Health Care Reform
Overview of the BIG Picture
Part 1

Today’s Focus

• The provisions impacting you as a Minnesota public sector sponsors:
  – A major medical group health plan
  – A health reimbursement arrangement (HRA)
  – A health flexible spending account (Health FSA)
  – A cafeteria plan
• Benefits aspects (what’s provided, to whom, etc.)
• Tax aspects
• Administrative and reporting aspects
Today’s Agenda – Part 1

Health Care Reform – Part 1
• Focus on pre-2014
• Two main concerns:
  – Group health coverage
  – Miscellaneous

Pre-2014: Miscellaneous Concerns

• Miscellaneous Concerns*:
  – Adult child tax consequence (Code § 105(b))
  – OTC Rx requirements
  – See Hitesman Client Alert:
  – HSA penalty increased to 20%
  – $2,500 maximum health FSA salary reduction
  – W-2 reporting
  – Possible wellness incentive increase to 30%

Note: Separate from requirement to provide coverage to 26.

HSA Distributions Out

• Distribution for anything
• Not required to be covered under qualified high deductible health plan
• Taxable unless a medical expense for account holder, spouse (DOMA), dependent (not § 105(b))
  – Distribution amount as taxable income
  – Excise tax too – 20%
  – No exceptions for inadvertent
  – “Medical expense” - § 213(d) but limited insurance premiums
• Watch out for interplay with qualified high deductible health plan

*Not intended to be exhaustive
$2,500 Salary Reduction Maximum

• Effective January 1, 2013 (regardless of plan year)
• Just health FSAs
• Previously no statutory maximum
• "True" employer contributions should be outside limit
  — No cash out available
  — Watch out for HIPAA Portability
• Flat dollar amount
  — Not like dependent care FSA limit
    • Per participant; family status irrelevant
    • Not combined with spouse
  — No coordination or offset with available tax credit
  — Not indexed for inflation
    • Aggregate for employer

W-2 Reporting Requirement

• Effective 2012 (reported in 2013)
• Aggregate cost of applicable employer sponsored coverage
• Excludable under § 106 or would be excludable if paid by the employer
• Any coverage that meets the definition of group health plan for COBRA, subject to certain exceptions

W-2 Reporting Requirement

• Exceptions include
  — Long term care
  — Modified HIPAA Excepted Benefits Rule
    • On-site medical
  — Stand alone vision, stand alone dental
  — Specified illness, fixed indemnity where paid by employee on after tax basis
  — HSAs
  — Special rule for health FSAs

HSA indefinitely excluded under interim guidance.

• First step: Identify your group health plans and identify which are not subject to HIPAA Portability
W-2 Reporting Requirement

- “Just reporting”
- Transitional relief for employer filing fewer than 250 Form W-2s for preceding calendar year
- Other transitional relief provided
- Lots of comments submitted regarding additional issues


Pre-2014: Group Health Plan Concerns

- “Group health plan”
  - COBRA
  - PHSA mandates (i.e., not subject to HIPAA Portability)
  - Special rules

Pre-2014: Group Health Plan Concerns

- Two primary categories
  - Administrative requirements
  - Substantive requirements

Important: Not all group health plans. Only with respect to group health plans left.
Administrative Concerns

• Administrative concerns*: 
  – Nondiscrimination on fully insured medical plans
    • See Hitesman Client Alert: 
  – Enhanced claims procedures
  – External review
  – Uniform Summary of Benefits and Coverage (SBC)
  – Automatic enrollment

*Not intended to be exhaustive

Nondiscrimination Rules to Fully Insured Health Plans

• Applies only to group health plans subject to HIPAA Portability
• Applies only to non-grandfathered plans
• Effective – plan years beginning on or after September 23, 2010
• But IRS Notice 2011-1 provides no compliance required until regulations; also requests comments
  – Many comments submitted
  – Likely impact on self-insured testing

Nondiscrimination Rules to Fully Insured Health Plans

• Fully insured plan cannot discriminate in favor of “highly compensated individuals” (HCIs) with respect to eligibility and benefits
• Rules “substantially similar to” now applicable to fully insured plans
Nondiscrimination Rules to Fully Insured Health Plans

- Code Section 105(h) – Applies to self-insured plans
  - No discrimination in favor of highly compensated individuals in benefits or eligibility
  - “Highly compensated individuals”
    - Top 25% ranked by pay of non-excludables, 5 highest paid officers, shareholders owning 10% or more
    - Excludables include collectively bargained, part-time, seasonal, less than age 25, less than 3 years of service

  Watch out for “sweet heart” deals (e.g., individual contracts, severance, settlement, etc.).

