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HEALTH CARE REFORM

April 28, 2010

INTRODUCTION

As you know, President Obama signed into law in late March, 2010, significant health care reform legislation -- the Patient Protection and Affordable Care Act, which was modified and expanded by the Health Care and Education Reconciliation Act of 2010 (collectively, "PPACA").

Many of you have read various articles and summaries of PPACA. We have prepared this summary only to give a bullet point list of the key provisions of PPACA. **This initial summary will be followed by additional memos** from us over the next few weeks, giving a more detailed explanation of important sections of PPACA that are effective either immediately or in the next year or two, and which affect employers that currently maintain medical plans and/or cafeteria plans.

The actual legislation is over 900 pages long (single spaced). This summary is not an inclusive list of all provisions of PPACA. Regulations and other guidance from various government agencies will be forthcoming to flush out details of the implementation of PPACA. There are various effective dates for PPACA's provisions, ranging from immediate to as late as 2018. PPACA is even unclear as to the effective date of some sections.

PPACA SUMMARY

The major provisions of PPACA that are not effective until 2014 or later and with respect to which we will not be issuing memos on these topics in the near future, include:

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- Maximum waiting period of 90 days for new enrollees, effective in 2014.
- Large employer (50 or more employees) responsibility to provide minimum coverage at an affordable cost to all full-time employees or pay an assessment, effective in 2014.
- “Shared responsibility” penalties for large employers providing unaffordable coverage or coverage below minimum value, effective in 2014.
- Individual responsibility to obtain health coverage and establishment of insurance exchanges in each state, effective in 2014.
- New annual returns to be filed with the IRS by employers, including reports to employees, effective in 2014.
- No annual limits on essential health benefits, effective in 2014 (restricted annual limits prior to 2014).
- Small employer access to state-sponsored exchanges beginning in 2016.
- Large employers, at discretion of state, access to state-sponsored exchanges in 2017.
- Tax on “Cadillac” plans, effective in 2018.

The following provisions of PPACA that are of more immediate concern to employers, and on which we will provide more detailed guidance in the near future, include:

Changes effective immediately:

- New tax credit for small employers (no more than 25 full-time employees with average wages of not more than \$50,000).
- Income exclusion under plans for medical expenses for children through the end of the taxable year in which they turn 26, even though they are not tax dependents.
- Breaks and privacy for nursing mothers.
- Temporary reinsurance program for early retirees to help subsidize early retiree medical expenses (to be established by federal government).

Changes effective for the first plan year beginning on or after September 23, 2010:

- Pre-existing condition exclusions and limitations for those under age 19 will be prohibited (prohibited beginning in 2014 for everyone).
- Offering of coverage for adult children up to age 26 regardless of marital status, unless other employer-provided coverage is available.
- Coverage may not be rescinded except in the case of fraud or intentional misrepresentation.
- “Simple” cafeteria plans will be available for eligible small employers.
- Lifetime caps on “essential health benefits” will be prohibited.
- Annual limits restricted, but permitted, prior to January 1, 2014.

Changes effective on January 1, 2011:

- Reporting on Form W-2 for the 2011 tax year the aggregate value to the employee of employer-sponsored group health plan coverage.
- Except for insulin, over-the-counter medications without a prescription will no longer be reimbursable from cafeteria plan flexible spending accounts, health reimbursement arrangements (HRAs), health savings accounts (HSAs) and Archer MSAs. This will apply to expenses incurred on or after January 1, 2011, regardless of plan year.
- The 10% excise tax on non-qualifying distributions from HSAs and Archer MSAs will increase to 20%.
- Public insurance option for long-term care (“CLASS Act”).

Changes effective January 1, 2013:

- Salary reductions for contributions to cafeteria plan flexible spending accounts will be limited to a maximum of \$2,500 each taxable year.

Uncertain effective dates:

- Medical plan auto enrollment for employees of a large employer (over 200 full-time employees), with ability by employee to opt out. No separate, definitive effective date, so March 23, 2010 is the default effective date, but Congressional intent appears to be 2014. Need guidance soon.
- Standards developed by HHS, DOL and Treasury for a four-page “uniform explanation” of a group health plan’s benefits in coverage. The agencies have one year to develop the standards and plans must distribute the explanation for plan years starting after the release of the standards.

Grandfathered Plans. You may have read that group health plans in existence on March 23, 2010 will be “grandfathered” and will not be subject to some of the changes imposed by PPACA. It is not clear what actions will be required for a plan to maintain its grandfathered status. Employers currently maintaining group health plans for employees may assume that their plans are grandfathered plans. However, care should be taken if major design changes are made to the plans other than for compliance with PPACA. Provisions that apply to new plans, but not to grandfathered plans, and that are effective for plan years beginning on or after September 23, 2010, include:

- Cost sharing restrictions on certain “essential benefits” and specified preventive care.
- Nondiscrimination requirements under the Internal Revenue Code for insured health plans. (In particular, may affect executive and retired executive supplemental and extended health coverage.)

- Plans with in-network coverage must permit participants to designate any primary health care provider.
- Claims appeal procedure that includes external review.
- Prohibition on requiring preauthorization for emergency service and covering expenses without regard to whether the provider is in-network or out-of-network.
- OB/GYN direct access to care without requirement of a referral or preauthorization.
- Offering of coverage for adult children up to age 26, regardless of availability of “other employer” coverage.

Collectively Bargained Plans

Additional guidance is needed on effective dates of the PPACA provisions with respect to existing collective bargaining agreements and the interaction with the grandfathered provisions. Generally it appears that PPACA reforms would not apply until the later of the termination of the latest collective bargaining agreement relating to the coverage or the statutory effective date.

This publication is intended to provide clients and friends of the Firm with information on recent legal developments. It should not be construed as legal advice or as a legal opinion on specific facts or circumstances. The content is intended for general information purposes only. Please consult licensed legal counsel if you have any further questions regarding your specific legal situation. This does not create an attorney-client relationship between any reader and the Firm.