Good for What Ails You: Health Care Reform for CAAs

CAPLAW 2010 National Training Conference

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Handouts:

1. PowerPoint Slides
2. Ballard Spahr Legal Alerts

April 27, 2010

IRS Releases First Round of Health Care Reform Guidance on Taxation of Health Coverage for Adult Children

by Brian M. Pinheiro and Edward I. Leeds

Today the IRS issued the first installment of what is expected to be an avalanche of guidance on the new health care reform law. The guidance confirms that an employer-sponsored health plan may provide coverage free from federal income tax to an employee's children up to age 27.

This exclusion applies regardless of whether the child is married and regardless of whether the child is regarded as a "dependent" under the Internal Revenue Code.

The gross income exclusion is subject to certain caveats, including the following:

- The exclusion is effective for health coverage provided on or after March 30, 2010. Before March 30, coverage for the child will be excludable only if the child qualifies as a tax-code dependent.
- The exclusion ceases to apply in the year in which the child turns 27. Thus, if a child will turn 27 on December 15, 2011, the exclusion applies to health coverage provided from March 30, 2010, through December 31, 2010.

Corresponding changes will be made to other regulatory requirements, including rules governing voluntary employees' beneficiary associations (VEBAs), employment taxes under FICA and FUTA, and cafeteria plans. For example, midyear changes will be permitted under a cafeteria plan when an employee's 25-year-old child has a change in status, even if the child no longer qualifies as the employee's dependent for federal income tax purposes.

On January 1, 2011, most calendar-year health plans will need to comply with the new health care reform mandate to extend coverage to adult children up to age 26. Certain insurers have announced that they are preparing to implement this change earlier than required for certain adult dependents. A special transition rule allows an employee to contribute toward the cost of coverage for an adult child on a pre-tax basis under a cafeteria plan this year as long as the cafeteria plan is retroactively amended by December 31, 2010 (if an amendment is needed to encompass adult dependents). Although various questions still need to be answered about the new requirement to cover adult children, the change in tax rules does much to pave the way for the timely (and early) implementation of the mandate.

As the federal health care reform effort gained steam, Ballard Spahr attorneys formed an initiative to monitor and analyze legislative developments. With federal health care reform now a reality, our attorneys are assisting employers in understanding the relevant changes and planning for the future. For more information on the firm's Health Care Reform Initiative, please click here.

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May 11, 2010

Guidance Clarifies Extension of Health Coverage to Adult Children

by Marla G. Roshkoff and Clifford J. Schoner

In the first of what promises to be an ongoing series of tri-agency regulations, the Departments of Health and Human Services, Labor, and the Treasury have issued rules on one of the most controversial provisions in the health care reform legislation—the extension of coverage for children up to age 26. The guidance clarifies several key issues relating to this mandate:

- *Coverage for children may not be conditioned on any factor other than the child's relationship to the employee.* Plans that currently limit a child's eligibility based on factors such as the support provided by the employee, the child's marital or student status, or obtaining an age that is younger than age 26 will need to be revised to remove these restrictions, even for minor children. Surprisingly, the regulations themselves do not define who will be considered a "child."

- *Rules apply only if the plan covers children as dependents.* Nothing in the new rules requires a plan to cover children. The rules apply only to plans that do. If a plan covers children, it must provide coverage for all children up to age 26.

- *Special enrollment period required.* A plan must offer an employee whose child has lost or has been denied coverage before his or her 26th birthday a special enrollment opportunity of at least 30 days to elect to cover the child. For a calendar year plan, the coverage, if elected, must be effective no later than January 1, 2011. The special enrollment period must begin no later than that date, although many employers will choose to run it earlier in conjunction with the regular annual enrollment period for the 2011 plan year. Appropriate notice of the special election period must be given to employees.

- *Identical coverage must be provided at identical cost.* Children, whether or not adults, must be offered all of the benefit options under the plan that are available to similarly situated dependents. They cannot be required to pay more for coverage than other similarly situated dependents are required to pay.

- *Coverage may be paid with pre-tax dollars.* As described in our legal alert dated April 27, 2010, coverage for an employee's child may be provided free from federal income tax until the year in which the child reaches age 27.

- *COBRA continuation coverage processes may be affected.* If a child eligible for the special enrollment period is currently or was previously a COBRA participant and the child reenrolls in the plan, any future COBRA coverage resulting from a subsequent qualifying event (including aging out of the plan at 26) will result in another, new COBRA election. The subsequent COBRA continuation period will be determined without reference to any prior COBRA continuation coverage period.

The regulations provide a very limited exception for certain grandfathered health plans. For plan years beginning before January 1, 2014, a plan that is considered a grandfathered health plan may exclude a child who has not attained age 26 from coverage only if the child is eligible to enroll in an employer-sponsored health plan (other than the plan of a parent). Regulations on grandfathered health plans are expected shortly. Further, although not specifically addressed by the regulations, certain collectively bargained plans will not be required to cover children up to age 26 until the expiration of the last collective bargaining agreement applicable to that coverage ratified before March 23, 2009.

The government is encouraging employers and insurers to make coverage for adult children available sooner than required under the rules. Certain insurers have committed to offering coverage to at least certain children under age 26 before they are required to do so to avoid removing dependents from their records only to add them back in several months. Employer-sponsored group health plans providing coverage through insurance contracts should contact their insurers to determine if the insurer has implemented extended coverage before the required deadline.

