HEALTH LAW

ObamaCare Update *or* Fear and Loathing: The Affordable Care Act

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In the conclusion of my October 2012 column on ObamaCare I wrote that no matter the outcome (of the presidential election) our future will not be boring. Fourteen months later, it has not been boring and we are just around the corner from imposing the individual mandate (aka tax penalty) on those who don't have minimal insurance coverage. However, before we cross the starting line let's review a bit of history and law.

In 2010, President Obama managed to convince both houses of Congress and a majority of the public that the Patient Protection and Affordable Care Act (PPACA) was in the best interest of our country. That remains highly controversial and was a pivotal part of the 2012 Presidential platform.

On June 28, 2012, Chief Justice Roberts, writing for the majority, published the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*. With a few exceptions, the decision upheld the bulk of the PPACA[1] and silenced any further attempts at blocking the law on constitutional grounds.

Recall that a linchpin of PPACA is "shared responsibility," which loosely translates into tax penalties for certain employers who fail to cover their employees with health insurance or fails to at least offer an accessible, affordable option for health insurance. In addition, starting this month, a tax penalty will be levied against individuals who fail to obtain health insurance.

In July 2013, the Obama Administration delayed the employer's responsibility for PPACA until 2015 but the Individual Mandate that affects employees and taxpayers started on January 1. Under PPACA, employees can opt out of employer-sponsored plans and go to the exchanges to purchase health insurance. Employers that do not offer insurance can go directly to the exchange. Employees who reside in states that have opted out of a state-sponsored "Health Insurance Marketplace" can go directly to the federal exchange at www.healthcare.gov for coverage. Under Section 18B of the Fair Labor Standards Act "FLSA," current employees had to be notified on or before about October 1, 2013 about open enrollment.

Open enrollment on the exchanges began on October 1, 2013 and by all accounts and after at least $600 million[2] spent, Healthcare.gov is not working; or, as Obama said, "Obviously my most recent concern has been that my website's not working… and we're evaluating why it is exactly that I didn't know soon enough that [it] wasn't going to work the way it needed to. But my priority now has been to just make sure that it works."

The Individual Mandate

By January 1, 2014, every person, save for some exceptions, had to demonstrate minimal essential health care coverage or meet one of the exceptions. If an individual had health care coverage at his or her place of work or through Medicare, Medicaid, Tricare or the VA, no penalty applied.

Other exemptions to the Individual Mandate:

1. Religious conscience: Members of sects who are opposed to accepting insurance benefits
2. Members of a health care-sharing ministry
3. Members of an Indian Tribe
4. Income is below the minimum threshold for filing a tax return
5. Coverage gap of less than 3 months
6. Filed for and approved as a hardship
7. Cost of minimum amount of coverage exceeds 8% of household income
8. Individual in prison
9. Individual not lawfully present in the United States

If an individual had no coverage by January 1, 2014, he or she will owe the U.S. Government a tax. The amount of the tax is the greater of the flat tax or a calculation based upon income and the cost of the "Bronze Plan." In 2014, the most that a family can be taxed for failure to have insurance is $285. By

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2016, that amount increases to $2085. The penalty, however, increases with income. So, if an individual makes more in salary than the threshold filing amount, the amount in excess of that threshold amount is used to calculate the penalty.

The Available Plans in the Marketplace aka 'The Exchange'

The Marketplace is an online store where people who don't have health insurance through an employer can enroll in a health plan. In addition, businesses with fewer than 100 workers can also purchase health insurance for their employees. Health insurance exchange plans will vary somewhat by state. However, most of the exchanges have 4 levels of plans, which vary based upon the out-of-pocket cost and the plan coverage.

- Bronze Plan: Member pays for 40% of health care costs.
- Silver Plan: Member pays for 30% of health care costs.
- Gold Plan: Member pays for 20% of health care costs.
- Platinum Plan: Member pays for 10% of health care costs.

The Employer Mandate

In July 2013, the Obama administration pushed back the start date of the Employer Mandate to January 1, 2015. Basically, the employer mandate compels any large employer (more than 50 full-time employees) to offer minimum essential coverage to their employees. Full time equates to more than 30 hours per week. To determine whether an employer has more than 50 employees who work more than 30 hours, a calculation is done that includes both full-time and part-time employees. Let's take, for example, an employer with 40 employees who work 30 hours per week and 15 part-time employees who work 25 hours per week. Based upon the calculation, the 15 part-time employees would be counted as 12.5 full-time employees, so the employer crosses the threshold and is subject to the employer mandate. If the employer leases the employees from a staffing agency, these employees will not be the employees of the recipient but of the staffing agency.

If one or more employees of a large employer (greater than 50 FTEs) claim a premium tax credit, that employer will be subject to penalties. Employees who are not offered an affordable plan that provides minimum value or employees who are not offered any employer-sponsored plan will be able to obtain insurance through the exchange. For the plan to be affordable, an employee has to pay less than 9.5% of his or her household income (for self-coverage) and the plan must pay at least 60% of covered health care expenses. Interestingly, the plan needs only to be available to full-time employees not part-time employees if the part-time employees were used in the calculation to determine if the employer met the "large employer" classification.

If a large employer does not offer an affordable plan that offers minimum value, the company will be subject to a penalty. The penalty will be calculated based on the number of full-time employees minus 30 multiplied by 1/12th of $2,000 for any month in which coverage is not provided. If an employer does not offer any plan at all, the calculation changes from a multiplier of $2,000 to $3,000.

PPACA in Effect Today

- Group health plans that were in effect on March 23, 2010 are grandfathered and do not have to comply with all of the PPACA rules unless significant changes are made to the benefit designs.
- As of September 2011, health insurers had to justify any base rate increase greater than 10%.
- Starting in 2010, small businesses with 10 or fewer employees receive a 35% tax credit if the average annual wage is less than $25,000. This credit gradually decreases until it is phased out completely for companies with more than 25 full-time employees and an average income of $50,000 or more.
- In June 2010, the administration released 5 insurance enrollee protections under PPACA.
- Insurance companies must spend at least 80% of premium income on health care claim and quality improvement. The other 20% can be used for administration, marketing and profit.
- PPACA created a temporary pool for patients with pre-existing conditions who had been uninsured for at least 6 months. That coverage expired this month, when broader coverage provisions were effective.
- PPACA requires employers with more than 250 employees to include health care coverage costs on W-2 forms.
- For those filing individually, a Medicare tax increase of 0.9% has been imposed on wages and self-employment income greater than $200,000. The second component is an additional 3.8% Medicare tax applied to net investment income when adjusted gross income is in excess of $200,000 for an individual and $250,000 for those filing jointly. Net investment income includes investment income and interest, dividends, royalties, rent, and income from passive activities.

Conclusions

The rollout of PPACA has been challenging and a "sea change" in the way insurance is offered and who must be covered. At present, large employers have until 2015 to comply, that is, to provide a plan with minimum value and affordable rates. Most employers will do a cost-benefit analysis prior to paying anyone for health insurance. As of January 1, individuals had to obtain health insurance or face the penalty. As an employer, work with your benefits advisor to ensure you are in compliance with the notification provisions and with the employer mandate. ■

1. "The Effect of PPACA on Urgent Care" Journal Of Urgent Care Medicine, Vol. 6, Issue 12, October 2012; Braveheart Publishing. Mahwah, NJ
2. IT Dashboard https://www.itdashboard.gov/investment?buscid=961 accessed on December 1, 2013.