

## Hot Issues Alerts – Law Firms

# Health Care Reform's Big Impact On HR

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Few people have read all 3,000-plus pages of the recently enacted Patient Protection & Affordable Care Act (Act) and the ensuing Health Care and Education Reconciliation Act of 2010, but no one doubts the compliance headaches these contentious pieces of legislation will present for human resource personnel for years to come. This article discusses the broad brush-stroke requirements under the health care legislation which will go into effect on various dates over the next several years, and provides guidance for HR personnel to both understand and prepare for the changes ahead.

### Grandfathered Plans

At the outset, it should be noted that in order to deliver on presidential promises made during the health care debate, the Act provides for no changes for enrollees in group health plans or health insurance in effect on the March enactment date, with some minor exceptions. The same grandfathering applies to plans provided by union collective bargaining agreements in effect in March 2010.

### Immediate Changes to Employer Health Care Plans

Several changes effective as of June 23, 2010 are directed at the nature of the health insurance offered by employers who self-insure or participate in group health plans. Group plans offering dependent coverage must continue coverage to children up to the age of 26 even if they are married, and must not exclude participants under age 19 with pre-existing conditions. In addition, the Act eliminates lifetime or annual limits on the dollar value of benefits as well as the ability to rescind participant coverage except in cases of fraud or an intentional misrepresentation. Other changes include application of nondiscrimination rules which previously applied only to self-insured group health plans.

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New private plans will also have to fully cover preventative care services without co-payments. By 2010, group health plans and insurers must prepare and distribute a standard summary explanation of benefits and, by 2014, must offer at least an "essential health benefits" package, which includes ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health and substance use, prescription drugs, rehabilitative services and devices, laboratory services, preventative and wellness care, and pediatric services.

### Early Retiree Benefits

Another change which will take place on June 23, 2010 is the establishment of a temporary reinsurance program for early retirees receiving health insurance coverage from former employers until Medicare kicks in. Since the new state-created health insurance exchanges discussed below will not come into existence until 2014, this voluntary reinsurance program will reimburse participating employers 80 percent of their per-employee costs between \$15,000 and \$90,000 a year in order to entice employers to offer health insurance to retirees between the ages of 55 and 64.

### State-created Exchanges

The primary vehicle for opening up health care to the estimated 32 million people who are currently uninsured will be the establishment of American Health Benefit Exchanges by states in 2014. These exchanges must include Small Business Health Options Programs or "SHOPs" to assist small-group market employers to provide qualified health plans to their employees.

### Free Rider Penalties

The piece of the legislation drawing the most attention is the mandate that, by 2014, employers with more than 50 full-time employees (FTEs) provide health insurance coverage or face a so-called "free-rider" penalty of \$2,000 per full-time employee (although the penalty is reduced by 30 FTEs). "Full-



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time employees" are those working an average of at least 30 hours per week; part-time hours are aggregated on a monthly basis and divided by 120 to determine FTEs. Qualifying employer health insurance coverage must be "affordable" and provide coverage of medical expenses with an actuarial value of 60 percent. "Affordable" coverage is defined as that costing no more than 9.5 percent of the employee's modified gross income.

### Major Employers

By January 1, 2014, employers with more than 200 FTEs offering more than one health plan will be required to automatically enroll any new full-time employees in one of the plans and offer these employees notice and the opportunity to opt out. This opt out written notice must contain clear language describing employee options in state-created health care exchanges as well as eligibility for a premium tax credit.

### Small Business Tax Credit

Small employers with 25 or fewer FTEs with annual average wages of \$50,000 or less will receive a tax credit to purchase health insurance for their employees. A qualifying employer must contribute at least 50 percent of the total premium cost of a qualified plan in order to be eligible for a tax credit of up to 35 percent of the employee's premium. A full credit will be available to smaller employers with 10 or fewer employees who have annual average wages of \$25,000 or less.

### Free-choice Vouchers

The legislation also requires that employers offer free-choice vouchers beginning in 2014 to low-income employees in order to allow them to purchase health insurance coverage through one of the state exchanges. Employees will qualify for the vouchers if their income is four times below the federal poverty level. The dollar value of the free-choice vouchers must equal what the employer would have paid to cover these low-wage employees under the most generous group plan option. Concern has been voiced that

vouchers will drive up health care premiums by pushing younger, healthier employees to opt out in order to purchase cheaper insurance through the regulated exchanges.

### HSA and FSA Changes

By 2011, employers will need to disclose the value of the health care benefits provided on employee W-2 forms. Employees enrolled in popular Health Savings Accounts (HSAs) and Flexible Spending Accounts (FSAs) will no longer be eligible for reimbursement for the purchase of nonprescription over-the-counter drugs. In addition the tax on nonqualified medical expense distributions from HSAs will increase from 10 to 20 percent effective 2011. By 2013, annual contributions to health FSAs will be capped at \$2,500.

### Whistleblower Protection

As employers and, more importantly, their HR personnel stumble through the various requirements under the health care legislation, they should be aware that employees have been incentivized to ensure employer compliance with the health care legislation. The law prohibits discrimination or retaliation by an employer against an employee who (1) reports or is about to report possible employer violations of the Act; (2) testifies about or assists authorities with an investigation under the health care legislation; or (3) objects to or refuses to participate in any activity, policy, practice or assigned task he or she reasonably believes to violate the health care legislation or any rule or regulation under it. The employee need only demonstrate that the protected conduct was a "contributing factor" in the adverse action by the employer. The employer, in turn, must prove "by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct."

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As a result, HR personnel will be carefully monitored not only by the government but by employees as they steer through the myriad requirements of the new health care legislation. Whether the health care legislation will achieve its ultimate goal of extending health care coverage to those who are currently not covered and, more importantly, make it more affordable, will be anybody's guess. However one thing is certain. The employee benefit aspects of the HR job description suddenly got a lot more complicated. It's time to ask for that well-deserved raise.

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