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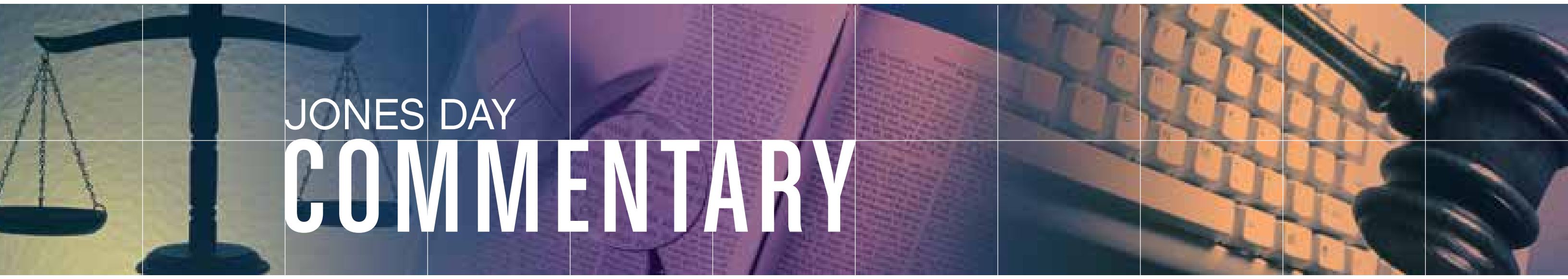

WHAT'S THE DEAL? THE AFFORDABLE CARE ACT IN LABOR CONTRACT NEGOTIATIONS

The Affordable Care Act ("ACA") infuses new complexities into collective bargaining negotiations over health insurance benefits. In past years, the challenge for many employers at the bargaining table has been to control escalating health insurance costs and to shift an increasing share of those costs onto employees. Those challenges were hard enough. But now, with the advent of the ACA, employers face entirely new challenges as they develop their bargaining positions on health benefits. The ACA forces unionized employers to reassess the health benefits that they provide employees and determine which employees should be eligible to receive them. In addition, employers must develop new strategies for negotiating health benefits, with the goal of minimizing their exposure to ACA penalties, satisfying the ACA's coverage and benefit requirements, and preserving flexibility to make changes to comply with the ACA's complex and evolving requirements.

These challenges begin with fundamental decisions about the ACA's employer "play or pay" provision. *See Jones Day Commentary*, "**Deciding Whether to Play or Pay Under the Affordable Care Act**." These "play or pay" decisions implicate any number of mandatory bargaining issues, including whether to provide health insurance, what types and levels of health insurance to provide, how to address coverage of part-time employees, and how to deal with employee costs. Given the significance of all of these issues to unionized employers, this *Commentary* will provide an overview of the bargaining issues and will be followed with a supplemental *Commentary* addressing the ACA's "Cadillac tax." In addition, on November 21, Jones Day will be presenting a webinar entitled "What's the Deal? The Impact of the Affordable Care Act on Labor Contract Negotiations," with registration information available here.

In short, regardless of what employers have negotiated into past labor contracts, the landscape has dramatically changed. Employers need to take a fresh look at their health insurance provisions and prepare new strategies for negotiating future contracts in light of the ACA.

BARGAINING CONSIDERATIONS

The ACA adds new consequences to some fundamental decisions about providing employee health coverage, directly affecting bargaining strategies. While providing health insurance benefits to unionized employees has been a fundamental term of most labor contracts for decades, the ACA forces employers to reconsider and readjust their arrangements if they want to avoid penalties and account for new costs imposed under the law. The threshold questions that employers must answer include:

The "Play Or Pay" Decision. Whether to offer health coverage or drop health coverage for employees and their dependents is a complicated economic, practical, and policy decision that unionized employers must make, taking into account the economic impact of that decision, the structure of their health benefit programs (e.g., existing coverage of union and non-union employees under the same plans), the employers' bargaining leverage, and the effect of the decision on employee morale, recruitment, and retention. In making the economic analysis of the ACA's penalties and costs for bargaining purposes, employers should:

