



HEALTH CARE REFORM—UPCOMING EFFECTIVE DATES FOR EMPLOYER-SPONSORED GROUP HEALTH PLANS

INTRODUCTION

On March 23, 2010, President Obama signed into law the “Patient Protection and Affordable Care Act” (the “Senate Bill”). The Senate Bill, which was originally approved by the Senate on December 24, 2009, was ratified by the House of Representatives on March 21, 2010. On that same day, the House approved the “Health Care and Education Reconciliation Act of 2010” (the “Reconciliation Bill”), which amends and modifies the Senate Bill. On March 25, 2010, the Reconciliation Bill was approved by the Senate (with changes unrelated to health care reform) and reapproved by the House of Representatives. As of this printing, the Reconciliation Bill was waiting for President Obama’s signature.

The health care reform rules contained in the Senate Bill and the Reconciliation Bill (collectively, the “Act”) will provide many challenges for employer-sponsored health coverage. This *Commentary* addresses the

many different effective dates that apply to the key changes for employer-sponsored group health plans under the Act. Jones Day’s health care reform task force is crafting a more detailed analysis of the Act. If you would like to receive a PDF of that analysis, please advise one of the Lawyer Contacts identified at the conclusion of this *Commentary*.

GRANDFATHERED PLANS

Group health plans in existence on March 23, 2010, are not subject to certain provisions of the Act. This means that existing group health plans (“Grandfathered Plans”) can continue to operate and enroll new employees and dependents without complying with some of the provisions of the Act. The Effective Date provisions described below indicate whether or not a Grandfathered Plan is subject to the new requirements.

ELIMINATION OF DEDUCTION FOR EXPENSES ALLOCABLE TO MEDICARE PART D SUBSIDY

Change Made. Employers who provide qualified prescription drug coverage to retirees age 65 and older may receive a Retiree Drug Subsidy from Medicare for covering participants who have not enrolled in Medicare Part D. The subsidy is not included in the employer's gross income. In addition, as the program was originally designed, the employer could deduct prescription drug plan expenses taken into account in determining the amount of the subsidy. Under the Act, deduction of these expenses will no longer be permitted.

Effective Date. This provision is effective for taxable years beginning after December 31, 2012.

Observation. We understand from several commentators with accounting expertise that this change will cause an immediate accounting issue for many employers. FAS 109 requires employers to book a tax asset for the present value of anticipated tax assets (the future deductions). The change in the prescription drug subsidy program has the effect of immediately reducing the value of the tax asset (the future value of the anticipated tax deduction). It appears that the only way this adverse accounting treatment can be currently avoided is if the Financial Accounting Standards Board provides relief.

Employer Action. Employers should review their plan design and plan cost going forward to determine whether changes are appropriate. In conducting this review, employers should keep in mind that Medicare Part D prescription drug coverage will be gradually improved over the next several years through a phased elimination of the "doughnut hole" coverage gap. In addition, employers receiving the subsidy should review carefully and quickly the accounting impact of this change as described above.

COVERAGE OF DEPENDENTS UNTIL AGE 26

Change Made. Under the Act, group health plans that provide coverage to dependent children of participants are required to continue to make such coverage available for adult children until the child turns 26 years of age. This requirement also applies to married adult children but not to grandchildren. The definition of "dependent" under the Internal Revenue Code is also expanded so that the additional periods of coverage are excludable from income. It is not clear how this required expansion in coverage affects other restrictions for dependent coverage. The Act provides that regulations will be promulgated by the Department of Health and Human Services to define dependents to whom coverage must be extended.

Effective Date. This requirement is effective for plan years beginning on or after September 23, 2010. This rule applies to all coverage, including Grandfathered Plans.

Employer Action. Employers should amend plan documents and update procedures to provide the extended coverage when effective.

PROHIBITION ON PRE-EXISTING CONDITION EXCLUSIONS

Change Made. Under the Act, group health plans may not impose any pre-existing condition exclusion limiting or excluding the coverage of a condition that existed prior to enrollment.

Effective Date. This prohibition is effective with respect to enrollees under age 19 for plan years beginning on or after September 23, 2010, and with respect to enrollees age 19 and over for plan years beginning on or after January 1, 2014. This prohibition applies to all coverage, including Grandfathered Plans.

