LEGAL UPDATES

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The Waiting Is the Hardest Part: Plan Sponsors Should Not Defer Until Court Rules on Healthcare Reform

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The U.S. Supreme Court recently heard oral arguments challenging the constitutionality of the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (together, the ACA). Numerous commentators declared the ACA dead after oral arguments. Oral arguments, however, are a poor barometer of the final outcome of an appeal, so plan sponsors may be left wondering what to do while they wait for the court's official opinion. In the meantime, compliance deadlines are approaching, some of which may require action before the court's decisions.

The two most significant issues for the Supreme Court to decide are: (1) whether Congress can require individuals to purchase health insurance (i.e., the "individual mandate"), and (2) if not, which parts of the ACA, if any, should survive without the individual mandate (i.e., "severability").

Based on the questions during oral arguments, it appears that Justice Anthony Kennedy will cast the deciding vote on the individual mandate. Justice Kennedy's questions during oral arguments indicate that he may side with the court's conservative block and strike down the individual mandate. Oral arguments also suggested that a majority of the court may throw out all of the ACA if the individual mandate is found unconstitutional. However, Justice Kennedy and Chief Justice John Roberts both asked questions and made statements that suggested they may be willing to uphold the ACA.

The court's decision is not expected before June, so while the finer points of the Commerce Clause are debated in the marble halls of the Supreme Court Building, sponsors of healthcare plans subject to the ACA may be left wondering what to do.

We believe sponsors should refrain from trying to interpret the tea leaves after oral arguments, as oral arguments are not necessarily good predictors of results. Instead, plan sponsors should continue working toward compliance while waiting for the court's decision. In addition to making plan design choices in anticipation of open enrollment, including whether to maintain grandfathered status, and implementation of currently applicable reforms such as external review for non-grandfathered plans, the following issues may require attention prior to the opinion's release:

Summary of Benefits and Coverage (SBC). The SBC is a four, double-sided page description of the health plan's key provisions (e.g., eligibility, cost sharing, covered services and exclusions). Final regulations provide that the SBC must be delivered to enrollees beginning with the first open enrollment on or after September 23, 2012. A significant amount of information must be disclosed on the SBC, much of which plan sponsors will need to obtain from external sources (e.g., a pharmacy benefit manager).

W-2 Reporting. The ACA requires plan sponsors to report the value of employer-sponsored coverage on an employee's Form W-2 beginning with the W-2 for wages paid in 2012 (i.e., the W-2 issued by January 31, 2013). Internal Revenue Service guidance details how to calculate the value of employer-sponsored coverage and describes which benefits to include (e.g., medical insurance premiums, certain health flexible spending accounts, and certain wellness programs). If they have not already, plan sponsors should evaluate whether they can await the court's decision before preparing their payroll systems to meet the reporting requirement.

Maximum Health FSA Elections. As detailed here, the ACA requires that health flexible spending account (FSA) elections cannot exceed $2,500 beginning in 2013. If your cafeteria plan is administered on a non-calendar year, then an amendment to implement this dollar limitation is necessary prior to the beginning of the plan year that ends in 2013.

Minimum Loss Ratio (MLR) Rebates. The ACA requires insurers to issue rebates to enrollees if the insurer's MLR exceeds certain standards—this requirement does not apply to self-insured plans. The MLR is the percentage of insurance premium dollars spent on reimbursement for clinical services and activities to improve health care quality. Final regulations require rebates to be issued no later than August 1, 2012. Further Department of Labor (DOL) guidance provides that MLR rebates may constitute "plan assets" depending on the terms of the plan and insurance contracts. If the documents governing the plan are silent or ambiguous, the rebate will be considered plan assets and allocating it

will be a fiduciary decision. Generally, if the rebate is plan assets, it must be distributed to participants (either as a reduction of future premiums or as a taxable cash payment) to the extent the rebate relates to participant contributions. If the rebate is not a plan asset, the sponsor has flexibility to keep the rebate. Plan sponsors should work with their insurers, consultants and legal advisors to determine whether plan documents and contracts should be amended before rebates are received. For example, it may be prudent to amend the plan document or wrap plan to clarify how the rebates will be allocated.

The Obama administration has said that the agencies responsible for overseeing implementation of the ACA will not delay as a result of the legal challenge. Further, even if the individual mandate is struck down, employer-specific reforms might survive. If the court rejects the entire ACA, the Obama administration might attempt to issue regulations under the pre-ACA legal framework to implement some reforms without passing new legislation. For example, the DOL might attempt to re-issue regulations to enforce the SBC requirements as part of its pre-ACA power to regulate participant disclosures. However, these types of revisions take time to adopt and are not likely to follow the existing compliance schedule.

What This Means to You

If the ACA is overturned, the impact will be significant, but until the final opinion is released, plan sponsors should continue to work toward compliance with the ACA if delay might result in litigation, penalties or other enforcement action by participants or government agencies.

Contact Info

Please contact a member of the Employee Benefits & Executive Compensation practice group if you have questions or if we can assist in any way.

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