- **Evaluate the costs of continuing coverage versus the costs of dropping coverage for employees, including all employees averaging 30 or more hours a week.** Employers that drop coverage may face a substantial penalty under the ACA. If the employees who both work full-time (i.e., on average 30 hours per week or 130 hours per month) and are not offered health coverage constitute more than 5 percent of the employer's work force, the employer is subject to an annual "no coverage penalty" equal to $2,000 multiplied by the number of the employer's full-time employees (less the first 30) if any full-time employee enrolls in health coverage through an exchange and receives a premium tax credit.
- **Evaluate the costs of making coverage "affordable" for lower-wage employees.** In many instances, to make coverage affordable and avoid penalties under the ACA, employers may have to bear a significant part of the coverage costs for their lower-wage employees. Under the proposed safe harbors for affordability, coverage is affordable if the employee's share of the premium does not exceed 9.5 percent of any of the following: the employee's actual W-2 wages, the employee's wages assuming 130 hours of work per month for the year, or the income for a single individual at 100 percent of the federal poverty line. If coverage is offered to at least 95 percent of the full-time employees but is not affordable, employers face the ACA's "inadequate coverage penalty" of $3,000 for each full-time employee who enrolls in health coverage through an exchange and receives a premium tax credit.
- **Evaluate the costs of making the ACA's required changes in health plans.** Employers need to account for the cost of making changes to comply with ACA rules for group health plans. For 2014, those changes include review of annual dollar limits on benefits in light of recent guidance defining essential health benefits, the maximum 90-day waiting period for coverage, and the cap on out-of-pocket maximums.
- **Consider the potential cost of the Cadillac tax starting in 2018.** Employers with high-cost plans need to determine how to avoid triggering the Cadillac tax in 2018, which will impose a 40 percent excise tax on administrators of plans providing coverage that costs more than $10,200 a year for single and $27,500 a year for plus-one or family coverage. These thresholds may be adjusted for inflation and for employers whose health care costs are higher in certain high-risk professions. If the employer does not anticipate the overall cost of their coverage in 2018 (including both the employer and employee shares of the cost) and restrict it through plan design, the employer will face the added cost of the Cadillac tax.
- **Consider the cost of providing coverage to children and providing (or not providing) coverage to spouses.** Significantly, the ACA does not require employers to provide coverage for spouses and does not penalize employers for excluding spouses from coverage, so employers will need to evaluate the potential savings from excluding spouses from eligibility for health coverage. The ACA, however, treats children differently: employers face a penalty under the ACA if they do not offer coverage to their full-time employees' children, including adult children up to age 26.

- **Consider the added cost of the ACA's various fees.** Self-insured employers will owe a "transitional reinsurance fee" in 2015, 2016, and 2017; for the first year, the fee is at the rate of $63 per covered life. In addition, for a single-employer plan, the employer must pay a "patient-centered outcomes research institute fee," which is $2 per covered life payable in the years 2014–2020.

Coverage Levels and Plan Design. Employers who decide, for economic and other reasons, to "play" and offer health insurance to employees must determine the level of benefits that they want to offer their union-covered employees. Employers need to meet the "minimum value" threshold to avoid ACA penalties but also should stay under the cost threshold to avoid triggering the Cadillac tax in the future. For many large employers, given the complexity of the ACA and its penalties, what the employer plans to provide all employees, whether unionized or not, on a company-wide basis will drive its proposals on benefit levels at the bargaining table, which makes preserving the right to make company-wide plan design changes a high priority. Some considerations include:

- **Consider using the minimum value standard and the Cadillac plan threshold as points of reference for the overall richness of the proposed plan.** Many if not most existing employer health plans generously exceed the "minimum value" standard (i.e., the standard that requires that the plan's share of the actuarially projected cost of covered benefits is at least 60 percent). On the other end of the spectrum, however, some employer plans, if not trimmed, risk triggering the Cadillac tax given their current cost and historic rate of growth. While unions may resist efforts to curtail employee benefits in the near term, employers should consider the leverage that avoiding the Cadillac tax provides at the bargaining table. Failure to address this problem could result in diverting economic resources to substantial taxes in 2018 that could otherwise be added to the economic package at the bargaining table or used for other business purposes.
- **Consider using one of the essential health benefits package benchmarks (e.g., the federal employee plan) as a point of reference for what benefits the employer will cover.** Under the ACA, all qualified health plans offered through the state exchanges must offer the essential health benefits package, and each state has a benchmark plan that is used to define the package of benefits. While employers are not required to offer an essential health benefits package in their group health plans, they need to be familiar with at least one benchmark plan. Employers can evaluate any benefits that unions may demand against one or more state benchmark plans, since those plans set the standard for comprehensive sound coverage that an individual is guaranteed to be able to purchase on the exchanges. The comparison gives employers an opportunity to identify particular benefit requests as exceeding a norm and either reject them or bargain for concessions in other areas in return for providing them.
- **Consider what additional benefits to offer employees, like dental, vision, disability, and long-term care.** The ACA requires employers to provide minimum essential coverage, meaning the core major medical coverage, but they can certainly offer more options. Offering these additional health benefits will not help the employer avoid a play or pay penalty, as they do not count toward the computation of minimum value; nor would they constitute minimum essential coverage if offered by themselves. These types of added benefits may be useful leverage in negotiations, since they do not contribute to the cost of coverage that can trigger the Cadillac tax if they are offered through separate fully insured policies. However, the same is not true for dental and vision coverage that is self-insured. Both employers and unions may see strategic value in negotiating over these added benefits.
- **Consider strategies for including wellness programs and related surcharges and incentives, including tobacco surcharges.** ACA regulations have reaffirmed that employers may attach economic rewards and penalties to wellness programs without violating the group health plan nondiscrimination rules that originated in HIPAA. *See Jones Day Commentary* **"Employer Wellness Programs: What Financial Incentives Are Permitted Under the Law?"** Wellness programs can include economic incentives that are based on achieving certain health outcomes, provided that the employer makes a reasonable alternative available. The regulations specifically permit an employer to impose a tobacco surcharge; however, certain state laws may limit an employer's ability to impose a tobacco surcharge. In addition, the EEOC has yet to give clear assurance that

