



The Impact of Healthcare “Reform” on Employers

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On March 23, 2010, after an epic legislative, political and popular struggle (which is likely to continue through the 2010 mid-term Congressional elections at least), President Obama signed the Patient Protection and Affordable Care Act (PPACA) (“the Senate Bill”) into law and, on March 30, 2010, the President signed into law the Health Care and Education Reconciliation Act of 2010, amending the Senate Bill to conform it in many respects to the previous “House Bill” on healthcare. Although there are many details of the healthcare legislation which remain to be discovered or clarified, this article provides an overview and summary of the changes affecting employers which are generally understood to be included and the significant omissions in the bill.

Employer Requirements and Penalties

The largest effect employers will see from the new law are the “pay or play” provisions – requiring employers to offer health insurance to employees or pay penalties. These requirements are not effective until January 1, 2014, and are only applicable to “large employers,” defined as an employer which employs at least 50 full-time employees. (Employers with fewer than 50 full-time employees will not be required to offer health insurance to employees.) A full-time employee is an employee who averages at least 30 hours of service per week, calculated on a monthly basis. Seasonal employees are not counted toward the 50 or more threshold if: (1) the employer’s workforce exceeds 50 full-time employees for 120 days or fewer in the calendar year, and (2) the employees in excess of 50 were seasonal workers during the 120 day period. The Bill is likely to result in an expansion of seasonal-only and part-time employee utilization. Some employers may also be inclined to limit their total employment to escape or minimize their exposure to these requirements, or pay the penalties rather than offer insurance for all employees.

Employers who meet the 50 full-time employee threshold (the earlier five-employee threshold for construction employers was deleted), but fail to offer full-time employee health coverage will be required to pay a

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penalty in any month in which the employee receives a federal individual insurance subsidy. The penalty, calculated on a monthly basis, is \$2,000 per year per full-time employee. The Reconciliation Bill gives small employers a break by allowing the employer to subtract the first 30 full-time employees from the calculation. Another complex set of penalties (between \$750-\$3,000 per employee) applies if the employer's medical insurance does not meet "minimum standards" or if the employee co-premium is too high (more than 9.5% of employee's gross income).

Employers with 200 or more employees are required to auto-enroll their full-time employees in their medical plan. Along with the auto-enrollment, the employees must be given notice and the opportunity to opt out of the plan (or, if the employer has other options, the opportunity to select other options).

The law also makes changes to waiting periods. Waiting periods in excess of 90 days are no longer permitted and employers will be assessed penalties for any waiting period between 31-90 days. Specifically, if the waiting period is between 31-60 days, the penalty is \$400, and between 60-90 days, the penalty is \$600.

There are also new employer reporting requirements to the Secretary of Treasury, including whether coverage is offered, the waiting period for coverage, the number of full-time employees and the name, address and taxpayer identification number of each full-time employee, as well as the months the employee was covered under the plan. Since Form 1099s must also be submitted on all vendors who are paid \$600 or more annually under the new law, as a means to monitor non-employee service providers, employers should review their Independent Contractor arrangements to be certain they are defensible as non-employment relationships.

The Exchanges

The new law provides states with funds to establish health insurance exchanges through which individuals may purchase health insurance. A state may allow smaller employers (defined in this

case as an employer with 100 employees or fewer) to participate in the program also. Since the basic structure of state-authorized insurance providers and mandated benefits is not changed (see "Omissions" below), it remains to be seen what cost benefit the exchanges will actually provide over the services insurance agents now offer.

Omissions from the Bill

What is not in the bill is as interesting as what is. Among the omissions are all of the things that we hoped (*LawFax* August 2009) would be included to reduce costs:

- There is no medical malpractice reform so healthcare cost increases arising from excessive doctors' insurance premiums and defensive medicine will continue.
- There is no reduction or change in the system of state-mandated required medical benefits (Minnesota has 68 at last count), and new federal mandates (such as "minimum standards" for benefits and no preexisting condition limitations) are added, so low cost, no frills plans cannot be offered.
- There is no creation of a national market for medical insurance – patchwork state-by-state regulation continues, so no competitive national plans can compete in Minnesota or other states, nor can trade associations offer their own plans.

