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Health Care Reform Requires Action in 2010: Action Items Employers Must Implement Before Year-End



By ERIC R. KELLER AND ANDREA M. GEHMAN

There seems to be little urgency toward wrestling with health care reform compliance in 2010. Perhaps many employers are overwhelmed or lulled to inaction by the phase-in of changes over many years. Whatever the reason, employers need to take some basic actions in 2010 in order to avoid liability for non-compliance.

Set forth at the end of this article is a checklist of action items for attention over the next few months. They relate to provisions of the Patient Protection and Affordable Care Act (PPACA) that will take effect im-

mediately or in the near future. With health care reform now codified and regulations being issued at a monumental pace, employers should prepare for the sweeping changes that are scheduled to unfold during the next several years, starting with those that become effective Jan. 1, 2011.¹

Employers may be tempted to take a piecemeal approach to the myriad changes that the PPACA requires. This approach will increase the chances that key decisions will be missed or decisions will occur in a vacuum today — with unexpected repercussions later on. The risk of liability for errors is real in that PPACA violations will expose employers to potentially significant excise taxes under the Internal Revenue Code and participant claims for lost benefits under the Employee Retirement Income Security Act (ERISA). Because of the interrelated nature of the PPACA's requirements and the liability risks from noncompliance, employers should take a holistic approach toward implementing the PPACA requirements.

To help guide employers through the process, the following is a list of action items, followed by a checklist to prepare for the 2011 changes:

1. Take an Inventory of all Benefit Programs to Determine Applicability to PPACA. Employers should first assess which of their health and welfare benefit programs are affected by the PPACA. The PPACA's changes generally apply to a "group health plan" which has the meaning given such term by Section 2791 (a) of the Public Health Service Act. While this term is associated with major medical plans, recently issued PPACA regu-

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¹ Jan. 1, 2011, assumes a calendar year plan. Some requirements listed in this article are effective on the first day of the first plan year after Sept. 22, 2010.

lations have confirmed that certain health related programs are not affected, such as retiree-only medical plans and HIPAA exempted benefits.² The PPACA-exempt programs include:

- most retiree only medical plans,
- most fixed indemnity policies,
- most stand alone vision and dental plans,
- most health flexible spending accounts — all health FSAs (whether or not they are an excepted benefit) are affected by PPACA's requirement that employee elective deferrals be limited to \$2,500,
- medigap policies,
- most specified disease policies,
- accidental death and dismemberment coverage, and
- some employee assistance programs (e.g., referral only EAPs) — EAPs are covered to the extent they provide medical benefits (e.g., visits with a trained counselor).

Employers that combine or “wrap” one or more of these exempt benefits together with nonexempt benefits in a single omnibus plan should evaluate whether such practice, if continued, would adversely affect any exemption that would otherwise be available if such benefits were offered separately.

2. Decide Whether to Maintain Grandfathering. Whether or not to maintain grandfathering for nonexempt plans is the question most employers will struggle with during annual renewals this year. While most employers likely desire to maintain grandfathering for 2011, many employers are concluding that the requirements for maintaining grandfathered status are cost prohibitive.

Employers should consider several factors when determining whether to maintain grandfathering for the 2011 plan year. For example:

- *Annual renewal*— Can the employer absorb the projected 2011 cost increase for the plan or does the employer need to pass on certain cost increases to employees, either in the form of increased premiums or higher cost sharing (deductibles, copays, etc.). For example, will the employer be charging additional premiums for each dependent in light of PPACA's mandate to provide coverage to adult children up to age 26?

- *Carriers* — For fully insured plans, is the employer satisfied with the service of its current carrier? Does the carrier still fit the population (i.e., is the employer “outgrowing” its carrier)?

- *Grandfathering benefits* — Do the changes above outweigh the costs/constraints imposed on nongrandfathered plans?

3. Amend Plans and Administrative Practices and Prepare Communication Materials. Once employers decide whether to maintain grandfathering for 2011, then it is time to start amending applicable plans and communicating to employees. Employers should determine what updates should be made (see our action item checklist below) and which plans may be affected. All the plans affected (and even those that aren't) must be considered in the planning. For example, the updates regarding dependent coverage could affect definitions in several plans. In addition, the analysis should not focus solely on compliance but also whether the plan's design

should be modified to minimize the employer's cost of compliance.

While employers are updating plans, they must also be preparing for PPACA's reporting and disclosure requirements. For example, in addition to updating health plans for dependent coverage, employers are required to implement a 30-day enrollment opportunity for dependent children under age 26. In addition, employers must preserve benefit materials for any grandfathered plans for potential audits by Health and Human Services and prepare its payroll system for required W-2 reporting which must be implemented by Jan. 1, 2011.

Employers should not wait until the last minute to implement these measures as doing so will likely increase the possibility of noncompliance and the associated liabilities described above. In addition, employers should not act alone; employers should appoint an outside adviser to serve as the project manager charged with ensuring that the compliance initiative addresses all the required areas and is completed on time. While typically consultants and brokers act as primary outside advisers for health benefits, it is imperative to have legal counsel to manage and review the process given the potentially significant legal exposure for mistakes.

Employer Action Items for 2011 — To Be Completed Before Dec. 31, 2010, for Calendar Year Plans

Initial Critical Decisions

- Determine what plans are subject to PPACA (e.g., retiree medical and limited scope vision and dental may be exempt if certain requirements are met).

- Decide whether to maintain grandfathering for nonexempt plans.

Plan Amendments For All Plans

- Amend health FSA document to permit reimbursement of drugs only if prescribed or insulin.

- Amend plan and to permit dependent children to remain on the plan to age 26 regardless of student or marital status. (Grandfathered plans may exclude dependents with other employer coverage.) Implement 30-day enrollment opportunity for dependent children under age 26. Amend cafeteria plan to reflect change in dependent child definition.

- Amend plan to eliminate lifetime maximum limits on coverage of essential benefits and the eliminate annual limits with exception for “essential health benefits.”

- Amend plan to eliminate pre-existing condition exclusions for children under the age 19 (elimination of pre-existing condition exclusion for all individuals goes into effect in 2014).

- Amend plan to eliminate any coverage rescissions except for fraud, misrepresentations, and certain allowances for nonpayment, etc.

Plan Amendments For Plans That Are Not Grandfathered

- Amend plan to cover emergency services without prior authorization and without out-of-network surcharges.

- Amend plan to provide coverage for, and no cost sharing on, preventive services.

- Implement new claims appeals process to include external review.

² Preamble to Interim Rules for Grandfathered Health Plans, 75 Fed. Reg. 34,537 (proposed June 17, 2010).

- Allow participants to choose their primary care provider, including an OB-GYN for females and a pediatrician for children.

- Implement any changes required to avoid fully insured plans from providing coverage that discriminates in favor of highly compensated employees. This may require modifications to severance arrangements.

Reporting Requirements Effective Jan. 1, 2011

- Modify payroll system to show value of health coverage on employee's W-2. (Applies to 2011 W-2s issued in 2012.)

- Nongrandfathered plans must submit a report to the Department of Health and Human Services regarding enrollment, claims payment, and financial information.