wellness program economic incentives are permissible under federal law, including the Americans with Disabilities Act, for wellness programs involving a medical examination or disability-related inquiry. Particularly if an employer is making wellness programs available to non-union employees, the employer will want a strategy for how to handle wellness programs when negotiating over health benefits for union-covered employees.

Part-Time Employees. The ACA's "full-time employee" definition sweeps in many workers who have long been considered part-time employees for purposes of providing health coverage. For those employers that currently provide insurance only to employees who work 40 hour per week, their covered populations will expand, potentially dramatically, when they treat part-time employees averaging 30 hours a week as full-time employees in order to avoid the ACA play or pay penalty. Bargaining priorities include:

- **Ensuring that part-time employees who meet the ACA's test of "full-time employees" are eligible for coverage.**
- **Addressing the look-back and stability "safe harbors" for determining who is a full-time employee under the ACA.** Employers should preserve the ability to take advantage of these safe harbors to determine whether variable-hour employees or seasonal employees are treated as full-time employees, particularly if they do not want to offer coverage to part-time employees or want to offer them different coverage. Employers should consider retaining discretion not only to use the safe harbors but also to adjust the length of the measurement periods and stability periods that are used for determining whether an employee is full-time for purposes of the play or pay penalty.
- **Preserving the flexibility to modify the definition of who is considered full-time under the ACA, in case there is a legislative change.** Bipartisan legislation has been introduced that would raise the full-time standard for purposes of the play or pay penalty from 30 hours per week to 40 hours per week.

Taft-Hartley Plans. For employers currently participating in multi-employer plans, or for those considering participation, the ACA presents additional requirements that make these plans problematic for employers. The ACA does not explicitly account for the possibility of multi-employer plans under the play or pay penalty or any number of other employer-based requirements. Although regulations have confirmed that a participating employer will get credit for offering an employee coverage if the coverage is offered on behalf of the employer through a Taft-Hartley plan, there will be problems aligning the requirements for plan contributions with the hours-based rules for determining who is a full-time employee. There will also be administrative issues in coordinating these kinds of programs with other ACA rules, like the maximum 90-day waiting period and required information reporting. Unions are acutely aware of the problems and have undertaken lobbying efforts to change the ACA out of a well-founded fear that the ACA will adversely affect Taft-Hartley plans.

BARGAINING STRATEGIES

Health benefits for active employees are a mandatory subject of bargaining under the National Labor Relations Act, and the ACA does nothing to change the employer's obligation to bargain with its unions over health benefits for its active, union-covered employees. The ACA does, however, change the dynamics of bargaining health benefits, since employers now face significant penalties and costs associated with providing or not providing health coverage to a potentially larger pool of "full-time" employees. Employers should take advantage of the leverage that the ACA provides, whether that means negotiating union waivers to allow employers significant flexibility to change and modify their plans, negotiating lower levels of coverage to balance out the added costs of expanded coverage, or negotiating to end coverage under employer-sponsored plans altogether.

