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PPACA's Impact: The Election, 2013 and Beyond

Law360, New York (July 20, 2012, 12:59 PM ET) -- The U.S. Supreme Court has issued its long-awaited decision addressing the constitutional challenges to the landmark health reform legislation. In a 5-4 majority opinion, the Supreme Court held that the key provisions of the Patient Protection and Affordable Care Act (PPACA) are constitutional — including the controversial "individual mandate," which requires most Americans to buy health insurance or pay a penalty.

Accordingly, the PPACA remains intact and employers must continue to implement the law.

Many observers believe that the Supreme Court's decision is just the first act in a drama that will play out in the November elections and beyond, as the law's opponents seek to repeal the PPACA and its supporters rally to its defense.

The Supreme Court's Opinion

The Supreme Court ruled on two key issues: the individual mandate and the expansion of the Medicaid program.

The court held that the individual mandate imposes a "tax" on individuals who fail to purchase health insurance coverage, and that the broad taxing powers in the U.S. Constitution give Congress authority to impose this tax.

The court also held that the federal government can deny increased Medicaid funds to states that refuse to extend Medicaid coverage to a larger segment of their low-income population.

However, the court ruled that the federal government cannot withdraw funding for a state's current Medicaid program if the state refuses to participate in the expansion. As a result, states now have the option to continue their Medicaid programs at current federal funding levels, without implementing PPACA's expansion of coverage.

Highlights

Employers must move quickly to implement the PPACA requirements that become effective in 2012 and 2013.

Effective in 2012

- Uniform benefit summaries.
- Reporting the cost of coverage on Form W-2.
- Patient-centered outcomes fee.
- Additional coverage of preventive care.

Effective in 2013

- $2,500 limit for health FSAs.
- Increased Federal Insurance Contributions Act (FICA) withholding.
- Notice of state exchanges.
- Loss of deduction for retiree drug subsidy.

Political Reactions

- Both parties will try to use the Supreme Court decision to their advantage in November.
- If Democrats retain control of the U.S. Senate, they might consider modest corrections and revisions to the PPACA.
- If Republicans control both houses, they will pursue a "repeal and replace" strategy.
- If President Barack Obama remains in the White House, Republicans will need a two-thirds majority to override a presidential veto.

Pressing PPACA Requirements

Employers have very little time remaining in which to comply with significant new health plan requirements that become effective this year or next. The PPACA requirements that take effect in 2012 and 2013 present significant challenges for employers.

2012 Requirements

Uniform Summaries of Benefits and Coverage

The PPACA requires employers that sponsor group health plans to provide uniform summaries of benefits and coverage (SBCs) to participants and beneficiaries during open enrollment periods that start on or after Sept. 23, 2012.

Employers must provide SBCs at various other times during a plan year to a limited number of individuals. An SBC is a four-page, double-sided description of each benefit package offered under an employer's group health plan.

The employer must create an SBC using a template provided by the U.S. Departments of Health and Human Services (HHS), Treasury and Labor (DOL) (the departments) in accordance with instructions and other guidance provided by the departments.

Reporting Cost of Coverage on Form W-2

The PPACA requires employers to report the aggregate cost of certain employer-sponsored health coverage on employees' Forms W-2. Treasury guidance requires large employers, i.e., employers that are required to file 250 or more forms W-2, to include the cost of health coverage on forms W-2 furnished to employees in January 2013 for calendar year 2012.

The reporting requirement also applies to retirees who receive a form W-2 for other reasons, for example, to report the imputed cost of retiree life insurance.

Patient-Centered Outcomes Fee

Sponsors of self-insured group health plans and issuers of health insurance policies must pay a fee to fund the Patient-Centered Outcomes Research Institute, which will research, evaluate, and compare the effectiveness of different health care strategies.

The fee will be collected for plan years ending on or after Oct. 1, 2012, and before Oct. 1, 2019. Employers and insurers must report the fee on form 720 and must pay it by July 31 following the applicable plan year, e.g., by July 31, 2013, for a plan year ending Dec. 31, 2012).

