A Timely Analysis of Legal Developments

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The IRS issued a notice delaying until at least 2012 the effective date of nondiscrimination rules made applicable to fully insured non-grandfathered health plans under the Patient Protection and Affordable Care Act (PPACA). On the same day, the Departments of Health and Human Services, Labor and Treasury also released new guidance on the PPACA and the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA).

IRS Extends Effective Date of PPACA Nondiscrimination Rule & Other PPACA Guidance Issued

By Lisa Taggart and Sean Brown

Last week, the Internal Revenue Service (IRS) issued Notice 2011-1, which delays until at least 2012 the effective date of nondiscrimination rules made applicable to fully insured non-grandfathered health plans under the Patient Protection and Affordable Care Act (PPACA). On the same day, the Departments of Health and Human Services, Labor and Treasury also released new guidance on the PPACA and the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). The most important features of these releases are summarized below.

Delay of Application of PPACA Rules Prohibiting Discrimination in Non-Grandfathered Insured Health Plans

As originally enacted, the PPACA provides that, effective the first plan year following September 23, 2010 (for many employers, this would be January 1, 2011), the existing restrictions that prohibit self-insured health plans from discriminating in favor of highly compensated individuals, are extended to non-grandfathered insured health plans. Depending upon how broadly these new restrictions are construed, they could have a significant impact on how employers structure employment contracts and severance agreements, including arrangements that provide coverage to a group that is predominately highly paid or that extend subsidized insurance benefits after termination of employment. Plans that fail to comply with the new rules are subject to significant penalties of an excise tax of $100 per day for each non-highly compensated individual that is not eligible for the discriminatory benefit, up to a maximum of $500,000.

On September 20, 2010, the IRS issued Notice 2010-63, requesting public comments on guidance related to this provision. Many comments pointed out the fundamental difficulties of complying with these rules come January 1st without regulatory guidance. The IRS heeded these concerns and issued Notice 2011-1 in which it agreed that "regulatory guidance is essential to the operation of the statutory provisions." The Notice delays the date employers and plans will be required to comply with this provision of the PPACA.

IRS Notice 2011-1 essentially provides an enforcement safe harbor in that there will

be no enforcement of the new nondiscrimination rules for non-grandfathered insured plans until the first plan year after regulations are issued. Since guidance will not be issued prior to 2011, the earliest these provisions could become effective would be January 1, 2012. This also means that employers will not be required to file IRS Form 8928 with respect to excise taxes prior to the date required for compliance with the new nondiscrimination rules.

The issuance of Notice 2011-1 means that for health plan provisions, as well as provisions touching on healthcare in employment contracts and separation agreements that extend into 2011, employers will not have to worry about the new nondiscrimination rules. This does not, however, impact plans, employment contracts and separation agreements with insured plan subsidies extending into 2012, nor does this Notice provide any relief from current nondiscrimination rules under self-insured medical benefit plans.

Through the Notice, the IRS also requested public comment on a number of issues. The highlighted issues echo many comments initially submitted by Littler in response to the IRS's first request for comments on these rules:

1. The basis on which the determination of what constitutes nondiscriminatory benefits should be made and what is included in the term "benefits." For example, is the rate of employer contributions toward the cost of coverage (or the required percentage or amount of employee contributions) or the duration of an eligibility waiting period treated as a "benefit" that must be provided on a nondiscriminatory basis?
2. The suggestion made in previous comments that agencies have the authority to provide for an alternative method of compliance with nondiscrimination rules that would involve only an availability of coverage test.
3. The application of nondiscrimination rules to insured group health plans beginning in 2014 when the health insurance exchanges become operational and the employer responsibility provisions, the premium tax credit, and the individual responsibility provisions and related PPACA provisions are effective.
4. The suggestion in previous comments that the existing nondiscriminatory classification provisions could be used as a basis to permit an insured health care plan to use the highly compensated employee definition in section 414(q) of the Internal Revenue Code for purposes of determining the plan's nondiscriminatory classification.
5. The suggestion in previous comments that the nondiscrimination standards should be applied separately to employers sponsoring insured group health plans in distinct geographic locations, and whether application of the standards on a geographic basis should be permissive or mandatory.
6. The suggestion in previous comments that the guidance should provide for "safe harbor" plan designs. Specifically, comments are requested on potential safe and unsafe harbor designs that are consistent with the substantive requirements of the nondiscrimination rules.
7. Whether employers should be permitted to aggregate different, but substantially similar, coverage options for purposes of nondiscrimination rules and, if so, the basis upon which a "substantially similar" determination could be made.
8. The application of the nondiscrimination rules to "expatriate" and "inpatriate" coverage.
9. The application of the nondiscrimination rules to multiple employer plans.
10. The suggestion in previous comments that coverage provided to a "highly compensated individual" (as defined in § 105(h)(5) of the Internal Revenue Code) on an after-tax basis should be disregarded in applying nondiscrimination rules.
11. The treatment of employees who voluntarily waive employer coverage in favor of other coverage.
12. Potential transition rules following a merger, acquisition, or other corporate transaction.
13. The application of the sanctions for noncompliance with the nondiscrimination rules.

Comments must be submitted by March 11, 2011.

Department of Labor and Department of Health and Human Services Publish FAQs Regarding Implementation of the PPACA

Last week, the DOL and HHS also issued Part V of FAQs regarding implementation of the PPACA. The FAQs provide the following guidance:

- A plan may charge a higher copay for a service provided in an in-network hospital than for the same service provided in an in-network ambulatory center;
- A plan may make distinctions in coverage based on age without violating the rules on providing dependent coverage to age 26 as long as the distinction applies to all coverage under the plan;
- In certain cases, an insurer may screen applicants for eligibility for alternative coverage options before offering a child-only policy;
- Grandfathered health plans that determine cost-sharing based on a percentage-of-compensation formula will not lose grandfathered status if the formula is unchanged even though this may lead to cost increases in excess of the cost increase thresholds in the regulations; and
- In line with other agency extensions of compliance deadlines due to a lack of regulatory guidance, the FAQs addressed two areas where employers will be provided with some relief. First, the Employee Benefits Security Administration (EBSA) has responsibility for rulemaking for a new requirement that large employers automatically enroll new full-time employees in the employer's health plan. Until EBSA issues regulations under this new section of the Fair Labor Standards Act, however, employers will not be required to comply with this rule. Second, group health plans will not be required to comply with the 60-day notice requirement for material plan modifications under section 2715 of the Public Health Service Act until the federal agencies provide standards on benefits and coverage explanations.

Guidance Regarding the MHPAEA

As part of the FAQs on implementation of the PPACA, the DOL and HHS also issued guidance under the MHPAEA. The guidance confirms that the small employer exception, for employers with 50 or fewer employees, still applies after the PPACA and sets forth how a plan can claim the MHPAEA's increased cost exemption. The FAQs also state that in-network health care providers and participants are entitled to receive information about a plan's medical necessity standards.

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