ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES: PRACTICAL Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, and Dan Taylor provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley Gillihan, Steven Mindy, Carolyn Smith and Dan Taylor are members of the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

A TEXAS COURT SAYS THE ACA IS UNCONSTITUTIONAL! WHAT DOES IT MEAN?

PERHAPS BACK TO THE FUTURE, BUT NOTHING FOR NOW.

A federal district court judge in Texas made headline news in December 2018 by ruling that the Affordable Care Act (ACA) is unconstitutional and therefore invalid. The decision has already been appealed and will likely eventually be decided by the Supreme Court.

A final decision in the case – which could either uphold the ACA or find some or all of it unconstitutional – will take some time with a final resolution likely in 2020 or beyond. The ACA remains in effect while the court case works its way through the appeals process.

Thus, employers and insurers must continue to comply with the ACA. This article provides a high level overview of the court case and potential long-term implications.

HOW DID WE GET HERE?

The law suit centers around Congress' recent repeal of the ACA individual mandate, which imposed a tax penalty on individuals that don't have qualifying coverage. A little bit of history helps to explain the law suit:

- In 2012, the National Federation of Independent Businesses (NFIB) and 26 states brought a law suit arguing that the ACA individual mandate was unconstitutional. The case went to the Supreme Court, which found that the mandate was constitutional because Congress has the authority to impose taxes. The 5-4 decision also found that the provision was not a tax for certain statutory provisions;

- In 2017, the Republican controlled Congress considered a number of different bills that would have repealed and replaced the ACA, but was not able to pass any overall repeal legislation in the Senate.

- At the end of 2017, Congress passed the Tax Cuts and Jobs Act (TCJA), and the President signed it into law. The TCJA reduced the tax penalty for failure to have qualifying coverage to zero starting in 2019, while keeping the "mandate" to have coverage in the law. As a practical matter, for individuals, reducing the penalty to zero and eliminating the "mandate" are the same; however, the fact that the "mandate" remains in the law has become a core issue in the current lawsuit.

- After enactment of the TCJA, Texas and 19 other states sued the federal government, arguing that the TCJA change reducing the penalty to zero means that the individual "mandate" is no longer a tax and is therefore unconstitutional. Further, because the rest of the ACA is so intertwined with the mandate, all of the ACA is unconstitutional. The lower court federal judge in the case agreed, but has "stayed" the decision, meaning that it is on hold until the case goes through the appeals process. The case will likely end up in the Supreme Court.

WHAT DO EMPLOYERS NEED TO DO NOW?

The short answer – nothing. Because the district court decision has been stayed pending appeal of the case, the ACA remains in effect. It is expected to take some time for the case to work through the appeals process; a final decision is not expected until 2020, and could be later.

As the lawsuit works through the appeals process, employers and insurers need to continue to comply with the ACA, including the following requirements:

- ✓ Employer penalties for applicable large employers that fail to offer affordable, minimum value coverage to full-time employees and dependents
- ✓ Coverage of essential health benefits (small group)
- ✓ Required 100% coverage for certain preventive care
- ✓ Out-of-pocket limits
- ✓ ACA employer reporting requirements under IRC 6055 and 6056
- ✓ Dependent coverage to age 26
- ✓ Pre-existing condition protections
- ✓ Metal tier levels/minimum value
- ✓ No annual or lifetime dollar limits

Regardless of how the law suit turns out, starting in January 2019, there is no penalty for individuals who do not have qualifying health coverage.

WHAT HAPPENS IF THE ACA IS ULTIMATELY HELD TO BE UNCONSTITUTIONAL?

We can't really know the answer to this question unless and until such a decision is reached, which will most likely be by the Supreme Court. However, it is possible that a final decision could potentially hold all of the ACA unconstitutional or just certain parts.

If some or all of the ACA health coverage mandates are held unconstitutional, then employers will have new plan decisions to make. For example, some employers may decide to keep in place certain provisions that have become very popular, such as coverage of certain preventive care services without cost sharing and coverage of dependent children to age 26, while re-adjusting other aspects of plan coverage (e.g., imposing dollar limits on certain benefits).

ERISA does not preempt State laws that apply to insurance, so that health insurance issuers providing coverage under group health plans are required to comply with State-law mandates. Many States have adopted legislation to implement the provisions of the ACA.

Thus, even if all of the ACA is struck down by the Supreme Court, State laws implementing the ACA may still be in place. Depending on the specifics of the State legislation, action of the State legislature may be required to undo the ACA implementing legislation.

Plans that are not subject to ERISA, such as self-funded church plans and governmental plans, also need to consider State law. In the case of fully insured plans, policy and contract terms will need to be taken into account when an employer is considering plan design changes if the ACA is struck down

TAX PROVISIONS

In addition to the coverage mandates addressed above, repeal of the ACA would also undo many of the ACA tax provisions including the following.

Employer Mandate to Provide Affordable Minimum Value Coverage and ACA Reporting: If the ACA is repealed, the employer responsibility requirement to provide affordable minimum value coverage and excise taxes (under IRC 4980H) would be

repealed as well as the associated ACA reporting requirements under IRC 6055 and 6056.

Prohibition on reimbursement of over-the-counter (OTC) medicines: Under the ACA, OTC medicines and drugs could not be reimbursed tax free without a prescription. If the ACA is repealed, tax-free OTC reimbursement from group health plans, health FSAs, HRAs and HSAs would again be permitted.

$2,500 cap on salary reduction contributions to health FSAs: A decision striking down all of ACA would repeal this cap.

W-2 reporting: The ACA requires that the value of health coverage be reported on employees' Forms W-2. This is a reporting requirement only; it does not affect employees' tax liability. This requirement should no longer apply if all of the ACA is struck down.

Cadillac plan tax: Although the Cadillac plan tax is not effective until 2022, many employers have already been reviewing their plans to determine if the tax would apply. If all of the ACA is struck down, the tax will not go into effect.

CONCLUSION

The federal district court ruling has sparked a lot of media attention, but for now, the ACA is in effect. It will take some time for the case to wind its way through the appeals process, and a final decision is not expected before 2020. Employers may want to start considering what sort of plan decision changes they would make if some or all of the ACA is eventually held invalid, but for now employers and insurers must continue to comply with the ACA. ■