

# Employee Benefits Report



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Health

March 2020

Volume 18 • Number 3

## States Actively Working to Reform Health Care

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**E**ven though health care reform continues to be a hot topic during the 2020 presidential election, the power to transform health care this year may lie with the states since Congress has not enacted changes.

Health care was a major topic in many governors' state of the state addresses in 2019 and numerous states passed new legislation aimed at lowering health care costs and improving quality of care. These changes could foreshadow steps the federal government may eventually take — although not all

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## Three Health Insurance Taxes Repealed; One Fee Reinstated

**P**resident Donald Trump signed a bill into law that not only funds the federal government through fiscal year 2020, but also affects employers and employees' health benefits.

The bill repeals three taxes that were enacted to fund the 2010 health care reform act known as Obamacare. The taxes include:

- ★ Sec. 4980I — also known as the Cadillac Tax — was a 40 percent excise tax on certain high-cost employer sponsored health plans.
- ★ Sec. 4191 was a medical device excise tax that was im-

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voters are in favor of federal or state-provided health care.

Here are some examples of current actions or proposed state laws that are making an impact on the health care industry:

### Price Transparency

Health care is unique because consumers often don't know what the cost will be to see a doctor or undergo a procedure until they receive the service. This lack of transparency makes it difficult for consumers to shop for health care. It also lessens competition among providers and removes the incentive to keep prices low.

To improve transparency, 16 states have implemented mandatory All-Payer Claims Databases (APCDs) to collect health care price and quality information. However, only eight states make the information available to the public.

Another consequence of lack of transparency is that patients often don't know which providers are out-of-network. This can cost significantly more money. Or, patients find out after receiving services that their insurance only covers a portion of the costs — leaving them to pay the balance. More than half of the states have passed or expanded laws to protect patients from these kinds of “surprise” or balance billings.

### Provider Payments

Most current payment models reward providers for quantity of care instead of quality. For instance, the more tests that are ordered, the more money the hospital or facility receives. Some states, such as Colorado

and Maine, have implemented accountable care organizations for their Medicaid program to encourage providers to improve the coordination of care and minimize unnecessary spending. Maine also requires some health plans to inform patients about lower-cost providers when making referrals.

Some states, such as Maryland, Pennsylvania, and Vermont, use global budgets, which provide a fixed amount over a fixed period of time per population groups rather than fixed rates for individual services or cases. The goal is to control volume by putting a cap on hospital spending.

### Market Power

Some states are trying to create a more competitive marketplace and bring down health care costs. One of the ways they are doing this is by repealing laws limiting competition.

For instance, in the 1970s, many states implemented certificate-of-need (CON) laws. CON laws limited the creation of health care facilities, because some legislators thought they would prevent overuse and keep costs down. Instead, it appears that CON laws have thwarted competition and contributed to rising health care prices. Fifteen states now have repealed CON laws.

In addition, some states want to:

- ✳ Reduce provider scope-of-practice limitations, which have contributed to shortages of primary care providers and led to higher costs and longer wait times for appointments.

posed a 2.3 percent tax on domestic sales of medical devices.

- ✳ Section 9010 was an annual fee on health insurance providers.

All three taxes previously had been postponed or suspended.

The bill also reauthorizes the Patient-Centered Outcomes Research Institute (PCORI) fee on those who sponsor certain types of self-funded health plans and on fully insured carriers. PCORI had expired for plan years ending after Oct. 1, 2019, but now will run through 2029.

The fee helps fund the Patient-Centered Outcomes Research Institute (PCORI), a non-profit government-sponsored organization charged with investigating the relative effectiveness of medical treatments, making health care more affordable and improving workplace productivity.

- ✳ Implement legislation banning anti-competitive contract terms that some large health care systems and health plans have used to gain advantages over smaller competitors.

### Cost Controls

States have utilized a variety of measures to try to keep health care prices low, including oversight commissions. In Delaware, Massachusetts and Pennsylvania, oversight commissions analyze health care cost data and make recommendations. In Oregon, the Health Policy Board develops plans to improve health care. The Rhode Island commis-

sion has regulatory control over insurers and limits providers to rate increases that don't exceed the Consumer Price Index-Urban.

Another tactic is using benchmarking to control costs. Benchmarking establishes a standard of excellence and measures how well businesses of a similar type, such as hospitals, perform in comparison. For example, the Massachusetts Health Policy Commission has set a benchmark for limiting growth of state health care costs for all payers to 3.1 percent. Those who are not able to contain costs according to the benchmark must submit improvement plans.

