JONES DAY

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HEALTH CARE REFORM: WHAT IF THEY THROW THE WHOLE THING OUT?

Just over two years ago, Congress passed, and President Obama signed, sweeping legislation to change the health care system in the United States. This legislation, the Patient Protection and Affordable Care Act, as amended ("PPACA"), includes a variety of provisions affecting employers and the health benefits they provide to their employees. Some of these provisions were effective within six months of passage, others have phased in more recently, and still others are yet to be effective. Various federal agencies have issued thousands of pages of guidance interpreting the provisions of PPACA. Employers have spent countless hours implementing its requirements.

Almost as soon as PPACA was enacted, plaintiffs filed cases in courts all over the United States asserting that various provisions of the new law violate the U.S. Constitution. Some courts have agreed with these plaintiffs and some have disagreed. This litigation has wound its way to the United States Supreme Court, with highly publicized oral arguments taking place March 26–28, 2012. We expect the Supreme Court's decision in June.[1]

The Supreme Court's decision may affect whether and the extent to which employers must comply with the requirements of PPACA. Employers should be prepared for the various possibilities. Because the decision will be announced in June and plan benefits are typically determined several months in advance of the beginning of the plan year, employers, particularly those with calendar year plans, may have to act quickly if the decision triggers any changes in the terms of their plan benefits. In addition, employers may need to be prepared for changes to the taxation of certain benefits they currently provide.

SUPREME COURT REVIEW

The Supreme Court is reviewing two constitutional issues with respect to PPACA: (i) whether the requirement that individuals have health insurance (commonly

1 Jones Day represented the private challengers in the Supreme Court litigation.

known as the individual mandate) is a constitutional exercise of federal powers under the Commerce Clause and (ii) whether the requirement that states expand eligibility for Medicaid coverage in order to continue to receive federal Medicaid funding exceeds the federal government's enumerated powers under the Constitution. Neither of these items directly affects the provisions in PPACA that impact employers and their health plans. However, if the individual mandate is found to be unconstitutional, the Supreme Court also will need to decide what to do with the rest of PPACA, including, perhaps, concluding that because the individual mandate is so inextricably linked with the remainder of the law, the whole law must be thrown out.

Most observers think that one of three things will happen when the Supreme Court hands down its decision in June.[2]

Possibility Number One: The Supreme Court finds the individual mandate to be constitutional. This decision would mean that the law would remain in place and employers would have to continue complying with its requirements, both those that are currently effective and those that will become effective over the next several years.

Possibility Number Two: The Supreme Court finds the individual mandate is not constitutional but that it is severable from part or all of the remainder of PPACA. The portions of PPACA that are severable will stand, while the portions that are not severable will cease to apply. It is possible that the Supreme Court will detail which portions of the law are severable and which are not. This decision would mean that some or all of the portions of PPACA that apply to employers may remain in place, but the final determination of which ones may not be known for several months.

Possibility Number Three: The Supreme Court finds the individual mandate is not constitutional but that it is not severable from the rest of PPACA. This decision would mean that the entire law would be voided and employers would no longer have to continue to comply.

2 A fourth possibility, currently viewed as unlikely, is that the Court will decide that it cannot hear a case regarding the individual mandate until such time as an individual violates the mandate and pays the associated penalty, and therefore cannot decide this issue until 2015.

WHAT IF THEY THROW THE WHOLE THING OUT?

If the Supreme Court decision released in June matches the scenario described in Possibility Number Three, we will be in a situation where employers will no longer have to comply with any of the PPACA mandates, and various PPACA provisions that affect employers will no longer apply. This includes portions of PPACA that are already effective, as well as those that are becoming effective over the next several years. Employers will need to decide whether to make changes to their plans and, if they make changes, when those changes will be effective. To further complicate things, when the decision is released in June, most employers will have only a short timeframe to make any changes in advance of the next plan year.

If PPACA is thrown out in its entirety, the first thing that employers can do is to stop worrying about the requirements that are effective beginning this year, including the W-2 reporting requirement and the requirement to distribute Summaries of Benefits and Coverage. In addition, the prohibition on discriminating in favor of highly compensated employees through fully insured health benefits (currently in a nonenforcement period) will be moot. Thus, employers need not worry about this wrinkle in providing executive health benefits.

Next, employers may wish to revisit the already effective requirements. Following are various requirements that are currently effective (both for grandfathered and nongrandfathered plans) and are most likely ones that employers will wish to revisit, along with some thoughts on what to consider in determining how to deal with these mandates going forward if they are no longer legally required.

