LawTrends

A publication of Eastman & Smith Ltd.

EASTMAN & SMITH LTD.
ATTORNEYS AT LAW
Established 1844

May 2010
volume 8 number 2

Health Care Reform: The Impact on Employers

by Mark A. Shaw, Holly L. Hollandsworth and Garrett M. Cravener

After a long series of debates, negotiations, and procedural tactics in Congress, the Patient Protection and Affordable Care Act (Affordable Care Act) and the "side car" Reconciliation Act that modifies certain provisions of the Affordable Care Act have been signed into law by President Obama. Under the Act, all individuals will be required to obtain health care coverage or pay a penalty. Employer-provided coverage will generally satisfy the coverage requirements, and lower-income individuals will receive a credit or voucher to help pay for health insurance. Generally, employers that currently offer health insurance to their employees may continue offering coverage, so long as their plans meet certain acceptable minimum requirements. Most employer-sponsored plans likely satisfy the requirements of the Act. Employers are not required to offer health coverage under the Act, however, employers electing not to offer qualifying coverage will be subject to additional taxes to help finance the health care coverage for their employees. The Act makes exceptions for small-businesses.

Regardless of size, however, these new provisions will fundamentally impact employers and employees alike. Therefore, employers are strongly encouraged to carefully review the new health care reform legislation. The following is a summary of the major provisions of the Affordable Care Act and Reconciliation Act that have an impact on employers.

Offices

Toledo Office:
One Seagate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699-0032
Telephone: 419-241-6000
Fax: 419-247-1777

Columbus Office:
100 E. Broad Street, Suite 600
Columbus, Ohio 43215
Telephone: 614-564-1445
Fax: 614-280-1777

Findlay Office:
725 S. Main Street
Findlay, Ohio 45840
Telephone: 419-424-5847
Fax: 419-424-9860

Novi Office:
28175 Haggerty Road
Novi, Michigan 48377
Telephone: 248-994-7757
Fax: 248-994-7758

www.eastmansmith.com

Large Employer Responsibilities

Although an employer is not "required" to provide health insurance coverage under the Act, a large employer that fails to offer its full-time employees and their dependents the opportunity to enroll in minimum essential coverage (i.e., a group health plan) will be assessed a substantial penalty if at least one of its full-time employees is enrolled in a qualified health plan (i.e., through a state exchange) through which a premium tax credit or cost-sharing reduction is allowed or paid. Generally, a "large" employer is defined as an employer with an average of 50 or more employees during the previous calendar year. Thus, the penalty does not apply to "small" employers, or those employers that average less than 50 employees. For each month of violation, the penalty assessed against the employer will be the number of full-time employees employed during the relevant month minus a 30 employee threshold times 1/12 of $2,000.

Example: ABC Company is located in Toledo, Ohio and employs 100 full-time employees. During 2014, ABC did not offer its employees minimum essential coverage until July 1, 2014. Therefore, ABC will be subject to a penalty for the six months that it did not offer minimum essential coverage. In this example, ABC will be assessed a $70,000 penalty (100 employees – 30 threshold x 6 months x (1/12) x $2,000).

Example: Now, ABC employed an average of only 49 full-time employees during the prior calendar year. Because the number of full-time employees is below the 50 employee threshold, ABC will not be assessed a penalty for not offering minimum essential coverage.

A large employer will also be subject to a penalty if it offered health coverage, but one or more full-time employees enrolled in a qualified health plan through which a premium tax credit or cost-sharing reduction is allowed or paid. In other words, an employer will be penalized if the offered health insurance is unaffordable to its employee(s) and he or she obtained a qualified health plan through other means. Under this scenario, for each month of violation, the penalty assessed against the employer will be the number of full-time employees who obtained a qualified health plan through other means during the relevant month times 1/12 of $3,000, but not to exceed the number of full-time employees during the relevant month times 1/12 of $2,000.

Example: ABC now offers minimum essential coverage during all of 2014, but 10 of its employees enrolled in a different health plan for sixth months during the year. ABC Company will be assessed a $15,000 penalty (10 employees x 6 months x (1/12) x $3,000).

Example: ABC offers minimum essential coverage during 2014, but 80 of its employees enrolled in a different health plan for sixth months during the year. ABC's penalty will not exceed the number of full-time employees during the relevant months times 1/12 of $2,000. Therefore, ABC will be assessed a $100,000 penalty (100 employees x 6 months x (1/12) x $2,000) as opposed to a $120,000 penalty (80 employees x 6 months x (1/12) x $3,000).