### ACA-Like Coverage

Concerned that the Affordable Care Act (ACA) will be invalidated, some states are reinforcing key ACA coverage provisions. Maine and Wisconsin are proposing that insurers provide coverage for individuals who have pre-existing conditions — a provision that already is law under the ACA. Pennsylvania and New Jersey are taking control of their ACA marketplaces from the federal government.

New Mexico and other states offer public insurance options and Washington is considering a Medicare-like plan. Colorado and Washington are implementing public insurance options some believe could be a model for Democrats at the federal level. Both plans would be privately administered, and would pay providers 160 percent or more of Medicare rates.

California is working on an ambitious state-financed coverage expansion.

### Un-ACA-Like Coverage

Not all states are working to keep ACA plans. Georgia is looking to eliminate the state's marketplace and wants to allow healthier consumers to choose pared down plans which do not meet all ACA standards but are more affordable.

Idaho is promoting short-term insurance plans as an alternative to the ACA. These plans are temporary and do not offer the same coverage as ACA. However, the plans are considerably less expensive and targeted to individuals who are between jobs, have missed open enrollment or are waiting to become eligible for Medicare. ■

## Background Checks: The Fine Line of Staying in Compliance

Background checks allow employers to get a clearer picture of an applicant's job and personal history. So, what happens if you find out that the applicant has a criminal background or has been convicted of drug use?



**D**enying an applicant a job based on what you discover during a background check — criminal or otherwise — has the potential of landing you in legal hot water.

Title VII of the Civil Rights Act of 1964 requires employers to prove that past criminal behavior would directly impede a candidate's ability to perform a job. In addition, the Equal Employment Opportunity Commission (EEOC) guidelines recommend that to avoid complaint issues employers should "eliminate policies or practices that exclude people from employment based on any criminal record." Thirty-five states prohibit employers from using criminal background checks during the application process, although there's no federal mandate requiring this practice.

Plus, there are other kinds of information you cannot use to base a hiring or firing decision. While EEOC and Federal Trade Commission rules allow employers to check an applicant's or employee's work histo-

ry, education, criminal record, financial history, medical history or use of social media — this type of information cannot be used to deny someone a job.

Federal laws protect applicants and employees from discrimination based on:

- ✦ Race, color, national origin, sex or religion
- ✦ Disability
- ✦ Genetic information (including family medical history)
- ✦ Age (40 or older).

You also must stay in compliance with the Fair Credit Reporting Act (FCRA), which regulates how credit reporting agencies can collect, access, use and share the data they collect in consumer reports. States and municipalities also have laws regarding background reports.

One of the most important things you can do is remember to treat all applicants and employees equally. And, if you plan to do a background search, tell the applicant or employee in writing you might use the information to make decisions about his or her employment. You must get their permission in writing.

### Social Media

Conducting a social media search on someone you may want to hire carries similar challenges.

A social media search can help you verify a candidate's skills and employment history. It also can uncover whether an individual appears to be abusing alcohol or using illegal drugs or has posted racist and sexist messages.

However, like background checks, social media searches and how you use that information must be handled fairly and must follow EEOC guidelines. Here are a few things you can do to stay in compliance when using social media to do your research:

- ✦ Do not require job applicants to give you access to their private accounts.
- ✦ If you discover an applicant's gender, race, sexual orientation or disabilities, you cannot use this information when making your hiring decision. You are only allowed to consider information that applies to the job they're seeking.
- ✦ Check your state's laws to make sure you're running the check at the right time in the hiring process, which usually is after you have invited the applicant for an interview or have given them a conditional job offer.
- ✦ Any research that is conducted must be done by someone who is not involved in the hiring decision.

A good way to control compliance risk to some extent is to purchase Employment Practices Liability Insurance. ■

## How to Stay in Compliance When Employees Work Remotely

As telecommuting continues to gain popularity with it comes a new set of compliance challenges for businesses.

Telecommuting occurs when employees do some or all of their work away from the company's main office. Computers, laptops and cell phones, and the availability of high-speed internet connections and secure servers, make working from home, hotels, airports, libraries or coffee shops much easier.

According to the 2017 "State of Telecommuting in the U.S. Employee Workforce Report," almost three percent of U.S. employees worked from home at least half of the time. This is a 115 percent increase in telecommuting jobs since 2005. Globally, the percentage of employees who work away from the office is higher. In 2018, IWG, a Switzerland-based service office provider, reported that 70 percent of professionals work remotely at least one day a week, while 53 percent work remotely at least half of the week.