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May 4, 2010

HHS Releases Guidance on Early Retiree Reinsurance Program

by Brian M. Pinheiro and Jonathan M. Calpas

Employers must move quickly after the release yesterday of the U.S. Department of Health and Human Services' first set of regulations under the health care reform law. The regulations provide guidance on the Early Retiree Reinsurance Program, which will reimburse employers and other plan sponsors for part of the costs incurred in providing group health benefits to early retirees.

The Program will be effective on June 1, 2010, and reimbursements will be made on a first-come, first-served basis. Given the expectation that claims for reimbursements will substantially exceed the $5 billion in funding allocated to the Program, speed is essential.

The new HHS regulations provide important guidance regarding the Program, including the following:

- The Program will be based in large part on the Retiree Drug Subsidy (RDS) program, under which eligible employers have been receiving Medicare Part D subsidy payments for their retiree prescription drug plans.
- Employer-based plans must have in place programs and procedures that generate (or have the potential to generate) cost savings with respect to participants with "chronic and high-cost conditions," such as diabetes and cancer.
- Claims eligible for reimbursement include the plan sponsor's net cost of providing health benefits for early retirees, but do not include a plan sponsor's or employee's premium costs in providing insured health plan benefits.
- Early retirees are defined as former employees who are at least age 55 and not yet Medicare-eligible. However, early retiree claims may include costs attributable to a spouse, surviving spouse, and/or dependent, even if such person is under age 55 or Medicare-eligible.
- Plan sponsors must have written agreements with their health insurance issuer or employment-based plan to require such entity to provide information to HHS upon request. Also, plan sponsors must have in place policies and procedures to detect and reduce fraud, waste, and abuse.
- Applicants must explain to HHS how they expect to use any reimbursements received under the Program and must project reimbursements for the next two years. Reimbursements must be used to reduce plan costs, including the plan sponsor's costs in providing the benefits. However, the plan sponsor must be able to show that the reimbursements will not reduce its

level of support for the plan.

- Transition rules will apply in determining reimbursements for the plan year that includes June 1, 2010.

Members of our Health Care Reform Initiative can assist employers and other plan sponsors who wish to apply for the Early Retiree Reinsurance Program. Please contact Brian M. Pinheiro, 215.864.8511 or pinheiro@ballardspahr.com; Jonathan M. Calpas, 215.864.8385 or calpasj@ballardspahr.com; or any member of our Initiative as soon as possible if you are interested in learning more about the Program.

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May 20, 2010

IRS Issues Guidance on Small Employer Health Insurance Expense Tax Credit

by Edward I. Leeds

The IRS has issued a notice explaining provisions in the recently enacted health care reform legislation that establish a federal income tax credit for small employers who implement or maintain health insurance coverage for employees. The notice clarifies various aspects of the new rules, including the following:

To qualify for the full tax credit, an employer must employ no more than 10 full-time equivalent employees with average wages of no more than $25,000. The credit decreases as the number and wages of employees get larger. It phases out entirely, for example, for employers with 25 or more employees or where the average wage is at least $50,000.

- To qualify, an employer must maintain health insurance coverage and contribute a uniform percentage of its premium cost. The contributions must equal at least 50 percent of the premium. A transitional rule offers some relief with regard to uniformity for 2010.
- Certain business owners may be excluded from the tests to determine whether an employer qualifies for the tax credit and, if so, how much the tax credit will be.
- A taxable employer may earn an annual federal income tax credit of up to 35 percent of its health insurance premiums. A tax-exempt employer may earn a refundable tax credit of up to 25 percent of those premiums. Various other limitations may apply to the amount of the tax credit. Further guidance will inform tax-exempt employers how to claim the credit. The tax credit reduces the amount of premiums for which a deduction may be taken, reducing the value of the credit for taxable employers.
- The tax credit is effective for 2010 and continues through 2013.

We can assist small employers in evaluating whether they are in a position to claim the tax credit, whether it would be worthwhile to do so, and whether they should be taking additional measures at this time to take the most advantage of the credit.

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April 9, 2010

National Health Care Reform Legislation Amends FLSA To Require Breaks for Nursing Mothers

by Brian D. Pedrow and Michelle M. McGeogh

Employers need to provide nursing mothers with a private place and break time to express breast milk. The new requirement is an amendment to the Fair Labor Standards Act (FLSA) included in the Patient Protection and Affordable Care Act, signed into law by President Obama on March 23, 2010.

A new section added to the FLSA provides for the following two requirements for employers of nursing mothers:

(1) Employers must provide "a reasonable break time" for an employee to express breast milk for a nursing child for one year after the child's birth each time the employee has the need to express milk.

(2) Employers must provide a place, other than a bathroom, that is shielded from view and intrusion by the public and coworkers where the employee can express breast milk.

The new law does not require employers to compensate an employee for the breaks, despite the fact that many rest periods or breaks of short duration are treated as "working time" by employers.

An employer that employs fewer than 50 employees may be exempt from the requirements if the law would impose an "undue hardship" on the employer. The law defines "undue hardship" as imposing on the employer "significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business."

Employers should be aware that many states already require breaks for nursing mothers, and existing state laws may have even more stringent requirements. The amendment to the FLSA specifically provides that it does not preempt state laws that provide greater protections to employees.

The U.S. Department of Labor in Washington, D.C., has not issued information yet on the new break requirements. District Offices have advised that they are awaiting guidance from the National Office, including whether regulations will be proposed.

The provisions are set forth in Section 4207 of the Patient Protection and Affordable Care Act, for which there is no stated effective date. Therefore, it appears that these requirements took effect upon the President's signing the legislation on March 23.

Attorneys in Ballard Spahr's Labor and Employment Group are prepared to answer your questions and to assist you in writing and reviewing policies to address the new requirements.

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