

Affordable Care Act Requires Timely Employer Compliance

July 2, 2012

In a lengthy but straightforward opinion, on June 28, 2012, the U.S. Supreme Court upheld the Patient Protection and Affordable Care Act's (PPACA) core provision; the individual mandate. The Court also upheld PPACA's expansion of Medicaid, but struck down PPACA's "draconian" penalty permitting the government to withhold all federal Medicaid funding from any state not expanding its Medicaid program.

The ruling means that all PPACA provisions employers and their insurance carriers have already implemented, continue in effect. And, barring successful Congressional action to repeal PPACA, employers should revisit and prepare for the following upcoming events:

As of 2012

- Employers should have a policy permitting nursing mothers "reasonable" unpaid break time to express breast milk; the mother/employee to be provided a secure/shielded area other than a bathroom
- W-2's must show the "value" of health benefits

Beginning 2013

- Annual FSA contributions will be capped at \$2500 (indexed)
- Employers must begin educating/informing employees about PPACA
- An additional Medicare Hospital Insurance Tax of 0.9% will apply to high wage earners
- A new Medicare Contribution Tax of 3.8% will apply to unearned income of taxpayers with high income
- The floor for deducting medical expenses increases to 10% of adjusted gross income from 7.5%

Beginning 2014

- State-run exchanges must be operational
- Individuals not exempted from PPACA must have "minimum essential" health insurance coverage or pay an income tax penalty
- Every employer with more than 50 full-time-equivalent employees, if even one employee requires government assistance with purchasing/using health insurance, will pay a penalty
- Employers with more than 50 employees must annually report health insurance and employee information to the government for use in determining household income, employer penalties, etc
- Employers must annually provide employees a "plain English" summary of offered health insurance coverages/benefits (the "SBC" referred to below)
- Employers with more than 200 employees must automatically enroll new employees

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What are the new benefit plan requirements under the Affordable Care Act?

The Act itself does not change the requirement that the Group Health Plan be in writing and communicated to its participants. What it does do is require additional disclosure to those covered by the Plan. Group Health Plans and Health Insurance issuers have to issue “summary of benefits and coverage” (SBC) along with notice of modifications and a “uniform glossary.”

It is not as much as a change in the Plan documents as a requirement to use the SBC template. Variance from the template is only contemplated where the plan provides a different structure of provider network tiers or drug tiers than is contemplated by the template, if a plan provides different benefits based on facility type (such as hospital inpatient versus non-hospital inpatient), where a plan is denoting the effects of a related health flexible savings arrangement or health reimbursement arrangement, or if a plan provides different cost sharing based on participation in a wellness program.

What are the new tax rates and potential penalties?

An employer who has at least 50 employees is potentially subject to penalties of up to \$2,000 per year per employee if it fails to provide the minimum essential coverage requirements under an employer sponsored plan. Additionally, even if an employer offers coverage, it can still be subject to penalties if one or more employees receives premium assistance through tax credits or otherwise.

One issue that remains to be resolved is what test will be used to determine whether an individual qualifies as an “employee” or an independent contractor. Given the Supreme Court’s conclusion that the individual mandate is a tax, courts may use the IRS multiple factor test in reaching a conclusion.

Businesses with less than 50 employees are generally not subject to the above mentioned penalty regime. Certain small businesses with no more than 25 employees may be eligible for a tax credit for contributions made for employee health insurance.

There is also a 40% excise tax on certain high cost health insurance plans which exceed maximum annual coverage amounts. This tax is imposed on insurance companies and on employers if their plan is self-funded.

Unaffected by the Supreme Court’s decision is the increase in Medicare taxes and the imposition of a 3.8% tax on investment income of certain high income individuals.

The law also imposes a number of industry specific revenue raisers and rules, such as a new executive compensation deduction limit for insurance providers, and annual fees for pharmaceutical companies, manufacturers and importers of medical devices, and health insurance providers.

Healthcare Provider Compliance Programs

As a condition to enrollment in Medicare, Medicaid and the Children’s Health Insurance Program, the Act requires that healthcare providers and suppliers establish and maintain compliance programs that satisfy the requirements of the Secretary of the Department of Health and Human Services. While the Act allows the Secretary to develop the required core elements for these compliance programs and also allows the Secretary to choose which providers and suppliers (if not all) will be included, it gives specific requirements for nursing facilities. If you are a nursing facility you will be

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required to implement an effective Medicare compliance program by March 2013. The compliance program must be "reasonably designed, implemented, and enforced so that it will be generally effective in preventing and detecting criminal, civil and administrative violations . . . and in promoting quality of care."

As regulations and interim guidance statement are implemented and issued, Miller Canfield will provide additional information and compliance assistance.

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