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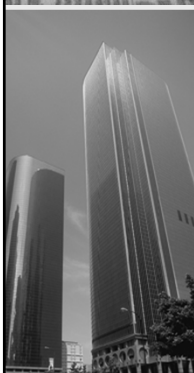
Implementing Health Care Reform in the Workplace

Long Term Care and the Law

**Atlantic City, NJ
March 24, 2011**

GREENBERG TRAURIG, LLP | ATTORNEYS AT LAW | WWW.GTLAW.COM

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Speaker:

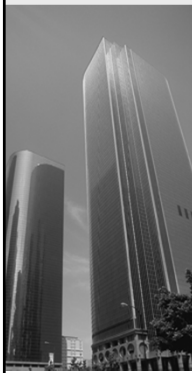
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Greenberg Traurig, LLP is an international, full-service law firm with approximately 1775 attorneys serving clients from more than 30 offices in the U.S., Europe and Asia.

Greenberg Traurig's multi-disciplinary Health Care & FDA Business Group provides strategic legal counsel to a diverse group of companies and organizations, helping them to respond proactively to the rapidly changing marketplace.

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Health Care Reform



There have been 18 interim final regulations and 11 guidance's, 10 Qs and As, and 8 final rules filed.

WILL BE NECESSARY TO FOLLOW –

EDUCATIONAL/REGULATORY INFORMATION
RELEASED BY AHCA WHEN IT BECOMES
AVAILABLE.

2

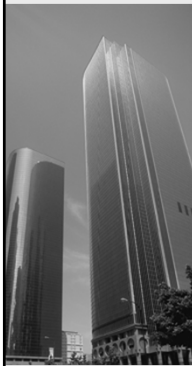
Health Care Reform



- Discussion about obligations as employers.
 - What is required when?
 - What do we know now?
- Discussion about obligations as individuals.
- What are the key changes.

3

Health Care Coverage Timeline



- Most changes occur in 2014 to expand coverage:
 - Reform insurance marketplace (“Exchange”);
 - Create tax credits; or
 - Medicaid eligibility for low-income who do not have access to employer-sponsored coverage.
- Some interim changes have occurred in 2011.
- First stage of reforms allows time for implementation of major changes in 2014.

4

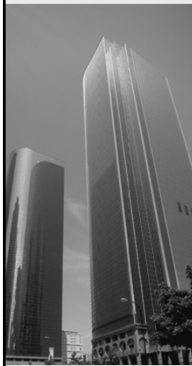
General Structure of Reform



- Most Americans stay in their employer-sponsored plans.
- Individuals and small groups may purchase coverage through the state-based exchanges in 2014. (An exchange is a group of insurance plans with new rules.)
- Tax credits for low-income individuals available only when coverage is purchased through the exchange.
- Between now and 2014, some changes to health insurance and employer-sponsored plans.

5

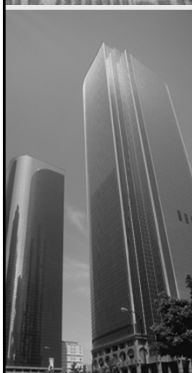
Changes That Occurred in 2010



- Reinsurance for retiree medical coverage
(45 CFR Part 149)
- \$250 rebate for seniors for coverage through the Medicare Part D gap or “donut hole.”
(P.L. 111-152, § 1101)
- Tax credits for small employers.
(IRS Notice 2010-44; IRS Notice 2010-82)

