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HEALTHCARE REFORM- What is NOT Delayed? And the Effects of the End of DOMA

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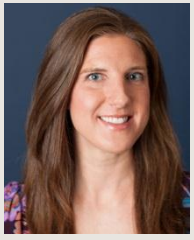

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Health Care Reform and Effects of the Supreme Court's Decision Invalidating DOMA

- This presentation is a general discussion based on current guidance from relevant federal agencies
- It is not legal advice
- Each municipality's situation will differ and the facts for each municipality will determine the particular application in your situation

Treasury delayed implementation of Pay or Play until 2015—
But what is NOT delayed?

What is NOT delayed?

ACA Requirement	Effective Date
Patient-Centered Outcomes Research Institute (PCORI) Fee	**Due Date-7/31/13** $1 per covered life ($2 next year)
Exchange Notice Requirement –Employers must provide notice to employees regarding availability of exchange and premium assistance tax credits	**Due Date- 10/1/13—new employees thereafter within 14 days of hire**

What is NOT delayed?

ACA Requirement	Effective Date
Summary of Benefits and Coverage	Due Date-2013 Open Enrollment
Open Enrollment for Health Insurance Exchanges—begins for individuals and small employers	Starts-10/1/13
Health Insurance Exchange Coverage	Starts-1/1/14 for employees who seek coverage under the Exchange

What is NOT delayed?

ACA Requirement	Effective Date
Group health plan and insurer mandates (all plans) • elimination of annual limits on essential health benefits • elimination of waiting periods in excess of 90 days • elimination of pre-existing condition exclusions	**Starts-Plan years beginning on or after 1/1/14** Note: Review any health reimbursement account plans!

What is NOT delayed?

ACA Requirement	Effective Date
Group health plan and insurer mandates (non-grandfathered plans) • comprehensive health insurance coverage • cost sharing limitations • coverage for certain clinical trial costs • guaranteed availability and renewability of coverage • prohibition of discriminatory health insurance premium rates • prohibition of discrimination based on health status • prohibition on discrimination against health care providers	**Starts-Plan years beginning on or after 1/1/14**

What is NOT delayed?

ACA Requirement	Effective Date
Shared Responsibility for Individuals – requires individuals to obtain coverage or pay personal income tax penalty (greater of $95/adult or 1% of taxable income in 2014)	**Starts-1/1/14**
Annual Fee on Health Insurance Providers	**Starts-1/1/14** Not a direct employer issue, but could affect the cost of insurance coverage

Overview: What is an Exchange?

- State mandate – every state must establish Exchange by January 1, 2014
- If a state doesn't satisfy the rule, federal government will establish Exchange
- Government-operated system for regulating and providing health care
- Offer Qualified Health Plans ("QHP") – "marketplace" that makes health care available to individuals and eligible employers
- Enhance competition in the health insurance market, improve choice of affordable health insurance, and give small businesses the same purchasing power of large businesses
- California: "Covered California"
  see website at *www.hbex.ca.gov*

Functions of Exchanges

- Certifying or decertifying QHPs
- Rating QHPs offered under the Exchange (e.g., quality and price ratings)
- Providing standardized consumer information on QHPs
- Creating electronic calculator enabling individuals to calculate cost of coverage net of any federal assistance
- Operating a website and call center providing comparative information and allowing individuals to apply for or purchase coverage

Functions of Exchanges (continued)

- Determining exemption from individual mandate and granting approvals relating to hardship or other exemptions

- Determining individual eligibility, including for federal assistance and reporting to IRS
  - Federal assistance = premium assistance credit or a cost-sharing reduction

Who Can Get Federal Tax Subsidy?

- Subsidy available if you have income less than 4X the federal poverty level
- Single – income up to $45,960 (2013)
- 2 person family – income up to $62,040
- 4 person family – income up to $94,200
- 6 person family – income up to $126,360

Enrollment Periods for Individuals

- Initial enrollment period: October 1, 2013 through March 31, 2014
- Special enrollment periods for triggering events: e.g. birth, adoption
- Annual enrollment period after 2013: October 15 – December 7

Notice of Exchange

- Employers subject to FLSA required to provide Notice of Exchange
  - Current employees, provide by October, 2013
  - New employees hired after10/1/2013, provide when hired (within 14 days of hire after 10/1/13)
- Content requirements
  - Existence of Exchange: including description, services, and contact information
  - Possible eligibility for premium assistance or cost-sharing reduction
  - Possible loss of employer's contributions toward premium costs, and that some or all of those contributions are excluded from federal income tax
  - Include contact information for the Exchange and an explanation of appeal rights

Notice of Exchange (continued)

- DOL issued guidance and model notices to be used on May 8, 2013, (Technical Release No. 2013-02)
- Two versions of notice—one for employers who are providing health plan coverage to some or all employees and one for employers who are not providing health plan coverage. Model notices can be found on DOL web site
- DOL guidance also issued an updated COBRA notice that now includes notice of options under the Exchange

Effect of 2014 on Health Reimbursement Account (HRA) Plans

- Rules prohibiting annual limits on essential health benefits for plan years on or after 1/1/2014
- HRAs by design impose limits on the dollar value of benefits
- Whether HRA will continue to be permissible depends on whether is an “integrated” HRA or a “stand-alone” HRA
- Guidance says “integrated” ok under ACA; this means only available to employees covered by primary group health plan of employer meeting the health care reform requirements
- Further guidance to come on stand-alone “retiree-only” HRAs

Planning and Bargaining Strategy—What Should You Be Thinking About for the Future?

