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Weekly Health Care Reform Update

Monday, September 28, 2009

Health Care Reform: Are We There Yet?

Nearly one month after the end of a tumultuous August, one might ask about health care reform: "Are we there yet?" This question raises both the element of time and of content. Are we close to having reform legislation that is ready for President Obama's signature? Do we know what that legislation might look like?

Over the last week, most of the focus has been on the Senate Finance Committee bill. Senate Finance Committee Chairman Max Baucus (D-Mont), is preparing his committee to finish its bill by Thursday or Friday of this week. If this timetable holds, then Senate leaders predict that a merged Senate bill between the Finance and Health, Education, Labor and Pension ("HELP") Committees could be ready for a vote on the Senate floor by mid-October. However, the Finance Committee bill is far from a done deal as the Committee must wade through numerous proposed amendments and, perhaps more importantly, Senate Democrats remain divided and no Republican supports it.

Despite predictions of its demise, the oft-maligned government-run public option is still on the table in discussions of both Senate and House legislation. It is expected that, on Tuesday September 29, Senators Charles Schumer (D-NY) and Jay Rockefeller (D-WV) will offer two different amendments to the Senate Finance bill to add alternative versions of a public option – Senator Schumer signaling that one proposal may be more "robust" than the other. Also, the liberal Democrats in the House have not softened their resolve for a robust public option, a call which was echoed throughout the ballroom last Thursday evening during a reception held in honor of Congressional Black Caucus members.

In the Senate, Majority Leader Harry Reid (D-NV) and his aides are making it known that they are bracing for the daunting challenge of melding the two competing Senate proposals into a single bill that will garner the votes of both liberal and moderate Democratic Senators and, perhaps, pick up the vote of one or two Republicans – namely Senator Olympia Snowe (R-ME) who has not rejected the Senate Finance bill and Senator Susan Collins (R-ME) who is still being wooed by the White House. At this juncture, Senator Reid is signaling that it will require the direct involvement of President Obama to mediate the disputes among the sharply-divided Senate Democratic caucus.

Meanwhile in the House of Representatives, House leaders are still trying to combine the three versions of the Tri-Committee bill, addressing some of the provisions which have drawn the most fire and are trying to bring down the bill's cost. Each version of the Tri-Committee bill includes a government-run public option and some form of public option that will likely survive in a House bill brought to a floor vote. However, opposition to a public option by the Blue Dog Coalition members has stiffened since the Senate Finance Committee released a bill without a public option. Now, some are questioning whether House Speaker Pelosi has sufficient votes to pass the bill with, or without, a public option.

The bottom line is that there is still a lot of heavy lifting to be done in both the House and the Senate before floor votes in the Congress. All of this occurring in the next couple of weeks is a laudable goal. Perhaps Karen Ignagni, the President of America's Health Insurance Plans, was correct last week when she suggested that health care reform stands a better chance of being decided in December (if not later) than October.

Health Reform – Focus on Employers

On Tuesday, September 29, the Senate Finance Committee will continue its mark up of Chairman Max Baucus' (D-Mont.) America's Healthy Future Act, after postponing some of the most contentious issues until this week. Meanwhile, the House leadership continues to meld and fine tune the Tri-Committee bill, with a possible vote on the resulting H.B. 3200 later this week. Employers will be impacted somewhat differently under the Senate and House legislative proposals, but under each will carry a large portion of the burden for implementing health reform.

The Baucus' bill requires all U.S. citizens and legal residents to have health care coverage, enforced with a fixed dollar tax penalty based on income at a percentage of the federal poverty levels, with certain exemptions. The House Tri-Committee measure requires all individuals to have acceptable health coverage, with a penalty for non-compliance set at 2.5 percent of adjusted gross income, up to the cost of the average national premium for a basic health plan.

Employers are not required to offer health care coverage under the Baucus proposal, a feature that survived after a spirited attempt to amend the proposal by adding an employer mandate. However, employers with more than 50 full-time employees that do not offer coverage would pay a fee for each employee who receives a tax credit for health insurance through a health insurance exchange. The fee would be based on the amount of the tax credit, but would be capped at an amount equal to $400 times the total number of employees at the firm. All employer-sponsored health coverage would be required to cover prevention services and must limit out-of-pocket expenses to the amount allowed for Health Savings Accounts, an indexed amount that

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Health Reform – Focus on Employers (cont'd)

includes deductible and out of network charges of $5,800 for individual coverage and $11,600 for family coverage in 2009. Under the current proposal, there are no other minimum benefit requirements that are required of employer-sponsored coverage.