Nondiscrimination Rules to Fully Insured Health Plans

- Consequences of failure are very different
  - Self-insured - impacts taxable income of HCIs
  - Insured – HHS penalties upon employer

Nondiscrimination Rules to Fully Insured Health Plans

- Key issues
  - Scope of “substantially similar to”
  - Effect on small employer plans; no carve out
  - Does the term “benefits” include employer contributions?
  - Do shorter waiting periods for HCIs violate nondiscrimination?
  - Can employees who elect no coverage, but have coverage elsewhere, be treated as “benefitting”?
  - Can imputing taxable income to HCIs avoid nondiscrimination?
Enhanced Claims, Appeals, and External Review

- Effective: has been a moving target
- Applies to group health plans subject to HIPAA Portability
  - Special grandfathered plan rule
- Net effect – ERISA requirements “plus” on public sector
- Key components
  - Full and fair review
  - Claims and appeals
    - Special rule regarding substantial compliance
  - Time frames, notice requirements
  - Culturally and linguistically appropriate
  - External review for medical judgment and rescissions; requires contracting with IROs

Summary of Benefits and Coverage (SBC)

- Applies to group health plans subject to HIPAA Portability
- Effective – plan years beginning on or after September 23, 2010
- But highly dependent upon regulations just issued in August

Summary of Benefits and Coverage (SBC)

- Format requirements include not more than 4 pages; not smaller than 12 point font; and use of uniform standard insurance and medical terms
- Required elements include description of coverage (including cost sharing); description of exceptions, exclusions, and limitations; description regarding renewability and continuation coverage; and examples of common benefit scenarios
- Does not preempt state insurance regulations requiring more information; preempts state insurance regulations requiring less information.
- Provided by insurance carriers for insured plans or plan administrator for self-insured plans
- All applicants
Summary of Benefits and Coverage (SBC)

- Culturally and linguistically appropriate manner
- Material modification to terms of coverage reflected in most recent four page summary of benefits must be provided at least 60 days before effective date.

Automatic Enrollment

- Applies only to group health plans subject to HIPAA Portability
- Applies only to FLSA employers
- Effective – by default date of enactment
  - But dependent upon regulations that have not been issued yet
  - Expected by 2014
- Employers with 200 or more full-time employees and subject to FLSA
- Must automatically enroll new full-time employees; continue enrollment of current employees
- Employer must provide notice of automatic enrollment and opportunity to opt out

Open issues

- What is full-time
- What is employee
- Must there be an opt-out ability
- Impact on Code § 125 cafeteria plan
Substantive Concerns

- Substantive concerns*:
  - Adult child coverage to age 26
  - No rescissions
  - No lifetime maximums on essential health benefits
    - Can still have on non-essential
  - No annual maximums on essential health benefits (3 year phase-in)
  - Preventive first dollar coverage
    - Not applicable to grandfathered plans
  - Emergency services at in-network rate without prior authorization
    - Not applicable to grandfathered plans
  - Obstetrical — no referral requirement
    - Not applicable to grandfathered plans
  - No pre-existing condition limitation for persons under age 19

Anti-Rescission Rule

- Applies only to group health plans subject to HIPAA Portability
- Effective — plan years beginning on or after September 23, 2010
- Rescission refers to cancellation or discontinuance of coverage with a retroactive effective date.
- No rescission permitted unless fraud or intentional misrepresentation of material fact involved.
- Not considered a rescission: prospective cancellation, failure to pay premiums, failure to notify of divorce and full COBRA premium not paid, and reconciliation period following loss of employment.

Anti-Rescission Rule

- Burden on plan to prove
- Determination is appealable — including external review
- Similar to "gross misconduct" for COBRA
Questions

Accessing Comment Letters to the IRS

• Because comments were requested on IRS notices, not on regulations, comments submitted have not been posted on any website, but are made available to the public upon request.

• Any request for accessing the comments on IRS notices should be e-mailed to Notice.Comments@irs.gov.

• Include reference to IRS Notice 2011-1 in the subject line.

• This is also the same e-mail address for submitting comments.

• Once an e-mail request is made for accessing the comments on notices, IRS will email the electronic copies of the comments within 24 hours.

• This process is applicable for accessing comments on any IRS notices.

