

Five Big Changes in 2011

By Steven R. Gerlach and Ellen Palminteri | February 16, 2011

Health care reform has ushered in sweeping changes for employers and group health plans. Although many provisions will not take effect until 2014 or later, a number of important provisions take effect or require action in 2011. Five changes that employers need to know about and prepare for are: Nondiscrimination Testing for Health Plans, the Small Employer Tax Credit, the Simple Cafeteria Plan, New Medical Account Rules and the Wellness Program Grants for Small Employers.

Nondiscrimination Testing

Prior to 2011, only self-insured health plans were required to perform annual nondiscrimination testing. Under the Patient Protection and Affordable Care Act (“PPACA”), insured plans are now required to perform this testing as well. To pass the nondiscrimination test, health plans must meet certain percentage requirements for eligibility and must not provide greater benefits to highly compensated employees.

Employers who fail the testing may be subject to penalties of \$100 per day per (non-highly compensated) employee affected. Employers may also be subject to civil liability under ERISA or other laws. *Fortunately, implementation of this provision has been postponed pending further guidance from the IRS, HHS or the DOL.*

Small Employer Tax Credit

Effective for tax year 2010, the Small Employer Tax Credit is a credit given to small businesses for certain payments of employee healthcare coverage for low to moderate income workers. In general, the credit is available to small employers that pay at least half the cost of single coverage for their employees. The credit can be applied to new health insurance coverage or it can help the small business maintain the coverage it already offers.

In order to qualify as a small employer eligible for the tax credit, the employer must have fewer than 25 full-time equivalent employees (“FTEs”) and the average annual wages of those employees must be less than \$50,000. The amount of the credit varies on a sliding scale based on the number of employees and their average wage. Employers with 10 or fewer employees whose average annual wages are less than \$25,000 may qualify for the maximum credit, which is 35% (25% for nonprofits).

Simple Cafeteria Plans

A cafeteria plan is an employer-sponsored plan that allows employees to choose from among certain pre-tax benefits or taxable cash. Under the tax code, a cafeteria plan must meet certain administrative requirements and may not discriminate in favor of highly compensated participants. If an employer violates the nondiscrimination rules the benefits provided to those highly compensated employees become taxable. Because of this potential adverse tax result, small employers, who may have a higher percentage of highly compensated employees, have tended not to provide cafeteria plans to their employees.

Effective in 2011, however, PPACA provides that small employers (100 or fewer employees) will be allowed to adopt new "SIMPLE cafeteria plans." The plans are subject to relaxed nondiscrimination testing so long as certain eligibility, participation and minimum contribution requirements are met.

Unfortunately, the new health care reform legislation did *not* change current law that prevents sole proprietors, members of limited liability companies, partners in a partnership, and more than two percent shareholders of S corporations from participating in a cafeteria plan. These restrictions will continue to be a major impediment to the use of cafeteria plans by these small businesses.

New Medical Account Rules

Over-the-counter medications will generally no longer be reimbursable from health reimbursement accounts (HRAs), health savings accounts (HSAs), medical savings accounts (MSAs), and medical flexible spending accounts (MFSAs) beginning on January 1, 2011. Under recent IRS guidance, such reimbursements are only permitted with a doctor's prescription.

Wellness Program Grants for Small Employers

Starting in 2011, \$200 million is authorized as grant money for small employers who provide employees with comprehensive workplace wellness programs. Any employer with fewer than 100 employees who work at least 25 hours per week is eligible for a grant. A comprehensive workplace wellness program must include: (1) health awareness initiatives such as health education, preventive screenings and health risk assessments, (2) efforts to maximize employee participation, (3) initiatives to change unhealthy behaviors, such as counseling, seminars, online programs and self-help materials and (4) supportive environment efforts such as policies that encourage healthy eating, increased exercise and improved mental health.

If you would like more information about any aspect of the new law, please call Steve Gerlach at (207) 228-7128. If you would like to receive one of my prior newsletters on the new health law, please call or email Jade Letourneau at jletourneau@bernsteinshur.com or (207) 228-7274.