Employer Action. Employers should amend plan documents and update procedures to eliminate pre-existing condition exclusions when effective.

PROHIBITION ON RESCINDING COVERAGE

Change Made. Under the Act, group health plans may not rescind coverage with respect to an enrollee once the enrollee is covered. This prohibition will not apply if the individual has performed an act or practice that constitutes fraud or makes an intentional misrepresentation of material fact as prohibited by the terms of the coverage. In addition, this prohibition does not affect the right to terminate coverage upon nonpayment, plan termination, or loss of eligibility for coverage.

Effective Date. This prohibition is effective for plan years beginning on or after September 23, 2010. This prohibition applies to all coverage, including Grandfathered Plans.

Employer Action. It is unlikely that this provision will have a great impact on employer-sponsored coverage. However, employers should review their plan documents to ensure that the right to terminate coverage for fraud or intentional misrepresentation is appropriately reflected.

LIMITATIONS ON LIFETIME AND ANNUAL LIMITS

Change Made. Under the Act, group health plans may not impose lifetime or annual dollar limits on the benefits provided to a particular participant. In certain limited circumstances summarized below, lifetime or annual limits on specific covered benefits may be imposed, provided such limitations do not otherwise violate Federal or State law (e.g., the Americans with Disabilities Act).

Effective Date. This prohibition is effective for plan years beginning on or after September 23, 2010. The prohibitions relating to lifetime limits apply to all coverage, and the prohibitions related to annual limits apply to all group health plans, including Grandfathered Plans.

Observation. Group health plans may impose an annual or lifetime per beneficiary limit on specific covered benefits that are not “essential health benefits.” What constitutes essential health benefits will be set forth in future guidance,

but will include basic health plan coverage including such things as hospitalization, prescription drugs, mental health and substance use services, office visits, and laboratory services. For plan years beginning prior to January 1, 2014, group health plans may impose a restricted annual dollar limit on benefits that are essential health benefits, in a manner that ensures that access to needed services is made available with a minimal impact on premiums and that complies with guidance to be issued.

Employer Action. Employers should amend plan documents and update procedures to bring lifetime and annual limitations into compliance when effective.

CAP ON HEALTH FLEXIBLE SPENDING ARRANGEMENT CONTRIBUTIONS

Change Made. Currently, there is no statutory maximum on the amount an employee may elect to contribute to a health flexible spending arrangement, although most employers impose a limitation. Under the Act, these arrangements will now be subject to an annual statutory maximum of \$2,500.

Effective Date. The change is effective for taxable years beginning after December 31, 2012. The statutory maximum will be adjusted annually for inflation beginning in 2014.

Employer Action. Employers should amend plan documents and update procedures to comply with this maximum beginning in 2013. Employers who wish to have a lower limitation may choose to do so.

COVERAGE OF OVER-THE-COUNTER DRUGS BY HEALTH CARE ACCOUNTS

Change Made. Currently, expenses for over-the-counter drugs may be reimbursed from a Health Savings Account (HSA), Archer MSA, Health Flexible Spending Arrangement (HFSA), or Health Reimbursement Arrangement (HRA). Under the Act, over-the-counter drug coverage is eliminated for HRAs and HFSA and made taxable for HSAs and Archer

MSAs. This change results in treatment of over-the-counter drugs under these accounts mirroring treatment for itemized deduction purposes.

Effective Date. This change is effective for amounts paid (by HSAs or Archer MSAs) or expenses incurred (for HFSAAs and HRAs) with respect to taxable years beginning after December 31, 2010.

Employer Action. Employers should amend plan documents and update procedures to eliminate coverage for over-the-counter drugs beginning in 2011.

INCREASED TAX FOR IMPROPERLY USED DISTRIBUTIONS FROM HSAs AND ARCHER MSAs

Change Made. A payment or distribution from a Health Savings Account (HSA) or Archer MSA that is not used for a qualified medical expense is includible in the recipient's gross income and is currently subject to an additional tax of 10 percent for HSAs and 15 percent for Archer MSAs. The Act increases this tax to 20 percent.