The fee is a specified dollar amount times the average number of covered lives; the Treasury Department has proposed several alternative methods for counting covered lives. The dollar amount for the first year is $1, for the second year is $2 and in later years will be determined based on increases in health care expenditures.

The fee applies to self-insured plans, including health reimbursement arrangements (HRAs) and retiree-only plans.

Women's Preventive Services

For plan years beginning on or after Aug. 1, 2012, employer group health plans that are not "grandfathered" generally must cover 100 percent of eight additional in-network preventive services for women, including preconception and prenatal care, lactation supplies and counseling, and contraceptives.

The contraceptive mandate includes certain exceptions for organizations that object to the coverage for religious reasons, but it continues to provoke controversy. Religious organizations have filed a number of lawsuits challenging the contraceptive mandate. The mandate is likely to be a polarizing issue in the November election.

Quality Care Reporting

The PPACA directed the HHS to create reporting requirements for programs under employer group health plans that improve health outcomes, prevent hospital readmissions, improve patient safety and promote health and wellness.

Although the PPACA required the HHS to create the new reporting rules by March 23, 2012, the department has not yet issued the rules. As a result, the reporting requirement is not yet effective.

2013 Requirements

$2,500 Limit on Salary Reduction Contributions to Health FSAs

For plan years beginning after 2012, the PPACA imposes a $2,500 cap on an employee's salary reduction contributions to a health flexible spending arrangement (health FSA). The limit generally does not apply to employer nonelective contributions to a health FSA or HRA.

Unused salary reduction contributions that are carried over for a grace period of not more than two-and-a-half months in a subsequent year do not apply against the $2,500 limit for the subsequent year.

Employers have until the end of 2014 to amend their plans to reflect the limit, but they must operate their plans in compliance with the limit beginning Jan. 1, 2013, for calendar year plans.

Employers will need to communicate the limit when employees make salary reduction elections in 2012 for 2013, and employers that carry forward employees' salary reduction elections from year to year will have to decide how to treat elections that exceed the new $2,500 cap.

Withholding for FICA Medicare Tax Rate Increase

For years beginning on or after Jan. 1, 2013, the PPACA increases employees' hospital insurance tax rate by 0.9 percent for FICA wages over $200,000 ($250,000 for married couples filing jointly). The hospital insurance tax, which finances the hospital insurance program under Part A of Medicare, currently applies to all FICA wages at a rate of 1.45 percent for both employers and employees.

The tax rate for employers is unchanged in 2013, but employers must ensure that their payroll systems are programmed to withhold the additional 0.9 percent from employees' FICA wages that exceed $200,000.

A comparable tax increase applies to self-employed individuals, such as outside directors and independent contractors. Although employers are not required to withhold the tax for these individuals, employers might wish to alert their outside directors to the tax increase.

Employers might also wish to consider whether to accelerate the vesting of certain awards so that they will be included in FICA wages in 2012, when the tax rate is lower.

Notice of State Insurance Exchanges

By March 1, 2013, employers must provide employees with written notices that include

1. Information regarding the existence of a health insurance exchange, including a description of the exchange's services and contact information for the exchange;
2. If the employer's plan pays less than 60 percent of the covered benefits, a statement that the employee may be eligible for premium tax credits if the employee purchases coverage through the exchange; and
3. A warning that the employee might lose the employer contribution toward the cost of health coverage, including the tax favorable treatment of the employer's contribution, if the employee purchases coverage through an exchange.

Notices must be in the form prescribed by the DOL in guidance, which has not yet been issued.

Loss of Deduction for Medicare Part D Subsidy

If an employer provides retirees with prescription drug coverage that is actuarially equivalent to the coverage available under Medicare Part D, the employer can qualify for a federal subsidy equal to 28 percent of the employer's eligible retiree drug costs.

Currently, the retiree drug subsidy is not included in taxable income, and an employer is not required to reduce its deduction for health care expenses by the amount of any subsidy it receives.

