THE PATIENT PROTECTION AND AFFORDABLE CARE ACT AND THE HEALTH CARE AND EDUCATION RECONCILIATION ACT OF 2010

Revised March 30, 2010

After a year of debate, Congress passed comprehensive health care reform legislation. On March 21, 2010, the House of Representatives passed the Senate-version legislation, the Patient Protection and Affordable Care Act (H.R. 3590) (the "Affordable Care Act") and a separate budget reconciliation bill, The Health Care and Education Reconciliation Act of 2010 (H.R. 4872) (the "Reconciliation Act"), which addresses the House Democrat's desired modifications to the Affordable Care Act. The president signed the Affordable Care Act into law on March 23, 2010 and signed the Reconciliation Act into law on March 30, 2010.

Numerous state legislators are already passing laws to exempt their citizens from elements of the health care reform package, specifically the individual and employer mandates. Whether these laws are preempted by federal legislation will be an issue for the courts to address.

As the health reform legislation stands today, the issues affecting individuals and employers are outlined below in order of implementation deadline.

90 DAYS AFTER ENACTMENT

Temporary Retiree Reinsurance Program

Ninety days after enactment, a federal reinsurance program will be available for employers providing insurance for retirees over age 55 years of age, who are not eligible for Medicare. The program will reimburse employers for 80 percent of claims incurred for the retirees between the ages of 55-64 for costs between $15,000 up to $90,000. There was no change in the Reconciliation Act to this provision.

National High-Risk Pool

Ninety days after enactment, a federally subsidized high-risk pool will be established for individuals with pre-existing conditions who have been uninsured for at least six months. There are certain restrictions for variance of premiums according to age and a maximum cost sharing of $5,950 for individuals and $11,900 for families. The legislation appropriates $5 billion for this high-risk pool. This national program can work with existing state high-risk pools and will end on January 1, 2014, once the exchanges are operational and other preexisting condition and guarantee issue provisions take effect.

SIX MONTHS AFTER ENACTMENT

Dependent Coverage

For plan years beginning six months after the date of enactment, plans would be required to provide coverage for adult children up to age 26. Until 2014, grandfathered plans are only required to provide such coverage if the dependent does not have access to other employer-sponsored coverage. The Reconciliation Act amends Section 105 of the Internal Revenue Code and states that the cost of health coverage for dependent children through age 26 is excluded from taxable income. Thus, the coverage is nontaxable even if the child is not the employee's "dependent" for tax purposes. There is no requirement that the individual be a student to qualify for coverage under this provision.

No Rescissions

For plan years beginning six months after the date of enactment, plans would be prohibited from rescinding coverage except in the case of fraud or intentional misstatement of material fact. Applies to new plans, grandfathered plans and self-funded plans.

No Lifetime/Restrictive Annual Limits

For plan years beginning six months after the date of enactment, new and existing fully-insured and self-funded plans are prohibited from having lifetime limits on coverage or restrictive annual limits. Annual limits will be allowed through 2014 only on Health and Human Services (HHS) defined non-essential benefits.

Pre-Existing Conditions

For plan years beginning six months after the date of enactment, there can be no pre-existing limitation for coverage of children under age 19, although insurers could still reject those children outright for coverage in the individual market until 2014. Applies to new and grandfathered plans.

Preventive Care Mandate

Preventive care that the US Preventive Services Task Force rates A or B will be covered by group and individual health plans (fully insured and self-funded plans) with no cost sharing for plan years beginning six months after enactment. Minimum preventive coverage also includes immunizations recommended by the Advisory Committee on Immunization practices for the Centers for Disease Control and Prevention. Also included for infants, children and adolescents are evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration. Additional services for women are also included.

Highly Compensated Individuals

For plan years beginning on or after six months after enactment, a plan sponsor of a group health plan may not establish rules relating to the health insurance coverage eligibility (including continued eligibility) of any full-time employee that are based on the total hourly/annual salary of the employee; the plan sponsor also may not establish eligibility rules that have the effect of discriminating in favor of higher wage employees in any manner. This requirement is similar to the rules already in existence for self funded plans and qualified benefits under a cafeteria plan.

Certain Covered Benefits

For plans years beginning on or after six months after the date of enactment, fully-insured group and individual health plans and self-funded group plans must cover emergency services at in-network levels, regardless of provider, without prior authorization. Also enrollees must be permitted to designate any in-network doctor as their primary care physician (including an OB/GYN or pediatrician).

New Appeals Procedures

For plan years beginning on or after six months after enactment, insurers and self-funded plans must implement new mandated appeals processes with both internal and external appeal rights. HHS is charged with providing the procedural standards. Grandfathered plans appear to be exempt from the requirement.