Coverage to Age 26. PPACA requires, for health plans that provide coverage to children, that the plan must provide that coverage to children until they reach age 26. Under PPACA, health plan eligibility rules may not distinguish between children, other than with respect to the child's relationship to the employee (and for grandfathered plans, with respect to the child's access to certain other employer-sponsored coverage). To comply, health plan eligibility rules had to be amended, not only to increase the

age limit but also to eliminate requirements such as those regarding financial dependence, marriage, and full-time student status. For uniformity, many employers amended not just their health plans but also other benefits available to children, such as health flexible spending arrangements, dental plans, and dependent life. PPACA also includes a change to the Internal Revenue Code, which allows for this expanded health coverage to be provided to children without the coverage being treated as income to the employee. If PPACA is thrown out, the change to the tax code disappears along with the requirement to cover children to age 26. Employers who continue to cover children to age 26 will have to impute income for coverage of any children who were not eligible for tax-free coverage prior to PPACA. Because of the imputed income issue, if PPACA is thrown out, in addition to considering what changes to make to eligibility based on general company policy, employers will want to consider whether any changes are necessary, either immediately or for the next plan year, to avoid any unwanted imputed income impact. Of course, any state insurance laws regarding coverage through a certain age would still apply for insured coverage. Employers will also need to consider whether any income must be imputed for coverage already provided.

Post-65 Retiree Drug Coverage. PPACA eliminates the deduction for retiree prescription drug expenses for which Medicare Part D Subsidy payments are received, effective for taxable years beginning after December 31, 2012. While not yet effective, this tax law change resulted in many employers taking a charge against earnings related to the future elimination of the deduction. If PPACA were no longer in place, the deduction would again exist and employers would need to determine whether or when a change to their financial statements would be required.

Early Retiree Reinsurance Program. PPACA established a temporary program to reimburse eligible plans for a portion of the cost of providing coverage to early retirees. Five billion dollars was allocated to fund this program, and the program has already received claims in excess of the maximum reimbursement amount. If PPACA is thrown out, it is unclear how this program would be affected. It is possible that future payments, if any, may cease. It is not clear whether there would be any impact on distributions made prior to the Supreme Court's decision.

No Coverage of Over-the-Counter Drugs in a Health Flexible Spending Arrangement or Health Reimbursement Account Without a Prescription. PPACA eliminated reimbursements for over-the-counter drugs from a health flexible spending arrangement or health reimbursement account, unless the drug was filled with a prescription. If PPACA is overturned, employers may consider whether or not to again allow reimbursement for these items.

$2,500 Maximum Annual Contribution to Health Flexible Spending Arrangement. PPACA caps the annual contribution to health flexible spending arrangements at $2,500, beginning with the 2013 calendar year. If PPACA is overturned, employers should consider whether they wish to increase the permitted annual maximum contribution. Before PPACA, there was no statutory maximum; however, because of the requirement that every dollar that a participant elects to contribute to an account be available to reimburse health expenses on the first day of the plan year, employers generally imposed a limitation.

Coverage of Certain Preventive Care with No Cost Sharing (nongrandfathered plans only). PPACA mandates coverage of certain preventive care with no cost sharing for nongrandfathered plans. Because of the way the guidance was drafted, there is some ambiguity regarding exactly which preventive care services are subject to the mandate. Employers have been addressing this ambiguity, in part, by cross-referencing the legal requirement in their plan documents. If this PPACA mandate is eliminated, employers should define the scope of the preventive care services being covered by their health plan and the respective cost-sharing for these services, and reflect the exact coverage in their plan documents, including in particular, the summary plan description.

No Pre-Existing Condition Exclusions for Children Under Age 19. Employers that have pre-existing condition limitations may consider adding those back for children under age 19.

No Annual or Lifetime Dollar Limits on Essential Health Benefits. Employers who eliminated annual or lifetime dollar

limits in order to comply with PPACA may consider whether it is appropriate to reinstate some or all of those limits.

Expanded Claims and Appeals Procedures, including External Review Requirement (nongrandfathered plans only). Employers may wish to work with their claims administrators to eliminate additional claims and appeals processes added by PPACA, including the external review requirement. It is possible, however, that some of these requirements will eventually be added to the ERISA requirements for claims procedures. Employers should be on the lookout for future changes to the requirements in the claims area.

Other currently effective PPACA requirements that employers may wish to revisit are:

- No rescissions (retroactive terminations of coverage);
- Patients' rights to designate their own primary care physician (including a pediatrician) and see an OB/GYN without a referral (nongrandfathered plans only); and
- Coverage of out-of-network emergency room services with same cost-sharing as in-network (nongrandfathered plans only).

CONCLUSION

If the Supreme Court decision handed down in June results in PPACA being overturned, or some or all of its requirements being eliminated, employers will have much to consider regarding potential changes to their health plans. Further, employers may need to act quickly in order to address any changes that they want to make effective for the current or next plan year.

This is one in a series of *Commentaries* Jones Day intends to provide to our clients and friends on the provisions of PPACA. We will provide additional guidance on how the provisions of PPACA, and the developing regulatory framework, affect employer-sponsored health plans and their sponsoring employers as developments occur.

LAWYER CONTACTS

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