



EMPLOYEE BENEFITS NEWSLETTER ~ APRIL 2010

Health Care Reform Law— A Look at 2010



The comprehensive health care reform legislation signed into law in March 2010 has numerous deadlines that employers will have to satisfy. And many of those deadlines in the Patient Protection and Affordable Care Act (PPACA) as amended by the reconciliation act, will take effect as early as 2010.

What Happens in 2010?

- A new tax credit for eligible small employers equal to a portion of the employer's cost to provide health insurance.
- ⇒ Employers with no more than 25 "full-time equivalent" employees and annual average wages of no more than \$50,000 are eligible.
- ⇒ The credit is up to 35% of employers contribution toward health coverage if the employer pays at least 50% of the premium.
- Auto-enrollment for employers with more than 200 employees.
- ⇒ Provision has no separate effective date, so general rule that effective date is date of enactment appears to control
- ⇒ But compliance is effectively delayed until regulations are issued

90 Days after 3/23/2010

- State high risk pool for individuals with pre-existing conditions but without creditable coverage for 6 months.
- ⇒ Insurer or employer found to have encouraged individuals to disenroll and join high risk pool must reimburse expenses.

- Early retiree reinsurance
- ⇒ Temporary program to reimburse claims of retirees age 55 and older who are not Medicare-eligible
- ⇒ Would pay 80% of eligible claims
- ⇒ Plan may use reimbursement only to reduce costs (premiums, copayments, out-of-pocket costs)

Effective first plan year after 9/23/10

- No lifetime limits and no annual limits on the value of essential benefits are allowed
- ⇒ For plan years beginning before January 1, 2014, the law allows a plan to establish a restricted annual limit on essential benefits as determined by HHS regulations
- ⇒ The law allows annual or lifetime limits on non-essential benefits
- No rescission of coverage is permitted except in cases of fraud or intentional misrepresentation
- No pre-existing condition exclusions or limitations for children under age 19 (applies to all in 2014)
- First dollar coverage (no cost sharing) must be provided for certain evidence based preventive care (including well-child care) and certain immunizations
- Plans that cover dependent children must provide coverage for adult children until age 26
- ⇒ Children of covered dependent children need not be covered

Patient Protections

- Plan enrollees are allowed to select any available participating primary care provider or pediatrician in the case of a child
- No preauthorization or increased cost-sharing for emergency services (in or out of network)
- No preauthorization or referral by the plan for obstetrical or gynecological care

- Fully insured plans sponsored by employers will generally be required to satisfy the Code § 105(h) nondiscrimination rules that apply to self-funded plans
- Appeals process changes impose several new requirements, including
- ⇒ Allowing claimants to present testimony as part of the benefit appeals process
- ⇒ Allowing claimants to continue receiving coverage during the appeals process
- ⇒ Compliance with state external review laws (for insured plans)
- ⇒ Implementation of external review process meeting standards to be established by HHS (for self-insured plans not subject to state law)
- New summary of benefits and coverage
- ⇒ Must be provided by plan administrator (for self-insured plan) or insurer (for fully insured plan) in paper or electronic form
- ⇒ To all applicants, policyholders, and enrollees both at the time of initial enrollment and at annual enrollment
- ⇒ Significant penalties (up to \$1,000 for each willful failure)
- ⇒ Notwithstanding general effective date, there is a special distribution deadline of 24 months after 3/23/10

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OSHA Proposes Recordkeeping Revision

The U.S. Occupational Safety and Health Administration (OSHA) has proposed a revision of its recordkeeping regulation that would add a column to the OSHA 300 Log for employers to record work-related musculoskeletal disorders (MSDs).

The proposed rule does not change requirement for when and under what circumstances employers must record MSDs on their injury and illness logs.

