" exempt from pay-or-play are those with less than 51 employees.

Although the "pay or play" features won't kick in for several years, employers using the services of independent contractors, or hiring employees through third-party employers or staffing agencies, must be vigilant. A periodic and honest check up on the status and documentation of independent contractors would be a worthwhile project for employers who don't want to push their full time employee head count to an average of 51 or more. Similarly, employers using the services of staffing agencies will want to review their contracts and other documentation with the real "employer"—the staffing agency—to make sure the right language, and more importantly, the right resources and insurance, are in place. The risk of being found to be a joint employer liable for "pay or play" insurance payments would be an unwelcome surprise.

D. BATTLEGROUND: "CADILLAC" PLANS

Perhaps the most controversial aspect of the otherwise relatively more "employer-friendly" Senate bill was the 40% excise tax it imposes on employer-paid health insurance premiums in excess of $8,500/year for individuals, and $23,000/year for families. The House was strongly against such a tax, and under President Obama's proposal, the amount of premiums exempt from assessment was increased to $10,200 for individuals, and from $23,000 to $27,500 for families. The exempt amount will be indexed for inflation. President Obama also proposed to "adjust" the "Cadillac" premium threshold by including an adjustment for firms whose health costs are higher due to the age or gender of their workers, and by no longer counting dental and vision benefits as potentially taxable. President Obama's proposals in this regard were included in the Reconciliation bill, which passed both the Senate and the House on March 25, 2010. So, the "Cadillac" tax now has a slightly higher trigger (and will not kick in until later this decade). Note: employers who maintain age and gender data related to health insurance must be *exceedingly* careful in how that information is disclosed, and for what purpose it is used, to avoid other kinds of discrimination claims. Employers should at minimum review health care benefits now to determine potential exposure to the excise tax on "Cadillac" plans and to explore possible options with their brokers to avoid the excise tax.

E. EMPLOYER LESSONS FROM MASSACHUSETTS

Anecdotal evidence from Massachusetts (where a variant of the proposed reform is already underway) suggests that large, sophisticated employers with robust and nimble payroll systems will see little dramatic increases in costs of administering the reforms. As always, the increased financial and administrative burdens of health care reform fall more harshly on smaller employers, restaurants, retailers, and the staffing industry.

F. CONCLUSION

Healthcare reform looks like it's here to stay (for at least a little while – Republicans are talking about "repeal and replace" in the Fall of 2010; stay tuned!). Take steps now to best-position your company or clients for what it will require.

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