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# Healthcare Reform Passed, So What's Next?

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The recent passage of the Patient Protection and Affordable Care Act ("PPACA") and the Health Care and Education Reconciliation Act ("HCERA") is old news for just about anyone. No matter what people may think about healthcare reform, virtually all are now left asking one question: What is next?

Much of the new law is designed to take effect in 2014 or even later. But some provisions take effect now. And some will require preparation and changes to familiar policies and procedures. For employers, human resources managers, and employment lawyers, it is not to early to learn about the law and begin preparing for the changes.

This 2500-plus page bill contains many undiscovered ambiguities and unintended consequences. Only time and court decisions will tell what this law really contains. For now, there are several express provisions that affect employers.

Changes to the Fair Labor Standards Act

The PPACA amends several provisions of the Fair Labor Standards Act ("FLSA"). Even the U.S. Department of Labor may have been surprised that it received increased enforcement authority through the PPACA. As of yet, the DOL has not issued any official guidance on the amendments.

Four PPACA sections amend the FLSA. PPACA Section 1511 adds a new section to the FLSA (Section 18A), which essentially creates an "opt-out" system for healthcare benefits for many employees. Specifically, employers with 200 or more full-time employees ("FTEs") must automatically enroll all new FTEs in one of the health plans they offer and provide them with a notice and opportunity to opt out. FTEs will be "in" until they affirmatively "opt out" of the plan.

PPACA Section 1512 adds a new section to the FLSA (Section 18B), whereby employers must provide a detailed notice to employees highlighting certain provisions (such as the yet-to-be defined insurance "exchange").

PPACA Section 1558 adds Section 18C to the FLSA, giving "litigation teeth" to the new provisions via anti-retaliation and whistleblower protections. Specifically, under Section 18C, employers are prohibited from taking any adverse action against employees because they have received a tax credit or subsidy for a health plan, or "provided" any information relating to any violation of the PPACA.

PPACA Section 4207 adds to federal law a new "lactation accommodation" requirement. The new Section 7(r)(1) of the FLSA brings federal law in line with the laws of some states, including California's Labor Code Sections 1030 through 1033. Under federal law, employers must provide both a place and unpaid break time for nursing mothers to express breast milk for one year following the child's birth.

New Mandates for Employers

The PPACA's provisions mostly concern the types of healthcare coverage that must be offered and related requirements. Health insurance policies must be revised change to reflect new requirements and prohibitions on matters such as lifetime caps, deductibles, expanded dependent coverage, minimum coverage for certain "core" issues, and the like.

These provisions certainly will impose burdens on insurance companies, benefits brokers, and other employee service providers. Vendors will have to develop appropriate products and keep their customers (including employers) out of trouble.

But the law also imposes a variety of requirements on employers, which will increase administrative burdens. Employers will have to change how they enroll employees in health insurance plans. They will have to train benefits workers on coverage changes, including dependent care, the availability of "free choice" vouchers for employees to participate in exchanges, and other new coverage options.

The paperwork requirements will change as well. For example, by 2014, small and large employers will have to make certain disclosures to the Internal Revenue Service regarding individuals covered by employer healthcare plans. The penalties for non-compliance will be significant. By March 2013, employers will have to give proper notice of healthcare options, including the existence of a third-party "exchange" and available tax credits. By March 2012, employers will have to provide a new summary of coverage approved by the federal Health and Human Services department. The W-2 form will be changed to include the value of health benefits, requiring more reporting by employers to payroll service providers.

These requirements are just the beginning. As the government develops regulations to implement the many new mandates, there will no doubt be additional paperwork, recordkeeping and reporting requirements. Accordingly, when budgeting for 2012 and beyond, it would be wise to include new employees in the accounting, payroll and benefits department.

No law would be complete without new opportunities for lawsuits, and the PPACA is no exception. There are new "whistleblower" and anti-discrimination protections available to employees who report violations of the law. In California, that means another source of "public policy" supporting common law wrongful termination claims.

Management must begin planning now for the new mandates health insurance reform will impose. There are too many opportunities for "excise taxes," penalties, and options that will result in higher costs to employers. It will be a mistake to wait until the law takes effect to take action, because the potential exposure for missteps and bad choices are significant.

Beyond Health Insurance Reform

With healthcare reform behind it, Congress now may turn to several other pending legislative proposals. If passed, these bills could profoundly affect workplace law and the workplace itself.

For example, the Taxpayer Responsibility, Accountability and Consistency Act would bring increased scrutiny – by the Internal Revenue Service ("IRS") – of businesses that classify workers as independent contractors instead of employees. If passed, this bill would require businesses to provide certain independent contractors with a notice detailing the benefits received by employees. This bill also would open up the door to a worker-initiated "mini-audit" by the IRS, as workers would be allowed to petition the IRS on an individual basis for a determination of whether they are a bona fide independent contractor or an employee. As part of the "mini-audit," the IRS would consider whether the employer previously classified similar workers as employees.

Paid Vacation Time

The pending Paid Vacation Act would further amend the FLSA, requiring some employers to provide employees with paid leave. As it stands now, the bill would require employers of 100 or more employees to provide at least five days of paid vacation for full-time employees during the first three years after passage of the law.

Following year three, employers of 100 or more would have to provide 10 days of paid vacation per year and employers of 50 or more would have to provide five days of paid vacation per year.

Paid Sick Leave

The Healthy Families Act would provide many employees with paid sick leave. Apparently modeled after San Francisco's sick leave law, this bill would require employers with 15 or more employees to provide seven (7) days of paid sick leave per year for each employee working 30 hours or more per week. Employees working less than 30 hours per week would be entitled to a pro rata portion of this paid sick leave. Unused leave would carry over from year to year.

Flexibility for Working Families

Finally, the Working Families Flexibility Act would give many employees a statutory right to request flexible working conditions. Specifically, any employee working 1,000 hours per year or more for an employer that employs at least 15 persons would have the right to request work flexibility to balance demands of their job and home life. The law mandates negotiations with individual employees regarding subjects such as the number of hours, the schedule for working those hours, and the location where those hours are worked.

Action Items

As the effective dates applicable to the various provisions in the healthcare reform laws approach, employers should take advantage of the many educational opportunities vendors, insurers, and benefits lawyers are offering.

As stated above, employers should be starting to plan for the new healthcare insurance reform requirements. Certain provisions apply to employers of more than 50

full-time employees; others apply only to larger businesses. Smaller employers approaching these thresholds must weigh the costs and benefits of growth under this new economic regime.

Employers also must begin to analyze how they will pay for new and different coverage for employees. Employers will have the option to offer certain coverage, or pay taxes and penalties in lieu thereof. Accountants and consultants specializing in this area likely will be busy calculating the costs and benefits of offering coverage versus paying the penalties.

Finally, given the addition of new anti-retaliation and whistleblower protection provisions, prudent employers will also take the time to both revise existing policies and educate employees – supervisors and non-supervisors alike – on these revisions and any other changes made to polices and benefits. Just as in the equal employment opportunity context, maintaining open avenues of communication will likely go a long way in preventing litigation in this new arena as well.

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