In addition, employers with 200 or more employees will be required to automatically enroll all employees in an employer-sponsored plan. Finally, employers will be required to give adequate notice of the automatic enrollment, and employees will have the right to opt-out of the plan if they demonstrate they have coverage from another source. These provisions regarding "large" employers are effective for months beginning after December 31, 2013.

Free Choice Vouchers

Where an employee chooses not to participate in an employer-sponsored health insurance plan, an employer may be required to provide free choice vouchers to qualifying employees. First, the employer must be an "offering" employer, meaning it offers minimum essential coverage to its employees and pays any portion of the costs of the plan. The free choice voucher allows an employee to apply the amount the employer would have paid had the employee chosen to participate in the employer-sponsored plan to the cost of insurance that he or she obtains through a health insurance exchange. This provision is directed towards assisting lower

income individuals and families in obtaining affordable health insurance coverage.

To be eligible for a free choice voucher, an employee must show: (1) his or her required contribution to the employer's plan exceeds 8% of his or her household income but is no greater than 9.8% of his or her household income; (2) his or her household income is no greater than 400% of the federal poverty line (currently $10,830 for an individual, and $22,050 for a family of four); and (3) he or she does not participate in the plan offered by the employer.

Generally, the amount of the free choice voucher will not be considered gross income for the employee. However, it will be treated as compensation for personal services rendered, which entitles the employer to a tax deduction. The Act provides the free choice voucher provisions will apply to taxable years beginning after December 31, 2013.

Small Employer Tax Credit

Under the Act, eligible small employers who offer health insurance to employees will be able to claim

Mandated Breaks for Nursing Employees

Many employers may not be aware that the Act included a provision which amends the Fair Labor Standards Act (FLSA) to include a provision requiring employers to provide reasonable unpaid breaks for nursing employees. In addition to unpaid break time, the amendment (29 U.S.C. § 207(r)(1)) provides that employers must furnish a private location, other than a restroom, which may be used by the employee to express breast milk. Employers with fewer than 50 employees are not subject to these requirements if such requirements would cause an undue hardship on the employer.

Although many states have passed laws requiring employers to provide nursing mothers with reasonable break time, Ohio's law addresses only the right to breastfeed in a place of public accommodation. Thus, under the FLSA, Ohio employers will now be required to provide a private area to accommodate nursing employees, and employers should revise their policies and procedures to ensure compliance with the new law.

In addition, in *Allen v. Totes/Isotoner*, many expected the Ohio Supreme Court would address the question of whether Ohio's pregnancy discrimination laws required employers to allow a woman who is breastfeeding to take unscheduled lactation breaks. Instead, the Court dodged the question, issuing five separate opinions. Ultimately, the Court upheld summary judgment in favor of the employer on the ground that it terminated the plaintiff for what she conceded were unauthorized breaks from her work station. However, Justice O'Donnell wrote a separate opinion, joined by Justices Lundberg Stratton and Cupp, to emphasize their view that in light of the facts in the *Allen* case, any opinion of the Court on the question of whether "discrimination due to lactation" would have been an improper advisory opinion.

The opinion most noteworthy to employers came from Justice O'Connor, joined by Chief Justice Moyer. While she agreed with the decision to uphold summary judgment in favor of the employer, Justice O'Connor wrote to express her views on the merits of the question of lactation in the workplace. Specifically, Justice O'Connor stated, "[g]iven the physiological aspects of lactation, I have little trouble concluding that lactation ... has a clear, undeniable nexus with pregnancy and with childbirth. Therefore, it necessarily follows that lactation is "because of or on the basis of pregnancy" and that women who are lactating are women "affected by pregnancy [or] childbirth." Thus, Justice O'Connor concluded that gender discrimination claims arising from lactation are cognizable under Ohio's pregnancy discrimination laws. In addition, Justice Pfeiffer wrote a dissenting opinion in which he stated, "employment discrimination due to lactation is unlawful pursuant to R.C. 4112.01(B)," and "clear public policy justifies an exception to the employment-at-will doctrine for women fired for reasons relating to lactation."