6

Changes Starting in Plan Year After September 23, 2010



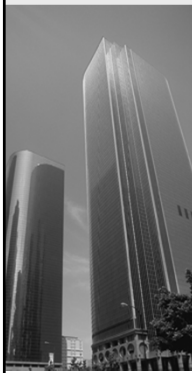
- **Insurance & Employer-Sponsored Plans Must:**
 - **Cover dependents up to age 26 (if plan offers dependent coverage);**
(PHS Act Section 2714, 29 CFR Part 2590; 45 CFR Parts 144, 146, and 147)
 - **No lifetime limits (e.g. no limit on the spending under the plan);**
(PHS Act Section 2711, 26 CFR 54.9815-2711T, 29 CFR 2590.715-2711, 45 CFR 147.126)
 - **No restrictive annual limits on essential benefits (may get a waiver under certain conditions);****
(PHS Act Section 2711, 26 CFR 54.9815-2711T, 29 CFR 2590.715-2711, 45 CFR 147.126)
 - **No rescissions (unless there is fraud);**
(PHS Act Section 2712, 26 CFR 54.9815-2712T, 29 CFR 2590.715-2712, 45 CFR 147.128)
 - **Appeals and grievance process*;**
(PHS Act Section 2719, 45 CFR §147.136)
 - **No cost sharing on certain prevention and wellness benefits*;** and
(PHS Act Section 2713, 26 CFR 54.9815-2713T, 29 CFR 2590.715-2713, 45 CFR 147.130)
 - **No pre-existing condition limitations on children 19 and younger.**
(PHS Act Section 2713, 26 CFR 54.9815-2713T, 29 CFR 2590.715-2713, 45 CFR 147.130)

*may be grandfathered.

**mini-med waivers have been granted.

7

Changes Starting in Plan Year After September 23, 2010



- There have been some delays in the implementation rules and some issues where we expect further changes:
 - Grandfathering
 - Appeals and grievances
 - Medical Loss Ratio (MLR to fully insured plans only)
- There have been 729 waivers of the requirements for annual limits for plans, and 4 waivers for States on behalf of issuers of state-mandated policies (26 CFR 54.9815-2711T; 29 CFR 2590.715-2711; 45 CFR 147.126) and 2 pending waivers for MLR applications (26 CFR 54.9815-2711T; 29 CFR 2590.715-2711; 45 CFR 147.126; OCIO Technical Guidance (OCIO 2010 – 2A))

8

Additional Changes



Additional Changes:

- W-2 reporting (not mandatory for 2011 W-2s);
- HSA penalty;
- Changes to FSAs/HSAs/benefits on OTC (prescription only) (applies after December 31, 2010); and
- CLASS Act enrollment begins (no implementing regulations have been promulgated).

9

Changes in 2013



- Notice to employees about benefits and eligibility for exchange (March 1, 2013).
- Medicare payroll and unearned tax increased for certain individuals (no change to employer contribution).
- Limit on FSAs (\$2,500).

10

Changes Starting on January 1, 2014



- Individual obligation to have coverage or pay a penalty.
- Employer obligations go into effect:
 - auto-enroll employees into plans if over 200 employees (RFI to be released on how employers offer default enrollment today);
 - offer affordable coverage or may pay a penalty.
- Employer plans must:
 - pay for 60% of benefit costs;
 - guarantee issue without limits on pre-existing conditions;
 - have no more than 90-day waiting period;
 - no annual limits, appeals and grievances, dependent coverage up to age 26, and other requirements.

11



Changes Starting on January 1, 2014

- The Exchange will begin – this means there will be a selection of insurance plans for individuals and small groups under 100 to select from in each State. (Enrollment will begin in 2013).
- We expect regulations in the next three months that define what the States can do and what will be governed under Federal requirements.
- Exchange plans will
 - offer “essential benefit packages” ;
 - guarantee issue without limitations on pre-existing conditions;
 - limit premium rates;
 - no more than 90-day waiting period; and
 - no annual limits, appeals and grievances, and other requirements.

12



Low-Income Americans without Employer Coverage (in 2014)

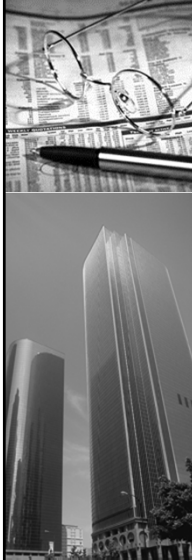
If an individual/family does:

- not receive “affordable” employer sponsored coverage and
- earns between 133-400% of the federal poverty level, then
- the individual/family will get a tax credit to pay for all or part of their health insurance coverage.

The tax credit can only be used in the exchange.

