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To: Robert Hanna
Subject: FW: Health Care Reform



EMPLOYEE BENEFITS ALERT

MARCH 30, 2010

HOW HEALTH CARE REFORM AFFECTS EMPLOYERS

The Patient Protection and Affordable Care Act, which became law on March 23, 2010, and the Health Care and Education Reconciliation Act of 2010, which became law on March 30, 2010 (together, the Act), effect a comprehensive restructuring of the American health care system.

This is a brief summary of the key provisions that affect employers.

Employer health plan requirements

The following requirements are generally applicable to employer group health plans for plan years beginning on or after September 23, 2010 (subject in some cases to grandfather rules and other limitations):

- Extension of dependent coverage to adult children up to age 26 (initially, only if they are not eligible for other employer-sponsored coverage)
- No lifetime limits on the dollar value of coverage
- Restrictions on annual limits on coverage (as determined by regulations)
- No pre-existing condition exclusions for children under age 19
- Mandatory preventive care without cost-sharing and certain preventive care services as required by the government
- Mandatory implementation of an external appeals review process
- No pre-authorization or increased cost-sharing for emergency services

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- Extension of discrimination rules to fully-insured medical plans
- Implementation of automatic enrollment with notice subject to an opt-out for employees (for employers with more than 200 full-time employees)

Special grandfather rules may apply to provide a broad exemption from some of these requirements including the application of the nondiscrimination rules to fully-insured medical plans, the preventive care mandates, and the requirement to extend dependent coverage to adult children up to age 26 regardless of other available employer-sponsored coverage. Generally, the grandfather applies to coverage in effect on March 23, 2010, family members who are added to the coverage, and new hires; special rules apply to collectively bargained plans.

Generally effective for plan years beginning on or after January 1, 2014, the following requirements will apply:

- No waiting period longer than 90 days to enter the plan
- No annual limits on coverage
- No pre-existing condition exclusions
- Limits on out-of-pocket maximums apply
- Limit on wellness incentive rewards increased to 30 percent of the cost of coverage (regulations may increase up to 50 percent)
- Coverage of routine care during clinical trials for life-threatening diseases

Health flexible spending account (FSA) plan changes

The following new rules apply to health flexible spending account plans:

- *Effective January 1, 2011*, no pre-tax reimbursement for over-the-counter drugs
- *Effective January 1, 2013*, contributions capped at \$2,500, increased annually by the CPI

Elimination of deduction for Medicare Part D subsidy

Effective January 1, 2013, the Act eliminates the deduction for the portion of the cost of an employer's retiree prescription drug coverage that is offset by the government subsidy (provided to the employer because the employer's prescription drug coverage is at least as valuable as Medicare Part D coverage). Although this provision of the Act takes effect in 2013, the loss of the deduction may require disclosure on public company financial statements in 2010. Employers are encouraged to consult their accountants about this provision of the Act.

Temporary reinsurance program for retiree health plans

By June 21, 2010, the government will establish a temporary reinsurance program for employers providing group health coverage to retirees over age 55 who are not eligible for Medicare (and their eligible spouses, surviving spouses, and dependents). The program will reimburse eligible employers for 80 percent of a

participant's claims between \$15,000 and \$90,000. The reimbursement must be used to lower costs for the plan, for example, to reduce premium contributions, co-payments, deductibles, co-insurance, or other out-of-pocket costs for plan participants. The program ends January 1, 2014.

Automatic enrollment in new government-run long-term care program

Effective January 1, 2011, employers must automatically enroll employees in the government's new long-term care program (CLASS Act) and facilitate payroll deductions. Employees may opt out.

Reporting and disclosure

Effective January 1, 2011, employers are required to report on Form W-2 the cost of employer-sponsored plan coverage for the participant, other than contributions to any Archer MSA, HSA, or cafeteria plan.

Effective January 1, 2012, in a change unrelated to health care, Form 1099 reporting, which has only been required for service providers who are natural persons, will be expanded to include payments made to corporations (other than tax-exempt organizations). In addition, the kinds of payments to be reported are expanded to include "amounts in consideration for property" and "gross proceeds."

