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employee benefits lawflash

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Preparing for the U.S. Supreme Court's Healthcare Decision

By taking a number of interim steps, employer group health plans can position themselves to respond quickly and appropriately—whether healthcare reform is upheld, partially upheld, or struck down.

After three riveting days of oral arguments in March, employers are anxiously awaiting the decisions of the U.S. Supreme Court about the fate of the Patient Protection and Affordable Care Act (the Act). In the interim, there are a number of steps employers should take to prepare for the decisions.

While the popular media has spent a significant amount of time analyzing the March oral arguments, employers aren't materially closer to knowing the fate of the Act than they were before the start of the oral arguments. While there is a much stronger hint of possible change in the air than anyone would have expected when the first court challenge to the Act was filed, we aren't likely to hear from the Supreme Court until the end of June.

During this period of waiting, employers should take interim steps in order to prepare for the eventual decisions. These interim steps take into account the full range of possibilities and should position employer group health plans to react to the possible outcomes, respond to inquiries and requests from internal stakeholders, and consider administrative and design issues presented by the eventual Supreme Court decisions.

Upheld

It is possible that the Supreme Court will leave the Act unchanged and on course to take full effect in 2014. Due to this possibility, employers should continue to address implementation steps for 2012 and beyond, such as the following:

- Summaries of benefits and coverage
- Form W-2 health plan reporting
- Patient-centered outcomes trust fund fee calculations
- Healthcare spending account limits
- Analysis of employer mandate implications
- Cadillac Tax design and accounting implications

Given how soon many of these implementation steps impact group health plan design and operation, losing two or three months of work while waiting for the Supreme Court decisions may jeopardize 2012 or 2013 compliance with the Act.

Partially Upheld

It is also possible the Supreme Court may only strike down portions of the Act (such as the Medicaid rules or the individual mandate) and, from the perspective of employer group health plans, these deletions will leave the Act's provisions applicable to employer group health plans basically unchanged. While such a result will certainly lead to calls for broader changes to shore up or strip away other portions of the Act, the election year realities in

Washington, D.C., may delay any such action until after November. As a consequence, employers should continue to take the steps outlined above in the event the Act is partially upheld.

Struck Down

There is a greater-than-originally-expected possibility that the Supreme Court may strike down the entire Act, particularly if the Court finds that the individual mandate is unconstitutional and that the Act only functions as an indivisible whole. Such a result will cause immediate chaos for employer group health plans, lead to loud calls for legislative action, and require quick agency guidance in a number of difficult areas. In order to prepare for this possibility, employers should, while awaiting the decisions, do the following:

- Determine whether they have retained the right to change their group health plans.
- Analyze the cost and desirability of retaining already implemented Act provisions for the balance of 2012 or beyond.
- Identify adult children and prepare to allow mid-year coverage changes if such coverage becomes taxable to employees.
- Prepare employee communication material addressing "What's Next?" issues for 2012 plan design and operation.
- Identify administrative "drop dead" dates for 2013 design changes, administration modifications, and communication projects.
- Ask carriers and third-party administrators whether 2012 medical flexible spending account claims can be readjudicated to include over-the-counter drugs or whether retiree medical drug claims must be reprocessed to reflect the reversion to prior Medicare Part D rules.
- Determine accounting consequences and timing issues related to the return to prior Medicare Part D subsidy taxation rules and the unwinding of any Cadillac Tax accounting steps.
- Consider postponing plans to spend any Early Retiree Reinsurance Program proceeds or Medical Loss Ratio rebates.

While these interim steps may seem daunting, it is very likely that, whatever the result of the Supreme Court's decisions, employers should anticipate a coming period of heightened federal activity associated with the Act, its possible modification, and a possible future replacement. Finally, even if the entire Act falls and Congress is unable or unwilling to pass a replacement, we may then begin to see reinvigorated state or local interest in addressing healthcare access issues similar to actions already taken in Massachusetts or San Francisco.

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