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THE RETIREE-ONLY PLAN EXCEPTION: IS IT STILL EFFECTIVE AFTER HEALTH CARE REFORM?

The recently enacted Patient Protection and Affordable Care Act ("PPACA") raises a question about the treatment of stand-alone retiree health plans under some provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), the Public Health Services Act, as amended (the "PHSA"), and the Internal Revenue Code of 1986, as amended (the "Code"). As discussed in this *Commentary*, the Departments of Labor, Treasury, and Health and Human Services ("Agencies") have addressed this question in the preamble to the Interim Final Rules regarding "grandfathered" health plans under PPACA, issued on June 14, 2010, and in the preamble to Interim Final Rules issued on June 22, 2010, relating to various PPACA provisions on patients' rights.

However, a position taken by the Agencies in a preamble to a regulation may not limit the authority of states to enforce PPACA or existing health coverage mandates with respect to health insurance issuers or nonfederal governmental plans. Nor is it certain that the Agencies' position will prevent an individual from maintaining a private cause of action to enforce those mandates through the courts. In this *Commentary*, we discuss the law prior to PPACA, the effect of PPACA, the Agencies' interpretation of the changes, and what the current state of affairs means for employer-sponsored group health plans.[1]

THE LAW BEFORE PPACA

In addition to establishing health privacy rules, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") included provisions to improve access to health coverage and to ensure a minimum level of coverage. These provisions include limitations on pre-existing conditions, prohibition of discrimination based on health status, mental health parity, special enrollment rights, minimum hospital stays following childbirth, and mandatory coverage for

1 The PPACA changes also apply to health insurance policies issued by insurance companies. Except as expressly noted, the discussion in this *Commentary* about group health plans applies equally to health insurance policies issued to such plans.

reconstruction following a mastectomy. Recent amendments to these provisions include the Genetic Information Nondiscrimination Act ("GINA"), coverage of dependent students on a medically necessary leave of absence (commonly called Michelle's Law), and expanded mental health parity requirements. These existing health coverage mandates ("HIPAA Coverage Mandates") were enacted through parallel provisions in ERISA, the PHSA, and the Code.

The HIPAA Coverage Mandates, as set forth in ERISA, the PHSA, and the Code included an exception (herein, "Retiree Plan Exception" or "Exception") for "group health plan[s] … for any plan year if, on the first day of such plan year, such plan has less than 2 participants who are current employees." ERISA section 732(a); PHSA section 2721(a); Code section 9831(a). A plan that meets this Exception would not be subject to the HIPAA Coverage Mandates other than those on minimum hospital stays following childbirth and the GINA rules.

Although the Retiree Plan Exception does not specifically state that it applies to plans that cover retirees only, it has generally been interpreted to apply to "stand-alone" retiree plans because such plans have less than two participants who are "current" employees. There is no guidance about what constitutes a "plan" for purposes of determining if there are less than two participants who are current employees. To obtain the advantage of the Exception, employers have purposefully separated their retiree plans from their active employee plans by drafting separate plan documents and filing separate Form 5500s.

Before PPACA, the HIPAA Coverage Mandates were consistently embodied in separate but parallel provisions in ERISA, the PHSA, and the Code. The Agencies, charged jointly with enforcing these requirements, also have routinely issued parallel regulations under these laws. In addition, the Agencies have entered into a Memorandum of Understanding (the "MOU") agreeing to coordinate their enforcement efforts to ensure that the requirements of these parallel provisions are enforced in the same manner by all three Agencies.

EFFECT OF PPACA

The provisions of PPACA imposing mandatory coverage and administrative requirements on group health plans were, in large part, drafted as an amendment and reorganization of the HIPAA Coverage Mandates found in the PHSA. Unlike in the past, however, the PPACA amendment changed the PHSA without making corresponding parallel amendments to ERISA and the Code. Instead, PPACA added new sections to ERISA (section 715) and the Code (section 9815) that appear to provide that the PPACA amendments made to the HIPAA Coverage Mandates in the PHSA are incorporated by reference into the HIPAA Coverage Mandates set forth in ERISA and the Code. In particular, this amendment provides that:

> [The HIPAA Coverage Mandates in the PHSA, as amended by PPACA] shall apply to group health plans, and health insurance issuers providing health insurance coverage in connection with group health plans, as if included in [ERISA or the Code, as applicable]; and to the extent that any provision [of ERISA or the Code, as applicable] conflicts with a provision of [the PHSA, as amended by PPACA] with respect to group health plans, or health insurance issuers providing health insurance coverage in connection with group health plans, the provisions of [the PHSA, as amended by PPACA] shall apply.

PPACA also explicitly deleted the Retiree Plan Exception from the PHSA, effective as of the date of enactment, March 23, 2010.[2] Because the Exception was deleted from the PHSA, many practitioners concluded that the Retiree Plan Exception was also eliminated from ERISA and the Code, and that stand-alone retiree plans would now be subject to the HIPAA Coverage Mandates, as amended by PPACA, *i.e.*, PPACA caused stand-alone retiree plans to be subject to provisions from which, heretofore, they had been exempt.

