



April 20, 2010

LEGISLATIVE BRIEFING

by Jennifer Lunski, Esq., Vice President, Compliance Officer

At Woodruff-Sawyer, we offer regular updates on legislative changes that impact employee benefit plans. Employers should review the update to ensure their plans and policies are revised and in compliance with the new legislation and regulations. This update includes articles on the following topics:

1. Summary of Health Care Reform: The Impact of The Patient Protection and Affordable Care Act
2. COBRA subsidy eligibility period extended through May 31, 2010
3. San Francisco Health Care Security Ordinance expenditures released and Annual Reporting Forms are due April 30, 2010
4. Federal Trade Commission Red Flag Rule

SUMMARY OF HEALTH CARE REFORM: THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

Employers that sponsor health benefit plans for their employees face significant new challenges under the sweeping changes made by the "Patient Protection and Affordable Care Act." The Act was signed on March 23, and amended by the "Health Care and Education Reconciliation Act" that the President signed on March 30. Following are some of the provisions and the impact they are likely to have on employer-sponsored plans. As additional government guidance is issued we will keep you informed of clarifications related to the provisions and monitor any provisions that change.

2010 Provisions That Require Immediate Attention

Reinsurance For Early Retirees: A temporary reinsurance program will be created for employers providing health insurance coverage to retirees over age 55 who are not entitled to Medicare. The government will reimburse employers 80% of retiree claims between \$15,000 and \$90,000. The program will expire in 2014 or earlier if the \$5 billion dollars

set aside for it are depleted. Amounts paid to a participating employment-based plan must be used to lower costs for the plan.

Impact: The government will be issuing guidance in the near future as to how employers can apply for this subsidy. Although the time period in which claims can be submitted for reimbursement is unclear, it would be prudent to keep records of any claims starting with January 1, 2010.

FSA/HSA/HRA/MSA Over-the-Counter Drugs Reimbursement Prohibited: Effective January 1, 2011, over-the-counter (OTC) drugs and medicines are not eligible for reimbursement under a Health FSA/HSA/HRA/MSA without a doctor's prescription. Sundries such as band-aids, contact fluid, etc. are still eligible expenses for reimbursements. This change applies January 1, 2011, regardless of plan year. Therefore, plans that renew prior to January 1, 2011 will be affected by the change.

Impact: Employers with plans renewing prior to January 1, 2011 may want to change their plan to exclude OTC drugs for the entire plan year (i.e. 7/1/10 – 6/30/11), which is earlier than what the legislation mandates. The downside is that employees would not be able to take advantage of the tax break for OTC drugs for the first part (prior to 12/31/10) of the FSA/HSA/HRA/MSA plan year. Alternatively, employers with plans renewing prior to January 1, 2011 that do not want to change their plan to exclude OTC drugs will want to communicate to participants that beginning January 1, 2011 they will be precluded from requesting reimbursement for over the counter drugs. Any plans that renew on or after January 1, 2011 will have to be revised to preclude requesting reimbursement for over the counter drugs. This change in eligible expenses does not qualify a participant to make to changes to their existing plan year elections.

Automatic Employee Plan Enrollment For Employers of 200 or More: U.S. employers with more than 200 employees will be required to enroll new full-time employees in their health care option with the lowest employee premium, unless the



employee makes an affirmative election to opt-out or elects a different option.

Impact: It is unclear from the statute when this provision takes effect. Industry experts say it will most likely take effect when implementation rulemaking is completed which may be this year. When implementation rulemaking is completed additional guidance will determine when this provision will require compliance by employers.

Grandfathered Provisions: The Act provides that a plan in existence on the March 23, 2010 date of enactment is exempt from some but not all of the individual and market reform provisions. Under the grandfathering provisions, coverage can be renewed, family members can be added to the current coverage, and new employees can be enrolled. The Act provides that there will be no changes required with respect to grandfathered plans, even if those plans renew. We know that all plans must comply with the following provisions: prohibition on lifetime or annual limits, rescission of benefits, adult dependent coverage, reporting requirements, waiting periods, and pre-existing exclusions.

Impact: It's not clear from the statutory language when a plan can lose its grandfathered status. The Act appears to state that a plan remains grandfathered until terminated. Therefore, we can assume in good faith that employer plans are grandfathered until we hear otherwise from the government. However, it is possible that government interpretation and regulations may state that if employer plans are modified (i.e. change of co-payments, carriers, etc.), they will lose their grandfathered status. The Department of Health and Human Services has advised that clarification of this provision will be forthcoming within 90 days.

Small Business Tax Credit: Employers with no more than 25 employees and average annual wages that do not exceed \$40,000 can receive a tax credit of up to 35% of the employer's contribution, if the employer contributes at least 50% of the total premium or benchmark premium.

