



Health Reform Phase II - Focusing Your Attention Wisely

May 25, 2011

Q&As from HUB International's Health Care Reform Webinar

[Text of questions has been left unchanged and appears as submitted. Nondiscrimination testing question caveat: Unfortunately, it's not possible to offer a definitive answer to any discrimination testing question without actually conducting required plan testing. Responses shared below are not intended to substitute for the plan sponsor's obligation to regularly test plans whenever such plans are subject to discrimination testing duties.]

Employer Mandate (2014) – Controlled Group Rules

Q: How is an employer of over 50 employees defined? We are a controlled group of companies each with fewer than 50 employees, and each with its own health insurance policy or policies.

[A similar question was asked: Would a group of 5 employers with different EIN's and health insurance plans be added to together to get to the over 50 count?]

A: If an employer is part of a controlled group for federal tax purposes, the employers will be aggregated and treated as if they are all one single employer for purposes of federal health reform. That means the employees of all related entities will be counted together to determine if the employer is subject to the health reform mandate in 2014, to offer affordable essential health plan coverage to all full-time employees who satisfy a minimum 90-day waiting period. The controlled group rules referenced appears in the tax Code at Section 1563. An employer should ask its CPA or tax advisor if it is part of a controlled group. (Health reform has prompted a number of employers to ask this question, and a significant percentage has learned they are part of a larger controlled group.)

Part-time workers at any organization within the same control group must also be counted by determining full-time equivalents. Under health care reform, the hours worked by those part-timers will be added together and divided by 120 to determine the minimum number of full-time workers who would have been needed to complete that amount of work. So, this number of full time equivalent employees is added to the real full-time employee count for purposes of whether the ER has 50 or more employees and is subject to the employer mandate.



Cadillac Tax (2018) – Regional Cost Differences Considered?

Q: Is there any chance of regional cost entering into the Cadillac provision? Health insurance is much more expensive for the same coverage in the NY Metro area than in other areas of the country. It looks like citizens are going to be unfairly taxed based on where they live or have to settle for lesser coverage.

A: It is unlikely regional variations in pricing will be considered (but it not impossible). The Cadillac Tax, in part, was designed to prod insurance carriers (and health care providers in turn) to reduce health plan costs. The federal agencies are being pressured by persons in lesser cost states to not allow any variation.

Even if Congress or the federal agencies desired to adjust the impact of the Cadillac tax based on geographic cost differences, the Constitution precludes such a rule because excise taxes must be uniform across the U.S. per Article I, Section 8. We anticipate that the Cadillac tax will go into effect without any consideration of regional plan cost differentials.

Form W-2 Reporting – Effective Date

Q: For the W-2 reporting, to clarify, do you have to do this in 2012? Meaning the 2012 W-2 which is sent by the employer in January 2013?

A: Yes, generally, the W-2 tracking must be done for the 2012 calendar year, with the Form W-2 report actually provided / filed in January 2013.

For certain smaller employers, the requirement is delayed one additional year if less than 250 W-2s are filed in 2011. If that is the case, then reporting for the 2013 calendar year is due in 2014. Beware of the impact of turnover that increases the filings above the number of employees on any given day or over any part of the year; if more than 250 W-2s are filed, the delay does not apply. Please contact your HUB representative to request a copy of our new Client Bulletin addressing operation of the W-2 reporting rule.

Non-discrimination Rules for Fully-Insured Plans – Employer Costs Vary Due to Selected Plan

Q: We offer a low, medium and high medical plan for all employees. However, for the employer portion, the Firm pays a higher percentage for the low and medium plans than they do for the high plan. Is this considered discrimination?

A: Based on the facts presented, it appears that the plan is not using a discriminatory design. This is because the employer contribution structure does not favor the highly-compensated employees. The employer simply contributes a different amount per plan. The cost difference does not depend on the employee's position in the firm, title, length of service, etc.



