



## Retail Detail

# The New Health Care Reform Law Creates Significant Obligations for Employers in the Retail Industry

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (PPACA). Less than a week later, Congress passed the Health Care and Education Tax Credit Reconciliation Act of 2010. The Reform made sweeping changes to our nation's health care system and imposes many new requirements on employer-sponsored group health plans. In April, Seyfarth Shaw provided guidance regarding the effects that this bill will have on retail employers in a news piece appearing in the Wall Street Journal.

Although the changes are phased in, and retail employers will have time to adjust their health care benefits plans for employees in accordance with the new government edicts, the retail industry will be especially hard hit by some of the provisions in the Reform.

## Breaks for Nursing Mothers

First, and perhaps most obvious and immediate, as part of the PPACA, Congress amended the Fair Labor Standards Act to require breaks for nursing mothers. This portion of the Act appears to be effective immediately and requires employers to provide "reasonable break time" for an employee to express breast milk for her nursing child. The requirement applies for one year after the child's birth. The PPACA places no limit on the number of the breaks employers must provide, and does not contain any guidance with respect to the duration of such breaks. In addition to providing reasonable breaks, the employer must also provide a place where the employee can express breast milk. The break room must be somewhere other than a bathroom and must be "shielded from view and free from intrusion from coworkers and the public." This poses a particular challenge for retail employers where offices, private rooms and other "non-productive" areas are scarce in retail stores and warehouses and the costs of creating such spaces for a nationwide retail chain could be prohibitive.

## Seasonal Employees

Second, many retail stores hire seasonal employees between October and late January to cover the busy holiday purchase and return season. The new law requires only a 90-day waiting period before an employee is eligible for health-care coverage. As a result, retail employers will have to closely monitor their seasonal employees' tenure and make sure they do not stay longer than 89 days or they will be forced to pay health insurance benefits to these workers.

## Financial Penalties

Another prickly issue for retailers is that the cost of health care coverage that employers offer cannot exceed 9.5% of family income. Retailers have a large number of low-wage staff. If the employee's cost is over 9.5% of family income, and at least one employee purchases coverage through the exchange, the employer will be charged a \$3,000 penalty for each worker who obtains insurance through the exchange (or \$2,000 per full-time employee, whichever is less). If an employer does not offer "minimal essential coverage" to full-time employees (i.e., insurance coverage wherein the employer pays at least 60% of the cost), the company will be penalized \$2,000 for each of these workers, after the first 30. Some retailers may not find these costs prohibitive compared to the cost of providing insurance, but they may also suffer negative publicity for their decision not to provide adequate coverage or the industry standard health care benefits.

If retailers keep employees' cost of coverage below 9.5% of household income, they will avoid the penalties discussed above. If the cost of coverage exceeds 8% of any employees' household income, however, retailers will be required to provide those employees with a voucher to purchase more affordable coverage through the state-based exchanges. The amount of the voucher will be equal to the most valuable coverage option the retailer offers. As a result, this cost to the retailer (the full cost of health coverage for each employee who goes to the exchanges) may be greater than the penalties discussed above (\$3,000 per employee who obtains coverage through the exchanges).

## Other Implications

Retailers who currently provide dependent coverage will be required to offer coverage to "adult children" up to age 26, starting in September (regardless of whether the adult child is a dependent of the employee). The cost of coverage provided by retailers will be excluded from employees' income.

In addition, beginning in September of this year, retailers with fully insured health plans may not discriminate in favor of highly compensated employees (nondiscrimination requirements already apply to self-insured health plans). For retail employers, this may mean that they cannot offer the premium health care benefits packages to executives or high-level managers that they are accustomed to using to attract and retain highly qualified personnel.

Also beginning in September of this year, employers may be required to pay the full cost of preventive coverage, including immunizations, breast cancer screening and other services as recommended by the U.S. Preventive Services Task Force. Such preventative care is especially important for retailers who lose significant productivity through employee sick days and who want to encourage immunizations and health screening because their employees are customer-facing. Employers with plans in existence at the time the PPACA passed will not be required to comply with this change.

Further, under the new Reform, retail employers with more than 200 employees must automatically enroll all full-time employees as soon as they are eligible for coverage, and only the employees themselves may opt out of coverage.

The Reform will impose additional reporting requirements in the future for retail employers and additional mandatory employee communication. For example, by September 2010, employers must submit to the Secretary of HHS (and make available to the public) information regarding claims payment policies, enrollment information, information on cost sharing and rating policies, information on out-of-network coverage and information on participant rights. The Secretary of HHS may require additional information as well.

In addition, by January 2011, employers are responsible for reporting the total cost of medical benefits provided on employee Form W-2s. Similarly, by March 23, 2012, retail employers will have to provide a summary of benefits and a coverage explanation to all participants at the time of enrollment and each subsequent year during annual enrollment. Employers may provide the summary in paper or electronic form. The summary should contain information regarding cost sharing, continuation of coverage, limitations on coverage and details on where participants can obtain more information.

In short, many of the new health care reforms will have a significant effect on retail industry companies. While some of the deadlines are not immediate, others are fast approaching. Please feel free to call any of the individuals on our health care reform team or retail industry team listed below for further guidance regarding compliance.

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For a more detailed analysis on how Health Care Reform will impact employers, please [click here](#).



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