If the Retiree Plan Exception no longer exists to exempt retiree-only plans from the HIPAA Coverage Mandates, many of these plans could be forced to make significant changes. For example, many retiree health plans do not extend

2 Patient Protection and Affordable Care Act, H.R. 3590, sections 1562(a)(1) and (c)(12)(A).

coverage to dependents not covered at the time of retirement. PPACA would require those plans to cover all such dependents to age 26. Many retiree health plans also have lifetime limits and annual dollar limits on certain benefits (such as prescription drug coverage). These limits would not be permitted in plans subject to PPACA. Other provisions of PPACA might likewise affect retiree health plans.

THE AGENCIES' INTERPRETATION AND NON-ENFORCEMENT POLICY

On June 14, 2010, the Agencies issued regulations ("Interim Final Rules") regarding grandfathered health plan status under PPACA. When a U.S. federal agency issues regulations, the regulations are accompanied by a preamble setting forth the agency's process in developing the regulations, the agency's viewpoint on the regulations, the agency's determination of the impact of the regulations, and, in the case of regulations issued in proposed or interim final form, a solicitation for comments.

The preamble to the Interim Final Rules regarding grandfathered health plan status ("Preamble") includes several paragraphs under the heading "Background" that address the Agencies' view of the status of the Retiree Plan Exception following the passage of PPACA. *The status of the Retiree Plan Exception is* not *addressed in the actual regulations.*

In the Preamble, the Agencies take the position that, although the PPACA amendments to the HIPAA Coverage Mandates under the PHSA are incorporated into the parallel provisions of ERISA and the Code, the pre-existing HIPAA Coverage Mandates in ERISA and the Code are not affected "unless they cannot be read consistently with an incorporated provision" of the PHSA. The Agencies then state their view that the pre-existing Retiree Plan Exceptions in ERISA and the Code do not conflict with the lack of a similar Retiree Plan Exception in the PHSA, and that the Retiree Plan Exception remains in place under ERISA and the Code.

Further the Agencies state that even though there is no longer a Retiree Plan Exception in the PHSA, they will not treat entities subject to the PHSA (such as fully insured plans and state and local governmental plans) differently under the PHSA than they would under ERISA and the Code, and they urge the states not to exercise their independent enforcement powers under the PHSA in this context. Thus, the Agencies set forth a non-enforcement policy for plans that qualify for the Retiree Plan Exception with respect to the HIPAA Coverage Mandates, including the portions added by PPACA.

Many employers are embracing the Agencies' interpretation and do not intend to extend the PPACA requirements to their retiree-only plans. Other employers are considering creating stand-alone retiree plans for current retirees who participate in plans that also cover active employees. Although these actions are consistent with the Agencies' guidance, employers should be aware that they could be subject to challenges.

RISK OF ACTIONS BY PARTICIPANTS OR STATE AGENCIES

Individuals may not enforce the Code. Only the Commissioner of the Internal Revenue Service may do that. But individuals can enforce ERISA, and both individuals and states can enforce the PHSA. Thus, an individual plan participant in an employer-sponsored plan who is denied benefits that are included in the requirements under PPACA could bring a lawsuit to enforce those requirements with respect to the plan, notwithstanding the Agencies' Preamble language.

For example, a retiree with a 25-year-old child might try to enforce the "coverage of children to age 26" requirement against a stand-alone retiree plan that does not provide such coverage based on the Retiree Plan Exception. A similar case might be brought under PPACA's prohibition on lifetime limits by a retiree whose claims exceed a plan's lifetime limits.[3]

Indeed, although courts typically give a high level of deference to duly promulgated regulations by agencies interpreting the laws they are charged with enforcing, here the Agencies did not state the legal exception in the regulations

3 Note that a lawsuit could be brought under more than one of these laws if more than one applies. For example, a suit against a fully insured plan subject to ERISA could be brought under either ERISA or the PHSA.

themselves, but rather stated their view in the Preamble. The degree of deference appropriate to an agency position contained in a preamble is less clear, and it is safe to say that courts that disagree with such views are less likely to grant deference. *See, e.g., Hecker v. Deere & Co.*, 569 F.3d 708 (7th Cir. 2009) (court questioned the government's reliance on a footnote in the preamble to the Labor Department's regulation for participant-directed plans (ERISA section 404(c))).

Likewise, the Preamble's non-enforcement policy may not preclude a state from enforcing its independent enforcement powers under the PHSA with respect to a fully insured plan or a nonfederal governmental plan.

CONCLUSION

Given the cost of complying with PPACA for retiree coverage, the non-enforcement policy recently announced by the Agencies for plans that qualify for the Retiree Plan Exception appears to be good news. Plan sponsors should be prepared, however, for a challenge by an individual under ERISA or the PHSA or by a state under the PHSA, and should have their counsel evaluate the merits of such potential challenge before proceeding.

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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