Non-Discrimination – Tiers of Coverage

Q. We are a company with less than 50 employees. Is it discrimination if you charge higher percentage for employee child, employee spouse, or employee family coverage versus the percentage charged for employee only coverage?

[A similar question was asked: If employee coverage is less than employee plus family, is it considered discriminatory?]

A. No, an employer can have different tiers of coverage and charge different amounts based on employee only than for the tiers which include family members. In fact, federal laws recognize the rates for the tiers may be blended (with certain caveats). The non-discrimination rules really only address rules that favor the highly-compensated – by contrast, tiers of coverage price variations do not cause that result. While the higher-paid employees can better afford family coverage, the non-discrimination rules should not affect this plan when those rules take effect.

(Note: In 2014, health plan coverage will have to be affordable as to employees; we do not yet know if the federal agencies will expect family coverage to be affordable as well. Costs to the employer and to the employees for coverage may have to adjust in 2014, in some cases significantly if the rules do apply affordability to families.)

Non-Discrimination for Fully-Insured Plans – No Cost for Dependents of Highly-Compensated

Q: under the Fully-Insured Discrimination rules, would it be illegal for the business to pay the insurance for dependents of a highly-compensated employee and not pay it for other staff under the Plan?

A: While no one ultimately knows what the specific testing rules will require, it appears that, from what's described in the question that, yes, the employer's program would be discriminatory as to contributions and thereby violate the nondiscrimination rules. (The federal agencies are expected to release guidance in mid-2011, with an estimated rolling effective date beginning with plan years starting in 2012.)



Non-Discrimination for Fully-Insured Plans – No Cost for Highly-Compensated Employees

Q: We have 40 employees, and only one health insurance plan. We have 4 key personnel who have their insurance paid in full by the company. Everyone else needs to pay a portion for this insurance. Will this be considered discrimination?

If so, when will that be effective?

A: Yes, that arrangement appears to favor highly-compensated, and would violate the non-discrimination rules based on the guidance we have to date (analogous rules for self-funded plans).

The nondiscrimination rules are expected to take effect with 2012 plan years as a rolling effective date. (For example, if the plan year starts May 1, the expected effective date of the non-discrimination rules would be May 1, 2012.)

“Mini-Med” Plans – Continued Viability

Q: Will mini-med plans be gone?

A: Some “mini-med” plans have obtained waivers from certain aspects of health reform. The agencies made those waivers available because otherwise lower-paid or part-time employees would have no access to any affordable coverage in advance of the Exchanges and federal tax credits and other financial assistance being operational and available. Until 2014, an employer offering a mini-med can continue to rely on waivers obtained by the carrier or can obtain its own waivers for a self-funded mini-med plan. (However, when the non-discrimination rules discussed elsewhere in these Q&As take effect – likely for 2012 plan years – those rules will require an employer to expand eligibility under its comprehensive fully-insured plan. Simply offering a mini-med to lower-paid persons will not be sufficient at that time...or in 2014.)

More detail on these waivers for mini-meds and similar programs appears at:

http://www.hhs.gov/ociio/regulations/annual_limit_waivers.html

Employer-Mandate (2014) – Requirement to Provide Insurance

Q: Full-time and Non-Benefit Employees – Must we get them Insurance?

A: If you have over 50 employees, then starting in 2014, you will be required to offer an affordable essential health plan to all full-time employees (persons working 30 or more hours per week on average in a month) after those individual satisfy the plan waiting period, which cannot exceed 90 days. (We do not yet know how the agency will interpret days of employment that are not consecutive. In a worst case scenario, the employer will need to track days of service over the years until they reach 90 days.) You must offer the coverage, but the employees need not elect the coverage. Also, if you have over 200 employees, you must



automatically enroll eligible employees (new hires and all eligible employees at annual enrollment). We do not know yet if family members must also be enrolled. However, employees (and likely their family members) can still dis-enroll and waive the coverage.

