

Regulatory Update

Health Care Reform: What Plan Sponsors Need to Know Now

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Few issues in recent memory have garnered as much attention, or controversy, as health care reform. The bill that was passed in March is sprawling and complex with many important provisions applicable to individuals and health insurance companies as well as employers. While a comprehensive review of the Patient Protection and Affordable Care Act of 2010¹ (PPACA) is beyond the scope of this column, the following is a high level overview of provisions that may require the attention of health plan sponsors now and in the near term.

While many notable provisions are not due to take effect until 2014 or later, such as the creation of state sponsored health exchanges (effective in 2014), mandated employer sponsored health care coverage (effective in 2014), and the implementation of a 40 percent excise tax on high cost health insurance plans (effective in 2018), there are other provisions, such as “grandfathering” of certain plans, the expansion of covered individuals and the early retiree reimbursement program, that may require plan sponsor consideration and action sooner.

Grandfathered Plans

Under PPACA, certain plans are “grandfathered” with respect to some of the health care reforms. Plan sponsors may wish to evaluate the extent to which their existing health plans may be able to take advantage of these exemptions.

PPACA defines a grandfathered plan as a group health plan or health insurance coverage in which an individual was enrolled on the date of PPACA’s enactment (March 23, 2010). Unfortunately, it is not clear what aspects of a plan, if any, a plan sponsor may amend and still maintain the plan’s grandfathered status. However, PPACA does provide that an individual covered by a grandfathered plan may add his or her dependents to the plan after enactment as long as the grandfathered plan allowed for dependent coverage on or before the date of enactment. Further, a grandfathered plan may permit individuals to reenroll in the plan and new individuals to enroll in the plan after enactment without compromising its grandfathered status.

While PPACA does not exempt a grandfathered plan from all reforms, it does exempt them from certain key provisions, including, among others:

- The requirement that preventive care must be provided without requiring the participant to share the cost.
- Application of nondiscrimination requirements under Internal Revenue Code Section 105(h) rules (currently these requirements apply only to self-insured plans).

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- Compliance with certain annual reporting requirements regarding plan coverage and health care reimbursement structures.
 - The requirement that avenues for external review of benefit claim appeals must be provided.
 - The requirement that any participating provider must be designated as a primary care provider.
 - The prohibition on rules for plan eligibility based on health related factors of the individual.

The Department of Labor (DOL) and the Internal Revenue Service (IRS) have indicated that regulations related to grandfathered plans will be published in the near future. In the meantime, plan sponsors may wish to review contemplated plan changes in light of any potential effect on grandfathered status.

Expansion of Covered Individuals

A number of provisions of PPACA expand who must be covered by a health plan and these provisions have different effective dates. Section 1511 of PPACA provides that if an employer has 200 or more employees and offers coverage under a health plan, the employer must automatically enroll all full time new hires and ensure continued enrollment for current full time employees (30 hours per week or more). Employers required to automatically enroll employees must provide notice to those employees and an opportunity to select another option or opt out of coverage altogether. The statute contains no effective date for this provision and, as of this writing, no guidance had been provided on the effective date. As a result, the safer course is to assume this provision was effective upon enactment and seek to comply.

There are two other coverage provisions with a near-term effective date—coverage of preexisting conditions and coverage of adult children up to age 26. While PPACA contains several preexisting condition provisions, plans must cover children under 19 with preexisting conditions by the beginning of the first plan year beginning after September 23, 2010 (which, for calendar year plans, would be January 1, 2011).

In addition, any plan that provides dependant coverage must cover adult children up to age 26 for plan years beginning after September 23, 2010 (i.e., January 1, 2011 for a calendar year plan). Recent guidance in IRS Notice 2010-38 sets forth a definition of a qualifying adult child for purposes of the coverage requirement under PPACA. The age limit, residency, and support tests found in Section 152 of the Internal Revenue Code do not apply in determining whether an individual will be considered a qualifying adult child. For nongrandfathered plans, adult children need only be under age 27 for the taxable year to qualify for such coverage, provided that the individual is a legal child, stepchild or eligible foster child of the employee. Grandfathered plans are permitted to exclude otherwise eligible adult children who have coverage from their own employers. The coverage extension applies generally to individual or group health coverage, though it does not apply to HIPAA-excepted benefits such as Medicare supplemental insurance and onsite medical clinic coverage. Coverage of adult children under PPACA will have the same tax benefits to employer as coverage of younger children, but employers may *not* charge such adult children any more than is charged for younger eligible children.