Beginning Jan. 1, 2013, the PPACA eliminates the tax deduction to the extent of the subsidy received. Many employers recognized the loss of future deductions in their financial statements in 2010, when the PPACA was signed into law.

It might be possible for employers to reverse or offset some of the adverse accounting consequences by taking action this year before the disallowance of the deduction becomes effective in 2013.

Political Reaction

President Obama and congressional Democrats are lauding the Supreme Court decision as a vindication of their efforts to pass the PPACA in order to provide health coverage to millions of Americans.

The Obama administration will continue vigorous efforts to implement the law by promulgating regulations and offering guidance on various provisions.

Republican presidential candidate Mitt Romney and congressional Republicans strongly disagree with the decision and plan to take it to the voters in the November election. Within an hour of the Supreme Court decision, the U.S. House of Representatives' Republican leadership scheduled a vote during the week of July 9, 2012, to repeal the PPACA. Within two hours of the decision, Romney reiterated his position in opposition to the law and raised an additional $1 million for his campaign.

The House has already held several votes during this Congress to repeal all or part of the PPACA. The Senate is not expected to consider repeal of the legislation as long as the Democrats retain control of the Senate. As a result, it is highly unlikely that Congress will make changes in the PPACA this year.

It is uncertain what impact the historic decision will have on the November elections and the makeup of the next Congress and administration.

If Congress is controlled by the Democrats after the election, Congress might consider modest, bipartisan legislation to reform the PPACA and fix technical problems.

If control of the Senate shifts dramatically to the Republicans, and the House remains in Republican control, there is certain to be PPACA-related legislative activity.

The Republican strategy probably will take the form of “repeal and replace.” If Republicans control both houses, they will pass legislation to repeal the PPACA and replace it with new health reform legislation. The Republicans have provided limited information so far on what shape the replacement legislation would take.

If President Obama remains in the White House, the Republicans will need a two-thirds majority in both houses in order to override a presidential veto.

Most legislation requires 60 votes — a filibuster-proof majority — to pass in the Senate, but the Senate can pass budget reconciliation legislation with a simple 51-vote majority. If Republicans gain control of the Senate by a narrow margin, they probably will pursue “repeal and replace” legislation under the reconciliation process. This is the same process the Democrats used to pass the PPACA in 2010, after they lost Sen. Ted Kennedy’s seat to Scott Brown, a Republican.

The reconciliation process limits the contents of the reconciliation package to measures that affect the federal budget. Republicans would be able to make major changes in the law, possibly including repeal of the individual mandate, since the penalty has been labeled a “tax” by the Supreme Court’s decision.

The budget reconciliation procedure would not allow Republicans to change certain key components of the PPACA, however, such as many of the insurance reforms and employer mandates.

Longer-Term Outlook

If the PPACA remains intact, most individuals will be required to obtain minimum essential coverage or pay a penalty starting in 2014. The PPACA contemplates that states will establish exchanges by 2014 to help their citizens purchase minimum essential coverage, but it is not clear that all states will be able to — or willing to — establish exchanges by the deadline.

If a state fails to establish an exchange, the HHS will establish an exchange for that state. Employers will watch the development of the exchanges closely to determine whether they offer an affordable alternative to employer-provided health coverage for early retirees and other groups.

Employers will face many new PPACA requirements that become effective in 2014 or later, including an excise tax for certain full-time employees who are not offered affordable coverage by the employer, a requirement to enroll employees in health coverage automatically, the elimination of exclusions for pre-existing conditions and a "Cadillac tax" on high-cost health plans.

The Supreme Court's decision concerning Medicaid expansion also raises concerns for employers. In states that choose not to participate in the expansion, there might be a coverage gap for individuals who are not eligible for Medicaid but whose income is too low to qualify for federal financial assistance if they purchase insurance through a state exchange.

The individual mandate does not apply to low-income individuals, increasing the prospect that they will remain uninsured. Uncompensated care provided to these individuals is likely to increase the cost of care for all payers, including employers that sponsor group health plans for their employees.

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