Cadillac Tax (2018)

Cadillac Tax (2018)

- Effective – 2018
- Conceptually simple – in practice, complex
- 40% excise tax on the aggregate cost of employer-sponsored health care coverage exceeding certain annual dollar thresholds
  - $10,200 for individual coverage and $27,500 for family coverage
  - Thresholds are higher for plans covering retirees and workers in high-risk jobs
  - Amounts subject to future indexing

Who Calculates the Tax?

- Employer is responsible
- Must determine what share of the tax is attributable to each coverage provider
  - Add up all the coverage – if there is an “excess,” then each coverage provider is responsible for its pro-rata share of the tax
- Failure to accurately calculate the tax results in a tax penalty for the employer
  - Coverage provider still pays the remaining tax owed
  - Employer also pays 100% of the additional amount owed as a penalty, plus interest (with some exceptions)

Who Must Pay the Tax?

- Coverage provider has responsibility
  - Insured plan = insurer
  - Health Savings Account = employer
  - Any other coverage (e.g., self-insured coverage) = “the person that administers the plan benefits” (e.g., the plan administrator)
- No employee pays the tax directly
- Definition of “person that administers the plan benefits”
  - Need guidance on this definition
  - Multiple parties often share administrative responsibilities
  - Could mean third-party administrator or an employer who is the plan administrator
  - Duties that make a particular party the “administrator” for purposes of the tax is unclear

What's the Theory?

- Revenue generation
  - Collection of the excise tax; and
  - Employers may choose lower cost plans that will in turn free up funds for wages, resulting in increased tax revenue
- Control health care costs by reducing demand for high cost coverage
- Potential trickle down to employees
  - Employers may stop offering "Cadillac" plans
  - Plans may be designed with higher deductibles and copayments to reduce premium costs to below the tax threshold
  - Insurers may pass on the cost of the tax with higher premiums
  - Employer may discontinue contributions to health and flexible spending accounts

What Should Employers Do Now?

- Currently, little guidance on the tax, so changes possible before 2018 arrives—but consider future planning now
- Acquire solid understanding of benefit plan costs
- Consider impact of the tax when negotiating and structuring health plan designs
  - For example, will maintaining grandfathered plan status still be valuable and cost-effective?
- Allow plenty of time to implement changes to health care benefit programs

Retiree-Only Plans—Do You Have One (or maybe not)?

- Prior to ACA, a retiree-only plan exemption was in place for HIPAA portability, mental health parity and other group health plan mandates in ERISA, the IRC, and the PHSA
- Exemption applies if less than 2 participants who are current employees
- Preamble to grandfathered plan regulations clarified that retiree-only plans are exempt from ERISA section 715 and IRC section 9815 (the market reform requirements)
- HHS said will not enforce requirements of HIPAA or ACA for non-federal governmental retiree-only plans

Retiree-Only Plans—Do You Have One (or maybe not)? (continued)

- Unless plan is “retiree-only”, subject to ACA market reforms
- If your municipality treats a plan as exempt but it isn’t, the penalty under the IRC is a $100 per day excise tax to the IRS for each individual for which there is a failure for the period of the failure
- Very little guidance yet on retiree-only plans
- What about rehired retirees, working subject to hours limitation under a public retirement system statute or regulations? Are they “current employees”? If so, and more than one of them—your plan may not be exempt from the market reforms

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The Supreme Court's Decision Invalidating DOMA

Enactment of DOMA

- The Defense of Marriage Act (DOMA) was enacted in 1996
- DOMA has only two substantive provisions:
  - Section 2: States and territories are not required to recognize a same-sex marriage validly established under the laws of any other state or territory.
  - Section 3: The federal government will recognize a marriage only between one man and one woman.

U.S. v. Windsor

- On June 26, 2013, the Supreme Court holds that Section 3 of DOMA is unconstitutional
  - The federal government will now recognize same-sex spouses as married for purposes of federal laws
- The Supreme Court did not overturn Section 2 of DOMA
  - States are not required to permit or recognize same-sex spouses
  - How will individuals be treated who are married in a state that recognizes same sex marriages and live in a state where same sex marriage is not recognized?
  - Historically, for tax purposes, where the individual resides – “domicile” – determines tax treatment

Application of *Windsor*

- It is unclear whether the application of Windsor is retroactive or prospective only
  - If Section 3 of DOMA is unconstitutional, has it been unconstitutional since it was enacted in 1996?
  - Employers could face claims for failing to provide benefits to same-sex spouses in the past
  - Employers and employees may want to file tax refund claims to recharacterize taxable income as excludable (e.g., imputed income for health coverage)
- Municipalities should keep careful watch for guidance from the IRS and other agencies

Impact of *Windsor* – Health & Welfare Plans

PRE-DOMA RULE	NEW RULE
<u>Participation in health plans – tax status of plan</u> Under IRS rules, a person who is not a spouse or tax dependent cannot participate in a tax free health plan. If someone who is not a spouse or dependent does participate, the tax free nature of the plan is lost for every person who participates (but see below).	A same sex spouse may participate in a tax free health plan.
<u>Participation in health plans – imputed income</u> To avoid losing the tax free status of a health plan, employers commonly impute as income to the employee the fair market value of coverage for the same sex spouse.	Income imputation is not needed for same sex spouse.

