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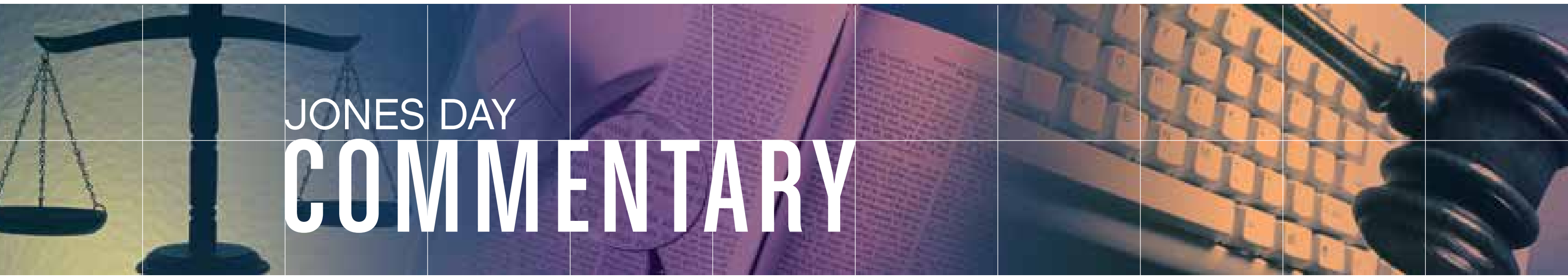

DEALING WITH THE AFFORDABLE CARE ACT IN LABOR CONTRACT NEGOTIATIONS

PART II: THE LOOMING EXCISE (a.k.a., CADILLAC) TAX

The Affordable Care Act ("ACA") imposes new taxes and fees on employers that will affect bargaining over health benefits. Some of these new costs, such as the Patient-Centered Outcomes Research Institute Fee and the Transitional Reinsurance Program applicable to plan issuers and sponsors, are already effective or will be in 2014. Starting in 2018, the ACA imposes another new tax, often called the "Cadillac Tax." It is a nondeductible 40% excise tax on any excess in the cost of employer-sponsored health care coverage provided to an enrollee over specified dollar thresholds. For purposes of the Cadillac Tax, employer-sponsored coverage includes major medical coverage and pharmaceutical coverage but excludes separate dental and vision plans. Where an enrollee participates in more than one type of employer-sponsored coverage, the cost of those plans is aggregated for purposes of calculating the Cadillac Tax. As employers prepare for labor contract negotiations, they need a strategy for bargaining over health benefits with the looming Cadillac Tax in mind. *See Jones Day Commentary*, Part I, "**What's the Deal? The Affordable Care Act in Labor Contract Negotiations.**"

Insurance companies are liable for the excise tax for insured plans. Plan administrators – who may be the employers themselves – are liable for the excise tax for self-insured plans. Employers are likely to bear the cost regardless of who is liable for paying the tax because insurers or outside plan administrators are highly likely to pass along the costs imposed by the excise tax to the employer sponsors of the plan through higher rates and fees. Employers will also face administrative costs because the plan sponsor (usually, the employer) is responsible for calculating the excess benefit subject to the tax and allocating the excess amongst the insurers and plan administrators. Employers are subject to penalties if they fail to make these computations accurately. Given all this, employers and insurers have a significant incentive to keep the costs of employer-sponsored health plans below the trigger point for the excise tax.

All employer-sponsored health care plans are potentially subject to the excise tax; there is no exception for plans negotiated as part of a collective bargaining agreement. In fact, unionized employers must address the excise tax earlier than nonunion employers. While nonunion employers may have the flexibility to adjust benefits anywhere between now and 2018 to get the cost below the threshold and avoid the excise tax (even though waiting may be inadvisable), unionized employers need to address the potential excise tax in their upcoming rounds of bargaining in order to ensure that the contractual changes necessary to avoid the excise tax are in place before 2018.