Thank you

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Health Care Reform
Overview of the BIG Picture
Part 2

Today’s Focus

• The provisions impacting you as a Minnesota public sector employer that sponsors:
  — A major medical group health plan
  — A health reimbursement arrangement (HRA)
  — A health flexible spending account (Health FSA)
  — A cafeteria plan
• Benefits aspects (what’s provided, to whom, etc.)
• Tax aspects
• Administrative and reporting aspects
Today’s Agenda – Part 2

Health Care Reform – Part 2
- 2014 and Beyond
  - More substantive requirements (e.g., no pre-existing condition limitations, limited cost sharing, limited waiting periods, etc.)
  - Individual Mandate
  - State Exchanges
  - Play or Pay Penalties
  - Cadillac Tax

2014 Concerns: How the Pieces Fit Together

Individual Mandate
- Effective 01/01/2014
- All adults required to obtain and maintain “minimum essential coverage” for themselves and dependent children
- In most cases, being covered through employer program will satisfy mandate
- Penalty applies to individual—lots of holes and exceptions

One of the key issues to be reviewed by Supreme Court. Oral arguments in March with decision in June.
Individual Mandate

- Tax penalty to individual:
  - Greater of (1) flat dollar amount, or (2) percentage of income
    - Flat dollar amount $95 in 2014 increasing to $695 in 2016
    - Percentage phased in 1 percent in 2014 to 2.5 percent in 2016
  - Lots of "holes", including
    - Incapacitated persons
    - Illegal aliens
    - Foreign nationals
    - Religious exemptions
    - Indian tribes
    - Hardship exemptions
    - Affordability exemptions
      - People who do not submit tax forms

Concern expressed regarding actual increases in covered persons.

Exchange

- Exchanges facilitate offering health insurance plans — provides access
- States required to have Exchange established and operational by 01/01/2014 (or HHS will establish and operate Exchange)
  - Varying degrees of state “efforts”
    - See http://www.ncsl.org/?tabid=21388
    - Minnesota
      - Legislation (see HF497 & HF1204) (Did not pass in 2011 legislative session and the bills may be reintroduced in the 2012 legislative session); Please see the Executive Branch Action at http://mn.gov/governor/images/EO-11-30.pdf
      - Governor Dayton Executive Order (see http://mn.gov/governor/images/EO-11-30.pdf)

Exchange

- Four different levels of coverage
  - Bronze, silver, gold, platinum, with actuarial values of 60, 70, 80 and 90% to individuals and small groups
  - Also invincibles coverage (e.g., under 30)
- Subsidy available through Exchange for some
Subsidy Exchange

- Two requirements
  - Household income between 100% and 400% “federal poverty level”
  - No eligible for minimum essential coverage
  - Exchange determines whether subsidy is available; notifies employer

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</tbody>
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Play or Pay Environment

- Employer not mandated to provide coverage
- Play or Pay for “large” employers
- If not “large,” then not even under Play or Pay
- Employer makes available certain level of coverage (“plays”) or pays a penalty

Observation: Very different analysis for not “large” employers.
Play or Pay Environment

- "Large" employer
  - Based on controlled group rules
  - Employs at least 50 full-time equivalents (FTEs) on at least 120 business days during preceding calendar year
  - "Full-time" defined as 30 or more hours per week
  - "FTE" defined as part-time hours per month divided by 30
  - Special rule for growing employers
- Seasonal employees
  - Not counted to determine whether "large" employer if working less than 120 days in a year

Large Employer Calculation

- An employer has 35 full-time employees (working at least 30 hours per week). Employer also has 20 part-time employees that work 24 hours per week. The part-time employees' hours (480 per week) are the equivalent of 16 full-time employees \([20 \times 24] / 30 = 16\]
- Employer has 51 FTEs \([35 + 16 = 51]\).
- The employer is considered a "large" employer.

Penalty Possibilities

- Two distinct categories of penalty
  - Fail to offer coverage to all full-time employees
  - Offer to all full-time employees but coverage is "not enough"
- Lots of moving pieces
- Must be one full-time subsidized at Exchange to trigger calculation

See Flow Chart Handout
Penalty Category 1

Where employer does not offer coverage to all full-time employees

- Employers subject to penalty must pay $2,000 per year for each full-time employee in excess of 30 full-time employees
- Monthly calculation \([\frac{2,000}{12} = 166.67 \text{ per month}]\)
- Period during which at least one full-time employee goes to Exchange and receives a subsidy

Penalty Category 1

Where employer does not offer coverage to all full-time employees

- Must be one full-time employee that (a) actually goes to Exchange and (b) receives subsidy
- Not tied to number of employees receiving subsidy at Exchange
- Who counts?
  - Full-time seasonal employees count for months considered full-time
  - Part-time employees do not count
- No offset/credit if provide something to less than all

Example Category 1

Where employer does not offer coverage to all full-time employees

- Large employer (100 full-time employees) does not offer coverage. One or more* full-time employees goes to Exchange and receives subsidy. First 30 full-time employees do not count in penalty calculation. Monthly penalty is: \([11,666. \ (100 - 30) \times 2,000 / 12]\).