Ending Company-Sponsored Insurance. Some employers may, for economic or other reasons, decide not to offer health coverage, pay the ACA's penalties, and send their employees to the state exchanges for health coverage. This approach will undoubtedly produce significant union opposition in bargaining, although employers may insist to the point of impasse on the issue of providing health insurance coverage, a mandatory subject of bargaining. Employers seeking to end company-sponsored insurance thus need to prepare to face intense challenges at the bargaining table, including union pressure to continue to sponsor health benefits or to participate in Taft-Hartley plans, union demands for wage or other economic concessions to compensate employees for loss of employer coverage, and union demands for health benefits that employees cannot get on the exchanges.

Flexibility. Employers who plan to "play" and provide company-sponsored health coverage and have open or soon-to-open contracts should consider making flexibility in health plan design a top priority. The ACA is enormously complicated and is producing a wide array of unintended consequences. Although there is little prospect of legislative action to fix problems right now, the dynamic will change after the exchanges have been operational for a year and the 2014 elections have passed. Legislative change is not only possible but probable during the term of any labor contract lasting more than a year or two. Employers should consider negotiating avenues to allow them to make mid-term adjustments in response.

Relying on the ACA's complexity and the uncertainty of the legal and regulatory landscape, employers should seek to negotiate waivers from their unions that will allow the employer the discretion to make plan changes, on a company-wide basis, without mid-term bargaining or arbitration with the unions. These waivers should extend to all plan design features, including deductibles, copayments, out-of-pocket maximums, and surcharges, as well as to definitional matters like who is considered a full-time employee and the measurement and stability periods used to determine full-time status. The waivers should also cover modifications that employers may need to implement to comply with changes in the ACA and its implementing regulations, so that they can adapt quickly to changes and avoid penalties. Any such waivers have to be "clear and unmistakable" to be effective under Board law. *See Omaha World-Herald*, 357 N.L.R.B. No. 156, at *3 (Dec. 30, 2011). That means that the waivers generally have to spell out explicitly the employer's reservation of rights and the union's waiver of its bargaining rights.

While unions that have mature bargaining relationships with employers and experience with "me-too" company-wide benefits arrangements may be willing to agree to such waivers, especially given the ACA's complexities, some unions will be extremely reluctant to do so. Employers, therefore, should consider the potential challenges to implementing waiver provisions unilaterally after reaching an impasse in bargaining. The NLRB has held that an employer's implementation of a contract proposal reserving its discretion unilaterally to change health plan design, providers, and benefits mid-term, even on a "me-too" company-wide basis, violated the NLRA because it excluded the union from any meaningful bargaining over the manner, method, and means of providing benefits and thus was "inherently destructive" of the bargaining process. *See KSM Indus., Inc.,* 336 N.L.R.B. 133, 135 (2001) (*citing McClatchy Newspapers, Inc.,* 321 N.L.R.B. 1386, 1391 (1996), *enforced,* 131 F.3d 1026 (D.C. Cir. 1997)). Accordingly, employers need to be prepared to consider alternative ways for preserving flexibility to make mid-term plan changes, including proposing less expansive waiver language tied exclusively to changes mandated by law, proposing a contract reopener for negotiating over the effects of material legislative or regulatory changes, or proposing finite periods for mid-term bargaining over ACA-related issues with the right to implement changes after such bargaining.

Economics. In negotiating contracts post-ACA, employers should seek to leverage the additional costs that the ACA imposes on *employers* to secure concessions in the level of benefits provided to employees and those employees' cost-sharing obligations. The employer's added costs are tangible and real: the ACA requires employers to expand coverage to those who may have long been considered part-time employees, provide coverage that meets a host of requirements including preventive services without cost-sharing, make certain mandatory plan changes, ensure that coverage is affordable, and stay under cost thresholds for Cadillac coverage in order to avoid costly penalties. The ACA also imposes significant recordkeeping and reporting obligations on employers. Employers should consider using these costs to leverage important plan design changes, including changes to deductibles and copayments, and provide a basis for requiring employees to share more of the premium costs for higher levels of coverage, as long as the plan continues to provide minimum value and affordable coverage. These types of changes should be factored into the employer's overall economic bargaining objectives.

Contract Term. With the postponement of the employer play or pay provision until 2015, and with continued uncertainty surrounding the ACA's implementation, employers have to consider contract duration as well. Depending on the employer's overall bargaining objectives and leverage, a shorter term contract (or a contract extension) that allows the employer to adapt sooner to ACA changes may be prudent, particularly if the employer is unable to secure a waiver from the union to make plan changes to comply with the ACA.

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