Employer Mandate (2014) – Affordability Penalty

Q; We are a restaurant company where many of our hourly employees have another job in addition to working for us; how are we going to be able to determine what is "affordable" when our payroll records are sometimes only a small portion of household income?

And can you explain the \$3,000 affordability penalty - how will that work?

A: You will not know an employee's household income, and the IRS indicates an employer cannot ask for that information (for example, to see a Form 1040). You will only know what that employee earns from you. Although it won't offer a perfect solution in every situation, many employers with low-paid workers are planning to charge lower paid workers who do take the plan no more than 9.4% of the employee's income, thereby better positioning these organizations to avoid the affordability penalty which is imposed for persons who must pay more than 9.5% of household income for the employee's share of the costs under the group plan.

The affordability penalty will be imposed on an employer if an employee declines the employer's coverage, then enrolls in the Exchange, and qualifies for federal assistance (for example, tax credits). So, the employee does not value coverage enough to take the employer's plan, but then values coverage enough to sign up on the Exchange. In most cases, that does not seem like an expected result – unless the individual is suddenly ill and needs the coverage. (Note: The Exchanges may prohibit entry except during specific enrollment periods; insurance carriers demanded such entry date restrictions from various state insurance regulators when the No Pre-ex Under Age 19 rule took effect for carriers in October 2010. State regulators required such limited access to carrier policies after carriers threatened not to insure persons in those states through individual policies.)

If we assume the employee waives the employer's plan and later signs up under the Exchange and also qualifies for federal assistance, then the \$3000 penalty is triggered. We have heard some rumors that an employer might be able to adjust the premiums on a one-off basis for that employee and stop the imposition of penalties. We cannot promise the regulations will allow that result, however.



Employer Mandate (2014) – Affordability & Dependent / Family Coverage

Q. We pay 100% of the premiums for our employees, but ask the employees to pay a portion of their dependents' premium cost. Do I need to worry about affordability, for employees with a number of dependents?

[A similar question was asked: (1) We pay 100% of the premiums for our employees, but ask the employees to pay a portion of their dependents' premium cost. Do I need to worry about affordability, for employees with a number of dependents?]

A: We do not yet know if coverage for dependents and other family members must be affordable. We should have guidance on this issue – we hope – by mid-2012. If family coverage must be affordable, the cost impact on employers will be significant. Unfortunately, health reform's underlying theme is that everyone in the U.S. needs to have insurance coverage so that medical providers ultimately receive payment and do not do write off losses for unpaid coverage in the future. The concept, if it can work, should theoretically help lower health care costs for everyone. We will continue to monitor developments in this area and to provide our input to the agencies on how they should interpret this affordability standard in a more appropriate manner.

Employer Mandate (2014) – Benefit-Ineligible Positions

Q: Classification of “Full-time - Non Benefit” - do we have to have them get insurance? Similarly, “Per Diem” - work a lot of hours, should they have Insurance? [Another question submitted asked: If per diem employees worked more than 30 hours in week, should they have insurance?]

A: Classification of employee as “Benefit-Ineligible” or other classifications with similar meanings will be irrelevant after the mandate takes effect in 2014. The employer will need to offer affordable essential health plan insurance to any employee who is full-time (based on the 30 hour rule) and who satisfies the waiting period (90-days maximum).

Depending on the meaning intended by “Per Diem,” that employee likely will need to be offered insurance as well. We need additional guidance from the government on “leased employees,” and staffing firm workers, but based on experience with other federal statutes and regulations regarding employment rights and benefits, either the leasing/staffing firm or the employer receiving the services of the worker will need to offer medical plan coverage on an affordable, essential plan basis.

The only apparent “exemption” will be for any worker who does not qualify as an “employee” under IRS standards based on a 20+ factor control test and who is instead an independent contractor. However, employers should exercise special caution in this area. Few employers (if any) will be able to assert that they are using an independent contractor or some other type of ineligible employee. The IRS is very actively enforcing the rules in this area, and proceeds from the assumption that a worker is an employee (not an independent contractor), until it can be clearly demonstrated otherwise.



