Health Care Reform
Our Update & advice

Morris & Reynolds Insurance Presents Advice & Answers on America's Health Care Reform — January 1st 2015

The Affordable Care Act In 2014 & 2015: Ending Year One And Looking Ahead

As 2014 draws to a close we take a look back on the year and think about the year to come and what it all means to the Affordable Care Act (ACA).

The Start of the Insurance Marketplace

Looking back, an objective observer would have to say that the year was, at best, mixed for the ACA. The year began under the shadow of news-generating failures in the roll-out of the Marketplace. Headline stories told a tale of websites crashing, failures to enroll and incomprehensible and never-ending screens for individuals to complete. Some states' websites fared no better: for example, Oregon requested and received an extension for its open enrollment because its website wasn't enrolling people. After spending approximately one-quarter billion dollars, Oregon threw in the towel and announced it was moving to the federal exchange model. On the opposite coast, Massachusetts spent millions trying to get its system-which had been working fine for 6 years-to work under the ACA model. At one point those attempting to enroll were being notified via U.S. mail whether they were eligible for subsidies.

On the other hand, it appears that millions of Americans were able to sign up for insurance for the first time in 2014. While many of those millions were clearly individuals who had been insured but had lost their coverage because of the ACA, many did not have insurance before the ACA. It has been reported that as many as 80% of those signing up for ACA coverage in 2014 received some form of subsidy or assistance.

Annual open enrollment began on November 15 and will run through February 15, 2015. While there have been sporadic reports of sign-up and other technology issues, so far (a week in at this writing) there have not been widespread reports of failures that heralded the inaugural enrollment.

The real problem for the Marketplace in 2015: rates are higher. Premium rates across the country for individual insurance plans purchased on Marketplaces will be increasing from 8% to 25%, according to a number of news sources. This means that those re-enrolling for coverage may find that the plan they had last year is unaffordable this year, even with the subsidies and assistance.

The Start of *Play-Or-Pay*

2014 was the year under the ACA that the employer mandate (play-or-pay) requirements were supposed to begin for employers with 50 or more full-time equivalent employees ("FTE"). The Administration delayed implementation of play-or-pay to 2015 to give the IRS time to work on the employer/carrier reporting forms that are the backbone of play-or-pay enforcement. In 2014, the Administration further delayed implementation of play-or-pay for those employers with from 50 to 99 FTE; they generally do not have to comply until 2016.

So, 2015 marks the first year that play-or-pay will go into effect for our largest employers, those with 100 or more FTE on average in 2014. In 2015 employers who elect to use the "look-back" method for determining full-time status for eligibility in their group health plans will put their methodologies and recordkeeping to the test. And 2015 also marks the first year that employers with 50 or more FTE will have to track information about full-time employee status and offers of affordable coverage so that they can accurately report this information to the federal government at the start of 2016.

Needless to say, 2015 will be a watershed year for full implementation of play-or-pay by employers. It is also an important year for the government administrators.

The Legal Landscape

In 2014 the Administration fell to 2-1 in U.S. Supreme Court decisions concerning the ACA. In June 2014 the Supreme Court held that the Administration had violated the Religious Freedom Restoration Act ("RFRA") in Burwell v. Hobby Lobby, striking

Continued on next page...

14821 South Dixie Highway
Miami, Florida 33176

305
238.1000

Established 1950
MORRIS & REYNOLDS Insurance

305
255.9643

www.
morrisandreynolds.com

HEALTH CARE REFORM
OUR UPDATE & ADVICE

MORRIS & REYNOLDS INSURANCE PRESENTS ADVICE & ANSWERS ON AMERICA'S HEALTH CARE REFORM JANUARY 1ST 2015

THE AFFORDABLE CARE ACT IN 2014 & 2015: ENDING YEAR ONE AND LOOKING AHEAD

down specific elements of HHS' preventive service rules dealing with abortifacients. The central finding in Hobby Lobby was that HHS could have used less restrictive measures for enforcing the law when dealing with for-profit employers who have religious objections to offering this form of contraception.

Those who misunderstood the Supreme Court's reasoning in Hobby Lobby were outraged a few days later when the Court (by a vote of 6-3) refused to order a Catholic college to follow one of the less restrictive alternatives mentioned as possibly working in Hobby Lobby. In any event, HHS responded to Hobby Lobby by enhancing its opt out provision for religious-based employers: a religious based employer (including for-profit entities like Hobby Lobby) would need only advise HHS of their opt out in a letter and then HHS would instruct an insurance carrier or third-party administrator of a self-insured plan to provide the contraceptive benefit.

The contraceptive issue was addressed again by the federal courts in November when the U.S. Court of Appeals for the District of Columbia Circuit (the "DC Circuit") ruled against Priests for Life (and others) with respect to this opt-out methodology. The DC Circuit found that the opt-out procedures do not amount to a "substantial burden" on the religious liberty of these organizations. In Hobby Lobby the Supreme Court did not rule on these procedures one way or another (which is why the subsequent refusal to order a college to comply with them makes perfect legal sense). The Supreme Court assumed that this issue will be presented in the lower courts and that is exactly what is happening.