*For this calculation, it does not matter how many receive subsidy as long as one does.
Penalty Category 2

Where employer offers coverage to all full-time employees but coverage is not enough:

- "Not enough"—Employer coverage either:
  - Requires individual contribution toward premium for self-only coverage that exceeds 9.5% of household income; or
  - Plan pays less than 60% on average of covered health expenses.

- Employers subject to penalty must pay $3,000 per year for each full-time employee receiving subsidy at Exchange:
  - Monthly calculation ($3,000/12 = $250 per month)
  - Only pay penalty for those that actually go to Exchange and receive subsidy.

Penalty Category 2

Where employer offers coverage to all full-time employees but coverage is not enough:

- Penalty capped at amount would have to pay if didn’t offer a health plan (i.e., Penalty Category 1):
  - If less than 30 full-time employees, penalty is $0.

Example Category 2

Where employer offers coverage to all full-time employees but coverage is not enough:

- Large employer (100 full-time employees) offers coverage but it “is not enough.”
  - Individual coverage cost more than 95% household income; or
  - Covers less than 60%.

- Twenty (20) full-time employees go to Exchange and receive subsidy.

- Penalty is $5,000 per month.

- Lesser of the penalty under category 1 ($11,666 per month), and the number of full-time employees that actually go to Exchange and receive a subsidy [20 x ($3,000/12) = $5,000].
Example Category 2

• Same employer but 50 full-time employees go to Exchange and receive subsidy.
• Penalty is $11,666 per month.
• Lesser of the penalty under category 1 ($11,666 per month), and the number of full-time employees that actually go to Exchange and receive a subsidy: $12,500.

Observations

• Lots of unanswered questions
  – Really every month?
  – Monthly jumping (i.e., ins and outs)
  – Coordination with cafeteria plans
  – Nondiscrimination testing
  – Reconciliation issues
  – Inability to design to avoid
• See article by Ann Caresani at www.employeebenefitslawreports.com/2011/11/health-care-shared-responsibilities-missing-link
• IRS Notice 2011-36 seeks input; specifically states not guidance

2018 Concerns: Cadillac Tax

Why?
– Generate revenue to pay for coverage of uninsured
– Make most expensive plans (equated with over use of medical care) less attractive
Cadillac Tax

- 40% excise tax on "aggregate value" of "applicable employer-sponsored health coverage" for employee that **exceeds** specified limits
- Applies beginning in 2018
- Limits: $10,200 individual; $27,500 other than individual
- Employee by employee basis
- Not just major medical
- Determined by employer; allocated by employer
- Discrepancies between excise tax amounts and amounts reportable on Form W-2

Cadillac Tax

- Towers Watson survey
  - Based on typical designs and costs today
  - Survey of 552 employer sponsored plans, mainly Fortune 1000 companies
  - 8% annual increase - estimate 6 in 10 employers will hit threshold for 2018
  - One time gap fixer adjustment may be available

Cadillac Tax

- Keeping increase to 6% may extend hitting threshold out to 2023.
  - Wellness
  - Utilization review; chronic condition management
  - Increase out-of-pocket responsibilities
Cadillac Tax

• Implementation issues
  – Employers seeking to avoid or minimize excise tax may have to actively manage value of health coverage offered to employees, which may include—
    • Placing limitations on employee health FSA elections
    • Converting independent, non-coordinated coverages from pre-tax salary reduction basis to after-tax payroll deductions
  – Because of way calculated (monthly calculation) and assessed, similar practical issues to Play or Pay
  – Lots of questions; guidance expected but not in the near future

Questions

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PART 1

Miscellaneous:
- Tax consequence adult children
- OTC
- HSA
- $2500 salary reduction cap
- W-2 reporting
- Wellness

PART 2

Individual Mandate

Individual Coverage

Exchanges

Group Health Coverage

Play or Pay

Cadillac Tax
PLAY OR PAY CHART

50 or more FTEs?
  yes
  Penalty Possible
  no
  No penalty possible

"Large" Employers Only

More than 30 full-time EEs?
  yes
  Any full-time EEs receive Exch. Sub.?
    yes
    Do you provide coverage?
      yes
      Coverage to all full-time EEs?
        yes
        EE contrib. too high?
          yes
          Penalty calculation 2.
          no
          Plan pays less than 60%?
            yes
            No penalty calculation
            no
            Penalty calculation 1.
            no
            No penalty possible
    no
    No penalty possible