

Where Federal Legislators Fear to Tread

Healthcare reform is like the weather – everybody talks about it, but nobody seems to do anything about it, at least not in Washington. Frustrated by the lack of any meaningful healthcare reform legislation on the federal level, state legislators around the country have been busy filling the gap. Statehouses are working on a variety of proposals intended to reduce their numbers of uninsured and ease the resulting strain on limited state resources. In 2007, several states, including California, Pennsylvania and Illinois, have put forth healthcare reform proposals. The legislation takes a variety of forms, including employer assessments, individual mandates requiring residents to have insurance, and an expansion of current state-funded programs.



Given the difficulty in enacting broad-based healthcare reform, states are also continuing to utilize other methods to address the issues. As states have generally met with less resistance to changes in their insurance laws, one popular approach has been the passage of insurance laws requiring, for example, the extension of coverage for dependent children.

We offer a review of reform progress on several fronts.

The Rocky Road to Healthcare Reform

Although several healthcare reform proposals have been introduced in state legislatures this year, the legislation enacted in 2007 has been significantly less encompassing than that passed in 2006. For instance, Rhode Island recently passed legislation requiring employers with more than 25 employees

to adopt and maintain a Section 125 cafeteria plan for their employees so that they may purchase health insurance on a pre-tax basis.

Meanwhile, it has not been entirely smooth sailing for healthcare reform passed last year. Certain aspects of the Massachusetts Health Care Reform Act recently went into effect, but significant delays in the release of implementing regulations left many employers scrambling to comply. The City of San Francisco enacted its Health Care Security Ordinance, which was immediately challenged as being preempted by the Employee Retirement Income Security Act (ERISA). Due to the lawsuit, the ordinance's effective date was pushed back six months, and whether the law ever goes into effect will be determined by the outcome of the suit. A similar Suffolk County (New York) law was recently struck down on much the same grounds. Only Vermont appears

to have been able to roll out its healthcare reform without significant complications.

Massachusetts



The Massachusetts Health Care Reform Act, passed in April 2006, affects individuals, insurers and employers. (For detailed information about Massachusetts developments,

please see Willis' *Employee Benefit Alert*, Issue 110.) It has generated quite a bit of press due to its broad scope, particularly as it applies to employers. Many employers initially ignored the law for a variety of reasons: it was touted as an individual or employee mandate and non-compliance on the employer side seemed to be penalized very lightly. In any event, most employers that provide health coverage already meet the law's requirements. Still, the regulations brought additional complexity to affected employers (any employer who has 11 or more full-time equivalent employees performing services within the Commonwealth of Massachusetts). Affected employers must comply with the following requirements.

- Employers must make a "fair and reasonable" premium contribution to the health insurance costs of their employees or be subject to an annual assessment of \$295 per person.
- Employers who do not offer to contribute toward or arrange for the purchase of health insurance will be assessed a special surcharge for any state-funded health costs incurred for employees or their dependents if such costs reach certain levels.
- Employers must adopt and maintain a Section 125 cafeteria plan so that employees can fund their benefits on a tax-free basis.
- Employers have certain filing requirements. These include the Health Insurance Responsibility Disclosure (HIRD) form that must be completed by employers and employees who either waive employer-sponsored coverage or have access to the employer's Section 125 plan. For state tax purposes, employers must also provide employees with a MA 1099 HC form. There is also an online filing requirement related to the fair and

reasonable contribution requirement. Although seemingly benign, the mandated methods of determining the value of the employer-provided plan and whether it complies will be costly.

Vermont



In May 2006, Vermont also enacted healthcare reform legislation. This law is significantly less problematic for employers than the Massachusetts

Health Care Reform Act. Similar to the Massachusetts law, this legislation also has a "pay or play" feature. Certain employers are required to pay into the Employer Health Care Contribution Fund. The amount that employers must pay is based on the number of their full-time employees who are uninsured.

- For 2007 and 2008, employers with eight or fewer employees are exempt from the requirement
- In 2009 this exemption reduces to six full-time employees
- In 2010 it further drops to four full-time employees

Vermont employers who do not pay some part of the cost of health insurance for their employees must pay the healthcare assessment for all their employees. Employers who offer health insurance coverage must pay the assessment for workers who are ineligible to participate in the healthcare plan and for workers who refuse the employer's healthcare coverage and do not have coverage from another source.

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The quarterly assessment of \$91.25 per person amounts to a dollar a day, or \$365 per year.

San Francisco



In July 2006, San Francisco adopted the Health Care Security Ordinance (HCSO). (For detailed information about San Francisco-related developments, please see Willis' *Employee Benefit Alert*, Issue 112.) The HCSO requires medium and large businesses to make certain minimum contributions toward employees' healthcare. The law originally provided that, effective July 1, 2007, employers with 100 or more employees would have to pay \$1.60 per hour worked towards employees' healthcare, and those with 20-99 employees would be required to pay \$1.06. (Nonprofit employers with fewer than 50 employees were exempt from the contribution requirements.)

