BRYAN CAVE
A Broader Perspective

Alert

Employee Benefits and Executive Compensation
Client Service Group

To: Our Clients and Friends

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Implications of Supreme Court Decisions on Health Reform

As yet another day passes without a decision from the Supreme Court on the constitutionality of the Patient Protection and Affordable Care Act (also known as health care reform), we are resigned to speculation and contingency planning. It seems likely that the Court will not say the Anti-Injunction Act applies, so the decision will likely uphold some, all or none of the law. The following discussion describes four possible outcomes of the decision, and their consequences for plan sponsors.

If the Supreme Court Upholds the Law

If the Supreme Court upholds the law in its entirety, then employers will have some work ahead of them. The short immediate list of "to dos" includes:

- Summaries of benefits and coverage are due for the first open enrollment beginning on or after September 23.
- Form W-2 reporting of the cost of health coverage will be required for most employers for 2012.
- Employers will need to amend their health FSAs by the end of 2014 plan year to comply with the $2,500 limit on employee contributions.
- The comparative effectiveness fee (discussed here) will be due this year.
- The first medical loss ratio rebates will be due this year.
- Prepare for the 2013 increase in Medicare tax

Additionally, for 2014, employers will need to prepare for:

- 90-day limitations on waiting periods.
- The complete elimination of pre-existing conditions (to the extent group health plans have those).

- The "shared responsibility" (aka "play or pay") penalties for employers who either (a) fail to offer health coverage or (b) offer health coverage that is either "unaffordable" (as defined by PPACA) or does not provide "minimum value" (as to be defined by the agencies).
- The filing of new information returns to the IRS and their delivery to certain full time employees.
- Increased incentives for wellness programs of 30% of the cost of coverage (and up to 50%, if HHS increases the incentive, as the statute allows).

And at some yet-to-be determined date(s), employers will need to prepare for:

- Non-discrimination rules for insured health plans.
- Automatic enrollment in health plans for employers with at least 200 employees.

And last, but not least, the "Cadillac Tax" on high-cost health plans, to come into effect in 2018.

If the Supreme Court Strikes the Mandate (or the Mandate and Some Other Provisions)

Another alternative available to the Court is to strike the individual mandate (the requirement that each U.S. citizen buy insurance or pay a penalty. If the Court determines that the mandate should be struck down, then one issue the Court has to grapple with is whether the mandate is fully or partially severable from the statute. The litigants challenging the law said it should not be severable. The U.S. Government argued that, if the individual mandate is struck down, the guaranteed issue (*i.e.*, no preexisting conditions) and community rating provisions should be stricken as well (the "mandate plus" option).

First, for group health plans, all or almost all preparations for PPACA will continue unabated. Whether it is "all" or "almost all" depends on whether the elimination of the guarantee issue provisions would include both individual and group plans. It likely would and, if it does, that means there would be no more elimination of pre-existing condition exclusions. However, due to HIPAA portability and creditable coverage rules, most group health plans have already eliminated, or substantially eliminated, preexisting condition exclusions, so it is unlikely that this will have much practical effect.

However, the elimination of the mandate alone, or the mandate plus option, has implications for employers who are considering eliminating coverage and allowing their employees to purchase coverage on the exchange. Even though a recent study reported that most employers plan to keep coverage, for some employers, paying the penalties rather than paying for coverage makes better economic sense. However, the analysis is different if there is no mandate. Without the mandate, insurance companies have argued that the individual market will become prohibitively expensive because healthy individuals will have no incentive to buy insurance. If they can receive the insurance on a guarantee issue, community-rated basis at any time, and not pay a penalty for not having coverage, they can take a wait to buy insurance until they need it. The insurance companies argue that this will create prohibitively expensive individual insurance.

If the Court takes the mandate plus option, some of these concerns would appear to be mitigated. Without the guarantee issue and community rating provisions, healthy individuals will have a harder time taking a wait and see approach because insurance companies would be able to impose preexisting

condition exclusions and medical underwriting requirements. However, this is essentially a system we have without health care reform and under that system, individual insurance is largely not a viable alternative to employment-based group insurance.