Tax Credits and Taxes

Tax credits will offset some of the additional cost and administrative burden on small employers (no more than 25 employees) by permitting partial deductibility of the employees' co-premium payments.

Business owners and managers, however, will face increased Medicare taxes on income (not to cover Medicare deficits, but to subsidize uninsured medical coverage) and an unprecedented new tax (for the same purpose) on investment income for high income earners. In addition, all the new mandates, "minimum standards" for benefits, subsidized coverage for the uninsured,

and the disallowance of preexisting condition limitations, will increase medical care costs, and premiums will therefore increase as well, for all.

Conclusion

All in all, the healthcare bill will create substantial new costs and a heavier regulatory hand for employers, and will not incorporate any of the changes employers and their trade associations, and the U.S. Chamber of Commerce, had sought: malpractice limits to reduce costs, a national market to increase competition and an override of the patchwork of state regulation and state-mandated benefits to permit true national insurance products for that national market. The Attorneys General of at least a dozen states have filed suit to challenge the new healthcare legislation on the grounds that the federal government has no constitutional authority to require individuals and businesses to purchase medical insurance, among other grounds, and Republican and business opponents of the legislation promise to seek repeal of many features of the bill and the passage of the omitted features discussed above. The next few months will determine whether the legislation will stand or fall or be significantly amended.

If you have any questions about the healthcare legislation and your rights as an employer, please contact the authors of this *LawFax* or any attorney at our firm at (952) 896-1700.

NLRB Obama Appointments

President Obama has now made two "recess" appointments to the National Labor Relations Board of Union Attorneys Craig Becker and Mark Pearce, to join current members, Wilma Liebman and Peter Schaumber. These appointments, despite the lack of Senate confirmation of these nominees, make the "score" at the NLRB – 3 union lawyers to 1 Republican appointee. Mr. Becker, in particular, is a very extreme appointment, since he has written in favor of excluding employers altogether from the NLRB proceedings on union elections and certification, and may move on some parts of the "Card Check" agenda without legislation. Employers will have tough going at the NLRB in the near future.

Mark Your Calendars for Upcoming Seminars

Seaton, Beck & Peters' lawyers will be speaking at the following training sessions (call or email for registration information as noted if you are interested):

April 13: Alec Beck speaking at the Human Resource Professionals of Minnesota's Spring Conference, Ramada Inn, Mall of America, all-day session. Contact Alec at (952) 896-1700 or abeck@seatonlaw.com

April 21: Alec Beck speaking on "Social Networking Policies" at 9:00 a.m. for HRThatWorks. Contact Alec at (952) 896-1700 or abeck@seatonlaw.com

April 22: Alec Beck speaking on "How Not To Get Sued" at the Lake Country Human Resource Association's Spring Conference, Holiday Inn, Detroit Lakes, all-day session. Contact Alec at (952) 896-1700 or abeck@seatonlaw.com

May 20: Doug Seaton, Jon Olson and Emily Ruhsam speaking at the Annual ABC Labor Law Forum for Construction Employers, half-day session at the offices of Minnesota Associated Builders and Contractors. Register at (952) 941-8693 or www.mnabc.com

May 25: Doug Seaton speaking on "The Basics of Employee Recordkeeping" (Breakout Session I, Section 801 at 2:45 p.m.) at The Minnesota CLE's 2010 Upper Midwest Employment Law Institute, May 24 & 25, St. Paul RiverCentre. Register at (651) 227-8266 or www.minncle.org

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The cost is \$975.00 for handbook and employment materials (with 2 hours customizing time included) and \$475.00 for drug and alcohol testing policy and materials (with 1 hour customizing time included). If Seaton, Beck & Peters has previously prepared a handbook for you, we are offering to update your handbook with the latest additions for \$375.00.