The Supreme Court Has Spoken: Now What Should Employers Do About Their Group Health Plans?

By David Pratt*

As discussed elsewhere in this issue, the Supreme Court has now upheld the constitutionality of the individual mandate and most other provisions of the Affordable Care Act. Although this is a major development, the future of the legislation, in anything like its current form, is still uncertain. Mitt Romney and congressional Republican leaders remain committed to repealing the Act, if they can. *See, e.g.*, Steve Teske, *Republicans Would Use Budget Reconciliation to Repeal PPACA in 2013, Hatch Says*, 39 PENS. & BENEFITS REP. (BNA) 1364, July 17, 2012. And even if the Democrats retain the White House, and control of the Senate, Republicans will do whatever they can to impede implementation of the Act through the budget process. *See, e.g.*, Ralph Lindeman, *House Appropriations Panel OKs Bill Blocking Spending to Implement PPACA*, 39 PENS. & BENEFITS REP. (BNA) 1408, July 24, 2012. So what should employers do?

Recent surveys suggest that few employers will cease offering health benefits to their employees. *See, e.g.*, *Employer Reaction to PPACA Ruling Mixed, Many to Continue Coverage, Survey Finds*, 39 PENS. & BENEFITS REP. (BNA) 1282, July 3, 2012; 2012 *Deloitte Survey of U.S. Employers: Opinions about the U.S. Health Care System and Plans for Employee Health Benefits*, www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us _ dchs _ employee _ survey _ 072512.pdf. For many employers, the apparent cost savings are outweighed by other considerations, such as the ability to attract and retain talented employees. Some provisions of the Act—such as coverage of adult children—are already in effect, and are unlikely to be repealed because they are very popular.

Many of the Act's substantive provisions do not take effect until 2014 or later. Accordingly, until the 2012 election results are in, the most sensible approach for employers is to (1) comply with those requirements of the Act that demand action now (see below), (2) make additional plan changes (such as cost containment and improved wellness programs) that are likely to be beneficial even if the Act is repealed, and (3) at least outline strategies based on alternative assumptions as to which provisions of the Act will remain in effect. In addition, any employer seeking to rely on the grandfathered plan exceptions to the Act's rules must ensure that grandfathered status is not lost inadvertently.

Immediate Concerns

Four requirements need attention in the near future.

1. Employers must report the value of health benefits on W-2 forms. I.R.C. § 6051(a)(14). The Service has issued interim guidance in Notice 2012-9, 2012-4 I.R.B. 315, which amends and supersedes the guidance provided in Notice 2011-28, 2011-16 I.R.B. 656. As Notice 2012-9 points out, "This reporting to employees is for their information only. The reporting is intended to inform them of the cost of their health care coverage, and does not cause excludable employer-provided health care coverage to become taxable…. To the extent that future guidance applies the reporting requirement to additional employers or categories of employers or additional types of coverage, that guidance will apply prospectively only and will not apply to any calendar year beginning within six months of the date the guidance is issued." In the case of the 2012 W-2 (and W-2s for later years unless and until further guidance is issued), an employer is not subject to the reporting requirement for any calendar year if it was required to file fewer than 250 Forms W-2 for the preceding calendar year. Notice 2012-9, Q & A 3.
2. Plan sponsors must provide to employees a uniform summary of benefits and coverage, generally during the first open enrollment period beginning on or after September 23, 2012. Participants and beneficiaries who enroll other than through an open enrollment period (*e.g.*, new hires), must receive an SBC on the first day of the first plan year that begins on or after September 23, 2012 (January 1, 2013 for a calendar year plan). *See* 77 Fed. Reg. 8668 (Feb. 14, 2012).
3. Employers must amend health plan documents to include a $2,500 indexed annual cap on employee contributions to health flexible spending accounts, for plan years starting after 2012. I.R.C. § 125(i). Plans that have a year that begins in 2012 and ends in 2013 do not become subject to the $2,500 limit until the plan year that begins in 2013. Notice 2012-40, 2012-26 I.R.B. 1046.
4. Employers must establish procedures to handle rebates under the medical loss ratio rules. Medical loss ratio rebates for 2011 were to be distributed by insurers by August 1, 2012. According to the Service, employers that distribute rebates directly to employees must withhold employment

* Professor of Law, Albany Law School, Albany, NY.

