

## **Health Care Reform Bill Signed Into Law Imposes Significant Financial Responsibility on Employers**

**By J. Alfred Southerland**

President Barack Obama recently signed into law the Patient Protection and Affordable Care Act (PPACA), the first of two interrelated bills that together will embody Congress's comprehensive health care reform legislation. The second piece of the legislative package is H.R. 4872, entitled the "Health Care and Education Affordability Reconciliation Act of 2010." This bill was signed into law on March 30, 2010.

Employers will be affected most directly by the health coverage provisions of Titles I and IX of the PPACA. Those provisions will transform the current model for employer-sponsored health coverage, under which an employer generally can choose whether, to what extent, and on what terms it will provide health coverage for some or all of its employees. In place of the current model, the PPACA will place an obligation on most individuals to obtain coverage for themselves and their dependents beginning in 2014. That same year, the PPACA also will begin to impose a financial responsibility on employers to subsidize the coverage selected by most employees.

### ***Short Term Effects***

Before turning to the substantial changes that will begin in 2014, it is worth noting a few of the "early deliverables" under the PPACA, beginning with the one that arguably had the greatest popular appeal. Within 90 days of enactment, the federal government will establish a temporary high risk pool that will insure individuals with pre-existing conditions. That pool will continue through 2014, when a ban on pre-existing condition exclusions goes into effect.

Effective for plan years beginning on or after September 22, 2010, lifetime limits on the dollar value of coverage are prohibited, coverage of unmarried dependent children under a plan maintained by a parent's employer is extended to age 26, and "first dollar coverage" (*i.e.*, no cost sharing) for certain evidence-based preventative care is required.

### ***The Individual Mandate***

Beginning in 2014, the PPACA will add a new provision to the Internal Revenue Code that imposes a penalty tax on an "applicable individual" who does not maintain "minimum essential coverage" for himself or herself and for any dependent who is an "applicable individual" during any month after 2013. The amount of the penalty is determined by a complex formula that takes into account factors such as household income and the national average premium for coverage under "bronze plans" offered by state or regional insurance Exchanges. The maximum penalty tax will be phased in over three years, reaching \$2,250 in 2016, and will be indexed thereafter.

Certain “applicable individuals” are exempt from the penalty tax, including (a) individuals whose household income falls below the federal poverty line; and (b) individuals whose share of premiums or employee contributions would exceed eight percent of their household income. These exemptions apply only after taking into account a means-based tax credit that will be available under the PPACA.

### ***The Employer Mandate***

The PPACA also adds a provision to the Internal Revenue Code that imposes a monthly assessment on certain employers that do not offer an employer-sponsored health plan that meets federally-determined standards for health coverage to their full-time employees, or that offer such coverage but whose plans have a waiting period of 60 or more days. The penalty for an extended waiting period is \$600 per full-time employee to whom the waiting period applies.

The penalty for not offering all full-time employees an opportunity to enroll in “minimum essential coverage” under an eligible employer-sponsored plan can be far greater: if even one full-time employee obtains such coverage elsewhere and is eligible for a tax credit or cost-sharing reduction, the monthly assessment on the employer is a multiple of all the employer’s full-time employees during the month.

Finally, an assessment also applies if an employer subject to the mandate fails to subsidize a sufficient portion of the employee’s cost for “minimum essential coverage” to prevent the employee from qualifying for a tax credit or cost-sharing reduction. This “under-subsidization” tax also is based on the employer’s total number of full-time employees, even if only one full-time employee qualified for the tax credit or cost-sharing.

The mandate applies only to an “applicable large employer,” which generally means an organization that employed on average at least 50 full-time employees on business days during the preceding calendar year. However, beginning in 2013, employers with as few as five full-time employees can be subject to the employer mandate if substantially all their revenue is derived from the construction industry and their annual gross receipts exceed \$250,000.

A series of complex rules governs the calculation of an employer’s average number of full-time employees. Also, the term “full-time employee” is defined as a worker employed on average for at least 30 “hours of service” per week, using a new definition of “hour of service” to be promulgated by the Secretaries of the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Labor – a definition that may not precisely match the definition of an “hour of service” for qualified retirement plan purposes.

### ***Health Care Exchanges***

The most fundamental changes caused by the PPACA will result from the creation of 50 or more geographically-based marketplaces, referred to as “Exchanges,” where standardized insurance packages can be purchased on what are expected to be favorable terms. The territory of many Exchanges will coincide with state or municipal boundaries, although multiple states can operate a single Exchange. In addition, the PPACA provides for multi-state health plans to

be offered by these Exchanges. The multi-state plans will be established by the Director of the Office of Personnel Management by contracts with for-profit and not-for-profit insurers.