Plan sponsors may wish to evaluate their plans and coordinate with any providers to ensure that newly required coverage is in place when required.

Early Retiree Reimbursement Program

Although many predict that PPACA is likely to result in increased health care costs to employers, one provision may instead offer some relief. Section 1102 of PPACA seeks to defray the cost of early retiree health coverage for plan sponsors by reimbursing plan sponsors for 80 percent of the net cost of an early retiree's health claims. This provision applies only to claims that total between \$15,000 and \$90,000 in any one plan year. Claim amounts are determined before copayments, coinsurance, and deductibles.

Eligible plans under this program include all self-insured and fully insured employer sponsored health plans that cover "early retirees." In providing guidance on this program, the U.S. Department of Health & Human Services (HHS) issued an Interim Final Rule (IFR) on May 3, 2010.² According to the IFR, "early retirees" include all former employees of the sponsor who are 55 or older, but not yet Medicare eligible, as well as all covered family members of such former employees.

Importantly, this is a temporary program that will end at the earlier of January 1, 2014, or the time when the budget for the program (\$5 billion) is exhausted. Because applications will be processed in the order in which they are received, this is essentially a first-come, first-served program. As a result, plan sponsors wishing to take advantage of this program have an incentive to file claims as soon as possible. Additionally, if there is a defect in an application, the applicant will be required to remedy the defect and resubmit a new application, thereby losing its original place in the queue. Thus, applications will need to be both timely and accurate to take full advantage of this program. There has been no indication as to how long it will take a claim to be processed, when reimbursement payments will be made, or how long the \$5 billion budget is expected to last.

To receive benefits under this program, an employer is required to:

- Timely file an application with HHS;
- Be certified by the Secretary of HHS (which requires a net claim amount of at least \$15,000);
- Ensure it has certain HIPAA-related agreements with the plan or the insurer;
- Implement programs and procedures to (a) generate cost savings for participants with chronic and high cost conditions and to (b) fight fraud and abuse; and
- Provide documentation of actual medical claim costs.

As of this writing, it was projected that application forms would be released in mid-to-late June 2010. HHS has indicated that these forms will be similar to the Medicare Part D subsidy application. Based on the guidance in the IFR, the forms are expected to require, among other things:

- Identifying information about the employer (TIN, name address, contract information);
- The participant's name;
- Information regarding the benefits provided (the nature of the benefits, the names of the health care providers, dates, applicable plan option);
- A summary of how the reimbursement will be used to meet the requirements of the program (PPACA requires that the funds received under this program may not be used as general revenue of the employer but instead must be used to lower the costs of the retiree health plan);
- A summary of the applicant's plans to implement programs and procedures to generate savings for plan participants with chronic and high cost conditions;

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- A projection of the applicant's reimbursement amounts for the first two plan year cycles (so that HHS may monitor the funding limit); and
 - An attestation by the sponsor that there are fraud, waste, and abuse policies and procedures in place.

Action

This discussion has covered only a very narrow slice of the myriad issues raised by PPACA for health plan sponsors. While plan sponsors will be addressing these issues for years to come, this discussion is intended to identify certain issues that may require plan sponsor actions sooner than others.

As a high priority matter, plan sponsors may wish to (1) consult with their advisors to review contemplated plan changes or other plan related actions in light of the grandfathering provisions; (2) evaluate the effect of the expanded coverage rules (preexisting conditions and adult children) that become effective on January 1, 2011, for calendar year plans; and (3) if eligible, prepare to file claims under the early retiree reimbursement program.

NOTES

- 1 P.L. 111-148, PPACA, as amended by the Health Care and Education Act of 2010, P.L. 111-152.
- 2 45. C.F.R. 149.1 *et seq.*