In November 2006, the Golden Gate Restaurant Association (GGRA), a group that represents the interests of restaurant owners, initiated a suit against the city in federal court in an effort to stop the HCSO from going into effect. The GGRA's lawsuit is based on a claim that the law is preempted by ERISA, an argument similar to the one used in a successful challenge of Maryland's Fair Share Health Care Act. Due in part to the lawsuit, the HCSO was amended to delay its effective date until January 1, 2008. The law was further amended to increase the required employer contributions.

Insurance: Expanding Dependent Age

Although most health insurance plans already provide dependent coverage up to age 19 (typically with an available three- to five-year eligibility extension for full-time students), new insurance laws are now beginning to require coverage for even older dependents. (For detailed information about state legislative interest in defining dependent age, please see Willis' *Employee Benefit Alert*, Issue 71.) In some instances, the new laws mandate longer periods of coverage that are contingent upon the dependent's student status or financial dependency. Other state proposals have tied the extension to particular

circumstances, such as full-time students taking medical leave or serving in the armed forces.

According to a recent study by the Kaiser Family Foundation, a healthcare policy research group, young adults between the ages of 19 and 34 are the fastest growing segment of the uninsured population. Although adding expanded dependent eligibility requirements to group health policies will almost certainly increase premiums, legislators seem persuaded by the idea that expanding health coverage availability will reduce the number of uninsured.

This raises a red flag for employers and business groups because of the increased cost of insurance. According to the Kaiser Foundation, healthcare premiums grew an average of almost eight percent last year, following a nine percent rise the previous year. Unrelenting cost escalation continues to be a bane to many employers – yet costly mandates continue to be legislated.


New Jersey



Although several states have passed dependent coverage measures, including most recently Maryland (where, if an employer subject to the law offers dependent coverage, they will be required to extend the coverage of dependents up to age 25) and Washington (where, subject to important limitations, dependent coverage is similarly available to dependents up to age 25), New Jersey's law has attracted the most attention because it requires continued coverage for certain dependents until age 30 – significantly longer than any other state's requirement.

New Jersey's new law applies to a covered employee's over-age dependents that meet the following criteria.

- Under 30 years old
- Unmarried
- Without children
- Residents of New Jersey or are full-time students
- No coverage under any other health benefit plan



As this is an insurance requirement, it does not apply to self-insured plans. Self-funded plans are not considered to be providing “insurance” and therefore escape state insurance rules.

All for Nought? ERISA Preemption

When Congress first enacted ERISA it added a special preemption rule that reserved regulatory and legislative power over employee benefit plans for the federal government. Arguably, many of the requirements under these laws and proposals are preempted by ERISA, and might not survive a challenge on those grounds. Many of the current healthcare reform laws resemble the Maryland Fair Share Health Care Fund Act of 2006, which required certain companies to either spend at least eight percent of payroll on employee healthcare or contribute to the Maryland Medicaid Fund. A Federal Circuit Court of Appeals held that ERISA preempted the Maryland law because the Maryland law essentially requires an employer to provide health benefits to employees. Currently, though, the Massachusetts and Vermont laws have not been challenged.

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The preemption power, however, contains a special exception which continues to allow states to regulate insurance laws. Because the state laws that expand the dependent age discussed in this article are considered insurance mandates, we believe that the laws will apply to employers who choose to buy insurance policies. Self-funded plans, which are not funded by insurance, are generally affected by neither ERISA’s preemption nor insurance rules. Employers sponsoring self-funded plans are therefore free, for example, to continue defining *dependent* as they wish for purposes of benefit eligibility.

Uncertain Results

While employers in Massachusetts and Vermont deal with compliance obligations brought on by healthcare reform, employers in other states anxiously await to see what, if

anything, their legislators will do. Coping with new insurance mandates is not easy. The expansion of dependent ages alone can create administrative difficulties in ways perhaps not immediately apparent. For example, if the employer must extend coverage to a dependent who does not qualify as a dependent under the Internal Revenue Code, it is possible that coverage could be considered taxable compensation. Further, there may be additional paperwork involved as employers seek certification from employees that an employee’s children still qualify as dependents under the terms of the plan. Such legislative developments can also create confusion as to how the extension interacts with COBRA requirements.

Ultimately, changes made to insurance regulations may have limited effect. According to the Kaiser Foundation, in 2006, 55 percent of covered workers were in a plan that was completely or partially self-funded, meaning that the majority of health plans will not be affected by insurance legislation. In addition, since insurance mandates tend to raise the cost of benefits, such changes could ultimately create a financial strain on those employers offering benefits as well as on those employees electing them, pushing more employers to the self-funded side.

Healthcare reform legislation, enacted and proposed, has stirred up considerable media attention. Whether these measures actually reduce the number of uninsured, and at what cost to employers offering fully-insured benefits, remains to be seen.

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