The excise tax is expected to have the most significant impact on the type of rich health care plans that labor unions have fought to obtain and protect over the years. Even though the government has yet to issue regulations giving specific details on how to compute the cost of coverage, employers can project the problem they will be facing by using their COBRA premiums, which must be computed to reflect the cost of coverage. The ACA imposes the tax on the portion of the annual value of health plan costs for employees that exceed in 2018 the following amounts: $10,200 for single coverage and $27,500 for family coverage, with higher amounts for certain retirees and employees in high risk professions. These thresholds for 2018 will increase if the cost of coverage in a specified option in the Federal Employee Health Benefits Program goes up by more than 55% between 2010 and 2018.

In the meantime, the thresholds are a valuable point of reference. According to the Kaiser Family Foundation annual survey, the average annual premium cost in 2012 for single coverage at employers with at least some unionized workers was $5,734 per year (or $4,466 below the threshold) and $16,073 for family coverage (or $11,427 below the threshold). *See* Kaiser Family Foundation /Health Research & Educational Trust, 2012 Employer Health Benefits Survey, Exhibits 1.5 and 1.6. These average amounts, which remain significantly below the trigger for the excise tax, are somewhat misleading, due to the tremendous variation in the costs of health benefit programs across the country. Employers in the Northeast and West often pay significantly more for health care plans than employers in the South. In addition, employers in certain industries, such as health care and in the public sector, usually pay health benefit costs that are significantly above the average. In fact, for certain unionized employers, the current cost of health benefits ***already exceeds*** the value that would trigger the excise tax in 2018. Based on a study conducted by SEIU regarding the likely application of the excise tax on the most commonly offered health plans among its represented members, 8 out of 14 health plans are expected to trigger the excise tax in 2018. *See* SEIU, FAQs: Excise Tax on High-Cost Health Plans, available at **http://www.seiu.org/images/pdfs/NHCR_FAQ%20Excise%20Tax-1.pdf** (last visited October 10, 2013).

It is critical for employers to assess now whether they are likely to trigger the excise tax, based on the current costs of their benefit plans as well as the projected rate of increase for the cost of those plans through 2018. Absent a significant legislative change to the ACA, it is unlikely that these thresholds for the excise tax will increase before 2018 other than by the adjustment that corresponds to the increase in rates for federal employees. After 2018, the dollar thresholds will be indexed for inflation as follows – for 2019, the consumer price index, plus one percentage point; and, for 2020 and after, by the consumer price index.

BARGAINING CONSIDERATIONS

Even though the excise tax will not be effective for several years, employers should develop their strategy now for avoiding the tax. Most significantly, unionized employers offering health coverage to employees must determine the level of benefits that they want to offer to their union-represented employees. Employers need to offer sufficient benefits to meet the minimum value threshold and avoid the play or pay penalty that could otherwise apply, but they also need to stay under the cost threshold to avoid triggering the excise tax. The focus has to be on scope and design of benefits because the excise tax is triggered by the total cost of coverage, regardless of how the cost is allocated between the employer and the employee.

Employers need to consider bargaining strategies that include:

Waivers. For many large employers, given the complexity of the ACA and its penalties, the employers' plans for benefits on a company-wide basis may well drive their proposals on benefits at the bargaining table. Securing the right to make mid-term changes, on a company-wide basis, to address plan design issues given the looming Cadillac Tax in 2018 would be optimal, but may not be achievable for some unionized employers. *See Jones Day Commentary*, Part I, "**What's the Deal? The Affordable Care Act in Labor Contract Negotiations**."

Trim Now. Absent waiver language, employers with open or soon-to-open contracts need to consider trimming their plans, as necessary, now. Most existing employer health plans generously exceed the minimum value standard. Some employer plans, if not trimmed, risk triggering the excise tax given their current cost and the historic rate of growth of coverage costs. Unions are likely to resist efforts to curtail employee benefits in the near term, but unions (hopefully) will understand that a failure to address the excise tax could divert resources that otherwise might be available to be added to the economic package at the bargaining table.

Cost Trigger. Even if employers are able to achieve health plan cost containment measures during contract negotiations, employers should also seek to include a provision in their labor contracts that would trigger cost reductions necessary to avoid the excise tax. The specifics of this provision would need to be addressed between the parties, such as the benefits that would be reduced or the process by which the union and the employer would agree on such changes. Such a provision would help employers avoid the worst case scenario regarding the excise tax, i.e., an obligation to pay a 40% nondeductible tax with no way to avoid it due to restrictions imposed by the labor contract.

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