

Health Care Reform Management Alert Series

Issue 6

Health Care Reform Mandates Do Not Apply to Retiree-Only Plans

This is the sixth issue in our series of alerts for employers on selected topics in health care reform. (Our general summary of health care reform and other issues in this series can be accessed by clicking [here](#).) This series of Health Care Reform Management Alerts is designed to provide a more in-depth analysis of certain aspects of health care reform and how it will impact your employer-sponsored plans.

This issue addresses the application of the new requirements in the legislation to health plans that only cover retirees of an employer (“retiree-only plans”).

The Patient Protection and Affordable Care Act, as modified by the Health Care and Education Reconciliation Act of 2010 (collectively the “Act”), imposes several new mandates on group health plans and health insurance issuers. On June 17, 2010, the U.S. Departments of the Treasury, Labor and Health and Human Services jointly published interim final rules for group health plans and health insurance coverage relating to status as a “grandfathered” health plan under the Act (the “Grandfather Rules”). “Grandfathered” plans are exempt from many of the new mandates under the Act, and we provide further analysis of the Grandfather Rules in a separate alert. (This alert can be accessed by clicking [here](#).)

Prior to health care reform, the Employee Retirement Income Security Act of 1974 (“ERISA”), the Internal Revenue Code (the “Code”) and the Public Health Service Act (“PHSA”) all contained an exemption from certain mandates for health plans with less than two participants who are current employees on the first day of the plan year (the “small plan exception”). This exemption has been widely interpreted to include retiree-only plans. The Act eliminated the small plan exception from the PHSA, but not from ERISA or the Code. Thus, it was unclear to what extent retiree-only plans would be exempt from the mandates added by the Act.

The preamble to the Grandfather Rules confirms what many thought was the intent of Congress, namely, that the small plan exemption will continue for *self-insured* group health plans under ERISA and the Code. Thus, the new mandates do not apply to retiree-only plans subject to ERISA and the Code. While it is unclear what constitutes a retiree-only plan, if a separate governing plan document is maintained or a separate Form 5500 annual report is filed for your retiree health programs, the plan would likely be considered a retiree-only plan. In addition, the preamble stated that the new mandates do not apply to “excepted benefits” such as dental-only, vision-only and flexible spending account plans.

It seems that the Department of Health and Human Services (HHS) intends to also preserve the retiree-only exemption for *insured* plans. The preamble states that, while the individual states have primary authority to enforce the PHSA over group and individual health insurance issuers, HHS is encouraging States not to apply the new mandates of the PHS Act to issuers of retiree-only plans or of excepted benefits.

There is also good news in the preamble for retiree-only plans maintained by state and local governments. The preamble states that, because there is no statement of intent that non-federal governmental retiree-only plans should be treated differently than private sector plans, HHS has stated that it does not intend to use its enforcement resources to enforce the requirements of HIPAA or the Act with respect to non-federal governmental retiree-only plans.

Although the mandates added by the Act do not apply to retiree-only plans, the “Cadillac Tax” discussed in our general summary of health care reform (which can be accessed by clicking [here](#)), which will be effective for tax years beginning on or after January 1, 2018, and the prohibition on reimbursing over-the-counter drugs obtained without a prescription from a health reimbursement arrangement, effective for tax years beginning on or after January 1, 2011, may apply to retiree-only plans.

For further details, or if you have any questions regarding retiree-only plans, contact your Seyfarth Shaw LLP attorney or any Employee Benefits attorney listed on the website at www.seyfarth.com/employeebenefits.

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