YEAR 2010

Small Employer Tax Credit
For years 2010 through 2013, businesses with fewer than 25 employees and average wages of less than $50,000 are eligible for a tax credit of up to 35 percent of the employer's contribution toward the employee's health insurance premium if the employer contributes at least 50 percent of the total premium cost or 50 percent of a benchmark premium. Tax-exempt businesses meeting the requirements above are eligible for the tax credits but are entitled to a maximum credit of 25 percent of their contribution toward the employee's health insurance premium.

Reporting on Medical Loss Ratio
Effective in 2010, health insurance plans, regardless of grandfathered status, are required to report the proportion of premium dollars spent on clinical services, quality, and other costs. Nonprofit Blue Cross Blue Shield plans must maintain a MLR of 85 percent or higher to take advantage of special tax status.

Medicare Prescription Drugs
The approximately 4 million Medicare beneficiaries who hit the so-called "donut hole" in the program's drug plan will get a $250 rebate in 2010. Next year, their cost of drugs in the coverage gap will go down by 50 percent. In 2011, the bill would also begin phasing down the beneficiary coinsurance amount in the coverage gap so that it reaches the standard 25 percent beneficiary coinsurance by 2020.

Rate Review
The HHS must establish a process for reviewing premium rate increases and requires insurers to justify rate increases. Carriers that have a pattern of unreasonable increases may be barred from participating in the exchanges.

YEAR 2011

Medical Loss Ratio
Effective in 2011, insurers must provide rebates to consumers for the amount of the premium spent on clinical services and quality that is less than 85 percent for plans in the large group market and 80 percent for plans in the individual and small group markets. A process will be established for reviewing increases in health plan premiums and requiring plans to justify increases. States are required to report on trends in premium increases and recommend whether certain plan should be excluded from the Exchange based on unjustified premium increases.

Medicare Advantage Plans
The Reconciliation Act would freeze Medicare Advantage (MA) payments for 2011. MA payments would be restructured by tying them to 100 percent of Medicare fee-for-service costs, providing bonuses for quality and making adjustments for unjustified coding patterns. The government currently pays the private plans an average of 14 percent more than traditional Medicare. Besides reducing payments overall, there will be a shift in funding, with some high-cost areas to be paid 5 percent below traditional Medicare and some low-cost areas to be paid 15 percent more than traditional Medicare.

Employer Reporting
Employers must begin reporting information concerning an employee's insurance benefits on the employee's Form W-2. If the employee receives health insurance coverage under multiple plans, the employer must disclose the aggregate value of all such health coverage, but exclude contributions to HSAs and salary reduction contributions to FSAs. Applies to benefits provided during 2011 and reported in 2012.

HSA/FSA/HRA Restrictions
Starting in 2011, there will be no tax-free coverage for over the counter items under HSAs, FSAs, HRAs and Archer MSAs; and, there will be a higher penalty for nonqualified HSA distributions of 20 percent, up from 10 percent.

CLASS Act
The "Community Living Assistance Services and Supports Act" or the "CLASS Act" becomes effective in 2011 and establishes a national voluntary long-term care insurance program for purchasing community living assistance services and supports. The Secretary of HHS is required to establish procedures for individuals to automatically enroll in the CLASS program by an employer in the same manner as an employer may automatically enroll employees in a 401(k) plan.

The Secretary is also required to establish an "alternative" enrollment process (other than auto-enrollment) for individuals who are self-employed, who have more than one employer, or whose employer does not elect to participate in the automatic enrollment process.

Cafeteria Plan Safe Harbor
Beginning on Jan. 1, 2011, small employers (100 or fewer employees) will be allowed to adopt new "simple cafeteria plans." In exchange for satisfying minimum participation and contribution requirements, these plans will be treated as meeting the nondiscrimination requirements that would otherwise apply to the cafeteria plans.

YEAR 2012

Uniform Benefit Summaries
All group plans and group and individual health insurers (including self-funded plans) will have to provide a summary of benefits and coverage explanation that meets specified criteria to all enrollees. The summary and explanation can be provided electronically or in written form and there is a $1,000 per enrollee fine for willful failure to provide the information.

