

Morgan Lewis

together

Health Care Reform: Pre-2014 Employer Group Health Plan Considerations

2010 BCBS National Tax Conference

Andy R. Anderson

December 3, 2010

Background

- The Patient Protection and Affordable Care Act of 2010 (PPACA)
 - Signed March 23, 2010
- Amended by the Health Care and Education Reconciliation Act of 2010 (Reconciliation)
 - Signed March 30, 2010
- Jointly referred to as the “Healthcare Reform Law”
- Confusing to put together
- **Flood** of recent regulatory guidance

Background (cont.)

- Focused, like its predecessor in MA, on expanding coverage
 - Not on reducing cost
- Keys:
 - Requires coverage/some subsidies
 - Insurance reforms
 - Employer mandates

Background (cont.)

- My focus today is on near-term requirements and changes for employer group health coverage
 - Brief mention of some 2014 insurance reforms
 - Brief mention of financing vehicles
- Many more 2014 and beyond issues
- Still a ways off
- Many more election cycles (with resulting twists and turns) between now and 2014

Immediate Impact

- Retiree Drug Subsidy Taxation
 - Loss of deduction for subsidy; immediate accounting hit
 - May drop plans/move to Employer Group Waiver Plan
- Early Retiree Medical Reinsurance Program
 - \$5 billion reinsurance fund for retirees aged 55 through 64
 - 80% of annual claims between \$15,000 and \$90,000
 - *List of “approved” employers*
 - *Open for Claims!*
- Temporary High Risk Pool

First Plan Year Beginning After September 23, 2010

- Adult Child Coverage Until Age 26
 - Tax-free (Income/FICA/FUTA)
 - *Applies back to 3.30.2010 if inclined to adopt early*
 - Until the 2014 plan year, grandfathered plans can require that the child not be eligible to enroll in another employer group health plan
 - “Adult Child” is an individual who is a son, daughter, stepson, stepdaughter, or legally adopted or eligible foster child of the employee
 - *“Other” dependents are not subject to the same rules!*
 - End of full-time student verification processes, dependent restrictions, Michelle’s Law

First Plan Year Beginning After September 23, 2010 (cont.)

- Preexisting Condition Exclusions
 - Prohibits the application of preexisting condition exclusions for plan years beginning on or after January 1, 2014
 - Begins six months after enactment for children who are under age 19
 - *Furor over child-only policies*
 - Statute does not clearly require allowing such children into coverage, but interim final rules insist on this interpretation

First Plan Year Beginning After September 23, 2010 (cont.)

- Lifetime Maximums
 - Prevents health plans from applying a lifetime maximum on benefits that are essential health benefits
- Annual Maximum
 - May initially apply some limits to essential benefits as long as those limits will not violate other federal or state laws
 - *Gradual increase in these and phased out in 2014*
 - May still impose annual limits on benefits that are not “essential health benefits”
 - *No guidance yet on “essential health benefits”*

First Plan Year Beginning After September 23, 2010 (cont.)

- Prohibition on Rescissions
 - Prevents health plans from rescinding health coverage once an individual is covered under the plan
 - Exception for fraud or intentional misrepresentation of a material fact
 - Unclear how this impacts mistaken enrollments or the late reporting of transfers, terminations, changes in status, etc.
 - *Fear is that none of these typical situations will now permit retroactive termination of coverage*

First Plan Year Beginning After September 23, 2010 (cont.)

- 60-Day Prior Notice of Material Modification
 - Creates timing and notification issues for changes associated with the annual enrollment process
 - Prevents employers from immediately changing plan terms during a plan year
 - Paired with a new \$1,000-per-participant penalty for each willful failure to meet the new 60-day advance notice requirement
 - *Not yet effective*
 - *Will change renewal process and timing*

First Plan Year Beginning After September 23, 2010 (cont.)

- Nondiscrimination Testing
 - Applies existing Internal Revenue Code section 105(h) nondiscrimination rules to insured health plans
 - Much more difficult to offer new insured health plans to a small group of executives
 - Penalty will be a \$100 per day per person excise tax
 - Carrier exposure
 - See “Grandfather Rules” below

First Plan Year Beginning After September 23, 2010 (cont.)

- Preventive Services
 - Plans must cover certain preventive services for free such as immunizations and infant preventive care and screenings without cost to the employee
 - *Can still impose limits on out-of-network preventive services*
 - See “Grandfather Rules” below for the application of this rule to grandfathered plans

First Plan Year Beginning After September 23, 2010 (cont.)

