



Healthcare Reform

One Year Down, Eight More to Go

By Kirsten Vignec

Less than a year ago, the Pension Protection and Affordable Care Act and the Health Care and Education Affordability Reconciliation Act were signed into law. These two massive pieces of legislation are more commonly referred to as "health care reform." Since health care reform was signed into law, federal regulatory agencies have issued thousands of pages of regulations and other guidance in order to assist with the implementation of the new requirements.

And this is only the beginning. The requirements under health care reform become effective over a nine-year period. The first provisions of health care reform became effective in 2010, and the last requirements are currently slated to go into effect in 2018. Health care reform affects employee health benefit plans, employees, and employers (regardless of size). As a result, the already complicated world of an HR professional has become more difficult. Keeping up with the current requirements, the new guidance that will be published, and the complex effective dates for health care reform may seem like a full-time job.

As the first anniversary of health care reform approaches, it is important to ensure that changes that have already become effective have been properly implemented. The following checklist provides a brief summary and timeline of changes affecting employee health plans in 2010 and 2011:

Effective in 2010

- Early retiree reinsurance available. Applications should have been filed with the Department of Health and Human Services to determine eligibility.
- Availability of small business tax credit.
- Effective Plan Years beginning on or after September 23, 2010
- Restrictions on rescission of coverage.

- Dependent coverage for adult children under age 26.
- Reasonable annual limits and elimination of lifetime limits.
- Elimination of pre-existing condition restrictions for individuals under age 19.
- The following changes are not applicable to grandfathered plans:
 - Changes to the claims and appeals process.
 - First dollar coverage for preventive care.
 - Selection of primary care provider/pediatrician.
 - No preauthorization or referral requirement for OB/GYN services.
 - No preauthorization or increased cost sharing for out-of-network emergency services.
- Nondiscrimination requirements apply to fully insured plans. (IRS issued Notice 2011-1, which provides that the nondiscrimination provisions will not be enforced with respect to fully insured health plans until regulations are issued.)

Effective January 1, 2011

- Over-the-counter medications are no longer eligible for reimbursement without a prescription.
- Simple cafeteria plans are available for companies with fewer than 100 employees.
- Tax on distributions from health savings account for nonqualified expenses is increased from 10 percent to 20 percent.
- Adoption assistance limits increased and extended.
- Originally, Form W-2s issued for 2011 were required to disclose the cost of health benefits. However, this requirement has been delayed and will first apply to the Form W-2s issued for 2012. Although there has been some confusion, the reported amounts are not taxable to the employee.

As 2011 begins, it is important to ensure that the necessary steps have been taken to implement the foregoing requirements, including employee notices, plan amendments, and updates to benefit summaries. Procedures need to be implemented to ensure that the nondiscrimination testing requirements are met with respect to fully insured plans (and continue to be met for self-insured plans). It is imperative that HR professionals continue to communicate with insurance carriers and third-party administrators regarding any changes to a plan's grandfathered status (if applicable).

Health care reform also offers some opportunities that may assist employers in lowering health care related costs. The following addresses wellness programs and the availability of simple cafeteria plans that employers may want to consider implementing in an effort to lower benefit costs and administrative costs.

Wellness Programs

Many employers have introduced wellness programs to employees in the hope that promoting healthier lifestyles will ultimately lower health care costs. The Wellness Council of America has indicated that \$1 invested in a wellness program saves between \$1.50 and \$3 in health care costs.

Wellness programs can take many different forms, but they generally offer incentives to encourage employees to make healthier choices. Examples include discounted premiums for reduction of cholesterol levels, participation in nonsmoking programs, health club discounts, and health risk assessments.

Wellness programs that encourage participation in a program but do not reward employees for satisfying specific health standards are permitted, so long as the programs are available to all similarly situated individuals. Examples

include reimbursement for attending a smoking cessation program (without regard to the outcome), incentives to participate in health testing (regardless of outcome), and reimbursement for a health club membership.

Wellness programs can also provide rewards or incentives to employees based on the ability of individuals to meet certain health standards. However, these types of programs are only permitted if they meet the following conditions:

1. The incentive must not exceed 20 percent of the cost of coverage under the plan. This amount will increase to 30 percent in 2014 (and may be further increased by federal regulators in the future). Generally, the maximum incentive is based on employee-only coverage, unless dependents are also enrolled in the wellness program, in which case the maximum incentive may not exceed 20 percent of the cost of coverage for the employee and dependents.
2. The program must be reasonably designed to promote health or prevent disease. This is satisfied if the program has a reasonable chance of improving the health or preventing disease for participating individuals and is not overly burdensome, is not a subterfuge for discriminating based on a health factor, and is not highly suspect in the method chosen to promote health or prevent disease.
3. The program must give individuals eligible for the program the opportunity to qualify for the incentive under the program at least once per year. The program can be offered more frequently.
4. The incentive under the program must be available to all similarly situated individuals. A reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the incentive must be made available for those who have a health factor that makes it unreasonably difficult or medically inadvisable to satisfy or attempt to satisfy the otherwise applicable standard. The decision to grant a waiver or permit the use of an alternative standard must be made on the same basis for all employees.
5. Plan materials describing the terms of any program that requires that a health standard be met must include a statement regarding the availability of the reasonable alternative standard for obtaining the reward. The final regulations include sample language plans can use to meet this disclosure requirement.

