

Health Care Reform Update

Health Care Reform Implications for Employers with Seasonal Employees



Many industries (e.g. ski resorts, retail, restaurants, agriculture, fishing and tourism) have a significant number of seasonal employees. These employees are hired by the employer to work for a limited period of time, typically during the employer's "busiest" season.

Health care reform legislation passed earlier this year will have significant impacts on individuals and employers. This is particularly true for employers with a seasonal employee population. While many of the requirements are not effective until 2014, this summary is intended to highlight some key points for employers with a seasonal workforce to consider when developing a long-term benefits strategy. It is not an exhaustive analysis and further guidance is needed on many of these issues.

2010 – 2011

Benefit Design Requirements

Effective for the first plan year that begins on or after September 23, 2010, all group health plans will need to comply with the following requirements:

- No lifetime limitation on essential benefits;
- No unreasonable annual limits on essential benefits;
- Provide coverage for an employee's child up to age 26¹;
- No recessions of coverage except for fraud, intentional misrepresentation of material fact, or failure to pay premiums; and
- Impose no pre-existing condition exclusions on individuals under age 19.

Non-grandfathered plans will need to comply with the following additional requirements effective for the first plan year that begins on or after September 23, 2010:

- Cover preventive services at 100% in-network;
- An insured plan cannot discriminate in favor of highly compensated individuals as to eligibility or benefits;²
- Certain patient protections (PCP designation, OB/GYN access and emergency services); and
- More expansive claims, appeals and external review procedures.

¹ Until the first plan year that begins on or after January 1, 2014, grandfathered health plans are not required to cover children up to age 26 if the child has their own employer-based coverage available (provided that coverage is not a parent's employer-based plan).

² Internal Revenue Code Section 105(h)(2) – these rules are already applicable to self-insured plans regardless of grandfathered status.

Tax-Favored Accounts

Expenses for over-the-counter (OTC) medicines and drugs incurred on or after January 1, 2011 are not eligible for reimbursement through a health flexible spending account (health FSA) or a health reimbursement arrangement (HRA) without a prescription. If OTC medicines and drugs are reimbursed through a health savings account (HSA) without a prescription, then they will be treated as a non-qualified reimbursement, subject to taxation as well as a 20% penalty.

W-2 Reporting – Optional for 2011

Starting in tax year 2011, employers are required to report the value of the health insurance coverage they provide employees on each employee's annual Form W-2. However, to provide employers the time they need to make changes to their payroll systems or procedures to comply with this requirement, the IRS will defer the reporting requirement, making 2011 reporting optional. This reporting is for informational purposes only, to show employees the value of their health care benefits. The amount reported does not affect tax liability, as the value of the employer contribution to health coverage continues to be excludible from an employee's income and it is not taxable.

This calculation may include medical insurance coverage (including prescription drugs), HRA contributions, or other supplementary health plan coverage (e.g. EAPs, wellness programs). It does not include stand-alone dental or vision coverage. More guidance is needed on how to determine the value of the coverage provided.

Impact to Employers with Seasonal Employees

- If you offer a group health plan, you must comply with the applicable requirements described above.
- Determine whether your group health plan(s) will retain grandfathered status.
- If applicable, communicate changes to the health FSA, HRA and HSA to employees, and update relevant plan documents as applicable.
- Ensure payroll vendors can assist with W-2 reporting.

Limited Medical Plans

Many employers offer limited medical plans to seasonal, part-time or low income workers. These plans generally provide a fixed amount of medical benefits available in a year (e.g. \$15,000 annually).

Health care reform prohibits a group health plan from imposing annual limits that fall below the following thresholds:

- For a plan year beginning on or after September 23, 2010, but before September 23, 2011, \$750,000.
- For a plan year beginning on or after September 23, 2011, but before September 23, 2012, \$1,250,000.
- For plan years beginning on or after September 23, 2012, but before January 1, 2014, \$2,000,000.

Thus, many limited medical plans will violate this requirement.

However, the regulations and subsequent guidance provide that, prior to January 1, 2014, a limited medical plan may seek a waiver from the strict annual limitation requirements through the Department of Health and Human Services (HHS). The waiver program is available if compliance with the required annual limitations would result in a significant decrease in access to benefits or a significant increase in premiums for those individuals covered by the limited plan.