Impact: Small employers will have additional tax credits available to them.

Effective for Plan Years Starting After October 1, 2010

Dependent coverage to age 26: Insurers must extend coverage to an employee's child up to age 26 if the adult child is not eligible to enroll in their own employer-sponsored plan.

Impact: For fully-insured plans, medical carriers will be tasked to update their contracts and provide this coverage for effective

dates October 1, 2010 and beyond. Self-funded contracts should be amended for plan years starting October 1, 2010 to extend coverage to dependent children up to age 26.

Pre-existing Condition Limits: Group health plans and issuers in the individual and group markets are prohibited from excluding coverage for pre-existing health conditions for individuals under 19.

Impact: For fully-insured plans, medical carriers will be tasked to update their contracts and prohibit pre-existing condition exclusions for individuals under 19 for effective dates October 1, 2010 and beyond. Self-funded contracts should be amended to prohibit pre-existing health condition exclusions for individuals under 19 for plan years starting October 1, 2010.

Coverage for Emergency Services: Coverage for emergency services must be paid at the in-network cost sharing level with no pre-authorizations required or mandated.

Impact: Employers should review their plans to determine whether a change is required to comply with this provision.

Ban on Health Insurance Rescissions: Insurers would be prohibited from cancelling coverage except in the event of fraud.

Impact: Most group insurance contracts and self-funded plans do not have rescission provisions. Therefore, this will have a minimal impact on employers.

Ban on Lifetime and Annual Dollar Limits: Plans may not impose lifetime dollar limits. However, restricted annual dollar limits will be allowed on a yet to be determined list of services.

Impact: For fully-insured plans, medical carriers will be tasked to update their contracts and eliminate lifetime dollar limits and annual dollar limits on coverage for essential benefits for effective dates October 1, 2010 and beyond. Self-funded contracts should be amended for plan years starting October 1, 2010 to eliminate lifetime dollar limits and annual dollar limits on coverage for essential benefits. While some essential benefits have been defined in the Act, it is anticipated that additional government regulations will provide clarification.

Requirement for Group and Individual Plans to Provide an Effective Appeals Process for Coverage Determinations: Both fully-insured and self-funded plans will be required to allow claimants to present testimony as part of their administrative appeals process and to continue receiving coverage during the appeals process. Insured plans must comply with state law external review provisions. Self-funded plans must implement an external review process that meets standards set by the Secretary of HHS.



Impact: Plan documents of both fully-insured and self-funded plans will have to be revised to include appeals processes that are in compliance.

Preventive Services: New group health plans and plans in the individual market must provide first dollar coverage for preventive services.

Impact: Plan designs will have to provide first dollar coverage for preventive services.

Prohibition of Discrimination Based on Salary: Insured group health plans will have to satisfy the nondiscrimination requirements of Code Section 105(h)(2) (the eligibility and benefits tests).

Impact: The offering of benefits will be subject to the non-discrimination requirements with respect to highly compensated employees. If employees are charged different premiums, legal counsel should review this to ensure compliance.

New Reporting and Disclosure Requirements: Insurers of insured health plans and plan administrators of self-funded health plans must provide applicants and enrollees a "summary of benefits and coverage" before enrollment or re-enrollment.

Impact: New Reporting and Disclosure requirements will need to be incorporated into open enrollment materials.

2011

Requirement for Employers to Report Health Coverage Costs on Form W-2: Employers must disclose the value of the benefit provided for each employee's coverage on W-2s beginning with the 2011 tax year.

Impact: More administrative requirements will be added to payroll.

Increased Tax on Health Savings Accounts and Medical Savings Accounts: The tax on distributions from a health savings account (HSA) or an Archer MSA that are not used for qualified medical expenses will be increased to 20% (from 10% for HSAs and from 15% for Archer MSAs) of disbursed amount.

Impact: Education to employees on this increased tax will be required.

Carrier Rebates Take Effect if Health Insurer Providers Do Not Meet the Minimum Loss Ratio (MLR) requirements: If minimum loss ratios are not met, the health insurance issuer must provide a rebate to enrollees. Minimum loss ratios are considered not met if the cost of clinical services are less than 85% in the large group market and 80% in the small group market.

Impact: If fully-insured loss ratios are below the minimums, rebates to enrollees are required. More guidance from the government and carriers is needed to determine how this will be calculated.

Automatic Enrollment in New Government-run Long Term Care Program: Employers may automatically enroll employees in the government's new long term care program and facilitate payroll deductions. Employees may opt-out.

Impact: Employers have the option of enrolling in the government plan with an effective date of January 1, 2011. Benefits would not be payable until an individual pays at least five years of premiums for such coverage.