13

Individual Obligation - 2014



Individual must obtain coverage through:

- Medicare;
- Medicaid;
 - Eligibility expanded to all individuals with incomes up to 133% FPL (under age 65)
- Exchanges;
 - Individual
 - Small Groups (up to 100)
- Employer-Sponsored Coverage;

Or pay a penalty (exceptions for income below tax filing threshold, no affordable plan available, non-citizens, and religion)

14

Court Case Review

Court cases are raising issues about the Constitutionality of the individual obligation.

Commonwealth of Virginia v. Kathleen Sebelius, 728 F.Supp.2d 768 (E.D.Va. 2010)

State of Florida, by and through Attorney General Pam Bondi, et al. v. United States Department of Health and Human Services, et al., (N.D.Fla. 2011)

Thomas More Law Center et al v. Barack Hussein Obama, et al., 720 F.Supp.2d 882 (E.D.Mich. 2010)

15

Key Issues on the Cases:

- 1. Constitutionality of the Individual Obligation**
- 2. Standing**
- 3. Severability**
- 4. Timing**

16

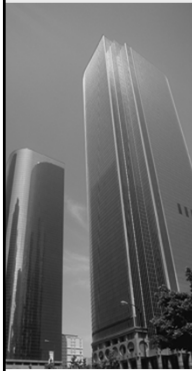


Employers may either offer coverage or risk paying a penalty.

- Coverage is only required for full-time employees (working more than 30-hours/week measured over a month).
- Coverage must be a plan that pays out 60% of the benefits.
- Coverage must be “affordable” for full-time employees, or full-time employees may get coverage in the exchange and may qualify for a tax credit.

17

If Employer Offers Coverage That is Not Affordable



If the full-time employee must pay more than 9.5% of income for an individual premium costs, the plan may be deemed “unaffordable” and **employee** may opt out and receive a tax credit for coverage in the exchange.

For each full-time **employee** that qualifies and receives a tax credit, employer will pay \$3,000 (or \$2,000 for all full-time employees, whichever is less).

18

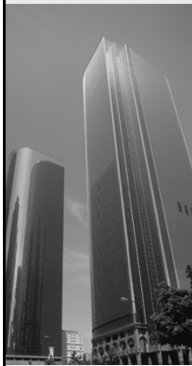
Example



- Employer offers coverage to all 230 full-time employees (and dependents).
 - Coverage is unaffordable for 40 full-time employees.
 - These 40 full-time employees get tax credits to buy coverage in the exchange.
 - Employer must pay \$30,000, the smaller penalty.
 - $\$3,000 \times 40$ FT employees receiving tax credit = \$120,000; versus
 - $\$2,000 \times (230-30)$ 200 FT employees = \$400,000.

19

If Employers Do Not Offer Coverage



- For employers ***not*** offering coverage to full-time employees (30 hours/week for a month) (and their dependents):
 - If one full-time employee gets a tax credit to buy insurance in exchange:
 - Employer must pay a fee –
 - \$2,000 x # of all full-time employees (minus 30 full-time employees).

20

Example



- Employer with 230 full-time employees does not offer coverage.
- 40 full-time employees get government tax credit to buy coverage in the exchange.
- Employer must pay:
 - \$2,000 x (230-30) = \$400,000.

21

But Employer Does Not Have to Offer Coverage:



- For part-time workers;
- For seasonal/temporary workers during a 90-day waiting period;
- For full-time workers during a 90-day waiting period.

22

Implementation Issues

What employees are covered and what are the issues that must be defined that will impact the long-term care industry:

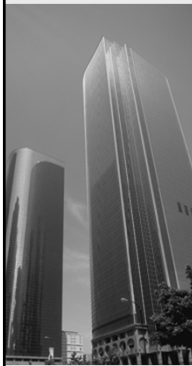
Full time calculation of hours; category of workers definitions; per diem workers; seasonal workers; exempt classifications.

Waiting period; eligibility period to meet full-time definitions.

Medicaid eligible workers.