Effective Date. The change is effective for distributions made after December 31, 2010.

Employer Action. Employers should consider whether any communication materials need to be updated.

NATIONAL VOLUNTARY LONG-TERM CARE COVERAGE

Change Made. Under the Act, the Department of Health and Human Services is directed to establish a national voluntary long-term care benefit plan, to be called the CLASS program. Employers may elect to automatically enroll employees in the CLASS program, subject to the employee's right to waive enrollment. Employers may also allow employees to elect enrollment in the CLASS program. Premium

payment would be made through automatic payroll deduction unless the employee opts out of coverage.

Effective Date. The form of the program is to be established no later than October 1, 2012, and enrollment should begin some time thereafter.

Employer Action. Employers should consider the impact of the CLASS program on any long-term care benefits currently being offered.

INCLUSION OF COST OF EMPLOYER-SPONSORED HEALTH COVERAGE ON W-2

Change Made. Under the Act, employers must include the aggregate cost of certain employer-sponsored health coverage on employees' Form W-2.

Effective Date. This provision is effective for taxable years beginning after December 31, 2010.

Employer Action. Employers should be prepared to include this information when preparing Form W-2 in 2012, as this requirement will apply for the 2011 tax year. Presumably, in the interim, the IRS will amend the W-2 form to allow inclusion of this information for applicable employers.

LIMITED DEDUCTIONS FOR COMPENSATION TO HIGHLY PAID INDIVIDUALS IN THE HEALTH INSURANCE INDUSTRY

Change Made. Under the Act, companies that issue health insurance will now be subject to limits on deductions for compensation to highly paid individuals in years in which 25 percent or more of the gross premiums received from providing health insurance coverage by such company is from minimum essential coverage. Under new Internal Revenue Code Section 162(m)(6), the deduction for compensation for such services is limited to \$500,000 per individual per year. The limitation applies to both (a) current

compensation and (b) deferred compensation for services provided in a taxable year beginning after December 31, 2009, but for which a deduction is available in a subsequent year (after the effective date). In the case of deferred compensation, the limitation applies in the taxable year for which the deduction is available. The limitation applies to any individual who is an officer, director, or employee of the company, as well as to any individual who provides services for or on behalf of the company.

Effective Date. This provision is effective for taxable years beginning after December 31, 2012.

Employer Action. Health insurance companies should consider the effect of this provision on their compensation structure.

GENERAL OBSERVATION

Changes to the Public Health Service Act. Many of the substantive changes of the Act that apply to group health plans are codified in the Public Health Service Act, without corresponding changes to the Employee Retirement Income Security Act (“ERISA”) and the Internal Revenue Code. The Act does provide, however, for a new Section 715 of ERISA and a new Internal Revenue Code Section 9815. These new sections provide that certain substantive provisions of the Public Health Service Act will apply to group health plans as if such provisions were included in ERISA and the Internal Revenue Code. In other words, certain provisions of the Public Health Service Act are now incorporated by reference into ERISA and the Internal Revenue Code. The Act also provides that if any provision of ERISA or the Internal Revenue Code conflicts with the Public Health Service Act, the provisions of the Public Health Service Act will take precedence. This change in the structure of the law applicable to group health plans is unprecedented. It remains to be seen how the various Federal agencies with oversight for these laws will allocate regulatory and enforcement responsibilities.

IN CONCLUSION

This is one in a series of *Commentaries* Jones Day intends to provide to our clients and friends on Health Care Reform. In the weeks ahead, we will be providing additional guidance on how the provisions of the Act affect employer-sponsored health plans and their sponsoring employers, both in the near future and over the longer term.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com.

Marlene P. Frank

+1.614.281.3843

mpfrank@jonesday.com

Daniel C. Hagen

+1.216.586.7159

dchagen@jonesday.com

Elena Kaplan

+1.404.581.8653

ekaplan@jonesday.com

Evan Miller

+1.202.879.3840

emiller@jonesday.com

Gary G. Short

+1.214.969.5238

ggshort@jonesday.com

J. Quitman Stephens

+1.214.969.4841

jqstevens@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.