

# U.S. Health Care Reform – Key Issues to Watch

**January 15, 2010**

With the passage of sweeping health care reforms appearing imminent, employers will soon be faced with new and complex challenges to their delivery of health care benefits to employees. Proskauer's newly-created Health Care Reform Task Force is well poised to help employers navigate these new requirements. Comprised of members of the Employee Benefits, Executive Compensation & ERISA Litigation Practice Center as well as the Health Care, and Labor & Employment Departments, the Task Force brings to bear a unique interdisciplinary approach and perspective that will assist employers and health care providers in addressing health care compliance issues.

The first order of business Congress will tackle in the new year is reconciliation of the Patient Protection and Affordable Care Act (H.R. 3590), approved by the Senate on December 24, 2009, and the Affordable Health Care for America Act (H.R. 3962), approved by the House of Representatives on November 7, 2009. Congress is set to place reconciliation of the two measures on a fast track, bypassing the typical House-Senate conference approach. The stated goal of the Democratic leadership is to pass reconciled legislation prior to President Obama's State of the Union Address, which is thought to occur in early February. Indeed, numerous reports indicate that, as of today, congressional leaders and the Obama administration are close to an agreement on several aspects of a final health care reform bill and could seek a Congressional Budget Office revenue score on new legislative language within the next several days.

As Congress works to hammer out the final health care reform bill, there are several issues employers should watch. Resolution of these issues will likely have a significant impact on how employers design and administer their health plans. Although many of these provisions would not become effective for several years, certain provisions could become effective as early as the date legislation is enacted. Therefore, employers should begin considering now how all of these issues would affect them.

**Employer Mandate.** The House and Senate bills include significant new employer mandates. Under the House bill's "pay or play" provisions, employers would be required to meet minimum benefit and premium contribution requirements as well as a 70 percent minimum actuarial standard (which means that, on average, the plan must cover approximately 70 percent of the expected cost of covered benefits) to avoid an eight percent payroll penalty. The Senate bill provides employers with more flexibility, imposing a "free rider" approach to employer responsibilities with a flat dollar penalty. The approach adopted in the final bill will have a substantial effect on an employer's ability to tailor its health care plan to meet the actual needs of its employees.

**Automatic Enrollment.** The House bill requires employers to automatically enroll employees in their lowest cost health coverage option unless an employee affirmatively elects another coverage option or opts out of the employer's plan within 30 days. The Senate bill requires employers with 200 or more employees to automatically enroll them in health plans unless an employee demonstrates that he/she has coverage from another source. The Senate bill permits employers to impose a penalty-free, 60-day waiting period prior to automatic enrollment. Waiting periods between 60 and 90 days are permissible under the Senate bill, provided that the employer pays a penalty, but waiting periods longer than 90 days are prohibited. The length of permitted waiting periods is particularly important for employers with a high turnover workforce.

**Taxation of Retiree Drug Subsidies (Medicare Part D).** Both the House and Senate bills include a provision eliminating the ability of employers to exclude from taxation the subsidies they receive for maintaining retiree drug coverage for their Medicare-eligible retirees. Because inclusion of such a provision in the final bill would require employers to treat the subsidies as taxable income, it is thought by some that the provision would be a deterrent to the continued maintenance of employer-sponsored retiree drug coverage. For this reason, it is not a certainty that the provision will remain in the final bill even though present in both the House and Senate bills.

**Retiree Health Restrictions.** The House bill limits the ability of an employer to amend its retiree health plan in a manner that would reduce the plan's actuarial value by more than five percent or increase the retirees' share of the premium by more than five percent, unless the same change is made in benefits for active employees. Although it is thought that this provision is unlikely to make it into the final bill since no such provision was included in the Senate bill, the issue is still one to watch given that this restriction would have a substantial impact on employers who currently provide retiree health coverage. In particular, such a provision might limit the ability of employers to eliminate, for example, their existing retiree drug coverage should Medicare Part D subsidies become taxable as described above.

**Grandfathering.** The House bill includes a five-year grace period before employers must comply with the new requirements. By contrast, the Senate bill provides for unlimited grandfathering of plans in effect as of the date of enactment. However, it is not clear what plan changes employers would be allowed to make without destroying grandfathering. The resolution of this issue in the final bill will shape an employer's ability to amend its health plans in the future.

**Flexible Spending Accounts.** Both the House and Senate bills limit contributions to employee flexible spending accounts to \$2,500 per year, indexed to CPI. Such a limit, if included in the final bill, will raise health care costs for employees with unreimbursed health care expenses in excess of \$2,500 to the extent the employee currently has a flexible spending account that permits contributions in excess of \$2,500.

**Definition of Full-Time Employee.** The Senate bill defines a full-time employee as one who works at least 30 hours per week, determined on a monthly basis. This definition could require employers to provide health coverage to temporary or seasonal workers without a long-term connection to the workforce.

In short, key issues remain that must be reconciled by the House and the Senate prior to final passage of a comprehensive health care reform bill. It is impossible for anyone to predict what will ultimately appear in a bill that would be sent to the President for his signature. We will continue to issue *Client Alerts* updating our clients to new developments in this area of the law. In the meantime, please feel free to contact your Proskauer attorney or any member of our Health Care Reform Task Force should you have questions regarding the health care reform measures being taken by Congress.

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