23

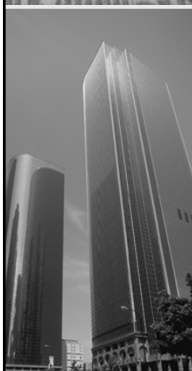
Aggregating Employees Among 2 or More Employers



- Employer obligation to provide insurance only applies to the “applicable large employer,” with 50 full-time equivalent employees.
- Law incorporates IRC provisions on “common control” to determine when 2 or more employers treated as a single employer for purposes of determining whether 50 employee threshold met.
- In cases where 2 or more employers treated as a single employer, the 30 employee reduction for the purpose of calculating any penalty applies only once, and is allocated among employers based on their contribution of employees.

24

Always Some Exceptions:



● Small employer exception

- 50 full-time equivalencies
 - (must add up all part-time workers when calculating number of employees for this exception).
- First 30 full-time workers exempted from *aggregate* penalty.

● “VOUCHER”

- If an employee's premium contribution is between 8-9.5% of income, then employee *may* take the employer's contribution to the exchange to purchase coverage.

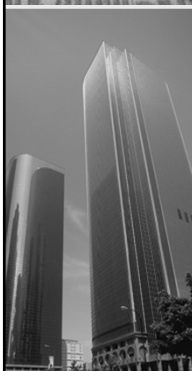
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SNAPSHOT - More to come



- There are many variables in the implementation of this law and its impact on employers.
- DOL has made it clear that employer plans should make a good faith effort to comply – audits unlikely at this time.
- Guidance, FAQs, other information available.

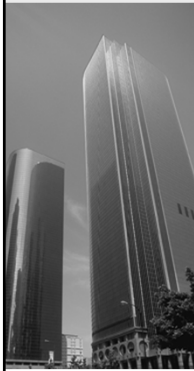
26



QUESTIONS & SPECIFICS

27

Do I have to offer affordable coverage if some of my employees are eligible for Medicaid?



- Yes, otherwise you may still pay a penalty.
 - Penalty would ONLY be for those full-time employees who are eligible for a tax credit.
(Those between 133-400% of federal poverty limits.)
- No penalty for those eligible for Medicaid.
- More information will be provided about employees who are eligible for Medicaid.

28

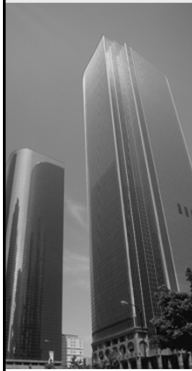
How do you define "employer"?



- For the employer obligation requirement, an applicable large employer is one with 50 full-time equivalent employees.
- Law stipulates how employer size and full-time equivalents are calculated.
- Under current rules, generally employees who are "similarly situated" are covered under the same "plan." Many times, employers will have more than one "plan," like a plan for salaried workers and a plan for hourly workers. We do not know whether that will change.
- HOWEVER, there are rules prohibiting discrimination in favor of highly compensated individuals.

29

Do I have to offer coverage to part-time workers?"



- No.
- In 2014, employers must offer coverage to their full-time workers (30 or more hours per week measured over one month); or
- pay a penalty *if* any full-time workers qualify for a tax credit through the Exchange.

30

Calculating Employer Size for Small Business Exception



- To qualify for exception, employer must have 50 or fewer full-time equivalent (FTE) employees. This is calculated by adding hours worked by all employees:

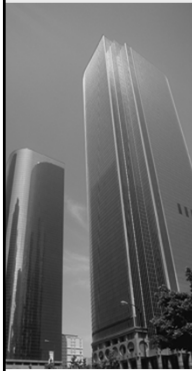
$$\frac{\text{Total \# of hours of service for which wages were paid}}{2,080} = ?^*$$

*The resulting number is rounded to the next lowest whole number.

- Special aggregation rules apply for calculation of employees when 2 or more businesses treated as 1 business under IRC "common control" provisions.

31

An Unaffordable Plan?



- If the cost of the plan to the employee exceeds 9.5% of that employee's income,
- The plan may be deemed "unaffordable;" and
- The **employee** may opt out and receive a tax credit for coverage in the exchange.
- Then, employer will have to pay a penalty.