Recordkeeping regulations issued in 2001 established a column for MSDs and hearing loss, but the MSD column was dropped in 2003 before the rule took effect. The requirement for the column was contained in Section 1904.12 of that rule, and that section never took effect, either. The proposal would reinstate the section, requiring the addition of the MSD column and defining MSDs as “disorders of the muscles, nerves, tendons, ligaments and joints, cartilage and spinal discs, except those caused by slips, trips, falls, motor vehicle accidents or other similar accidents.” Section 1904.12(b)(2) clarified that an MSD, like any other injury or illness, was recordable if it “is work-related, and is a new case, and meets one or more of the general recording criteria” in Sections 1904.5, 1904.6 and 1904.7.

In January 29th issue of the Federal Register, OSHA officials stated that the agency wanted to gather the information to gain more accurate and complete occupational injury and illness statistics.

If the rule becomes final, it would go into effect January 1, 2011.

Imagine Schools Inc. Will Pay \$570, 000 to Settle EEOC Pregnancy Discrimination Lawsuit

Imagine Schools Inc., an operator of more than 70 charter schools in 12 states, will pay \$570,000 to settle a pregnancy discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC), the federal agency announced March 18, 2010.

The suit, filed in U.S. District court for the Western District of Missouri (EEOC v. Imagine Schools Inc., No 4:08-cv-00731-SOW), charged that Imagine Schools discriminated when it chose not to retain two pregnant employees after closing its charter middle school in Kansas City, MO., and opening a private middle and high school, Renaissance Academy, at the same location. The lawsuit claimed that the company did not rehire LuShonda Smith, an office manager, and Charity Brooks, and administrative assistant, to work at the new school because they were pregnant.

The EEOC filed the Title VII lawsuit in September 2008 after first attempting to reach a pre-litigation settlement.

“Unfortunately, the EEOC keeps having to drive home the point that no woman should lose her means of earning a living simply because she is pregnant,” said EEOC Acting Chairman Stuart Ishimaru. “this significant settlement should serve as a reminder of that fact to other employers.”

In addition to requiring the payment of \$570,000 in back pay, emotional distress damages and attorneys’ fees, the two-year consent decree, which must be approved by the court, requires that the nationwide charter school company disseminate a policy on pregnancy discrimination, provide management training on such discrimination, report internal discrimination complaints to the EEOC and post a notice prominently regarding employee rights under federal anti-discrimination laws enforced by the agency.

“There is no excuse for a company in the business of educating children to discriminate against pregnant women,” said EEOC Regional Attorney Barbara Seely. “We are pleased that Imagine Schools is now setting a good example for today’s youth by recognizing that working mothers deserve the same opportunities as all other employees.”

Pregnancy discrimination charges filed with the EEOC and state and local Fair employment Practices Agencies rose from 4,160 in Fiscal year 2000 to 6,196 in FY 2009. In April 2009, the EEOC issued a document on best practices to avoid discrimination against workers with caregiving responsibilities.

Senate Passes Bill That Would Ban Texting While Driving in Kentucky

A bill seeking to ban people from sending text messages while driving in Kentucky has won approval from the State Senate. The measure would prohibit drivers from writing, sending or reading text messages when their vehicle is in motion. It cleared the Senate on a 27-6 vote Tuesday, March 23, 2010 and now goes to the House.

Under the bill, violators would receive a warning for the rest of the year. Starting in 2011, violators would pay a fine of \$25 plus court costs for a first offense, and a \$50 fine plus court costs for repeat offenses. Democratic Sen. Denise Harper Angel of Louisville, the bill’s lead sponsor, said the proposal would deter reckless driving and save lives. Opponents questioned how law enforcement would be able to enforce the measure.

Enrollment Rising in Account-Based Health Plans

Despite uncertainty surrounding health reform legislation, U.S. enrollment in consumer-driven health (CDH) plans that incorporate health savings accounts (HSAs), health reimbursement accounts (HRAs) or flexible spending accounts (FSAs) will rise to 45 million by the end of 2012, from 29 million accounts at the end of 2008. That's according to a February 2010 report by Aite Group LLC, a Boston based business research and advisory firm.

