Employers are feeling the heat of feds' health care audits

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The Patient Protection and Affordable Care Act, also known as Obamacare or health care reform, is not just increasing the numbers of those with health care coverage.

It is the impetus for a growing and concerted campaign by the federal government, through the U.S. Department of Labor, to audit employers of all sizes on a virtual alphabet soup of federal government regulations.

This past year, the Department of Labor, through its Employee Benefits Security Administration (EBSA), updated its protocols to audit employers based on certain health care reform provisions already in effect, including a federal law that prohibits employers from denying coverage or assessing higher premiums based on genetic predispositions.

In addition, employers are under scrutiny as to whether their wellness programs pass muster under federal law.

Since that time, increasing numbers of employers, of all sizes, types and shapes, have been going to their mail, only to find that the EBSA has written them a letter, advising they are being audited and investigated for their health plan.

For small and midsize employers, that is just the beginning of the surprise.

Today (and, at least for the time being), the vast majority of small and midsize employers are fully insured, meaning that they buy coverage for their employees directly from an HMO or insurance carrier. Most fully insured employers assume that whatever their broker, HMO or health insurance carrier has done is everything they would need to be compliant with federal law.

However, these employers are finding something quite different.

What is more, health care reform may entice many small and medium-size fully insured employers to think about becoming self-insured. Those that do only will be subject to further additional Department of Labor audit topics, not to mention a full-blown series of federal health information privacy and security requirements.

Under federal law, including under health care reform, the Employee Retirement Income Security Act (ERISA) and otherwise, employers providing health benefits coverage to their employees are subject to and must comply with a long list of federal requirements that specifically apply to them and for which brokers, HMOs and health insurance issuers do not purport to or otherwise cover the bases.

Consequently, what employers have been finding is what the federal government has found.

If selected as the recipient of one of the federal government's health benefits audit letters, employers can expect — seven out of 10 times, if not more — to be found failing to comply with federal law.

In part, this is the reason the government estimates it will "achieve" in excess of $1.17 billion in "total monetary results" through its 2013 enforcement efforts.

Notwithstanding the federal government's increased federal audit oversight of employers in respect to their health plans, employers don't need to know rocket science to be able to address an audit situation.

Rather, government statistics reveal what, in many ways, is common sense — those employers that are most likely to survive an audit are those that have proactively addressed the areas posing the greatest potential risk for fines and penalties.

On matters of health care reform, the federal government has made the issue of grandfathering an audit priority. Under health care reform, if an employer health plan is grandfathered, it is not required to comply with certain federal provisions that would apply but for its grandfathered status.

For example, a grandfathered plan is able to place certain limits on choice of primary care provider or impose cost-sharing for preventive services, whereas other plans cannot.

Generally, an employer health plan is grandfathered under health care reform if the plan existed on March 23, 2010, (when health care reform first became law); has continued to exist since that time; for which there has been no material changes to participant cost-sharing or benefits; and for which period notice has been given to participants of the health plan's grandfathered status.

Through its audits, the federal government seeks to check whether employers claiming grandfathered status for their health plans can legitimately do so.

HMOs and health insurance issuers typically will help their fully insured employers address a health plan's grandfathered status because the issue directly impacts them and the benefits they offer.

So, too, for the same reasons, will HMOs and health insurance issuers typically address another employer health plan audit priority: the extent to which employers extend dependent coverage to the age of 26.

However, not understood — or misunderstood — by employers is that the contracts, certificates of coverage or policies they may have with or receive from HMOs, health insurers or others typically do not satisfy federal plan document and summary plan description requirements.

Federal plan document and summary plan description requirements encompass specific language provisions on specific topics and imposes specific timing requirements.

They apply to small, as well as midsize and large employers. For each day a health plan participant is not provided a timely summary plan description, the Labor Department is authorized to impose a civil penalty of up to $110 per day per such participant.

Failure to timely file, let alone at all, Form 5500s is another substantial area of exposure to employers. Under federal law, employers with 100 or more health plan participants must file an annual report on their health plan, using DOL Form 5500.

Many fully insured employers do not know or think that this requirement applies to them.

As a result, these fully insured employers expose themselves in the event of an audit. Federal fines for noncompliance can come from two directions — the Department of Labor, of up to $1,100 per day (no limit); or the IRS, of up to $15,000.00; or both. ■

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