Therefore, if the Court takes either the "mandate only" or "mandate plus" options, there will be some short-term concerns about the viability of the exchanges and the individual insurance market may not be a viable alternative to employment-based coverage. However, it would not be surprising to see Congress try to refashion the mandate to make it Constitutional to rectify these problems.

If the Supreme Court Strikes Down the Law

To invalidate the health reform law, the Court would have to conclude that the individual mandate requiring all U.S. citizens to buy health insurance or pay a penalty was not a permitted exercise of Congress's power under the Constitution.

The Court could take any of a variety of routes if it strikes the law down. The Court could conclude that actions taken to date should not be disturbed, thus preventing a retroactive undoing of the law. For example, the Court could conclude that because the mandate is not scheduled to be effective until 2014, there is not a need to undo actions taken between 2010 and the issuance of its opinion. In taking such a position, the Court would be taking a practical approach.

However, the Court could also conclude that the law was essentially void from the start. In that case, some dependent coverage that was not taxable would become so. Employers who took advantage of the small business tax credit might need to adjust prior tax returns. However, because many group health plans and service provider contracts were amended to comply with PPACA, those plan provisions and service provider contracts arguably create rights that could not be undone retroactively. Thus, any plan changes will likely be prospective only.

Regardless of whether PPACA is struck down prospectively or retroactively, here are a few items to consider:

- Coverage of children after 19 (23 if not a full-time student) will become taxable. Employers will technically need to impute income to employees for the cost of the premiums (or charge after-tax premiums) to avoid treating the benefits as taxable. However, because of the disruption this will cause, we would not be surprised if the IRS issues transition relief through the end of 2012.
- Employers who have already worked to prepare Summaries of Benefits and Coverage will need to decide whether to proceed with providing them. In making that decision, employers should be mindful that group health plan benefits do not always fit neatly within the SBC template and the presence of the mandated uniform glossary.
- Employers consider modifications to their health plans may need to give notice to participants 60 days after the change. ERISA (even before health reform) requires a notice 60 days after the adoption of any material reduction in covered benefits or services under a group health plan (unless notices are provided at regular intervals every 90 days).

- Employers who adopted amendments to their health FSAs for the $2,500 limit for 2013 plan years will need to amend to remove that cap (assuming they want to remove it). Additionally, employers will be able to amend their health FSAs to allow for the reimbursement of over-the-counter drugs without a prescription.
- Since W-2 reporting of health coverage is no longer required, employers will need to consider whether to continue to report it (for so long as the form has a box for it).
- The comparative effectiveness fee (discussed here) will no longer be due.
- Limited benefit, or "mini-med," plans will continue to be viable and will no longer need to submit information to maintain their waivers from the annual limit requirements.
- Employers who received Early Retiree Reimbursement Program funds (remember that?) should be on the lookout to see if the government will pursue collection of those funds. This is not likely to happen, but it is possible.
- Some insured plans may not be able to completely roll back health reform mandates, to the extent those mandates or ones like them are required by applicable state law. Even if not required, insurers will be prohibited from changing the terms of policies without making new rate filings with the governing state insurance agencies, which will take time. Additionally, some insurers have indicated they are willing to keep some of the PPACA provisions.

Even though the list above assumes that all the provisions will be treated as invalid, employers should also bear in mind that the agencies may attempt to find authority in existing law for some PPACA provisions. To the extent they do, some of these rules may not be going away after all.

Regardless of how the Court rules, it will be far from the last word on health reform. The Bryan Cave Employee Benefits group plans to host roundtable discussions in some of our offices to discuss the implications of the Court's decision. Further details on those roundtables will be sent out in the coming days.

If you have any questions regarding anything discussed in this Alert, the attorneys and other professionals of the Employee Benefits and Executive Compensation group of Bryan Cave LLP are available to answer your questions.

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