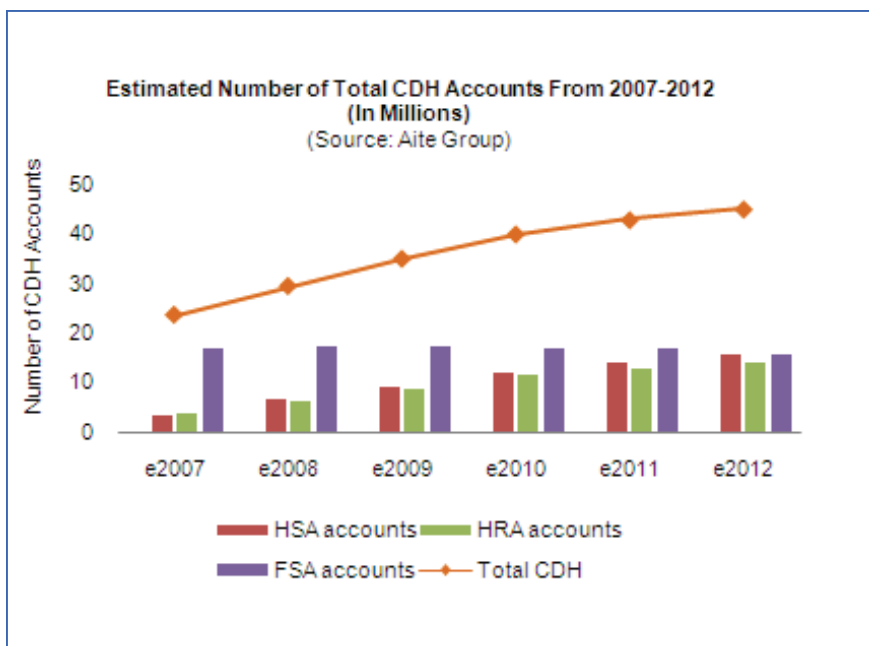
One reason for the rising enrollment: premiums have been increasing just 3 percent per year for account-linked health insurance plans, compared with an average of 8 percent for traditional preferred-provider organization (PPO) and health maintenance organization (HMO) insurance plans, the researchers found.

Although the CDH market has faced uncertainty over legislative changes to the nation's health care system, "financial institutions and health plans continue to see a steady uptake in the adoption of these accounts," says Kunal Pandya, Senior Analyst with Aite Group and author of the report. "Even legislation discontinuing a particular CDH account type would fail to disrupt overall growth of the CDH market. In this instance, the transition from one CDH to another from (from an FSA to an HSA, for example), would merely improve the forecast for the winning account type," he adds.

More Employers Offering CDH Plans

Joint research by AON Consulting and the International Society of Certified Employee Benefit Specialists (ISCEBS) in 2009 indicated that 83 percent of U.S. employers offered HSA or HRA plans to their employees, and 17 percent offered a CDH plan as the sole option.

Among the biggest U.S. firms, the 14th Annual National Business Group on Health-Watson Wyatt (NBGH/WW) Survey of 489 Fortune 1000 companies, conducted in January 2009 and released two months later, found that 51 percent had CDH plans as a choice or as the only offering, up 9 percentage points from the previous year. The NBGH/WW survey suggests that nearly 60 percent of large U.S. employers will offer a CDH plan in 2010.



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Wellness Programs Get a Boost in Health Reform Law

Employers can offer increased incentives to employees for participation in a wellness program or for meeting certain health status targets beginning in 2014 under the Patient Protection and Affordable Care Act signed into law by President Obama on March 23, 2010. The law will permit rewards or penalties such as premium discounts of up to 30 percent of the cost of coverage.

Existing wellness regulations developed under the (HIPAA) permit wellness incentives of up to 20 percent of the total premium, provided that the program meets certain conditions. The health reform law increases the amount of the potential reward/penalty to 30 percent of the premium, with some leeway for federal agencies to increase that amount after they conduct a study on wellness programs. In addition, the bill would create a \$200 billion, five-year program to provide grants to certain small employers (fewer than 100 employees) for comprehensive workplace wellness programs. The grants would go to small employers that did not have a wellness program when the law was enacted.

"The market has already marched ahead of where Congress is on this," says Jay Savan, a senior consultant at Towers Watson. "There are a variety of innovative strategies being used by employers to encourage participation in wellness programs. It's a nice bump, but I don't think it's going to cause a rush of employers to move forward when previously they weren't going to."

