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LABOR, EMPLOYMENT AND EMPLOYEE BENEFITS PRACTICE GROUP

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"What keeps you up at night?"

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Health Care Reform – What can we expect?

Newly released House of Representatives Health Care Bill and Senate HELP Committee Bills propose near universal coverage but also a surtax on high income earners.

By Dan S. Brandenburg, Paul M. Heylman, Joanne G. Jacobson and Eli Levine

With President Obama having identified health care reform as a top priority, it is becoming more widely accepted that major changes are required to control spiraling health care costs and provide coverage for the uninsured. As of July 17, the House and Senate took significant steps toward accomplishing that goal with the relevant House Committees releasing a comprehensive legislative package, and three committees: Senate HELP, House Ways and Means and House Education and Labor voting to pass health care reform legislation.

The President has set forth eight objectives for health care reform:

- Guarantee consumer choice of health plans
- Make health coverage affordable by reducing high administrative costs, fraud and waste
- Protect families' financial health by reducing premiums
- Invest in prevention and wellness to reduce cost drivers, such as smoking and obesity
- Provide for portability of coverage, i.e. eliminate preexisting condition exclusions and allow individuals to change jobs and not lose coverage
- Aim for universal coverage for all Americans
- Improve patient safety and quality care; i.e. through safety measures and incentives for changes such as use of health information technology
- Maintain long term fiscal sustainability so that the plan pays for itself.

To accomplish these objectives, multiple pieces of legislation have been introduced into Congress. On July 14, 2009, House Democrats unveiled bill H.R. 3200, the America's Affordable Health Choices Act (http://waysandmeans.house.gov/media/pdf/111/AAHCA09001xml.pdf) that would create a public health care plan option, provide subsidies for low-income individuals to help them obtain coverage, require everyone to have insurance and for employers to offer it, and to make sweeping changes to Medicare. In a preliminary analysis of the bill (http://cbo.gov/ftp-docs/104xx/doc10430/House_Tri-Committee-Rangel.pdf), the Congressional Budget Office said it would cost $1.042 trillion over 10 years and would result in 97 percent of Americans having health care coverage when fully implemented. New taxes in the bill—including surtaxes on the top 1.2 percent of households and an excise tax on larger employers who elect not to provide health benefits to employees equal to 8 percent of wages—would raise an estimated $544 billion over 10 years, according to a House Ways and Means Committee estimate. The House Ways and Means Committee Bill chose to use a surtax instead of capping the income tax exclusion on medical insurance coverage. Two of the three committees with jurisdiction over health care reform have already passed the legislation out of committee, and House Democratic leaders say they hope to pass the legislation before the August Congressional recess.

Over in the Senate, the Senate Health, Education, Labor and Pensions (HELP) Committee voted on July 15, 2009 to pass a $600-billion bill (http://help.senate.gov/BAI09A84_xml.pdf) that would expand coverage to nearly all Americans by requiring individuals to purchase insurance and employers to contribute to the cost. By legislative procedure, the HELP bill deals only with areas of legislation over which the HELP Committee has jurisdiction; the HELP Committee does not have jurisdiction over financing provisions. Thus, within the legislation, there are provisions to create a public plan, an employer mandate, and an insurance exchange through which individuals can purchase coverage. On the revenue side, the Finance Committee continues to negotiate and explore a range of possibilities and proposals but has yet to introduce formal legislation.

If passed, health care reform will have a major impact on many different industries in this country. Saul Ewing's Labor, Employment and Employee Benefits group will continue to monitor these bills as they move through the legislative process. Other practice groups will publish alerts on critical issues in their field.

Below are some of the most pressing issues for employers:

HEALTH INSURANCE EXCLUSION FROM INCOME TAX

Some Members of Congress have suggested eliminating or capping the employee's tax exclusion for employer-paid coverage as a major source of revenue to fund the changes made to the health care system. Senate Majority Leader Harry Reid has expressed strong concerns about this proposal. Many businesses and employees have expressed worries about the impact of such a provision on the future of employer-provided health care. Unions have also voiced strong concerns. The House Democrats opted not to cap the income tax exclusion as a source of revenue in the proposed House Ways and Means bill.