YEAR 2013

Increase Tax for High-Income Taxpayers
Effective 2013, for single taxpayers with adjusted gross income ("AGI") of $200,000 or more and joint filers with AGI of $250,000 or more, the Reconciliation Act would add a new tax of 3.8 percent on investment income from interest, dividends, annuities, royalties, rents and capital gains ("net gain from disposition of property"). The tax would not include income that is derived in the ordinary course of a trade or business that is not a passive activity. This additional tax would not apply to qualified plan distributions under Code sections 401(a), 403(a), 403(b), 408 408A, or 457(b). This 3.8 percent tax is in addition to the 0.9 percentage point increase in the Medicare payroll tax on earned income.

Flexible Spending Arrangements (FSAs)
The Reconciliation Act would delay the effective date of the new annual limit on health flexible spending arrangements until 2013, at which time the FSA contribution would be capped at a maximum of $2,500, indexed thereafter to general inflation.

Taxation of Retiree Drug Subsidies
Currently, the law provides tax subsidies to encourage employers to maintain retiree drug coverage for their Medicare-eligible retirees. The subsidies are excluded from taxation so that employers would be incentivized to continue this benefit for retirees. In 2013, the employer tax deduction for prescription drug claims will be reduced by the Part D Retiree Drug Subsidy amount payable to the employer.

Employer Notice Requirement
All employers are required, as of March 1, 2013, to provide notice to their employees informing them of the existence of the exchange. The federal authorities will supply a standard template for compliance.

YEAR 2014

Insurance Reforms
In 2014, the Reconciliation Act would prohibit:

» Pre-existing condition exclusions (for children, the exclusions are prohibited starting six months after enactment)
» Lifetime limits (already prohibited)
» Annual limits on coverage (which were restricted beginning six months after enactment)
» Denial of coverage for dependents to age 26 (regardless of whether they have access to another source of employer-sponsored coverage)
» Waiting periods exceeding 90 days.

Also fully insured plans must provide guarantee issue and renewal. Further all individual policies and all fully-insured small group (100 lives and under) policies (provided inside or outside of exchange) must abide by strict modified community rating standards with premium variations only allowed for age (3:1), tobacco use (1.5:1), family composition and geographic regions. Annual and lifetime limits apply to fully-insured and self-funded plans.

Employer Mandate
Effective in 2014, employers with more than 50 employees that do not offer coverage and have at least one full-time employee who receives a premium tax credit will be fined an amount equal to $2,000 per full-time employee (reduced from $3,000 per full-time employee in H.R. 3590), excluding the first 30 employees from the assessment (also added by the Reconciliation Act).

Employers with more than 50 employees that do offer coverage but have at least one full-time employee receiving a premium tax credit because coverage is "unaffordable," will pay the lesser of $3,000 for each employee receiving a premium credit or $2,000 for each full time employee. Coverage would be considered "unaffordable" if the premiums for the class of coverage selected by the employee exceed 9.5 percent of family income (down from 9.8 percent in H.R. 3590). Employers with 50 or fewer employees are exempt from penalties.

“Full-time” employee means an individual who averages 30 or more hours at least one week in a month. The Reconciliation Act added full-time equivalents for purposes of determining whether the 50-employee threshold is met. That is, solely for purposes of determining whether an employer is an applicable large employer, an employer must, in addition to the number of full-time employees for any month otherwise determined, include a number of full-time equivalent employees determined by dividing the aggregate number of house of service of employees who are not full-time employees for the month by 120. Full-time equivalents are not used to determine the assessment of a penalty.

Employer Voucher

Effective in 2014, employers that offer coverage would be required to provide a free choice voucher to employees with incomes less than 400 percent FPL whose share of the premium exceeds 8 percent but is less than 9.8 percent of their income and who choose to enroll in a plan in the Health Insurance Exchange. The voucher amount is equal to what the employer would have paid to provide coverage to the employee under the employer’s plan and will be used to offset the premium costs for the plan in which the employee is enrolled. Employers providing free choice vouchers will not be subject to penalties for employees that receive premium credits in the Exchange. No change to this provision by the Reconciliation Act.

Auto-Enrollment

Employers with more than 200 employees must automatically enroll employees coverage offered by the employer. Employees may opt out of coverage. No change to this provision by the Reconciliation Act.

Small Business Tax Credit

Small employers with no more than 25 employees and average annual wages of less than $50,000 that purchase health insurance for employees are provided with a tax credit. For 2014 and later, for eligible small businesses that purchase coverage through the Health Insurance Exchange, a tax credit is provided of up to 50 percent of the employer’s contribution toward the employee’s health insurance premium if the employer contributes at least 50 percent of the total premium cost. The credit will be available for two years. The full credit will be available to employers with 10 or fewer employees and average annual wages of less than $25,000. Tax-exempt businesses meeting the requirements above are eligible for the tax credits but are entitled to a maximum credit of 35 percent of their contribution toward the employee’s health insurance premium.

