



Health Care & Employee Benefits Law Alert

A Corporate Department Publication

May 2010

This Health Care and Employee Benefits Law Alert is intended to provide general advice for clients or interested individuals and should not be relied upon as legal advice. Please consult your attorney for specific advice regarding your particular situation.

Richard J. Helmreich
614-227-2088
rhelmreich@porterwright.com

Ann M. Caresani
216-443-2570
acaresani@porterwright.com

Richard G. Terapak
614-227-4301
rterapak@porterwright.com

Timothy B. Mitchell
614-227-2102
tmitchell@porterwright.com

James H. Prior
614-227-2008
jprior@porterwright.com

Seth J. Hanft
614-227-2052
shanft@porterwright.com

Sara M. Schroth
513-369-4244
sschroth@porterwright.com

The Patient Protection and Affordable Care Act: Dilemmas Facing Employers Sponsoring Group Health Plans

What plan-related changes are required by the Patient Protection and Affordable Care Act? When must these changes be implemented? Will these changes raise costs? What penalties and fees might my company face for non-compliance? Many employers sponsoring group health plans are asking these questions following the enactment of the Patient Protection and Affordable Care Act (PPACA). The changes required by PPACA are coming in waves. Some provisions, such as the small employer health insurance credit and the early retiree reinsurance program, require immediate action. Other provisions, such as the non-discrimination requirements and cost-sharing limits, have later effective dates. Unfortunately, PPACA does not include step-by-step instructions to guide employers through these different phases of health care reform. Consequently, employers are turning to professionals to help analyze how PPACA affects their plans and formulate a strategy to comply with these requirements.

Group Health Plan Mandates. PPACA requires employers to make a number of changes to their group health plans. For calendar year plans, many of these requirements become effective January 1, 2011, such as extended coverage for adult children until age 26, a ban on lifetime and annual limits on essential benefits, and a ban on preexisting condition exclusions. Other changes, such as the new limits on deductibles and out-of-pocket maximums, become effective January 1, 2014. Grandfathered plans — those existing on March 23, 2010 — are exempt from some of these requirements. Employers should beware that implementing these changes may be costly and should examine how best to apportion these rising costs.

A number of other provisions may affect group health plan costs for employers. As of 2013, PPACA eliminates employer tax deductions for Medicare Part D government subsidies. Employers must also implement a number of costly administrative changes. This includes reporting the value of employer-sponsored health coverage on each employee's Form W-2, automatically enrolling new full-time employees in employer-sponsored health coverage, and implementing both internal and external claim appeals procedures.

Penalties for Non-compliance. Effective as early as January 1, 2011, employers face penalties if they fail to implement certain requirements by their effective dates. Employers that fail to implement these requirements face a nondeductible excise tax of \$100 per day per person to whom the failure



relates. This excise tax applies to the following violations: failure to cover eligible adult children until age 26; failure to comply with ban on lifetime and annual limits; failure to cover preventative services without any cost-sharing; failure to provide emergency service benefits without requiring pre-authorization and/or imposing a different cost-sharing amount for out-of-network emergency services; failure to ban preexisting condition exclusions on enrollees; and rescinding a participant's coverage for reasons other than fraud or intentional misrepresentations.

Note that an employer may be able to avoid penalties if the error was unintentional and is corrected within 30 days of the date the employer knew or should have known that the failure existed. Nevertheless, employers will be better suited by complying with these changes before they become effective, thereby removing any risk of penalties.

Research Fee. Employers must pay a "comparative effectiveness fee" beginning in 2012. This annual per participant fee funds government-sponsored comparative effectiveness research. The fee is \$1 per participant for the first plan year ending after September 30, 2012. For subsequent plan years, until the plan year ending on or before September 30, 2019, the fee is \$2 per participant. For plan years beginning after September 30, 2014, the fee is indexed for inflation based on the per capita growth of national health expenditures.

Play or Pay? Some employers may be considering simply eliminating group health plan coverage to avoid these costs and penalties. It may be a bit too early to make this decision. PPACA requires each state to establish a state-based "exchange" to offer private health insurance choices to individuals and small employers. Small employers that offer insurance through these exchanges may claim a health insurance credit for any tax year beginning after 2013. These state-run health exchanges will likely not be available until 2014, so most small employers should not rush to drop coverage.

Dropping or failing to provide coverage could result in the imposition of additional penalties. Under PPACA's "play or pay" rule, which becomes effective January 1, 2014, employers with over 50 full-time employees face penalties if they have one or more full-time employees who receive a tax credit to buy insurance through a state exchange. Large employers who do not offer any qualified coverage face an annual penalty equal to \$2,000 (or \$166.67/month) multiplied by the number of full-time employees over a 30-employee threshold. A similar penalty applies to large employers who offer qualified coverage, but have one or more full-time employees who receive coverage through an exchange. For these employers, the annual penalty is equal to the lesser of: (1) \$3,000 (or \$250/month) multiplied by the number of employees receiving a premium tax credit for enrolling in a state exchange-offered plan; or (2) \$2,000 (or \$166.67/month) multiplied by the number of full-time employees over a 30-employee threshold.

Cadillac Tax. Employers providing high-cost health care benefits face additional penalties. Beginning in 2018, these employers face a 40% excise tax on the cost of coverage exceeding \$10,200 for single coverage and \$27,500 for family coverage. Plan sponsors will have to monitor costs to ensure they do not exceed these thresholds.

Conclusion/Action Items. Employers sponsoring group health plans have much to consider with little time to make decisions. Effective dates for many requirements are looming, and employers face penalties for non-compliance. Consequently, we are working with employers to implement the following six-step compliance program:

- Step 1: Perform a detailed review of the group health plan to determine whether the plan complies with PPACA.
- Step 2: Identify changes that must be made to the plan to comply with PPACA's new requirements.
- Step 3: Determine whether the necessary changes will cause the plan to lose its grandfather status.
- Step 4: Analyze implementation costs.
- Step 5: Train employees regarding new requirements and update administrative procedures to ensure compliance.
- Step 6: Develop an employee communication strategy concerning the impending group health plan changes.