The PPACA creates incentives for employers and individual consumers to prefer Exchange-provided coverage to other coverage alternatives. The PPACA also bars an insurer from offering coverage on an Exchange unless the insurer's policies adhere to standards established under the PPACA or in regulations that will be adopted by HHS under the PPACA. In addition, insurers will be required to make periodic disclosures relating to rating, claims processing, and other matters. Each Exchange will have additional protections from competition that could allow it to become virtually the only viable marketplace for health care coverage within its territory.

### ***Excise Tax on "Cadillac" Health Plans***

Beginning in 2013, coverage under group health plans that departs upwards from the basic federal model will become subject to a non-deductible excise tax. The 40 percent excise tax will apply to the amount by which the cost of the coverage provided to an employee exceeds predetermined limits. In the first year the excise tax applies, the annual limits are \$8,500 for self-only coverage and \$23,000 for any other coverage. (The limits will be subject to cost-of-living adjustments thereafter.) Any cost above those limits will be taxed at 40 percent, even if the employee pays 100 percent of the entire cost of the coverage.

The Cadillac health plan tax is expected to discourage employers from offering any group health plan that is not an "off the rack" Exchange-available insured plan.

### ***Break Time to Express Milk***

Section 4207 of the PPACA amends the Fair Labor Standards Act (the "FLSA"). Because Section 4207 does not specify an effective date, this amendment to the FLSA is immediately effective. As a result of the amendments made by the PPACA, the FLSA now requires "employers" to provide "reasonable" unpaid breaks for a nursing mother to express breast milk for her nursing child for one (1) year after the child's birth, each time the employee needs to express milk. The employer must provide an appropriate setting that is shielded from view and free from intrusion from co-workers and the public (other than a bathroom). The act provides that an employer with less than 50 employees is not subject to this rule, if the requirements would impose "an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."

Under the FLSA, "employee" is defined as any individual employed by an employer. The scope of Section 4207 covers non-exempt employees, as well as those subject to collective bargaining.

The Department of Labor has not yet defined how many breaks and how much break time is "reasonable." It is possible that the DOL will look to existing state statutes for guidance. Some states require that employers provide 30 minutes to express milk for every four-hour

period. Other states statutes have required 20 minute breaks at least once every three hours. Until the DOL issues guidance on this issue, it is not clear whether compliance with state laws will satisfy Section 4207. If the DOL interprets Section 4207 to require fewer breaks than existing state laws, CVS must comply with the state laws that are more protective.

The PPACA provides that the nursing mother must be provided a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, to express breast milk. It is unclear whether this space needs to be “reserved” for this purpose even when no employee needs it, or whether it only needs to be made available when a store/location has an employee on staff who is expressing breast milk. This issue may be further defined in the regulations.

The PPACA provides that breaks to express milk need not be “compensated,” creating the assumption that, contrary to the general FLSA rule on breaks of less than 20 minutes, the break time will not be considered “hours worked.” It is unclear how states will treat this provision under their minimum wage and rest/meal break laws when it comes to compensation, or categorization as “hours worked,” particularly if the mandatory federal break time is handled concurrently with state law break time.

Many state statutes give discretion to the employee to combine breaks to express milk with paid rest breaks or meal breaks. Most of the state statutes mandate that, when possible, such breaks run concurrently with any break time already scheduled. Some state statutes require an employer to permit an employee to use paid break time or meal time or both. At this time, it is not clear whether employers in states with existing laws can require employees to combine breaks under the federal statute with breaks already mandated or allowed by state law. Of course, employees will want to be able to stack their PPACA break on top of breaks already required or allowed under state law. This issue hopefully will be addressed in the regulations.

### ***H.R. 4872 and Its Impact***

H.R. 4872 will have several important effects on the employer-related provisions of the PPACA. It will extend the increase to age 26 for coverage of non-dependent children to all group health plans. Similarly, it eliminates an exception in the PPACA for “grandfathered plans” that exempts them from the prohibitions on lifetime limits, the prohibition on pre-existing condition exclusions, and other group market reforms.

H.R. 4872 also will postpone the excise tax on Cadillac group health plans until 2018, and raise the annual limits on which the tax will be based. In addition, it will allow for some relief in the case of an employer whose employee population deviates significantly from a national risk pool in a way that makes the employee group more costly to cover. It also reduces the penalty otherwise applicable to small employers that violate the employer mandate under the Act by permitting the penalty calculation to be based on the actual number of the employer’s full-time employees minus 30. By contrast, H.R. 4872 will increase one significant limitation on the amount of the penalty tax due from an “applicable individual” who does not satisfy the individual mandate to be insured.

## ***Conclusion***

Although almost all of the most far-reaching provisions of the PPACA will not become effective until after 2013, the process of planning for compliance must begin much earlier. Employers must immediately be prepared to provide breaks for new mothers. Moreover, the PPACA is clear that those state laws that provide greater protections for employees with respect to providing breaks for nursing mothers are not preempted and thus remain applicable. While Texas does not have a law requiring breaks, employers should review the state laws in jurisdictions where they have offices.

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