HAYS COMPANIES

New Illinois Health Coverage Disclosure Requirement

Illinois has passed a law (available here) that imposes new disclosure requirements on employers that sponsor group health insurance. The law, known as the Consumer Coverage Disclosure Act, was enacted on August 27, 2021 and is effective immediately. While the basic obligation imposed by the Act is straightforward, the Act leaves a large number of issues unresolved regarding an employer's obligations, as further discussed below.

What Employers are Potentially Subject to the Law?

According to the Act's definition of employer, the Act applies to all private and public employers "for whom employees are gainfully employed in Illinois." If such an employer "provides group health insurance coverage to its employees," then it is required to make the disclosures required by the Act.

Open Questions

Q. Is the term "group health insurance coverage" limited to actual insurance coverage, meaning employers that sponsor only self-insured health coverage are not required to comply?

A. It is possible the Illinois legislature was using the term in a very generic context and that the term is intended to apply to both fully insured and self-insured health coverage sponsored by an employer, but the phrase is open to interpretation.

Q. Does the term "group health insurance coverage" include any type of coverage other than medical coverage?

A. Although the term "group health insurance coverage" can include medical, dental, and vision coverage in other contexts, we believe it is limited to medical coverage in this case due to the nature of the information that must be disclosed.

Q. For private-sector employers whose health plans are subject to ERISA, is the disclosure requirement preempted by ERISA?

A. Because the disclosure obligations are imposed on employers sponsoring an ERISA plan, not the insurance carrier, ERISA preemption might apply regardless of whether the employer's plan is fully insured or self-insured. The answer to the preemption question likely will not be known until the DOL issues an opinion on the issue or a court decides the issue. While employers whose plans are subject to ERISA have strong arguments in favor of ERISA preemption, other similar state laws have gone unchallenged.

What Disclosures Are Required by the Act?

According to the Act, a covered employer must provide "a written list of the covered benefits included in the group health insurance coverage in a format that easily compares those covered benefits with the essential health insurance benefits ["EHBs"] required of individual health insurance coverage regulated by the State of Illinois." The Act then directs the Department of Insurance to provide information outlining the essential health insurance benefits required for individual health insurance coverage and indicates that an employer may use that outline "to inform eligible employees of benefits included or not included in their health insurance coverage."[1]

[1] At the time of this writing, we were unable to locate an outline of the EHBs on the Department of Insurance's website. However, CMS makes available a list of Illinois-required EHBs on its website here.

Although not entirely clear, the requirement to provide the information "in a format that easily compares those covered benefits with the essential health insurance benefits required of individual health insurance coverage" suggests the use of any existing documents prepared by the employer, such as the plan's Summary Plan Description (SPD) or Summary of Benefits and Coverage (SBC), would not be sufficient. Although those documents include information regarding covered benefits, they likely do not provide the information in a format that allows eligible employees to easily compare the plan's covered benefits to the EHBs that must be included in individual health insurance policies.

Open Questions

Q. Does the writing simply need to indicate whether the EHBs included in individual health insurance policies are included (or not included) in the employer's plan? Or must all benefits covered under the employer's plan (including items that are not EHBs) be included in the list?

A. The answer is unclear based on the wording of the statute. If the purpose of the requirement is to allow eligible employees to determine whether the employer's plan covers the same EHBs as individual health insurance policies, then one would assume that only EHBs need to be listed. However, the Act specifically states that the plan's "covered benefits" need to be listed without any language limiting them to EHBs covered by the plan.

To Whom Must the Information Be Disclosed?

The Act indicates that the disclosure must be made to "all employees eligible for the coverage." Employee is defined as "any individual permitted to work by an employer."

Open Questions

Q. Must the disclosure be made to eligible employees who do not reside or work in Illinois?

A. Many state laws like this one apply only to residents of the state or employees who work in the state, but this law appears to apply to all employees of a covered employer, regardless of where they reside or work.

Q. Is the "permitted to work" standard different than the common law employee standard that is normally used to determine which individuals are employees?

A. It appears it could include non-employees such as independent contractors if they are eligible for the employer's group medical plan.

What Methods May an Employer Use to Disclose the Required Information?

The Act provides that a covered employer may comply by providing the required information "by email to its employees or providing the information on a website that an employee is able to regularly access."

When Must the Disclosure Be Made?

The Act provides that the disclosure must be made "upon hire, annually thereafter, and upon request from an employee." Unlike some other disclosure laws, there is no requirement to make an initial disclosure to current employees when the Act becomes effective. Accordingly, covered employers will start by making the disclosure to new hires as they are hired after August 27, 2021, followed by an annual disclosure at some point in the future.

Open Questions

Q. When, in relation to an employee's hire date, must the disclosure be made?

A. The Act does not impose any specific deadline. Presumably, employers will have a reasonable amount of time to make the disclosure, but a literal interpretation suggests the disclosure must be made on the date on which an employee is hired.

Open Questions Cont.

Q. When is the annual disclosure required?

A. Typically, annual disclosures are linked to open enrollment periods or the start of a new plan year, but the Act is silent on the timing of the annual disclosure. Given the fact the disclosure is made to eligible employees, a reasonable approach likely would be to make the disclosure as part of the open enrollment materials distributed to eligible employees, similar to the SBC requirement under the ACA.

Q. If the employer complies with the Act by providing the information on a website, are the requirements regarding when the disclosures must be made automatically satisfied given the fact the information is always available? Or must the employer provide some type of notice at the appointed time notifying eligible employees that the information is available on the website?

A. The Act does not answer this question, but the safe approach would be to notify employees of the availability of the information on the website upon hire and annually thereafter.

Are There Penalties for Non-Compliance?

The Act includes a monetary penalty for non-compliance. The penalty amounts range from $500 to $5,000, with the applicable amount depending on the size of the employer (four or more employees versus fewer than four employees) and on whether the violation is the employer's first, second, or third plus offense. The Department of Insurance has discretion to impose a penalty amount that is less than the dollar amounts specified in the Act. It is directed to take into account the size of the employer, the good faith efforts made by the employer to comply, and the gravity of the violation when determining the amount of the penalty.

Takeaways for Employers

Private sector employers with employees working in Illinois who sponsor group medical plans need to make an initial determination whether to comply with the Act or take the position that ERISA preempts the Act and it is unenforceable against them. Employers considering relying on an ERISA preemption defense should seek the advice of legal counsel.

For employers that decide to comply with the law (or that cannot make the ERISA preemption argument because their plans are not subject to ERISA), there are many open questions as to the scope of the requirement and the particulars of satisfying it. In the absence of any regulatory guidance from the Department of Insurance, employers likely should not be at risk of penalties so long as they apply a reasonable, good faith interpretation of the Act and comply accordingly. We encourage employers to seek the advice of their legal counsel with respect to the open questions.

The Hays Research and Compliance team will continue to monitor the situation and provide important updates as they become available.

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