Impact of *Windsor* – Health & Welfare Plans

PRE-DOMA RULE	NEW RULE
FSAs, HRAs, HSAs Same sex spouse could not receive benefits if not a tax dependent.	Reimbursement of expenses may be made for same sex spouse.
COBRA COBRA coverage is not available to same sex spouses	COBRA coverage is available to same sex spouses.
HIPAA No special enrollment rights are available on marriage or when same sex spouse loses eligibility for coverage under another plan.	The same special enrollment rights must be made available to same sex spouses.

Impact of *Windsor* – Health & Welfare Plans

PRE-DOMA RULE	NEW RULE
<u>Family and Medical Leave Act</u> FMLA leave not required with respect to same sex spouse, including extensions of certain health care coverage rights during FMLA leave.	FMLA is now required as well as extension of health coverage.

Impact of Windsor – Retirement Plans

PRE-DOMA RULE	NEW RULE
<u>Beneficiary Designation</u> Plan document may not have required consent from same sex spouse to name someone else as a beneficiary. Under the plan document, the same sex spouse may not be default beneficiary if no other is named. Plan may not provide survivor benefits to other than a spouse.	Same sex spousal consent required to name other as beneficiary for both DB and DC plans. (Not required for 403(b) or 457(b) plans). Same sex spouse may become default beneficiary depending on terms of the plan. Plan would now provide survivor benefits to same sex spouse. Required survivor benefits under pension plans (unless waived by spouse) include qualified preretirement survivor annuities (QPSAs).

Impact of Windsor – Retirement Plans

PRE-DOMA RULE	NEW RULE
Required minimum distributions – time benefits begin Distributions after the participant's death to a non-spouse must begin within one year after participant's death.	Distributions to same sex spouse may be deferred until participant would reach age 70 ½.
Required minimum distributions – life expectancy Generally, under defined contribution plans, benefits may be distributed based on the life expectancy of the participant and non-spouse beneficiary. However, the life expectancy is determined once when benefits start and then is reduced by one each year.	The life expectancy of a participant and spouse may be re-determined each year, spreading the required payments over a longer period.

Impact of Windsor – Retirement Plans

PRE-DOMA RULE	NEW RULE
Minimum Distribution Incidental Benefit Expected payments to a non-spouse beneficiary more than 10 years younger than the participant cannot exceed a specified percent of the expected payments to the participant, in accord with a complex table published by the IRS.	Payments to a same sex spouse may equal as much as 100% of the annuity payable to the participant regardless of the age of the spouse.
Rollovers of Distributions Non-spouse beneficiary can only have a limited rollover to an inherited IRA.	Same sex spouse may rollover to the spouse's own IRA, or another employer's plan that accepts the rollover.

Impact of Windsor – Retirement Plans

PRE-DOMA RULE	NEW RULE
Hardship Withdrawals Hardship withdrawal on account of medical, tuition and funeral expenses of non-spouse not available unless is "dependent."	These hardship withdrawals are now available to same sex spouses without the additional restrictions.
10% Early Withdrawal tax 10% penalty tax may apply to withdrawal for the benefit of a non-spouse beneficiary.	10% penalty tax does not apply to certain withdrawals for medical expenses, tuition expenses and first time homebuyer expenses for spouses.
Spouse consent to plan loan Plan document need not require consent from same sex spouse to a plan loan.	Spouse consent required for plan loan.

Impact of Windsor – Retirement Plans

PRE-DOMA RULE	NEW RULE
Spouse consent to benefit form other than qualified joint and survivor annuity Plan document need not require consent from same sex spouse to a benefit form that is not a qualified joint and survivor annuity.	Spousal consent required for benefit form other than QJSA.
"One year marriage" rule Some plans require at least one year of marriage before a spouse survivor annuity is paid to avoid "deathbed marriages."	The same rule will apply to same sex marriages.
QDROs QDROs do not apply to same sex spouses.	QDROs will apply to same sex spouses (and former spouses).

Impact of Windsor – Retirement Plans

PRE-DOMA RULE	NEW RULE
Section 415(b) limit Section 415(b) requires an actuarial reduction to the dollar limit in determining the limit for survivor annuities for a non-spouse.	No actuarial reduction to the dollar limit is required for qualified joint and survivor annuities for same sex spouses.
Nonqualified Plans Distributions may be made on unforeseeable emergency of a beneficiary as well as to a spouse. Therefore, there was no restriction on making this distribution to a same sex spouse as long as he/she was a beneficiary.	Unforeseeable emergency distributions to a spouse makes this rule a bit less constraining.

Questions?

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