Individual Mandate

Citizens and legal residents are required to have “minimum essential coverage” by year 2014. Those without coverage pay a tax penalty of the greater of $695 per year up to a maximum of three times that amount ($2,085) per family or 2.5 percent of household income. The penalty will be phased-in according to the following schedule: $95 in 2014, $325 in 2015, and $695 in 2016 for the flat fee or 1.0 percent of taxable income in 2014, 2.0 percent of taxable income in 2015, and 2.5 percent of taxable income in 2016. After 2016, the penalty will be increased annually by the cost-of-living adjustment. Exemptions will be granted for those for whom the lowest cost plan option exceeds 8 percent of an individual’s income, and those with incomes below the tax filing threshold (in 2009 the threshold for taxpayers under age 65 was $9,350 for singles and $18,700 for couples). Additional exceptions include people with financial hardship, religious objectors, American Indians, people with coverage for less than three months, undocumented immigrants, and incarcerated individuals. The Reconciliation Act changes the penalty calculations, which are included in the numbers referenced above.

Individual Subsidies
Premium credits are made available to "eligible" individuals and families with incomes between 133 and 400 percent of the federal poverty level to purchase insurance through the Health Insurance Exchanges. Eligibility is limited to American citizens or legal residents who lack affordable employer-sponsored coverage and fit within the income levels outlined above. The premium credits will be tied to the second lowest cost plan in the area and will be set on a sliding scale. For example, people with incomes under 133 percent of FPL will pay only 2 percent of income toward premiums, while people between 300-400 percent of FPL will pay 9.5 percent of income toward premiums. There are also cost-sharing tax credits so that certain low-income people will pay only a small percentage of their income toward their insurance expenses.

Benefit Design
Effective in 2014, an essential health benefits package is established that provides a comprehensive set of services, covers at least 60 percent of the actuarial value of the covered benefits, limits annual cost-sharing to the current law HSA limits ($5,950/individual and $11,900/family in 2010), and is not more extensive than the typical employer plan. Abortion coverage is prohibited from being required as part of the essential health benefits package.

Effective in 2014, all qualified health benefits plans, including those offered through the Health Insurance Exchanges and those offered in the individual and small group markets (except grandfathered plans) are required to offer at least an essential health benefits package.

Expanded Medicaid Eligibility
States will have the option starting in 2014 to expand Medicaid eligibility to non-elderly, non-pregnant individuals who are not otherwise eligible for Medicare, with incomes up to 133 percent of the federal poverty level (FPL). From 2014 through 2016, the federal government will pay 100 percent of the cost of covering newly eligible individuals.

Health Insurance Exchanges
Effective in 2014, state-based Health Insurance Exchanges and Small Business Health Options Program (SHOP) Exchanges must be established, administered by a governmental agency or non-profit organization, through which individuals and small businesses with up to 100 employees can purchase qualified coverage. States are permitted to allow businesses with more than 100 employees to purchase coverage in the SHOP Exchange beginning in 2017. States may form regional Exchanges or allow more than one Exchange to operate in a state as long as each Exchange serves a distinct geographic area. (Funding available to states to establish Exchanges within one year of enactment and until January 1, 2015).

Wellness Initiatives
Starting for plan years beginning on or after Jan. 1, 2014, HIPAA wellness program incentive limit will increase from 20 percent to 30 percent of total cost of coverage; regulations may increase the 30 percent up to 50 percent. The Reconciliation Act did not alter this provision.

YEAR 2018

Tax on Cadillac Plans

The Reconciliation Act delayed implementation of the tax on Cadillac Plans and increased the threshold above which the tax applies. Effective in 2018, an excise tax is imposed on insurers of employer-sponsored health plans with aggregate values that exceed $10,200 for individual coverage and $27,500 for family coverage. The tax is equal to 40 percent of the value of the plan that exceeds the threshold amounts and is imposed on the issuer of the health insurance policy, which in the case of a self-insured plan is the plan administrator or, in some cases, the employer. The aggregate value of the health insurance plan includes reimbursements under a flexible spending account for medical expenses (health FSA) or health reimbursement arrangement (HRA), employer contributions to a health savings account (HSA), and coverage for supplementary health insurance coverage, excluding stand-alone dental and vision coverage. If health care costs increase more than expected, as determined by cost of an identified standard benefit option under the Federal Employees Health Benefits Program, then initial threshold will be automatically adjusted upwards. This provision also includes an adjustment for retirees ages 55-64 and for employees in high-risk jobs and an adjustment for age and gender in calculating health care costs that are subject to the tax.