The *Allen* decision suggests that when faced with the right factual scenario, the Ohio Supreme Court may be prepared to extend Ohio's pregnancy discrimination laws to lactation. This decision, coupled with the Affordable Care Act's recent amendment to the FLSA, dictate that Ohio employers should be cognizant of the needs of breastfeeding employees and ensure there are no obstacles to enabling employees to pump breast milk in the workplace in a private location.

a tax credit based on the employer's contribution towards its employees' health insurance premiums. The credit is available to eligible small employers immediately. To be eligible for the tax credit, the employer must have no more than 25 full-time employees for the taxable year and the average annual wages of these employees cannot exceed $40,000. For tax years 2011-2013, a small employer may be eligible for a tax credit of up to 35% (25% for tax-exempt small employers) of the contributions that the employer made on behalf of its employees, as long as the employer contributed at least 50% of the total premium cost. For tax years 2014 and later, a small employer may be eligible for a tax credit of up to 50% (35% for tax-exempt small employers) of the contributions that the employer made on behalf of its employees, with the same conditions as described above for tax years 2011-2013. Employers should keep in mind, however, that the credit will begin to phase out for employers with more than 10 employees with average wages of greater than $25,000.

High-Cost Employer Plans or "Cadillac Plans"

The Act provides, effective in tax years beginning after December 31, 2017, employer-sponsored health plans that provide an "excess benefit," or so-called "Cadillac plans," will be subject to a 40% excise tax. The tax will be assessed without regard to whether the employer or the employee pays for the coverage. The tax will be assessed on the costs of any coverage which exceeds $10,200 for individuals, and $27,500 for families, subject to certain health cost adjustment percentages and age and gender characteristic adjustments.

The employer will be responsible for calculating the amount of excess coverage subject to the excise tax and notifying the Secretary of Health and Human Services (in a manner to be determined by the Secretary) and each coverage provider of the amount so determined. The "coverage provider" is responsible for paying the excise tax on excess benefits. The insurance issuer is the coverage provider for typical group health insurance plans, however, the employer is the coverage provider for an arrangement where the employer makes Health Savings Account (HSA) contributions. Thus, employers who administer health savings account plans will be required to adhere to these provisions and should be familiar with the requirements of the law. Failure to properly calculate the excess benefit excise tax may subject the employer to a penalty, however, no penalty will be assessed where the employer establishes it neither knew, nor in the exercise of reasonable diligence would have known, of its failure to properly calculate the excise tax.

Reporting Requirements

Effective for taxable years beginning after December 31, 2011, employers will be required to disclose on each employee's annual Form W-2 the value of the employee's health insurance plan coverage sponsored by the employer. The Act will also require businesses to file an information return (e.g., a Form 1099) for all payments (made after December 31, 2011) aggregating $600 or more in a calendar year to a single payee, including non tax-exempt corporations.

In addition, starting with taxable years beginning after December 31, 2012, the Act will require insurers, including self-insuring employers, providing minimum essential coverage to any individual during a calendar year to report the following to both the covered individual and the IRS:

1. the name, address and taxpayer identification number of the primary insured, and the name and taxpayer identification number of each other individual obtaining coverage under the policy;

2. the dates during which the individual was covered under the policy during the calendar year;

3. whether the coverage is a qualified health plan offered through an exchange;

4. the amount of any premium tax credit or cost-sharing reduction received by the individual with respect to such coverage; and

5. such other information as the Secretary may require.

While many of the reporting requirements for employers are not immediately effective, it is important that employers be mindful of these requirements and their relevant effective dates so that they are ready to begin compliance with the new provisions once they become effective.

Medicare

For taxable years beginning after December 31, 2012, the Medicare Part A payroll tax will be increased by 0.9% to 2.35% on income over $200,000 ($250,000 for married filing jointly), and net investment income such as interest, dividends and net gains from disposition of property will be included in the base of such amounts. Additionally, employers will no longer be permitted to take a tax deduction for expenses that are allocable to Medicare Part D drug subsidy programs.

FSAs and HSAs

Under the new law, flexible spending account (FSA) contributions will be capped at $2,500 effective for taxable years beginning after December 31, 2012. Regarding HSAs, individuals under age 65 will be required to pay an additional tax for non-qualified distributions from an HSA. Specifically, effective with tax years beginning after December 31, 2010, the additional tax will be increased to 20%. In addition, the use of FSA or HSA funds to pay for over-the-counter medications will be prohibited.

For any questions or concerns you may have about the new health care law, our attorneys will be happy to assist you.

Mr. Shaw is a member of the Firm who represents employers in workers' compensation, litigation and employment matters.

Ms. Hollandsworth is an associate whose practice focuses on labor and employment law.

Mr. Cravener is an associate in the Labor & Employment Practice Group. He is a recent graduate of The Ohio State University law school.

The attorneys can be reached at our Columbus office (614-564-1445).

Melissa A. Gerber, law clerk, assisted with this article. She is a second year law student at The Ohio State University.

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