By March 23, 2012, sponsors of self-insured health plans must provide participants a uniform summary of benefits and coverage using standardized terms, or face a fine of \$1,000 per failure. The Secretary of Health and Human Services is required to develop uniform standards for this disclosure by March 23, 2011.

Participants must be provided with at least 60 days advance notice of any material modification to the terms of group health plans.

Comparative effectiveness fee

Generally effective October 1, 2012, the Act imposes a per participant fee on employer plan sponsors to fund government-sponsored comparative effectiveness research. The fee is \$1 per participant for the first plan year ending after September 30, 2012. For each subsequent plan year, until the plan year ending on or before September 30, 2019, the fee is \$2 per participant. For plan years beginning after September 30, 2014, the fee is indexed for inflation based on the per capita growth of national health expenditures.

Employer penalties for failing to provide coverage

Effective January 1, 2014, the Act penalizes employers with over 50 full-time employees if they either (1) fail to offer coverage under an employer-sponsored plan; or (2) provide coverage that is considered "unaffordable" for at least one full-time employee.

The penalty for failing to offer full-time employees coverage is \$2,000 per year, per full-time employee, excluding the first 30 full-time employees. The penalty for providing coverage that is

considered “unaffordable” is the lesser of (1) \$3,000 per year, per full-time employee for whom coverage is unaffordable; or (2) \$2,000 per year, per full-time employee, regardless of whether coverage is considered unaffordable. Coverage is considered “unaffordable” if the employee is required to contribute more than 9.5 percent of his or her household income (which entitles that employee to a premium tax credit).

Detailed employer reporting requirements will apply to enforce this penalty provision.

Free choice vouchers

Effective January 1, 2014, if an employer pays a portion of the cost of coverage under an employer-sponsored plan, then the employer must also provide “free choice vouchers” to certain low-income employees. The “free choice voucher” represents the monthly portion of the cost of coverage that the employer would have otherwise paid if the employee was covered under the employer’s plan. An employee can use the free choice voucher to purchase alternative coverage through health care exchanges to be established by the States under the Act (the Exchange). The employer must pay the amount of the voucher directly to the Exchange and, if the amount of the voucher exceeds the cost of the Exchange coverage, the excess is to be paid to the employee. The amount of the free choice voucher is deductible by the employer.

To be eligible to receive a free choice voucher, the employee must (1) be required to contribute between 8 percent and 9.5 percent of his or her household income to receive coverage under the employer-sponsored plan; (2) have a household income not more than 400 percent of the poverty line; and (3) choose not to participate in the employer-sponsored plan. By March 1, 2013, employers will be required to provide a notice to employees to educate them about the Exchange.

Compensation deduction limit for health insurers

The Act limits the deduction allowed for compensation paid to employees and consultants by health insurance providers to \$500,000. This deduction limit applies to (1) current compensation attributable to services performed during tax years beginning after December 31, 2012, and (2) deferred compensation attributable to services performed during tax years beginning after December 31, 2009, but payable during tax years beginning after December 31, 2012.

Cadillac plan tax

Effective January 1, 2018, the Act imposes a nondeductible 40 percent excise tax on the extent to which the total value of employer-sponsored coverage (excluding dental and vision benefits) for an employee, former employee, surviving spouse, or other primary insured individual exceeds a threshold amount. The threshold amount is \$10,200 for individual coverage and \$27,500 for family coverage, adjusted if the actual growth of US health care costs from 2010 to 2018 is faster than currently projected, and indexed for inflation beginning in 2019. Higher thresholds apply to retirees who have reached age 55 and are ineligible for Medicare and employees engaged in specified high-risk professions. The

excise tax is imposed on insurers of fully insured plans and sponsors of self-insured plans (including any Archer MSA, HSA or health FSA), although insurers are expected to pass on the cost to employers.

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The Act is complex and subject to clarification under forthcoming regulations, and this Alert is intended only as a brief overview. In the days ahead, we will be scheduling a webcast to further discuss the impact of the Act on employers. If you have any additional questions, please contact any of the **members of our Employee Benefits and Executive Compensation Group**.

For more information on DLA Piper's Health Care practice generally, please contact Senator **Tom Daschle, Tom Boyd, Kimberly K. Egan** and **James P. Rathvon**.

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