Non-Discrimination – Actual Participation

Q: We have two plans: expensive and inexpensive. The percentage paid by the employer is the same. Anyone can pick either plan. As it worked out, the highest paid employees took the most expensive plan. The dollar value paid by the company is higher for the expensive plan, as the percentage is the same - would this be considered discriminatory?

A: The IRS may consider actual participation and whether higher-paid persons take the richer plan, depending on how they draft the rules, but it is unlikely they will examine that issue. When a plan is non-discriminatory on its face, when every employee is eligible, IRS auditors usually do not pursue the issue by delving into participation. (But note our standard caveat with regard to the issue of plan nondiscrimination requirements.)

Employer Mandate – Full-Time Status

Q. For eligibility - who defines full time? Is it defined by the employer or is it mandated by the government as 30 hours per week? Our company currently defines full time employees as working 32 hours per week.

A: The federal government has created a new rule that will apply at 30 hours per week. For this group, the employer will need to be more generous than in the past. It is up to the employer to track hours actually worked, and an employer with any persons who work less than 30 hours will want to track their time very closely.

Non-Discrimination – Election of Family Coverage

Q. We pay 100% of all employees health insurance, no matter if single plan or family plan. Employee picks the plan based on their family situation. Is this discriminatory, because some employees are getting more of a benefit?

A. No, the plan design does not favor the higher paid workers. (But note our standard caveat with regard to the issue of plan nondiscrimination requirements.)

Non-Discrimination – Premiums Paid for Spouse of Owner

Q: We have less than 20 employees. The owner of the company pays 100% of employee insurance premium cost and 50% of family/spouse premium cost. We pay 100% of the owners /spouse premium coverage. Is this considered discrimination?

A: The nondiscrimination rules apply regardless of employer size. Paying 100% for an owner's spouse's coverage would be discriminatory. The way to avoid the issue would be to reduce the amount paid for the spouse to the same 50% rate paid for other dependents/spouses, and the owner can simply draw more salary from the company and pay pre-tax for the spouse's



coverage. It should be a wash from a federal tax standpoint. (But note our standard caveat with regard to the issue of plan nondiscrimination requirements.)

Waivers from Health Reform – Application Process

Q: How do we get the exemption we hear about in the media so often?

A: Special eligibility criteria have to be satisfied in order to qualify for obtaining a waiver. Waivers applications are available from the federal agencies at the HHS website: http://www.hhs.gov/ociio/regulations/annual_limit_waivers.html

Non-Discrimination – Better Benefits

Q. We pay full premiums on all of our employees insurance, but the top % get a better quality insurance plan, is that considered discrimination.

A. Much will ultimately depend on the specific rules when discrimination testing standards for insured plans are actually published. Nevertheless our best judgment is, yes, the rules will prohibit discrimination on the basis of eligibility for better benefits. Therefore the design described is likely not to be permitted.

New Disclosure Obligations – Four-Page Mini Plan Summary

Q: Who is responsible for 4-page mini summary, the carrier or employer?

A; We are optimistic the carriers (and plan administrators for self-funded plans) will step up to the plate and assist in preparing these items after we receive model formats and language from the federal agencies. Ultimately, as with similar current ERISA requirements, the obligation falls on the employer.



Non-Discrimination – Schedule of Employer Contributions Varies for New Hires

Q. We are a company of 23-25 employees. All current (more tenured) employees participate according to a schedule. New employees, on the other hand, are allowed a fixed amount toward the cost of their health care premium. If their premium exceeds the allowance, they are responsible for the balance.

If on the other hand the premium is less than the allowance those employees can choose to have that money placed into a HSA, FSA or into their paycheck (taxable). Would this be considered a class? [A similar question was asked: If the employer gives each employee a benefit pool to purchase the benefits they choose. Some employees choose to use the funds to purchase health insurance and others do not.]

