HUNTON& WILLIAMS

CLIENT ALERT

March 2011

Contacts

L. Scott Austin
1445 Ross Avenue, Suite 3700
Dallas, Texas 75202-2799
(214) 979-3002

600 Peachtree Street, NE
Suite 4100
Atlanta, Georgia 30308-2216
(404) 888-4088
saustin@hunton.com

David Mustone
1751 Pinnacle Drive, Suite 1700
McLean, Virginia 22102
(703) 714-7509
dmustone@hunton.com

Leslie A. Okinaka
200 Park Avenue
New York, New York 10166-0091
(212) 309-1276
lokinaka@hunton.com

Health Care Reform — Implementation to Continue Despite Litigation

A number of suits have been filed in the past year challenging the legality of the Patient Protection and Affordable Care Act of 2010, as amended (the "Health Care Reform Act"). A handful of district courts have already issued rulings, with two holding that all or part of the law is unconstitutional. The others have ruled otherwise and the losing parties in all of the cases have already announced their intention to appeal the decisions. In these circumstances, it is likely that the constitutionality of health care reform will ultimately find its way to the U.S. Supreme Court and, hence, will not be finally resolved for perhaps several more years.

Despite the ongoing litigation and adverse court rulings (as well as Republican opposition in Congress), it appears that the administration fully intends to move forward with implementing the new law within the general statutory timeframe. Given the current state of affairs, employers may wish to continue to comply with the applicable reforms, rather than risk participant disputes and possible government intervention/penalties. For many employers, the brunt of the work required for compliance with the initial reforms is behind them and only a few additional changes are in the offing until 2014. For additional background on this timeframe and the remaining pre-2014 changes, see "Health Care Reform — What Employers Need to Know Now," issued in April 2010.

In addition, the government has issued the following helpful guidance regarding the timing of some of the upcoming reforms and other changes affecting employers.

Delay of Nondiscrimination Rules for Insured Health Plans

The Health Care Reform Act extended the long-standing nondiscrimination rules for self-insured health plans to *nongrandfathered* insured health plans, effective as of the first plan year beginning after September 22, 2010 (which, for a calendar year plan, is 2011). In general, these nondiscrimination rules bar the provision of health benefits exclusively (or on a more favorable basis) to high-paid employees. The current thinking is that this provision will (given the potential penalties involved) likely impact the use of insured arrangements for providing executives separate or enhanced health benefits during or following employment.

Fortunately, the Internal Revenue Service has provided some welcomed relief in this regard. In late December of last year, it announced in Notice 2011-1 that these rules will not be enforced *until* final regulations are issued and put into

effect, the aim being to ensure that plan sponsors have sufficient time to bring any covered programs into compliance. In the interim, affected plan sponsors do not need to worry about complying with these rules.

Effective Date for Automatic Enrollment Requirements

The Health Care Reform Act generally provides that large employers (generally, those with 200 or more full-time employees) must enroll eligible employees in the employer's health program unless the employee affirmatively opts out. The Department of Labor (DOL) has recently issued guidance that provides that affected employers will *not* need to comply with this requirement *until* final regulations are issued and in effect. *See* DOL FAQs About Affordable Care Act Implementation Part V. (Q2). DOL intends to issue final rules by 2014 (when the individual coverage mandate and employer "play or pay" rules are scheduled to go into effect if the act is not found to be unconstitutional).

Application of 60-Day Advance Notice Requirement for Material Changes

In general, the Health Care Reform Act also provides that a group health plan must provide 60 days' advance notice of any material change to health plan benefits (as reflected in the most recent version of the plan's summary plan description). This requirement was enacted in tandem with the requirement that group health plans provide uniform plan summaries (using government-developed terminology and template), beginning two years after enactment (March of 2012). There has, however, been considerable uncertainty as to when the 60-day notice requirement is to go into effect, with some thinking that it was effective on enactment. The government has recently clarified, however, that this requirement is, as many had thought, not effective until the uniform plan summary rules are finalized and in effect. *See* DOL FAQs About Affordable Care Act Implementation Part V (Q4).

We welcome the opportunity to respond to any questions you may have regarding these or any other aspects of the Health Care Reform Act.

© 2011 Hunton & Williams LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.