In addition to the foregoing, in developing a wellness program, employers will also have to consider the restrictions under the Genetic Information Nondiscrimination Act (GINA) and the Americans with Disabilities Act (the ADA). GINA prohibits the collection of genetic information, including family medical history. As a result, employers who have wellness programs that offer incentives for the completion of a health risk assessment should ensure that the risk assessment does not request genetic information.

The ADA limits the ability of an employer to inquire about employees' medical conditions unless the inquiries are for medical histories that are part of an employee health program (including a wellness program) and participation is voluntary. In addition, the information obtained must be kept confidential (in accordance with the rules under the ADA) and cannot be used to discriminate against the employee.

The EEOC has not released formal rules addressing the level of incentive that may be offered by a wellness program before the program is no longer viewed as voluntary. However, in an informal letter, an EEOC representative has indicated that a program requiring the completion of a health

assessment in order to obtain benefits under the health plan would violate the ADA. Given the increased focus on wellness programs as an integral part of health care, additional guidance would be helpful.

The health care reform rules allow HHS to establish a five-year program to provide grants to small employers (with no more than 100 employees who work at least 25 hours a week) that wish to establish comprehensive wellness programs. The grants are available to small employers that did not have a wellness program prior to March 23, 2010. The provision authorizes the appropriation of \$200 million for fiscal years 2011 through 2015. Eligible employees who are interested in receiving a grant must submit an application to the HHS. The application must describe the proposed wellness program. HHS has not released specific details of the application process or the amounts that will be available to employers. The legislation provides that the wellness programs should include:

1. Health awareness initiatives, including health education, preventive screenings and health risk assessments;
2. Efforts to maximize employee engagement, including mechanisms to encourage employee participation;
3. Initiatives to change unhealthy behaviors and lifestyle choices, including counseling, seminars, online programs and self-help materials; and
4. Supportive environment efforts, including workplace policies to encourage healthy lifestyles, healthy eating, increased physical activity, and improved mental health.

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an employer meets the 100-or-fewer employee requirement and establishes a simple cafeteria plan, it may continue to maintain the plan until the employer employs an average of 200 or more employees during any subsequent year.

Eligible employees are those who are credited with at least 1,000 hours of service for the preceding year. However, the employer may choose to exclude certain categories of employees (e.g. employees who have not attained age 21 or have less than one year of service, collectively bargained employees, or nonresident aliens). Once an employee is eligible, he or she must be permitted to elect any benefit available under the plan, subject to any terms and conditions that are applicable to all participants.

An employer adopting a simple cafeteria plan must make a contribution on behalf of every "qualified employee," whether or not the qualified employee makes a salary deferral to the plan. A "qualified employee" includes any employee who is eligible to participate in the plan and who is not a highly compensated employee or a key employee (as those terms are defined under federal law). The contribution may be equal to a uniform non-elective employer contribution equal to at least two percent of each qualified employee's compensation. This two percent requirement may appear reasonable to some employers who have been paying a substantial portion of their employees' health benefit costs and who are willing to restructure the amounts they pay toward employee benefits.

An alternative contribution requirement is also available. The contribution may be an amount not less than the lesser of (1) Six percent of the qualified employee's compensation

Simple Cafeteria Plans

Health care reform establishes new rules for simple cafeteria plans as an option for smaller employers. If an eligible small employer adopts a simple cafeteria plan and satisfies certain eligibility and contribution requirements, the employer can take advantage of a safe harbor from certain nondiscrimination rules. An employer adopting a simple cafeteria plan may be able to reduce costs and the administrative burdens related to the performance of certain annual nondiscrimination tests. However, because of the contribution requirements, the cost associated with the simple cafeteria plans may outweigh any savings.

The simple cafeteria plan is not an option for all employers but should be considered by employers who have difficulties passing the various nondiscrimination tests. If an employer adopts a simple cafeteria plan, the following nondiscrimination requirements are deemed to have been met: (1) the cafeteria plan nondiscrimination tests (eligibility, benefits, and key employee concentration test), and (2) the nondiscrimination tests that apply to group term life insurance, self-funded health plans (including flexible spending accounts), and dependent care flexible spending accounts. Unfortunately, it is not clear whether the new nondiscrimination rules that apply to fully insured health plans will fall under the safe harbor, as these new rules are not yet listed among the nondiscrimination requirements that may be avoided. Guidance on this issue is needed.

Under the simple cafeteria plan rules, an eligible employer is any employer that, during either of the two preceding years, employed an average of 100 or fewer employees. If

for the plan year; or (2) a matching contribution equal to twice the amount of the salary reduction contributions of each qualified employee. If an employer decides to provide the matching contribution, it cannot provide a greater matching contribution to highly compensated employees (or key employees) than to other employees. The employer must use the same method to calculate the minimum contribution for all non-highly compensated employees.

An employer can make contributions to provide additional "qualified benefits" under the plan, as long as the above requirements are met.

In determining whether the simple cafeteria plan is an available option, employers will need to consider the costs of the required contributions, its ability to pass the required nondiscrimination tests, and the administrative burdens related to the performance of the nondiscrimination tests.

One of the most common questions we are asked is whether health care reform will be repealed. Unfortunately, a crystal ball is not available, and all employers can do is comply with the new requirements as they become effective and wait to see what happens.

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