Only limited medical plans in place prior to September 23, 2010 are eligible for the waiver program. The waiver application must be submitted not less than 30 days before the beginning of the plan year, or in the case of a plan year that begins before November 2, 2010, not less than 10 days before the beginning of the plan year.

The application must include:

- The terms of the plan for which a waiver is sought;
- The number of individuals covered by the plan submitted;
- The annual limit(s) and rates applicable to the plan submitted;
- A brief description of why compliance with the regulations would result in a significant decrease in access to benefits for those currently covered by such plans, or a significant increase in premiums paid by those covered by such plans, along with any supporting documentation; and
- An attestation, signed by the plan administrator or Chief Executive Officer (“CEO”) of the issuer of the coverage, certifying (a) that the plan was in force prior to September 23, 2010; and (b) that the application of restricted annual limits to such plan(s) would result in a significant decrease in access to benefits for those currently covered by such plans, or a significant increase in premiums paid by those covered by such plans.³

A waiver approval applies only for the plan year beginning between September 23, 2010 and September 23, 2011. A group health plan or health insurance carrier must reapply for any subsequent plan year prior to January 1, 2014. HHS may modify this waiver approval process at any time.

Further guidance is available at: http://www.hhs.gov/ociio/regulations/patient/ociio_2010-1_20100903_508.pdf.

Impact to Employers with Seasonal Employees

Seasonal employers with a limited medical plan will have to make some decisions:

- Determine whether to increase the annual limits to meet or exceed the permitted thresholds; or
- If a limited medical plan was in place prior to September 23, 2010, and otherwise satisfies the requirements, you may be eligible to apply for a waiver from the annual limit requirement. For an insured plan, you should consult with your carrier to determine whether the plan is eligible for the waiver. For a self-insured plan, the plan administrator should coordinate with the third-party administrator to apply for relief.

2014

In 2014, many significant aspects of health care reform will take effect. This includes, among other things:

- New penalties imposed on *applicable large employers* if certain full-time employees receive government assistance to purchase coverage through a state-based Exchange;
- An individual mandate requiring U.S. citizens to have health insurance coverage or face penalties;
- The establishment of Exchanges, a new state-based insurance market for individuals and small groups; and
- Additional mandates on health plan coverage.

Employers with a seasonal workforce will want to understand these requirements and the potential impact to their health plans.

³ The plan administrator or CEO should retain documents in support of this application for potential examination by HHS.

Employer Mandate

Nothing in the law requires an employer to provide health insurance to employees.

However, *applicable large employers* will face penalties if full-time employees qualify for and receive government assistance (in the form of premium credits or cost-sharing subsidies) to purchase health insurance through the Exchange.

The term *full-time employee* means an employee who is employed on average at least 30 hours of service per week.⁴

An *applicable large employer* is an employer who, with respect to a calendar year, employed an average of at least 50 full-time employees on business days during the preceding calendar year.⁵

To determine whether an employer is an *applicable large employer*, employers:

- Will need to count employees who do not work full-time (i.e. part-time employees) by dividing the aggregate number of hours worked for a month by 120;
- Will need to consider controlled group rules, as members of a controlled group will be treated as a single employer and all employees will be treated as employed by a single employer⁶; and
- Will not be considered to have employed more than 50 full-time employees if the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year and the employees in excess of 50 employed during the 120-day period were *seasonal workers*.⁷

Employers with fewer than 50 full-time employees will not face penalties if their employees receive government assistance and purchase coverage through the Exchange.

Impact to Employers with Seasonal Employees

Generally,

- If you have more than 50 full-time employees, you will be considered an *applicable large employer*, potentially subject to penalties.
 - **Example:** In the preceding year, a ski resort has 100 year-round full-time employees and hires 200 seasonal employees for 6 months. Employer will be an *applicable large employer* as the employer employed 50 or more employees.
- If you are an employer with 50 or fewer full-time employees, but hire seasonal employees (thus increasing your full-time employee count above 50), you will not be an *applicable large employer* if your workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year and the employees in excess of 50 employed during the 120-day period were *seasonal workers*.
 - **Example:** In the preceding year, a retail establishment has 30 full-time employees working year round. The retail employer hires 30 seasonal employees to work the holiday season for 60 days. This employer is not an *applicable large employer* because the workforce only exceeds 50 employees due to seasonal employees who were hired for fewer than 120 days.

