



Special Alert

Congress Passes Major Health Care Reform *Senate to Take Up Reconciliation Bill This Week*

This evening, the House of Representatives passed the Senate's Patient Protection and Affordable Care Act (H.R. 3590), as well as the Health Care & Education Affordability Reconciliation Act of 2010 (H.R. 4872). President Obama is expected to sign H.R. 3590 into law, while H.R. 4872 is expected to move to the Senate for a vote this week. These comprehensive reform bills mark the most significant change to the nation's health care laws in at least four decades, although the final details of health care legislation remain subject to additional political maneuvering.

Where We Are and How We Got Here

- The Senate passed its version of comprehensive health care reform on December 24, 2009. In January of this year, Congress seemed close to sending a bill to the President for signature, until the Massachusetts special election cost Democrats in the Senate their supermajority. Reform efforts gained steam over the past month, however, as the President proposed changes to the legislation and the House worked to gather the necessary votes to pass the Senate's bill.
- After threatening to pass the Senate bill using a controversial "deem and pass" procedure, the House changed gears over the weekend and today voted on and passed the Senate bill. The House also voted on and passed the Health Care & Education Affordability Reconciliation Act of 2010 (H.R. 4872), which is meant to "fix" or reconcile the Senate bill with changes proposed by the House. Although the Senate bill will become law as soon as President Obama signs it, the reconciliation bill will now proceed to the Senate where debate is expected to begin this week.
- Senate Republicans are vowing to make procedural challenges to the House reconciliation bill, however, and any change could force the reconciliation bill back to the House for another vote. Other legal and political challenges may be in store as well.
- Thus, while Congress passed health care reform legislation, the Senate could vote as early as this week to modify the legislation.

Expected Changes and Impacts

Much of the substance of the law remains in limbo, but a number of major reforms are expected to remain in place and will have a significant impact on employers, including:

- **Creation of State Health Care Exchanges for Small Businesses and Individuals.** Individuals and small businesses would have the option of purchasing health insurance through state-based exchanges. The exchanges would include a not-for-profit run insurance option that will offer competitive benefits at affordable prices. Individuals and small businesses may be eligible, in certain circumstances, to receive credits toward the purchase of insurance through the exchanges. The exchanges will begin in 2014.
- **Individual Coverage Mandate.** All individuals will be required to obtain health coverage or pay a penalty tax. There are religious and hardship exemptions, and low income individuals will either receive coverage through an expansion of Medicaid or receive subsidies to make coverage more affordable. The penalty begins in 2014.
- **Excise Tax on Employers Maintaining High Cost Health Plans (the “Cadillac Tax”).** Employers offering high cost health plans (plans with health coverage exceeding certain thresholds) must pay an excise tax equal to 40% of the value of the plan that exceeds the threshold amount. This provision could have significant collective bargaining implications, as union health care coverage in particular could easily exceed the Cadillac Tax threshold. This provision is effective starting 2013 in the Senate bill, but the provision would not take effect until 2018 under the House bill.
- **Employer Coverage Mandate (“Pay or Play”).** Employers with more than 50 full-time employees will be required to make available to all employees a minimum level of coverage (with the legislation specifying the features of this minimum coverage—the first time that Congress has set a baseline for health plan coverage), or pay a per-employee fee. Employers will not be required to provide coverage for part-time employees, but these employees will be counted as partial employees for purposes of determining whether an employer has 50 employees. If the employer offers coverage but employees are forced to purchase insurance through the state-based exchanges because the employer’s coverage is not affordable, the employer must pay separate fees. The Pay or Play provision becomes effective 2014 upon the creation of the state-based exchanges.
- **Elimination of Tax Break for Retiree Drug Subsidies.** Employers that provide prescription drug benefits to Medicare retirees and receive subsidies will be taxed on the amount of the subsidy. This could have a significant impact on employers’ balance sheets under the Generally Accepted Accounting Principles and SEC reporting rules. This provision is effective at the beginning of 2011 in the Senate bill, but the House bill would delay the effective date to 2013.
- **Limitation on Employee Contributions to Health Care Flexible Spending Account.** Employees would be limited to an annual contribution of \$2,500 to health care flexible spending accounts. Also, employers would no longer be permitted to reimburse employees for over-the-counter medication under flexible spending arrangements. This provision is effective at the beginning of 2011 in the Senate bill, but the House bill would delay the effective date to 2013.

- **Increase in Permitted Wellness Program Incentives.** Employers could offer increased incentives (in the form of rewards or premium reductions) of up to 30% of the cost of coverage for employees to participate in wellness programs. Employers must offer alternative arrangements for individuals who are not able to participate due to physical or other limitations. This provision becomes effective in 2014.
- **Mandatory Coverage of Adult Dependents.** Group health plans will be required to offer coverage for participants' adult dependents through age 26. This provision takes effect six months after the enactment of the (Senate and House) legislation.
- **Elimination of Preexisting Condition Exclusions and Lifetime Limits.** Group health plans and insurers will no longer be permitted to exclude coverage for preexisting conditions or place lifetime limits on coverage. Lifetime limits are prohibited effective six months after enactment of the legislation. Preexisting conditions exclusions must be eliminated for dependent children within six months of enactment and must be completely eliminated by 2014.

What's Next?

As Congress moves toward a final vote on health care reform, employers will be presented with new opportunities, but they will also face operational and financial challenges. The new legislation will require employers to reconsider the design of employee health and welfare plans. For unionized employers, there may be related collective bargaining implications.

Seyfarth Shaw's Health Care Reform Legislation Team is following and analyzing the strategic and compliance challenges presented by the new law. After the Senate acts (or fails to act), we will provide an operational overview of the law's new requirements impacting employers, a summary of the cost implications of the new law on business, suggestions for evaluating employers' ability to comply with the new law's provisions, as well as considerations for developing benefit strategies in light of these changes.

In the coming weeks, we will be hosting a webinar for all employers on the new legislation. We will also host specialized webinars regarding the specific implications for health care employers, and regarding strategies for unionized employers and collective bargaining.

If you have any questions regarding the health care reform legislation, please contact the Seyfarth attorney with whom you work, who can put you in touch with a member of our Health Care Reform Legislation Team (www.seyfarth.com).



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