Under the House Tri-Committee bill, employers are required to provide coverage at established minimum benefit levels and contribute at least 72.5 percent of the cost for employee coverage and 65 percent of the cost for family coverage OR pay an amount equal to 8 percent of total payroll into an Exchange Trust Fund.

Premium subsidies are offered to small employers (currently, 25 or fewer employees with an average salary under $40,000) under both the Baucus bill and the Tri-Committee legislation. The Baucus bill gives premium credits if the small employer offers health care coverage, starting at 35 percent of the employer contribution or 50 percent of a benchmark amount. The Tri-Committee bill offers tax credits that equal 50 percent of the premium costs. The tax credits decrease as the firm size and earnings increase, to a maximum $80,000 annual salary. The Tri-Committee proposal adds a temporary reinsurance program for employer coverage of retirees between ages 55 and 64 for the purpose of minimizing employer group risk for retirees.

The Baucus bill also provides for an excise tax on "Cadillac" plans that would be imposed on the issuer of the plan. The Plan Administrator of self-insured employer programs or the insurer for fully-insured plans would be subject to the tax if the cost and benefits exceeded the established maximums. Flexible spending accounts would be limited to $2,000 yearly in contributions and could be used to pay only for items and services that are allowed as medical expense deductions under the federal income tax rules.

Finally, while both the Senate and House health reform measures require the coverage of various preventive services with no cost-sharing, a provision from the Senate HELP bill (the earlier–completed legislation from the Senate Health, Education, Labor and Pension Committee) has been offered as an amendment to the Baucus bill that would encourage employer wellness programs by increasing the allowable premium discount for employees enrolled in these programs from 20 percent to 30 percent.

As mark-ups of the House and Senate proposals continue, so does the debate on the effect of the potentially dramatic changes on the employer group health plan market. Many employers are reviewing the cost of their health care coverage and beginning consideration, subject to review of final legislation, of whether dropping coverage altogether and paying the resulting penalty would ultimately be a more economical choice than providing more expansive coverage and greater premium contributions for all employees.

Speculation About Health Reform Results in Medicare Advantage Uproar

The Centers for Medicare and Medicaid Services ("CMS") responded last week to concerns triggered by a letter from Humana to its members covered under Medicare Advantage programs. It was reported that the Humana letter included statements that pending health reform legislation could result in cutting benefits and services under some Medicare Advantage policies. Humana urged its members to contact their elected representatives. Medicare Advantage plans are private insurance options in which Medicare eligible individuals can enroll in lieu of participating in traditional fee-for-service Medicare. These plans frequently offer benefits in addition to regular Medicare benefits, but have come under fire for being more expensive for CMS to finance. All of the health reform proposals have included provisions for reducing the payments to insurers providing Medicare Advantage programs.

CMS sent a letter to all of its Medicare Advantage contractors ordering that communications such as the Humana letter cease, as they are alleged to be misleading and confusing to the members. CMS indicated that further communications could result in violations of the provisions of the Medicare Advantage contracts regarding communications between health plans and their members.

Republican members of the Senate responded with a letter to Health and Human Services Secretary ("HHS") Kathleen Sibelius urging her to lift the "gag order" on the insurers. The letter from Senator Mitch McConnell of Kentucky and other Republican Senators said that Medicare Advantage plans "should not be threatened with punishment if they speak out on a matter of public concern simply because the administration disagrees with their position." Republicans also feel that the order violated a 12-year-old guidance on such communications from HHS that would appear to have allowed the Humana letter. The Republican Senators have further threatened to delay confirmation consideration of Obama administration appointees to positions at HHS until the matter is resolved.

HHS spokesman Nicholas Papas responded, upholding the Department's position, saying "Our Department is committed to protecting Medicare beneficiaries and ensuring that their personal information is not used inappropriately. Seniors on Medicare should not be subjected to misleading information about their Medicare benefits. We have serious concerns that certain communications from a major insurance company violated CMS regulations and our investigation will continue."

This latest development in the on-going debate over health care reform raises significant first amendment issues.