⁴ Regulations are expected to help determine the hours of service of an employee, including rules for the application of this definition to employees who are not compensated on an hourly basis.

⁵ Be aware that there are various provisions of the statute that apply to *large employers*, but define the term differently. For example, a *large employer* for purposes of the penalty is an employer with 50 or more employees, but for purposes of automatic enrollment a *large employer* has more than 200 employees.

⁶ See Internal Revenue Code Section 414(b), (c), (m) and (o).

⁷ For purposes of this section, the term *seasonal worker* means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by 29 CFR §500.20(s)(1) and retail workers employed exclusively during holiday seasons.

When can employees receive government assistance through the Exchange?

Not all employees of an *applicable large employer* will be eligible for government assistance through the Exchange.

To qualify for government assistance, the employee must have household income between 100%-400% of the Federal Poverty Level, and either have:

- No coverage provided by the employer;
- Employer provided health insurance coverage with an actuarial value below 60% (meaning that the plan's share of provided benefits is less than 60%), or
- A required contribution toward employer-provided coverage that exceeds 9.5% of their household income.⁸

Individuals satisfying these requirements may be eligible to receive government assistance through the Exchange.

I am an applicable large employer, now what?

If full-time employees receive government assistance to purchase coverage (or receive cost-sharing subsidies) through the Exchange, then penalties may apply. The amount of the penalty will depend on whether or not the employer provides health plan coverage to full-time employees. Generally, penalties will be assessed on a monthly basis, but are annualized for illustrative purposes in the following examples.

Large Employer not Offering Coverage

A penalty of \$2,000 multiplied by the number of full-time employees in excess of 30 employees will be assessed on an applicable large employer who does not provide minimum essential coverage to full-time employees (and their dependents) and at least one employee receives government assistance and enrolls in health plan coverage through the Exchange.

- Example : ABC Company has 100 full-time employees and does not provide health insurance coverage. Fifteen (15) of ABC Company's full-time employees receive government assistance to purchase insurance coverage through the Exchange. ABC Company will face a penalty of \$140,000 ($100 - 30 = 70 * \$2,000$).

Large Employer Offering Coverage

A penalty will be imposed on an applicable large employer who offers minimum essential coverage to full-time employees (and their dependents) if one or more of the full-time employees receives government assistance and enrolls in health plan coverage through the Exchange.

Generally, the penalty assessed will be \$3,000 multiplied by the number of full-time employees receiving government assistance. However, the maximum penalty imposed cannot exceed the penalty that would be assessed if the employer did not offer health coverage. In other words, the maximum penalty is capped at \$2,000 multiplied by the number of full-time employees of the employer in excess of 30 employees.

- Example – Regular Penalty: Same example as above, except ABC Company provides health insurance coverage to full-time employees. Fifteen (15) of ABC Company's full-time employees receive government assistance to purchase insurance coverage through the Exchange. ABC Company will face a penalty of \$45,000 ($15 * \$3,000 = \$45,000$).

⁸ It is possible that the 9.5% threshold will be changed to 9.8% to be consistent with the threshold for the Free Choice Vouchers discussed later in this summary.

- Example – Aggregate Limit: Same example as above, except ABC Company provides health insurance coverage to full-time employees and fifty (50) of ABC Company’s full-time employees receive government assistance to purchase insurance coverage through the Exchange. ABC Company will face a penalty of \$140,000 based on the aggregate limit (70 * \$2,000 = \$140,000), as opposed to \$150,000 based on the regular penalty (50 * \$3,000).⁹

Impact to Employers with Seasonal Employees

A penalty may apply when seasonal employees meet the definition of a full-time employee under the statute and receive government assistance toward coverage they purchase through the Exchange. Again, regulations are expected to better clarify the definition of a full-time employee and the application of a penalty.

As penalties are assessed on a monthly basis, it would appear that the employer will only be liable for a penalty in each month that the seasonal full-time employee is employed by the employer and otherwise eligible for assistance.

- Example: An applicable large employer provides group health plan coverage to non-seasonal full-time employees. Seasonal full-time employees are not eligible for coverage. If one seasonal full-time employee who works for 6 months (working on average 30+ hours per week) receives government assistance toward Exchange-based coverage, the employer may face penalties. It is likely the penalties are assessed based on the period of time the employee is working for the employer. In this scenario, the penalty assessed would likely be \$1,500 for one seasonal employee (which is 6/12 * \$3,000). This is an estimate based on the language of the statute. Regulations could change this outcome and further guidance is needed.