THE EMPLOYER MANDATE

To broaden coverage, some health reform proposals would require employers to offer coverage or pay to help finance subsidies for those without access to affordable coverage. This type of proposal is often referred to as a "pay-or-play" policy. Employer pay-or-play proposals vary based upon the level of coverage required to comply, the cost of the penalty to employers not offering coverage, and the size of any exemption for the smallest businesses. The House of Representatives' composite bill requires larger employers to offer coverage to their employees and contribute at least 72.5 percent of the premium cost for single coverage and 65 percent of the premium cost for family coverage of the lowest cost plan that meets the essential benefits package requirements or pay up to 8 percent of payroll into the Health Insurance Exchange Trust Fund. Employers who fail to satisfy the bill's health coverage participation requirements would face a tax of $100 per day per each non-covered employee. In the Senate HELP Bill, businesses with 25 or more employees that do not offer insurance would have to pay the government $750 per year per employee after the first 25 employees, or $375 per year for part-time employees. Those with fewer than 25 employees would be exempt from the requirement. Employers would be required to pay 60 percent of the cost of insurance premiums for their employees in order to avoid the charge.

The reasoning behind such a proposal is to build on the existing system by maintaining and broadening employer-sponsored coverage, thereby adding more employees to the ranks of the insured and minimizing disruption for those currently insured. It will also provide a source of revenue to pay for new coverage.

Some employers argue that this is burdensome and will make it harder for them to grow their businesses or even maintain their current workforces. The National Federation of Independent Business has estimated that an employer mandate would eliminate 1.6 million jobs over five years. However, Wal-Mart, the nation's largest private employer, announced that it supports a proposal requiring businesses to contribute to the cost of employee health insurance, arguing that broad comprehensive health care reform could lower health care costs across the board.

THE IMPACT ON DEFERRED COMPENSATION

As mentioned before, the House legislation proposed to raise approximately $544 billion from a surtax on the wealthiest 1.2 percent: individuals earning more than $280,000 and households earning more than $350,000. The tax rates would range from 1 percent to 5.4 percent. In the states with the highest state income tax brackets, the legislation, when combined with the sunsetting of the tax cuts passed in the early 2000s, would provide a 55 percent effective income tax upon the wealthiest Americans, which could have lasting impact on how some individuals structure their compensation packages, including what they do with deferred compensation. For example, it may be financially wise to take income in 2009 at lower income tax rates than to defer to 2011 and beyond at potentially higher income tax rates.

FLEXIBLE SPENDING ACCOUNTS, HEALTH SAVINGS ACCOUNTS, HEALTH REIMBURSEMENT ACCOUNTS, AND ARCHER MEDICAL SAVINGS ACCOUNTS

There has been speculation and legislative discussions that Congress could raise revenue for health care reform by eliminating or modifying Flexible Spending Accounts (FSAs) Health Savings Accounts (HSAs), Health Reimbursement Accounts (HRAs), and Archer Medical Savings Accounts that allow consumers to put aside before-tax dollars to pay for medical expenses. It has been estimated that a proposal to eliminate FSAs could raise $68 million, which the Committee could use to offset costs of the health reform package. The situation is volatile and subject to change. Pay careful attention to this area.

THE ADVERSE SELECTION PROBLEM OF HEALTH CARE REFORM

The debate over whether employment-based insurance, the principal form of coverage for people under 65, should and will be strengthened, weakened or left alone has emerged as an issue in health care reform. Employers have voiced concerns, based on an analysis done by the Congressional Budget Office, that the changes to the health care system and the proposed subsidies would threaten the current employer-based health care system as more of the healthy workers would leave employers' plans to buy their own individual, cheaper, private insurance. President Obama and Congressional allies have repeatedly stressed that people who are happy with their insurance will not have to change it.

SUMMARY

The bills making their way through Congress contain some common features that build on the objectives advanced by President Obama. President Obama and Democratic Congressional leaders have expressed an interest in having concrete legislation passed by the time of the Congressional recess, likely the end of the first week of August. Some of these features have already been adopted as part of the Massachusetts health care reform experience. What we now know is that neither the President nor Congress is advocating a single payer plan at this time. In the coming weeks, it is expected that there will be greater focus on the mechanisms for delivering and financing health care reform. Pay careful attention to the legisative process. We expect to keep you apprised of further developments as they develop more fully.

This Alert was written by Dan S. Brandenburg, Paul M. Heylman and Joanne G. Jacobson, members of the Labor, Employment and Employee Benefits Practice Group, and Eli Levine, a summer associate resident in the Washington, DC office. If you have questions regarding health care reform, please contact Dan at 202.295.6644 or dbrandenburg@saul.com, Paul at 202.342.3422 or pheylman@saul.com and Joanne at 202.295.6616 or jjacobson@saul.com. This publication has been prepared by the Labor, Employment and Employee Benefits Practice Group for information purposes only.

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