Telecommuting's appeal to employees is that the increase in flexibility creates better work-life balance and the decrease in travel time means less time on the road and less wear and tear on their vehicles.

The principal appeal to employers is that less office space is needed, meaning lower facility and infrastructure costs. Global Workplace Analytics reports that a typical business can save about \$11,000 per person in reduced office space and associated costs when employees telecommute.

As good as that might sound, there are legal issues surrounding telecommuting. Consider talking to an employment law attorney to put in place a formal company policy before starting your telecommuting program.

Here are a few of the compliance issues you might face:

### Time and Compensation

Although findings from the Champlain College's Online Masters in Law degree program indicate that salaried workers are more likely to work remotely than nonexempt employees, that doesn't mean you don't need to monitor employees' productivity. It's particularly important when nonexempt employees telecommute. The Fair Labor Standards Act (FLSA) requires employers to keep accurate records of the hours employees work, as well as to pay employees for all hours worked — including overtime for more than 40 hours per week. Telecommuters also must be allowed rest and meal breaks.

Human resource experts recommend employers have a written telecommuting policy that employees sign off on. The policy can include the number of hours expected to be worked each day or week and how hours are recorded. It also should stress that non-exempt employees are prohibited from work-



ing off-the-clock.

In addition to possibly using an electronic system to track hours, managers and supervisors should communicate regularly with employees who work off site.

### Company Property

If you require your employees to use company-owned equipment, such as a computer or cell phone, you should determine ahead of time who will be responsible for any damage or theft of the equipment. Have your employees sign paperwork acknowledging their responsibility and whether the equipment can be used for personal reasons.

### Security

Businesses that deal in confidential and proprietary information must ensure that remote employees are working from a secure connection or through a VPN. Employees also should secure access to company information by using encryption, passwords and network firewalls and avoid the use of personal devices for company business.

### Workers' Compensation

Employees who are injured on the job — even when working at home — can file worker's compensation claims because employers are responsible for the safety of their employees. To reduce the possibility of injuries, it's helpful to have employees set aside the part of their home used as office space and reduce fatigue by designating set times for breaks and lunch.

### ADA and FMLA Laws

Employees who are disabled often are better accommodated when they work from home. These employment situations are governed by the Americans with Disabilities Act; the Family and Medical Leave Act (FMLA); state workers' compensation laws; privacy concerns; and workplace safety. Your managers and supervisors must ensure they are providing reasonable accommodations and are in compliance with those rules and regulations.

For more information on compliance issues and telecommuting, please contact us.

# The Role of Pharmacy Benefit Managers

Does your health benefit plan have a pharmacy benefit manager (PBM)? If so, it's important you understand how a PBM affects your and your employees' access to prescription drugs, as well as controlling your out-of-pocket costs.

**P**BMs manage prescription drug benefits for health insurers in several ways:

- ✦ Working directly with the drug manufacturers to negotiate rebates and lower costs.
- ✦ Determining which drugs members can purchase without having to incur additional out-of-pocket costs; and maintaining lists, or formularies, of covered medications.
- ✦ Contracting directly with individual pharmacies for lower costs.

Representatives for the federal Centers for Medicare and Medicaid Services say that in the last three years PBMs have helped lower drug prices and slow the growth of drug spending by negotiating rebates directly with the manufacturers. While some PBMs pass along the rebates to the insured members, some don't and some may even recommend higher-priced drugs in order to earn larger rebates. Employees with high-deductible plans must pay high copays based on the drug's list price.

Drug manufacturers argue that the rebates PBMs demand force them to raise prices. The Commonwealth Fund, a private company devoted to promoting the common good, reports that manufacturer rebates to PBMs increased from \$39.7 billion in 2012 to \$89.5 billion



in 2016, which partially offset price increases. PBMs say that they are passing along a larger share of the rebates to insurers.

Critics suggest that PBMs start receiving greater scrutiny and suggest requiring PCMs to:

- ✦ Be more transparent about rebates
- ✦ Discontinue spread pricing, to ensure insured members and employers are not overpaying PBMs for prescription drugs.
- ✦ Require PBMs to give 90 percent of the rebates to payers or to patients.
- ✦ Reorient their business model away from securing rebates and more toward improving value in pharmaceutical spending. ■

