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What's The Deal? The Affordable Care Act In Labor Negotiations

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The Affordable Care Act infuses new complexities into bargaining health insurance benefits. In past years, the challenge for many employers in bargaining has been to control escalating insurance costs and shift a greater share of costs to employees. Those challenges were hard enough. But now, with the ACA, employers face entirely new bargaining challenges. These challenges begin with fundamental decisions about the ACA's employer "play or pay" provision, including whether to provide health insurance, what types and levels of insurance to provide, how to address coverage of part-time employees, and how to deal with employee costs. In short, regardless of what employers negotiated into past contracts, the landscape has dramatically changed – forcing employers to develop new strategies for negotiating health benefits with the goal of minimizing 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.

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Pre-Bargaining Considerations

The ACA adds new consequences to some fundamental decisions about providing health coverage, directly impacting bargaining strategies. The threshold questions that employers must answer include:

1. To "play or pay"? Whether to offer or drop health coverage for employees and their dependents is a complicated 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 impact on employee morale, recruitment, and retention. In analyzing the ACA's costs for bargaining purposes, employers need to consider:

- *The cost of continuing versus dropping coverage for employees, including those averaging 30 or more hours a week.* Employers need to evaluate both options, with the understanding that dropping coverage may trigger a substantial ACA penalty. 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, then 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.
- *The cost of making coverage "affordable."* To make coverage affordable and avoid ACA penalties, employers may have to bear a significant part of the coverage costs for lower-wage employees. Under the proposed "affordability" safe harbors, coverage is affordable if the employee's premium share does not exceed 9.5 percent of any of the following: the employee's 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 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.
- *The cost of making required plan changes.* Employers need to evaluate 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, the maximum 90-day waiting period for coverage, and the cap on out-of-pocket maximums.
- *The potential cost of the Cadillac tax.* Employers with high-cost plans need 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 (subject to adjustment). If the employer does not anticipate and plan to reduce overall coverage costs in 2018 below these thresholds (including both employer and employee shares), the employer may face the hefty Cadillac tax.

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• *The cost of dependent coverage*. Employers face a penalty if they do not offer coverage to their full-time employees' children up to age 26. However, the ACA does not require employers to provide coverage for spouses, so employers need to evaluate potential savings from excluding spouses from coverage.

• *The cost of applicable ACA fees*, including the "transitional reinsurance fee" and "patient-centered outcomes research institute fee."

2. Coverage Levels and Plan Design. Employers who decide to provide health insurance must determine the level of benefits to offer. They need to meet the "minimum value" threshold to avoid ACA penalties, but stay under the cost threshold that would trigger the Cadillac tax. Some considerations include:

• *Using the minimum value standard and the Cadillac plan threshold as points of reference for the plan's overall richness.* Many existing employer plans exceed the "minimum value" standard (i.e., the plan's share of the actuarially projected cost of covered benefits is at least 60 percent). However, some plans, if not trimmed, risk triggering the Cadillac tax given their current costs and historic rate of growth. Employers should leverage the looming Cadillac tax at the bargaining table to curtail overly rich benefits.

• *Using one of the essential health benefits package benchmarks as a reference point.* All qualified health plans offered though state exchanges must offer the "essential health benefits" package, and each state has a benchmark plan that sets the standard for comprehensive sound coverage that an individual is guaranteed to be able to purchase. While employers are not required to offer an essential health benefits package in group health plans, being familiar with benchmark plans will enable employers to evaluate union demands against these benchmarks.

• *Offering non-medical benefits*. The ACA only requires employers to provide minimum essential coverage, i.e., core major medical coverage, but they can offer more options like dental, vision, and disability. These added benefits may be useful leverage in negotiations, since they can be structured so as not to add to coverage costs for triggering the Cadillac tax. However, offering these additional benefits will not avoid a play or pay penalty, as they do not count toward minimum value.

• *Wellness programs*. ACA regulations reaffirm that employers may attach rewards and penalties to wellness programs, including tobacco surcharges, without violating HIPAA rules. However, employers seeking to negotiate these programs into labor contracts need to be aware of state law limitations on tobacco surcharges and the EEOC's view of wellness programs.

3. Part-Time Employees. The ACA's "full-time employee" definition sweeps in many workers long considered part-time for purposes of health coverage. For many employers, their covered populations will expand, potentially dramatically, when they treat part-time employees averaging 30 hours a week as full-time employees to avoid the ACA's play or pay penalty. Employers need to plan in bargaining to:

• Ensure that part-timers who meet the ACA's "full-time employee" test are eligible for coverage.

• Address the ACA's "safe harbors" for determining full-time status. Employers should consider retaining discretion not only to use the safe harbors, but to adjust the measurement and stability periods.

• Preserve the flexibility to modify the full-time employee definition, in case of legislative change.

Bargaining Strategies

Health benefits are a mandatory subject of bargaining under the National Labor Relations Act, and the ACA does nothing to change the employer's duty to bargain over health benefits for 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 to force change in their negotiated plans:

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. This approach will undoubtedly produce significant union opposition in bargaining, though employers may insist to impasse on the issue. Employers seeking to end company-sponsored insurance thus need to prepare for intense challenges at the bargaining table, including pressure to participate in Taft-Hartley plans and to make wage or other concessions to compensate for loss of coverage.

Flexibility. Employers who plan to provide health coverage and have open or soon-to-open contracts should consider making flexibility in plan design a top priority. The ACA is enormously complicated and has spawned unintended consequences, making legislative change possible during the term of any multi-year labor contract. Employers should consider negotiating avenues to allow mid-term adjustments in response.

One approach is to negotiate waivers allowing the employer to make plan changes, on a company-wide basis, without mid-term bargaining or arbitration. These waivers should extend to all plan design features, including deductibles, copayments and surcharges, as well as the measurement and stability periods used to determine full-time status. The waivers should also cover modifications necessary to comply with changes in the ACA and its regulations, so that the employer can avoid penalties. Any such waivers have to be "clear and unmistakable" to be effective under Board law. *See Omaha World Herald,* 357 NLRB No. 156 (2011).

While unions with experience with "me-too" company-wide benefits arrangements may agree to such waivers, some unions will be reluctant to do so. Employers, therefore, should consider the potential challenges to implementing waivers unilaterally after a bargaining impasse. The NLRB has held that an employer's implementation of a proposal reserving discretion to change unilaterally 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 benefits. *See KSM Industries Inc.,* 336 NLRB 133, 135 (2001). Thus, employers need to be prepared to consider alternative ways for preserving flexibility to make mid-term changes, including less expansive waiver language tied exclusively to changes mandated by law.

Economics. Employers should leverage the costs that the ACA imposes on *employers* at the bargaining table. These added costs are tangible: the ACA requires employers to expand coverage to part-time employees, provide coverage that meets a host of requirements like preventive services without cost-sharing, make certain mandatory plan changes, and ensure that coverage is affordable. It also imposes costly record-keeping and reporting obligations on employers. Employers should use these costs to leverage plan design changes and increased employee cost-sharing, as long as the plan continues to provide minimum value and affordable coverage.

In addition, as noted above, the ACA provides employers with unique economic bargaining tools. In negotiations, they can use their actuary's assessment of a plan design that meets the ACA's minimum value and affordability tests as the floor for an acceptable benefit plan. And, on the other end, employers can use the Cadillac tax thresholds as the ceiling on benefits that they would be willing to provide. In between, they can also evaluate the market by looking at state benchmark plans – and push back on unreasonable union demands.

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