Waiting Periods and Penalties

Among other reform mandates in effect for the first plan year that begins on or after January 1, 2014, a group health plan will be prohibited from imposing a waiting period in excess of 90 days on participants.

Impact to Employers with Seasonal Employees

If an employer were to make group health plan coverage available to seasonal employees, the plan may impose a up to a 90-day waiting period with respect to the coverage. In the case of a 120-day season, once a seasonal employee satisfied the 90-day waiting period, he or she would be eligible for benefits for 30 days. It is not clear however whether the time the seasonal employee spends in a waiting period can be counted for penalty purposes. Would the employer face a penalty if, during the waiting period, the seasonal employee received government assistance to purchase coverage through the Exchange? More guidance is needed.

Further, employers looking to cover seasonal employees should know that if the employer is subject to COBRA, the seasonal employee’s termination of employment and loss of group health plan coverage will likely trigger a COBRA obligation.

Finally, if the plan is self-insured or a non-grandfathered insured plan, the health plan must comply with Code Section 105(h) nondiscrimination requirements. While seasonal and part-time employees generally may be excluded for purposes of these tests, more guidance is needed when seasonal and part-time employees are provided coverage under a group health plan.¹⁰

⁹ In practice, the aggregate limit may have limited application, as a significant portion of the full-time employee population would need to receive government assistance in order to hit the maximum expenditure.

¹⁰ Generally, for purposes of the Eligibility test, certain employees, including part-time and seasonal employees, may be excluded from consideration. Any employee whose customary weekly employment is less than 25 hours or any employee whose customary annual employment is less than 7 months may be considered as a part-time or seasonal employee.

Also, employees whose customary weekly employment is less than 35 hours are considered to work part-time if other employees in similar work with the same employer (or, if no employees of the employer are in similar work, in similar

Vouchers

A voucher program may be available to certain employees who have household income between 100%-400% of the FPL and a required contribution toward employer-provided health plan coverage that exceeds 8% but is less than 9.8% of household income. It is suggested that this program would involve converting the employer's contribution toward group health plan coverage into a voucher that the employee can use to purchase insurance coverage through the Exchange. More guidance is needed.

Automatic Enrollment

Employers with more than 200 employees will be required to automatically enroll eligible employees into the group health plan coverage. Employees must have an opportunity to opt-out of the coverage.

Individual Mandate

Generally, all U.S citizens and legal residents will be required to have qualifying health insurance coverage or pay a penalty. Individuals without coverage will face a penalties, assessed as the greater of:

- 2014: \$95 or 1% of taxable income.
- 2015: \$325 or 2% of taxable income.
- 2016: \$695 or 2.5% of taxable income (after 2016, amounts adjusted for inflation).

Exemptions are available for financial hardship, religious objections, American Indians, those without coverage for less than 3 months, and undocumented immigrants.

Impact to Employers with Seasonal Employees

Many employees who work on a seasonal basis will be required to have health insurance coverage or face penalties, unless an exception exists. If they do not receive coverage through their employer(s), these employees will need to secure coverage through some other vehicle (i.e. the Exchange) in order to avoid the tax consequence.

Certain employer-provided coverage that may be available to seasonal employees (e.g., limited medical plans, on-site medical clinics) may not be sufficient coverage to satisfy the individual mandate.

CONCLUSION

This summary is a very high-level look at a few of the key health care reform requirements and the potential impact on employers with a seasonal employee population. This summary is not exhaustive as there are many additional requirements not discussed in this material, including, but not limited to, small business tax credits (2010), new notice and reporting obligations (summary of benefits and HHS reporting in 2012), changes in the health flexible spending account (2013), and a new high cost plan tax (2018).

We will continue to monitor the impact of health care reform on employers with seasonal employees and will provide further analysis as guidance is issued.

work in the same industry and location) have substantially more hours and, seasonal employees whose customary annual employment is less than 9 months are considered to be seasonal if other employees in similar work with the same employer (or, if no employees of the employer are in similar work, in similar work in the same industry and location) have substantially more months.



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