A. The answer depends on how the amount provided under the schedule is calculated by the employer. If the formulas for the two different groups take into account years of service, income level, or position, for example, that may be discriminatory. We expect that the IRS will pay close attention at premium variations that might tend to favor the highly-compensated.

We do not yet know the impact of flex credits or dollar that can be shifted from health plan coverage to other benefits or cash. If only higher-paid persons receive such amounts or have that flexibility to transfer into other accounts (or benefits), that would be likely also present a discrimination problem when those rules take effect, likely in 2012. Presumably, in 2014, if such dollars are offered and can be used toward health plan coverage, they should count toward the affordability standard; we are providing input on that and other issues to the government through our participation in an IRS Advisory Council.

Employer Mandate (2014) – Seasonal Employees

Q: We historically have "seasonal employees" who typically work from May until August or September and are not benefited. They do work 40 hours a week during that time. Am I correct in my thinking that these employees would be eligible for benefits in 2014?

A: Yes, seasonal workers will be eligible for coverage as any other employee, based on limited guidance provided to date -- namely the statute only. The health reform law does not distinguish between regular and seasonal employees except when it comes to counting employees to determine if the employer is over 50 employees. We need more guidance on seasonal workers.

Employer Mandate (2014) – Use of Inmate Workers

Q: We employ 100 people. About 20% of these are temporary employees who are parish/county inmates released each day by the local sheriff's dept. to work at one of our locations. These employees work 30 to 40 hours weekly for a period of 4 to 6 months. Is



there any provision in the healthcare law whereby this type of inmate-employee would qualify for health coverage?

A: Clearly our most unusual question. These workers would qualify for health insurance under the rules in the statute if the employer for whom they perform services controls their work – work hours, the task at hand, how it is accomplished, dress code, etc.

These employees appear to be similar to leased employees or employees through a staffing firm, and while we have no guidance on these workers yet, we believe one of the two potential “employers” of such workers must offer them affordable health benefits. Will these inmates elect the coverage, if they receive any income for their work? Although it’s difficult to speculate, it seems unlikely such a person would actually elect health coverage.

We are compelled to note that if using inmate services enabled employers to avoid health reform compliance, then it would be easy to anticipate a tidal wave of employers doing so as an alternative to regular health care compliance duties. It is unlikely the federal agencies will permit this loophole to exist.

Unions – Effect on Health Reform Rules

Q: Can collective bargaining agreements “trump” any of these provisions?

A: The statute does not offer exemptions from health reform for union programs / multiple employer plans as other federal laws typically have provided. It is anticipated that regulations will provide such exemptions. We are already seeing the agencies express interest in public input about how to create union-related rules and exemptions where possible. And some initial guidance indicates exemptions; the Form W-2 rules do not require an employer to report amounts paid to a multiple employer plan, for example.

Non-Discrimination – Retiree Plans

Q: What happens with Retirees plans where the employer pays for the Retiree premiums based on a former acquisition (contract) and other Retirees have to pay their premiums? Is this discriminatory by contract?

A: Retiree-only plans are generally exempt from health reform. That should extend to the non-discrimination rules as well; we will be monitoring this issue when agency guidance is released on non-discrimination rules in general.



No Incentives to Waive Health Insurance – Declining in Favor of Spousal Coverage

Q: If the spouse of an employee has insurance, and the employee declines ours, because they're included in the spouse's insurance, the company at this time offers flex dollars. Can we still offer them those dollars?

A: The rule prohibiting incentives does not address flex dollars. While other federal laws in similar contexts – such as Medicare Secondary and Tri-Care – allow some leeway for cafeteria plans, no rules have been issued yet under the new law, and the statute itself does not offer that relief. Some employers are taking a better-safe-than-sorry approach and eliminating this possibility by no longer using flex dollars for that purpose.

