



SET FOR DEBATE

Health Care Lawsuit Poised to Debate the Constitutionality of Health Care Reform Law
BY AMANDA N. WEGNER

On January 18, Wisconsin Attorney General J.B. Van Hollen made good on a long-held promise: He entered Wisconsin into the legal battle against health care reform in a Florida federal court.

To date, 26 states have entered into or filed lawsuits against the health care law, and 20 legal challenges, by states, organizations and individuals, are circulating.

Parts of this sweeping legislation, the Patient Protection and Affordable Care Act, are already in force. But should the lawsuit throw out the law in its entirety, as the most recent ruling by the Florida federal court seems to indicate, what does that mean for Wisconsin businesses forging ahead with health care reform? Can employers do anything now, long before a final verdict is reached, to soften the blow a rollback would deliver?

In a word: No.

“At this point, all we can do is speculate,” says Cheryl DeMars, president and CEO of The Alliance, a not-for-profit, employer-owned health insurance cooperative based in Madison.

AT THE CORE: CONSTITUTIONALITY

For Van Hollen, the central issue is the constitutionality of the law’s core mandate for individual health coverage. Starting in 2014, individuals who cannot show that they are covered by an employer, government program or their own policy will face IRS fines.

“The Constitution places limits on the power of the federal government, and these limits must be defended or they will disappear,” Van Hollen said in a press release. “Never before has the federal government required an individual to either buy government-approved insurance or pay a penalty. And nowhere does the Constitution authorize Congress to regulate in this manner.”

On the individual mandate, the other side argues that if people are not required to buy health insurance, it strains the system.

“From a policy perspective,” explains health care policy expert Linda Reivitz, a UW-Madison School of Nursing faculty member and former state secretary of health and social services, “if people are not mandated to purchase insurance, but cannot be denied insurance because of pre-existing conditions, then many people will wait to purchase insurance until they need it. After all, that is the most logical thing to do. But that will increase the cost of insurance to everyone, perhaps prohibitively so. ... Insurance companies need more healthy people in the insurance pool to help pay the cost of those who are less healthy.”

The lawsuit is complicated and evolving: On January 31, Florida Judge Roger Vinson ruled that the entire law was unconstitutional; the U.S. Department of Justice announced it would appeal the decision shortly after. On March 3, he issued a stay of his own ruling after the Obama administration issued a request for “clarification,” as it differed with the opinion of several states over whether Vinson’s original order was meant to be immediately effective. At that time, Vinson gave the Obama administration one week to file an expedited appeal of his January 31 ruling, and the Justice Department filed a motion for an expedited appeal with the U.S. Court of Appeals for the Eleventh Circuit on March 8. [This was the latest action as of the date this issue went to press.]

The ruling, says Robert Kraig, executive director of Citizen Action of Wisconsin, a coalition that works on social, environmental and economic justice issues, leaves the state in an odd position.

“The attorney general was pretty strident after the Florida decision that the law was no longer in effect,” says Kraig. “He’s walked back on that a bit, but that leaves Wisconsin in an uncertain place, considering some consumer protections are already in effect.”

Some of those protections, which went into effect September 23, 2010, include: coverage expansion for adult dependents until age 26; free preventative care; children can no longer be denied coverage for pre-existing conditions; and insurers prohibited from rescinding coverage.

“If the attorney general is saying this is null and void, then do insurance companies have a legal case if they get in trouble for rescinding coverage? They could say that doesn’t apply in Wisconsin. We’re concerned that Van Hollen has jumped the gun and created too much ambiguity,” says Kraig.

CONFUSION, FRUSTRATION, AMBIGUITY

Thus far, the law of the land hasn’t changed, says DeMars. “Even with the judgment in the Florida court, that doesn’t mean that federal government will stop enforcing the law.”

But it does mean more ambiguity and confusion for employers.

And frustration.



“Businesses are very much impacted,” says Jon Rauser, president of Milwaukee’s The Rauser Agency. “The notion that they need to move ahead with a lot of different planning that may be potentially tossed out is frustrating.”

For fully insured plans, the cost of compliance adds two to four percent to the double-digit increases for medical inflation.

“Fully insured plans don’t have much say,” says Rauser. Self-insured plans, he adds, are agonizing over “grandfather” status, an option available to self-funded plans in place prior to March 23, 2010; last June, the federal government issued regulations for exemptions for grandfathered health plans and the changes that plans seeking to retain their grandfathered status may and may not incorporate.

“[Self-funded plans] have largely given up grandfather status,” Rauser reports.

While the impact is highly dependent, some businesses are already the better for the law. Companies that didn’t offer coverage pre-reform and have no more than 25 workers are eligible for incentives such as tax credits and grants.