"From a policy perspective, I don't know too many employers that are hitting the existing 20 percent level," says Kathy Bakich, senior vice president and national health compliance practice leader at The Segal Co., an HR consultancy. In her view, employers are more concerned about the effectiveness of their programs than the amount of the incentive discount.

But some employers have been lobbying for a higher rewards ceiling. In a June 2009 op-ed column in the *Wall Street Journal*, Safeway CEO Steven Burd said of his company's Healthy Measures wellness program:

"When we surveyed, 78% of our employees rated our plan good, very good, or excellent. In addition, 76% asked for more financial incentives to reward healthy behaviors. We have heard from dozens of employees who

lost weight, lowered their blood pressure and cholesterol levels, and are enjoying better health because of this program. Many discovered for the first time that they have high blood pressure, and others have been told by their doctor that they have added years to their life.

"Today, we are constrained by current laws from increasing these incentives. We reward plan members \$312 per year for not using tobacco, yet the annual cost of insuring a tobacco user is \$1,400. Reform legislation needs to raise the federal legal limits so that incentives can better match the true incremental benefit of not engaging in these unhealthy behaviors. If these limits are appropriately increased, I am confident Safeway's per capita health care costs will decline for at least another five years as our work force becomes healthier."

"The effectiveness of financial incentives is closely tied to the amount you provide," concurs Thom Mangan, CEO of Corporate Synergies, a Mount Laurel, NJ based health insurance consultancy that serves middle-market companies. In his experience, the perception of avoiding a penalty, such as not getting a discount, has a greater impact on changing behavior than does the opportunity to receive a reward. "Absent a truly massive carrot to motivate employees, then unless you have a 'stick' and provide some sort of penalty for not participating, you won't see anybody but the healthy take advantage of a wellness-based plan," he comments.

One way to put this to employees, Mangan offers, is to say: "If you participate, then your premiums are 10 percent less. If you don't participate, then your premiums are not discounted. As the renewal comes about and premiums are 8% to 12% higher, then those who are participating don't get hit with that, but those who are not participating are subject to the increase".

It's important to note, Mangan adds, that the incentive discount is 10 percent of the total premium cost, "not just 10 percent of whatever the employee's share of the premium might be. If you've got a family plan that's running you \$16,000 a year, missing out on a 10 percent discount is a pretty big stick. And employers can do this now."

Still Mangan wishes that employers had been allowed to provide even higher discounts. "If Congress really wanted

to bend the cost curve, it would have permitted much bigger incentives to draw people into healthy lifestyles," akin to the way that life insurers can charge smokers much higher premiums based on actuarial tables showing their greater likelihood of early death. "You can't do that with health insurance, and it's a shame because you've got to have that stick to drive people to wellness," Mangan says. "We all know we should practice healthier habits, but knowledge is not action."

However, when offering discounts for health behaviors, employers must make sure that they meet all HIPAA requirements, including offering an alternative to employees who can't meet the standard because of physical reasons. "Employers have to be careful that they are not just putting in the penalty, but they're offering a program that has a sound medical underpinning, and that they provide a real alternative for people who can't meet the standard because of physical limitations—and in those cases—for example, reward participation rather than goal achievement.

Running Afoul of the Excise Tax?

The health reform law is likely to give a short-term boost to the use of financial incentives in wellness plans, but employers should beware of triggering the 40% excise tax on high value or "Cadillac" plans that takes effect in 2018, for plans valued annually at more than \$10,200 for individuals and \$27,500 for families. Employers spending on wellness programs would add to their health plan's value, pushing them closer to that trigger. "Those who are not early adopters in using wellness initiatives to curb the cost of health insurance will end up being hurt if they try to launch a program in 2018 or later, because "the cost curve does not come down for 2 to 3 years once you've implemented a wellness program" stated Mangan. "We're strongly encouraging companies to step up their wellness efforts today to better control their future health spending, making it more likely they'll avoid the tax," Mangan advises.

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