See HUB Client Bulletin at:

<http://www.hubinternational.com/uploadedFiles/incentives%20tracking%20SCB%20DGF.pdf>

Employer Mandate (2014) – Individual Policies

Q: We currently have employees on private plans that they have elected instead of our business health insurance plan. We reimburse the employee monthly for the premium amount up to the amount we would have paid if they were on our office health plan. Will this still be allowed?

A: We are not sure if it will be permitted. The employer mandate rules would seem to indicate the employer offers a plan, in the way we have already understood plan to be defined. However, presumably, the federal agencies will give employer's "credit" if it provides employees an amount toward Exchange-based coverage such that it will be affordable. We will know more by mid-2012 or so when guidance on the mandate is expected.

Offering individual policies creates other compliance problems and challenges, however. It is not recommended that an employer do so because individual policies typically lack features that enable the employer to comply with federal group plan requirements such as COBRA, Medicare Secondary, pregnancy discrimination law, etc. Consequently, while the full implications of paying for an individual's health coverage is unclear in the post-2014 health care reform world, there are very important ERISA and federal law reasons to consider eliminating that practice now.

Non-Discrimination – Carrier Participation Requirements

Q. We have to exclude hourly workers from our pool, not because of our insurance, but because they choose not to take advantage of the plan when they cannot afford their contribution to the coverage?

A: In the past, some employers have had to put in plan eligibility rules – to favor workers who could afford to elect the coverage – because otherwise the employer would not satisfy the



carrier's requirement that a certain percentage of eligible persons actually elect coverage. This issue has been problematic for some time. Insurance carriers may need to re-adjust such participation requirements. Any employers that have had class-outs or other plan designs that favor more highly-compensated employees will have to comply with the new non-discrimination rules when they take effect, which broadens the class of eligible persons, but these persons may not elect the coverage. If a carrier is willing to take the risk of adverse selection in the short run, prior to the affordability rules taking effect in 2014, could increase or at least not lose its membership.

Reporting on Plan Coverage – Coverage Not Elected / Waived

Q: What are the reporting requirements when employees choose to be on a spouse's plan or not on any plan at all?

A. The employer would simply indicate no coverage for that person on future federal reports to take effect for 2014.

Employer Mandate (2014) – Is Employer over 50 Employees, or under 50 and Exempt?

Q: How is 50 employees calculated? We have a number of casual employees that drop in and out. We have some that work 4 weeks a year or 5 hours here and there.

A: Full-time status for calculation of the 50 employee threshold and for purposes of eligibility will be based on 30 hours per week on average in a month. Part-timers, such as those described in this question, must be aggregated and measured as full time equivalent workers and could push smaller employers over the 50 numerical threshold and thereby make them subject to "pay or play" compliance. An employer first must look to the prior calendar year to determine if it has over 50 employees and then must comply with the mandate in the current year, starting in 2014.

"Full-time employees" are defined as those persons working 30 or more hours per week. The definition does not exclude any workers such as seasonal, casual, or temporary employees. Further, the law does not say scheduled to work, so time measured is that time actually worked. For part-time employees, their Full-Time Equivalents (FTEs) must be determined by the employer to determine whether an employer meets the 50-employee threshold. The calculation is done by adding up all hours worked by part-time persons in a month, then that number is divided by 120 to determine the number of full-time workers it would take to do the same amount of work as was performed by these persons. (The 120 hours comes from 4 weeks of work at 30 hours per week; 30 hours per week must be considered "full-time" for health insurance eligibility purposes in 2014 under the new federal definition of "full-time.")

Penalty Relief: Part-time employees are not counted when assessing any actual penalties. If an employer does not offer part-time workers health coverage of any kind, even if the employer is over 50 employees, no penalties will be calculated based on any part-time workers. As



described above however, part-time workers must be considered when it comes to measuring whether an organization has 50 employees or not.