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notional amount. To the contrary, for the Windfall Tax, "there was no need to calculate imputed gross receipts; gross receipts were actually known," rendering the third example "facially irrelevant." Instead, the Fifth Circuit implicitly concluded that the 9/4ths multiplier served merely to adjust the tax rate. The Court articulated this view through a hypothetical extension of the Windfall Tax to encompass nine actual years. In such case, the Fifth Circuit stated, the multiplier would become 1, and even under the logic of the Third Circuit, the Windfall Tax would be creditable. The Fifth Circuit saw no reason to treat the Windfall Tax as actually enacted differently from this hypothetical version, and therefore held it creditable. *Entergy II*, 683 F.3d at 238.

Looking Ahead

As a result of their respective technical interpretations of the relevant regulation, the divergent decisions of the Third and Fifth Circuits have placed two taxpayers with "materially identical facts" into fundamentally different tax positions. The differences in these tax positions is ultimately based solely on the taxpayers' respective locations of tax litigation, thus throwing into sharp relief a fundamental risk of our system of circuit court precedent. Of wider impact is the fundamental basis on which each decision was reached: taxpayers in Texas, Louisiana, and Mississippi may for the moment confidently argue creditability based on history and mathematical reformulations, while their counterparts in Pennsylvania, New Jersey, and Delaware had best not count on such arguments, at least for now.

A circuit split of this nature cries out for resolution by the Supreme Court. As stated in the Petition for Writ of Certiorari in *PPL v. Commissioner*, filed July 9, 2012, the Third Circuit—or perhaps the Fifth—"creates a direct, acknowledged, and untenable circuit split, adopts a deeply flawed approach to creditability that is irreconcilable with the governing regulation and case law, and casts a long and lingering shadow over the creditability of foreign taxes paid by U.S. taxpayers." 2012 WL 2834244, at *35. Whether the Supreme Court will heed this cry remains to be seen. ■

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taxes when the rebates are for pre-tax premium contributions. *See* Frequently Asked Questions, www.irs.gov/newsroom/article/0,,id=256167,00.html. Plan sponsors must determine whether rebates are plan assets and ensure that they are used consistently with applicable fiduciary responsibilities. *See* Department of Labor Technical Release 2011-04.

Longer Term Issues

The following provisions are effective in 2014 or later. Although employers should consider how to address them, a final decision is not yet needed.

Employers with more than 200 full-time employees were to provide automatic health plan enrollment for employees. Fair Labor Standards Act § 18A, added by Affordable Care Act § 1511. This requirement has been delayed until the Department of Labor issues guidance. DOL Technical Release 2012-01. The Department has indicated that the regulations may not be issued until 2014. As comments have noted, automatic health plan enrollment is far more challenging than automatic 401(k) plan enrollment because of the variety of plans and types of coverage (*e.g.*, single versus family) offered by larger employers.

A 40% excise tax (the "Cadillac tax") takes effect in 2018 for health coverage costs exceeding $10,200 for single coverage and $27,500 for family coverage.

Nondiscrimination rules apply to insured health plans. Public Health Service Act (PHSA) § 2716; I.R.C. §§ 9815(a), 105(h). Notice 2010-63, 2010-41 I.R.B. 420, requested public comments on guidance needed regarding section 2716. Treasury, the Service, and the Departments of Labor and Health and Human Services determined that compliance with section 2716 should not be required until regulations or other administrative guidance of general applicability has been issued. "In order to provide insured group health plan sponsors time to implement any changes required as a result of the regulations or other guidance, the Departments anticipate that the guidance will not apply until plan years beginning a specified period after issuance. Before the beginning of those plan years, an insured group health plan sponsor will not be required to file IRS Form 8928 with respect to excise taxes resulting from the incorporation of PHS Act § 2716 into § 9815 of the Code." Notice 2010-63, *supra*; *see also* Notice 2011-1, 2011-1 C.B. 259, containing a further request for comments.

Information is required about the availability of coverage through exchanges. The Affordable Care Act requires employers to provide employees with a written notice about the exchanges by March 1, 2013. New employees must be given notice at the time of hire. Act § 1512.

Penalties will be imposed on large employers that do not provide health benefits to full-time employees or provide health benefits that are not affordable or do not provide minimum value. I.R.C. §§ 4980H, 5000A. ■