Medicare Part D Subsidy: Companies that receive a 28% subsidy for their Medicare enrollment will need to include the tax impact of this subsidy on the Company financial statements ending in 2013.

Impact: Employers with Medicare enrollment will have to report tax impact on the financial statements.

COBRA SUBSIDY ELIGIBILITY PERIOD EXTENDED THROUGH MAY 31, 2010

Once again, the COBRA subsidy eligibility period under the American Recovery and Reinvestment Act (ARRA) has been extended. The new eligibility expiration date is May 31, 2010. The President signed into law the Continuing Extension Act of 2010 (HR 4851) on April 15, 2010. This law takes effect immediately and is retroactive to April 1, 2010. Previously, the COBRA subsidy eligibility period expired on March 31, 2010. Only Assistance Eligible Individuals (AEIs) qualify for the subsidy. In order to qualify, they have to experience one of two types of Qualifying Events. The first is an involuntary termination of employment. The second is a reduction in hours followed by an involuntary termination of employment if that involuntary termination occurs on or after March 2, 2010, and on or before May 31, 2010. The COBRA maximum coverage period is still based on the original reduction in hours Qualifying Event date. The subsidy period is still 15 months.



Impact:

1. If you outsource COBRA, Woodruff-Sawyer will work with your vendor to make sure that they are revising the required notices on your behalf. If you administer COBRA internally, Woodruff-Sawyer can assist you in making sure you have the most up-to-date Department of Labor model notices;
2. Woodruff-Sawyer will assist you in providing any necessary open enrollment materials for individuals who are eligible for the subsidy;
3. Woodruff-Sawyer will monitor whether the COBRA subsidy will continue to be extended. Keep in mind that if HR 4213 is passed, it would extend the subsidy eligibility period through the end of 2010.

SAN FRANCISCO HEALTH CARE SECURITY ORDINANCE EXPENDITURES RELEASED AND ANNUAL REPORTING FORMS ARE DUE APRIL 30, 2010

2011 Health Care Expenditure Rates

The City of San Francisco has released the 2011 health care expenditure rates under the Health Care Security Ordinance (HCSO). The 2011 health care expenditure rate for large employers (100+ employees) will be \$2.06/hour. For medium-sized employers (20-99 employees), the rate will be \$1.37/hour.

2009 Annual Reporting Forms Due April 30, 2010

The deadline to submit the 2009 Annual Reporting Form is Friday, April 30, 2010. Preprinted Annual Reporting Forms were

The information provided in this Legislative Update should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only and you are urged to consult an attorney concerning your own situation and any specific legal questions you may have.

Woodruff-Sawyer is one of the largest independent insurance brokerage firms in the nation, and is an active partner of International Benefits Network and Assurex Global. For over 90 years, Woodruff-Sawyer has been partnering with clients to implement and manage cost-effective and innovative insurance, employee benefits and risk management solutions, both nationally and abroad. Headquartered in San Francisco, Woodruff-Sawyer has offices throughout California and in Portland, Oregon. For more information, call 415.391.2141 or visit www.wsandco.com.

mailed to employers in March. Employers can also download a fillable PDF from the HCSO website : <http://sfgsa.org/index.aspx?page=418>.

Employers with fewer than 20 employees company-wide (including employees performing work outside San Francisco) are not covered by the HCSO and should not return the Annual Reporting Form.

FEDERAL TRADE COMMISSION RED FLAG RULE

The U.S. Federal Trade Commission (FTC) will enforce its "red flag" rule on identity theft beginning June 1, 2010. The new rule states that group health plans offering Flexible Spending Account (FSA) and/or Commuter Benefit (CB) plans with a debit card or similar reimbursement option should work with their third-party administrator (TPA) to ensure there is a written Identity Theft Program in place that helps protect sensitive information.

Impact: Upon request, Woodruff-Sawyer will work with you to monitor your third-party administrator to ensure that written Identity Theft Programs are in place that help protect sensitive information.

About Jennifer

Jennifer is Vice President, Compliance Officer in the Benefits practice at Woodruff-Sawyer & Co. She consults directly with our Employee Benefits clients on all matters of compliance and leads both internal and external trainings. She has also conducted numerous trainings on ERISA, COBRA and HIPAA to Department of Labor employees, the Department of Justice and to employers that sponsor ERISA-covered plans. A published expert on ERISA, COBRA and HIPAA rules and regulations, Jennifer has investigated a broad spectrum of company employee benefit plans and has extensive experience negotiating with industry fiduciaries and service providers.

Before joining Woodruff-Sawyer, Jennifer was a Senior Investigator at the US Department of Labor (DOL), Employee Benefits Security Administration in San Francisco. Jennifer can be reached at 415.402.6577 or jlunski@wsandco.com.