Health Care Reform Outlook

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With the Supreme Court's landmark decision upholding the Affordable Care Act, employers have a renewed interest in what the Act will mean for their businesses in the years ahead. Employers need to be aware of the possible political outcome as they continue to make sure their plans are in compliance.

Political Aspects of the Supreme Court Ruling on Health Care

The political reaction to the Court's majority decision has been swift and predictable. No sooner had the court ruled than both sides of the political aisle began plotting their next moves. Proponents immediately vowed to vigorously defend and implement the Act expeditiously. Meanwhile, opponents renewed their calls to rescind the law. Thus, far from delivering the last word, the Court's decision has merely served to move the debate and, ultimately, the fate of the law back to the political arena and the upcoming elections.

Like horse races, election outcomes are hard to predict - especially several months before any votes are cast. Nonetheless, each political party is using the Court's decision as part of its campaign messaging and fundraising activities. Indeed, Republicans in the House, once again, cast a largely symbolic vote to repeal the law. Not surprisingly, Democrats in the Senate quickly dismissed the vote. Additional skirmishes may surface throughout the remainder of the Congressional session as a run-up to the elections, but the result is not likely to change. Consequently, in light of the current Congressional standoff, many political analysts and campaign strategists are now casting the elections this fall as a national referendum on the law and its mandates.

As it stands now, the Presidential contest remains a toss-up. In Congress, Republicans are favored to hold on to their majority in the House of Representatives. In the Senate, Republicans are poised to gain seats and will either come close to, or actually claim, a razor-thin ruling majority. Depending on how the November elections unfold and the winners and losers are declared, several possible scenarios could emerge that could affect the future of the health care law. Clearly, if President Obama is re-elected, he would hold a distinct advantage over opponents of the law

and would likely veto any legislation aimed at rescinding all or parts of the law. Notwithstanding a potential electoral sweep, a Republican President along with a Republican-controlled Congress may encounter significant parliamentary hurdles and legislative roadblocks that may stymie plans to nullify the law. This does not mean to suggest that it cannot be done or that the law cannot be repealed. It can--but it will not be done easily or as quickly as some would like.

Most agree that a new Republican President could not unilaterally revoke the law by Executive Order. Nevertheless, he could require agencies to slow down the process for issuing regulations implementing the law or cut funding to agencies charged with implementing it. On Capitol Hill, the prospects for an early and outright legislative repeal of the statute are not good. At this stage, the political fallout and implications of the Court's decision affirming the constitutionality of the law are beginning to play out and be assessed. While it is broadly acknowledged that the decision will be a factor in the November elections, how large or small of a factor is yet to be determined. The only thing that is certain is that, regardless of which way the elections go and which political party or candidate prevails at the ballot box, the health care debate will continue for several years to come.

Compliance Requirements for 2012 Through 2014

Assuming that the Affordable Care Act remains in effect, the following are compliance requirements that will apply in 2012, 2013, and 2014.

2012

Several Affordable Care Act requirements have or will become effective this year. In particular, plan sponsors need to confirm that their plans are in compliance with the following.

Claims Procedures for Non-Grandfathered Plans

Language Services. Plans must comply with the Affordable Care Act's non-English languages services requirement if ten percent or more of the population in a participant's or beneficiary's county of residence is literate only in the same non-English language. If the threshold is met, the plan must offer certain non-English language services. Specifically, the regulations require the following services to be provided if the 10 percent threshold is met:

- The plan must provide oral language services (such as a telephone customer assistance hotline) that include answering questions in the applicable non-English language and providing assistance with filing claims and appeals (including external review) in any applicable non-English language.
- The plan must provide, upon request, notices in any applicable non-English language; and
- The plan must include in the English versions of all notices, a statement prominently displayed in any applicable non-English language clearly indicating how to access the language services provided by the plan.

Explanations of Benefits.

Explanations of Benefits, or EOBs, must include diagnosis, treatment and denial codes and explain their meanings.

External Review. As of July 1, 2012, non-grandfathered plans should have contracts with at least three Independent Review Organizations.

Annual Limits

The maximum annual limit for 2012 is $1.25 million. Plans may require amendment to comply with this restriction.

Disclosure Requirements

Summary of Benefits and Coverage. The new four-page Summary of Benefits and Coverage (or SBC) must be issued to participants and beneficiaries who enroll or re-enroll during an open enrollment period beginning on or after September 23, 2012. Sponsors of self insured plans should confirm whether their third party administrators will be preparing the SBC. Insurers likely will be providing SBC on behalf of insured plans. Plan sponsors of self-insured and insured plans need to make sure that the SBC sent on behalf of the plan complies with Affordable Care Act requirements.

Advance Notice of Plan Changes. Any plan change that would affect information disclosed in the SBC must be communicated to participants and beneficiaries at least 60 days before the change takes effect.

W-2 Reporting

Forms W-2 for 2012, issued in January, 2013, must include the value of health benefits provided to employees. IRS Notice 2011-28 provides guidance regarding this new reporting requirement.

Comparative Effectiveness Research Fee

For the 2012 through 2018 plan years, plans will be required to pay the new Comparative Effectiveness Research Fee. For the 2012 plan year, the fee will be $1 per covered individual. For subsequent years, it will be $2 per covered individual. The fee will be due by July 31 immediately following the end of the plan year and payable on Form 720. Accordingly, for a calendar year plan, the first Form 720 and annual payment will be due July 31, 2013.

2013

Flexible Spending Arrangement Cap

Effective as of the first plan year beginning after December 31, 2012, the maximum permitted annual salary reduction contribution to a health flexible spending arrangement will be $2,500. The $2,500 limit only applies to salary reduction contributions. It will not apply to employer non-elective contributions to health flexible spending arrangements, health savings account contributions, or dependent care flexible spending arrangement contributions.

2014

Automatic Enrollment

Employers with over 200 full-time employees will be required to automatically enroll new employees in their group health plans. Existing employees must be automatically re-enrolled during open enrollment. Employees must be allowed to opt out.

Waiting Periods

Eligibility waiting periods will be limited to 90 days. The 90-day period will begin as of the date that an employee becomes otherwise eligible for coverage.

Pre-existing Condition Exclusions

No pre-existing condition exclusions from plan coverage will be permitted beginning January 1, 2014. The Affordable Care Act currently prohibits such exclusions only with respect to children.

Wellness Rewards

Beginning in 2014, the Affordable Care Act increases the maximum wellness program reward from 20 percent to 30 percent of the cost of employee-only coverage (or family coverage if family members may participate in the wellness program). The Secretaries of Labor, Health and Human Services, and Treasury will have discretion to increase the maximum percentage to 50 percent.

Employer Mandate

In 2014 employers with at least fifty employees will be required to provide affordable health insurance coverage to employees or face a penalty. Such employers who fail to offer affordable health insurance may face an annual penalty of up to $2,000 multiplied by the number of employees in excess of thirty. Employers need to determine whether their group health coverage satisfies the Affordable Care Act requirements as well as the potential penalties if they fail to comply.

Next Steps

Employers should review plan documents and operations to confirm that their plans are in compliance with the Affordable Care Act. The new Summary of Benefits and Coverage should be prepared and reviewed well in advance of the upcoming deadline. Employers also need to develop a strategy for dealing with the 2014 employer coverage mandate.

Williams Mullen will provide you with additional alerts on this topic as further developments occur. If you have any questions, please contact any member of the Williams Mullen Employee Benefits or Federal Government Relations team.

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