- Appeals and Reviews
 - Must adopt ERISA-like claims and appeals processes
 - Guarantees the receipt of benefits during the appeals process
 - Requires an external review process!
 - *Mix of state and federal external review processes*
 - See “Grandfather Rules” below for the application of this rule to grandfathered plans

First Plan Year Beginning After September 23, 2010 (cont.)

- Primary Care Physicians
 - Plans must permit designation of any participating primary care provider
 - Special rules for:
 - *Emergency services*
 - *Pediatric care*
 - *Ob/Gyn care*
 - See “Grandfather Rules” below for the application of this rule to grandfathered plans

First Plan Year Beginning After September 23, 2010 (cont.)

- Grandfather Rules
 - Limited provisions/narrowed by Reconciliation, as compared to original Senate bill from 12.24.2009
 - Individuals who were enrolled in a plan as of March 23, 2010
 - *Family members and new employees*
 - *Newly enrolled employees*

First Plan Year Beginning After September 23, 2010 (cont.)

- Grandfather Rules
 - Day of reckoning postponed, for insured collectively bargained plans, until the date the last related collective bargaining agreement terminates
 - Significantly, self-insured CB plans subject to same deadlines and effective dates as nonbargained plans
 - *Disrupts CB relationship*
 - Can now change insurers without automatically losing grandfather status

2011

- Form W-2 Reporting
 - Report the aggregate cost of employer-provided group health coverage
 - *Postponed until 2012*
 - Excludes coverage through an Archer MSA, an HSA, or employee salary reductions to a FSA
 - Determined under COBRA-like rules
 - What counts/what is excluded?
 - *On site clinics?*

2011

- Over-the-Counter Drug Prohibition
 - Ends the tax-advantaged treatment of most over-the-counter drugs
 - Applies to HSAs, Archer MSAs, FSAs or HRAs
 - Still acceptable for prescribed drugs (even over-the-counter) or insulin
 - *Does not apply to items such as crutches, etc.*

2011

- HSA and Archer MSA Penalty Increase
- Small Employer “Simple” Cafeteria Plans
 - Employers with 100 or fewer employees
 - Escapes nondiscrimination testing requirements as long as the employer satisfies minimum eligibility, participation and contribution requirements

2011

- “CLASS Act” (Community Living Assistance Services and Supports Act)
 - National employee-funded long-term care benefit
 - Voluntary, but default enrollment encouraged
 - Widely criticized funding approach and benefit levels

2012

- Research Trust Fund Fee
 - All plans, starting with plan or policy years ending after September 30, 2012, will have to pay a \$2 per participant or enrollee fee (\$1 for fiscal year 2013) to finance the Patient-Centered Outcomes Research Trust Fund
 - Fee ends in 2019 and contains exceptions for certain exempt governmental programs

2012

- Uniform Explanation of Coverage
 - Secretary of HHS to develop standards summarizing plan benefits
 - *No more than four pages*
 - *12-point type*
 - Must be distributed to plan participants, written in a “culturally and linguistically appropriate manner” and distributed to new participants
 - *Recent claims and appeals guidance may be instructive*
 - New \$1,000 per participant penalty for each willful failure to distribute the summary

2013

- Flexible Spending Account Limit
 - Caps the maximum health flexible spending account salary deferral at \$2,500
 - Indexed for years beginning in 2014
 - Excludes true employer matching or other employer contributions to an FSA
- Employer Notice Regarding Exchange
 - Inform employees about:
 - *Exchanges starting in 2014*
 - *If employer subsidizes 60% of the cost of coverage*
 - *How purchasing coverage through an Exchange may end employer subsidy*

2014

- Insurance Reforms
 - No preexisting exclusions
 - Rating corridors
 - Expansion of guaranteed issue/availability/renewal
 - Discrimination bar
 - Expanded wellness programs
 - Provider discrimination

2014

- The Fun begins!
 - Exchanges
 - Individual mandate
 - Subsidies
 - ER penalties
 - And on—and on—and on!

Financing Sources?

- 2011 HSA/MSA tax increase
 - Additional tax for nonmedical HSA and Archer MSA distributions boosted to 20%
- 2013 HI tax increase on high income individuals
- 2013 increase on floor for medical expense deductions
- 2013 HI taxation of unearned income
- 2018 “Cadillac Tax”

Contact Information



Andy R. Anderson
312.324.1177;
aanderson@morganlewis.com



international presence

Beijing Boston Brussels Chicago Dallas Frankfurt Harrisburg Houston Irvine
London Los Angeles Miami Minneapolis New York Palo Alto Paris Philadelphia
Pittsburgh Princeton San Francisco Tokyo Washington Wilmington