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Employee Benefits and Executive Compensation Alert

October 2012

Health Care Reform: Large Employers and the New Health Insurance Exchanges

Historically, employers have adopted a number of strategies intended to control the ever-increasing cost of health care, including self-insuring their own employees' health risks, implementing wellness programs, and shifting more and more costs onto their employees. In the wake of the enactment of the Patient Protection and Affordable Care Act ("PPACA"), employers are examining a number of new strategies to control costs (e.g., "private" health insurance exchanges). Click **here** to review a recent alert on private exchanges. Large employers[1] are also trying to understand whether they can leverage the new State-based Exchanges (or Federally-facilitated Exchange, as the case may be) that are being created under PPACA. Below are some common questions we have heard from our clients about the new Exchanges.

Q: Can a large employer offer health coverage sold through an Exchange?

A: Initially, no. Beginning in 2014, an Exchange is intended to offer health coverage to (1) individuals (and families) in the fully-insured individual market and (2) employees of small employers in the fully-insured small group market. In 2017, a State may elect to permit the sale of fully-insured group health plans to employees of large employers through the Exchange, but a State is not required to do so. As a result, a large employer will not be able to offer a fully-insured group health plan to its employees through an Exchange until 2017, at the earliest. It is important to point out that self-insured group health plans can never be offered through an Exchange.

Q: Can an employee purchase health coverage sold through an Exchange?

A: Yes. An employee may opt out of the employer's group health plan and purchase a fully-insured individual policy through an Exchange.

Q: If an employee opts out of the employer's plan and purchases health coverage through an Exchange, will the employee receive a government subsidy?

A: In general, no. If an employee is offered a group health plan by its employer that (1) is "affordable" (i.e., the plan does not exceed 9.5% of the employee's W-2 income) and (2) provides "minimum value" (i.e., the coverage pays for at least 60% of the benefits under the plan), then the employee is not eligible for the government subsidy for health insurance. In addition, it is likely that the employee would lose the contribution that the employer would otherwise make towards the cost of coverage because he or she opted out of the employer's health plan.

Q: What happens in cases where the employer's plan is "unaffordable" or does not provide "minimum value"?

A: In this case, an employee may opt out of the employer's group health plan, purchase a fully-insured individual policy through an Exchange, and obtain a government subsidy for health insurance, if income eligible.[2] Here, the employer would be subject to an annual $3,000 penalty tax under the "shared responsibility" requirement (otherwise known as the "employer mandate") for each employee that obtains a subsidy.

Q: Can the employer fund the employee's purchase of a fully-insured individual policy through an Exchange on a pre-tax basis?

A: It depends on how the purchase of the fully-insured individual policy is funded. PPACA prohibits the pre-tax purchase of individual health insurance through an Exchange with a Section 125 cafeteria plan. However, unless the Department of Treasury indicates otherwise, an argument can be made that an employer may be able to fund the purchase of a fully-insured individual policy through an Exchange on a tax-free basis with a health reimbursement arrangement ("HRA"). It is important to note that PPACA enacted a number of new rules that may adversely affect the use of HRAs as a funding mechanism for the purchase of a health plan – namely the restriction on annual dollar limits on the "essential health benefits" and the employer mandate. Therefore, large employers interested in this type of arrangement should consider advocating for regulations that resolve these legal uncertainties.

Q: Can an employer fund its retirees' purchase of health coverage through an Exchange on a tax-free basis with an HRA?

A: Yes, so long as the arrangement is a "retiree-only" health plan (i.e., a plan that has less than two participants who are current employees). A retiree-only plan is not subject to many of the new requirements under PPACA. As a result, an employer could fund – through an HRA – its retirees' purchase of health insurance policies on an Exchange without having to worry about the restriction on annual limits. In addition, this arrangement would not trigger the employer mandate.

Q: How can Venable help?

A: At Venable, we have attorneys who previously worked in Congress and participated in the development of the Exchanges created under PPACA. As a result, we have a deep understanding of the technical rules and the policy associated with these new marketplaces. Our Venable team also includes experts on all matters relating to employer group health plans and fully-insured individual policies. Contact members of our **Employee Benefits and Executive Compensation**, **Legislative** or **Healthcare** groups for assistance.

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1 Generally, a large employer is a company with more than 100 employees. Until 2016, however, states have the option to define a large employer as a company employing more than 50 employees.

2 In general, the government subsidy for health insurance is only available to an individual whose income is 400% or less of the Federal Poverty Level (that is for 2012, $44,650 for an individual and $92,200 for a family of four).