Adding to the uncertainty is the fact that many details of the law, including what is required and how it should be implemented, are being hammered out.

“The law is really a broad framework and a lot of the detail is being filled in,” says DeMars.

STATE MONEY AT STAKE

A major detail is the creation of health care exchanges at the state level, where individuals can “shop” for coverage on the open market. These exchanges must be in place by 2014.

And there’s a lot of money at stake.

In mid-February, Wisconsin accepted \$38 million in federal grants as part of an “early innovator” program to develop the state’s exchanges; it also sent back a nearly \$640,000 grant issued through the law that would assist people in enrolling in health coverage and filing complaints.

“The Wisconsin attorney general has said that as far as he is concerned, the law is dead in Wisconsin ... I don’t know how you have it both ways,” says Reivitz, referring to the state accepting the grant.

But Gov. Scott Walker has made it clear that he’s going to do it his way. After receiving the \$38 million grant in February, the Walker-created Office of Free Market Health Care issued this statement: “Receipt of the early innovators grant does not commit Wisconsin to a specific approach to exchange development. Wisconsin will main-

HOW TO GET THE BIGGEST BANG FOR YOUR HEALTH CARE BUCK



Here are a few opportunities to reduce the impact health care has on your business' bottom line.

WELLNESS PROGRAMS: Nearly one-third of this country's medical costs, says Nelson Braslow, senior medical director, Dean Health Plan, are linked to modifiable behaviors: high stress, substance use, obesity and lack of exercise. And a well-designed wellness program, which is a long-term investment, can help shift that number down.

"Start by identifying the problems and common themes," says Emily Borenitsch, manager of prevention and health promotion, Dean Health Plan. There are several tools to help guide your efforts.

"Any group that hopes to see benefits needs to have coordination," says Braslow. "An ad hoc approach won't yield the biggest bang for your buck."

Offering incentives will increase participation as well, adds Braslow.

"These are life habits. It can take several years to see the benefits, but wellness is always a good investment," says Borenitsch.

PREFERRED PHARMACY BENEFITS: Taking a page from the PPO model, Milwaukee-based Restat's Align program creates a preferred network of pharmacies; because the participating pharmacies gain new business and market share, they offer lower drug costs and reduced dispensing fees in return.

"We're creating cost clarity," says president Dave Kwasny. "Employees save money, and employers save money. It's really a win-win."

Employers can save at least 13 percent annually in pharmacy costs with the model, Kwasny reports.

The downside is that the Align model relies on capacity; Kwasny needs a minimum of 5,000 employees in the network, but smaller employee groups could be worked in once critical mass is attained.

SELF-FUNDED PLANS: When using an outside insurance company, employers pay for that company to manage insurance risk and contribute to the insurance company's profit. Bringing health care "in-house" with a self-funded plan saves on these costs.

Self-funded plans tend to work better for larger employee groups. Employers must also weigh their risk tolerance; there will be highs and lows in the medical spend year to year.

HIGH-DEDUCTIBLE PLANS: Offering a high-deductible plan with a health saving account allows employees to save tax-free money to pay for health care – when they actually need it.

These plans come with a lower premium and higher deductible, anywhere in the \$1,000 to \$5,000 range. Nationwide, some 22 million people are enrolled in high-deductible plans, and the number is rising as employers offer incentives to employees for moving to this type of plan.

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tain the ability to create an exchange that is consistent with a free market approach.” He also sent a letter, with 20 other Republican governors, to Health and Human Services Secretary Kathleen Sebelius noting that health care reform threatens their state budgets and asked for “complete flexibility” in operating their exchanges.

While estimates vary, Wisconsin could save more than \$500 million between 2014 and 2019 as the federal government would pick up a larger part of the cost to insure low-income individuals and families. Recent testimony before a Congressional committee by Dennis Smith, secretary of the Wisconsin Department of Health Services, indicates that Wisconsin could gain an additional \$1 billion in federal payments through other provisions of the law.

STAY ENGAGED

Legal observers agree that it will be some time before there's a final verdict on the lawsuit. It's expected to go to the Supreme Court, and may be drawn out to 2012, even 2013.

But businesses can't sit on the sidelines,” cautions Rauser.

Recently, Rauser was in a brainstorming with business leaders and owners; the conversation centered on education, permits, the difficulty of finding quality employees and more, but no mention of health care.

“Toward the end of [the] meeting, I said I was curious why health care didn't come up and the perception I got was that businesses have thrown in the towel, they're sitting on [the] sidelines until there's some definition.”

“But doing nothing,” says Rauser, “that's a mistake. That's the biggest mistake of all.” 🍷

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