In 2015, we may see another federal court rule on whether the opt-out (or similar accommodations by HHS) present less restrictive alternatives. It is possible that the issue could go to the Supreme Court during the term that ends in June 2015, but it is unlikely.

However, the Supreme Court did decide to hear a case that could have a huge impact on the ACA. On November 7, just three days after the mid-term elections, the Supreme Court announced that it would hear arguments in King v. Burwell during its current term.

At issue in **King v. Burwell** is whether individuals purchasing insurance on federal Marketplaces are eligible to receive subsidies and tax credits. More than 35 states have federal Marketplaces. The ACA on its face only provides subsidies for insurance purchased in state-established Marketplaces. In 2012, the Internal Revenue Service released regulations that provided for subsidies in both federal and state Marketplaces. The Fourth Circuit Court of Appeals found that the IRS did not exceed its regulatory authority in King v. Burwell by declaring the subsidies to be available in both the state and the federal Marketplaces.

If the Supreme Court finds that subsidies are not available in federal exchange states, the impact on ACA implementation would be disastrous: millions of individuals would lose their subsidies, making their insurance unaffordable. Many would likely be forced to drop their coverage. In addition, employers in federal Marketplace states would be exempt from the ACA's play-or-pay penalties, because by law the penalties under the ACA are only assessed when a full-time employee obtains subsidized coverage on the Marketplace.

Those on either side of the debate who state boldly that "the issue is well settled" seem to ignore the fact that if something were "well settled," the Supreme Court would not be hearing it. The case can go either way. On the one hand, the ACA's statutory language is not ambiguous or vague: it is clear that, as drafted, the ACA permits subsidies only in states operating their own Marketplace. A majority of the Supreme Court may not believe that the IRS had the authority to fix what is not unclear or ambiguous. On the other hand, the Supreme Court will see statements from federal legislators

Continued on next page...

14821 South Dixie Highway
Miami, Florida 33176

305
238.1000

Established 1950
MORRIS & REYNOLDS Insurance

305
255.9643

www.
morrisandreynolds.com

HEALTH CARE REFORM
OUR UPDATE & ADVICE

MORRIS & REYNOLDS INSURANCE PRESENTS ADVICE & ANSWERS ON AMERICA'S HEALTH CARE REFORM JANUARY 1ST 2015

THE AFFORDABLE CARE ACT IN 2014 & 2015: ENDING YEAR ONE AND LOOKING AHEAD

who drafted the ACA that law was intended to provide affordable coverage for all Americans, regardless of where they live. Placed in that context, the Supreme Court could find that the IRS was acting within its regulatory capacity when it drafted the rule to "fix" the ACA.

Again, the case can go either way-don't let anyone tell you different. But the fact is that the Administration is currently down 2-1 in Supreme Court decisions about the ACA. If they go down 3-1 on King, it will be a knockout blow to the ACA-unless the Administration and Congress can work together to fashion a legislative fix.

THE POLITICAL LANDSCAPE: CAN THEY WORK TOGETHER?

On Tuesday, November 4, the Republican Party won control of the U.S. Senate and supplemented their House votes. They also won control of 29 state legislatures and saw victories in key state gubernatorial races, including Illinois, Maryland and Massachusetts-traditionally "blue" states. In other words, the Republican Party controls a majority of the states.

I maintain hope that the 2014 Republican political wave, coupled with the Supreme Court's decision to hear King, may prompt the Administration and Congress to work together and legislatively fix the ACA and thus take the decision out of the hands of the Supreme Court.

Is it possible for the Administration and the Republicans to, for example, agree to amend the ACA to allow federal subsidies in federal Marketplaces in exchange for repeal of controversial parts of the ACA, including the medical device tax or the definitions of full-time employees or "Applicable Large Employers"? These changes would cost the government money, so any discussion would also have to include a hard discussion about how to pay for them. But isn't having hard discussions that require compromise what Americans expect the President and members of Congress to do?

The question is always what's in it for them to compromise. From the Administration's side, it knows it's down 2-1 in Supreme Court decisions about the ACA. The federal courts do give some deference to administrative agencies when they implement statutes, but this may present a case too far. In any event, does the President really want to risk the ACA (and subsidized coverage to millions of Americans) to the Supreme Court?

On the other side, Republicans need to realize that they have as much to fear from an adverse decision in King. Millions of individuals (who will be voters in 2016) will lose their insurance coverage if the Supreme Court rules against the Administration. Any politician in a party supporting the Supreme Court's decision will be easily painted as heartless and uncaring. Republicans should consider whether placing affordable insurance beyond the reach of millions of voters makes sense politically and should come to the table ready to compromise.

Compromise may be tough, especially when the President's first major post-mid-term act was to issue an executive order that Republicans claim is illegal and especially when Congress is suing the President. 2015 will tell us whether both sides can rise above politics and address issues important to Americans.

MORRIS & REYNOLDS INSURANCE

The Reynolds family has been in the insurance profession since 1910 and has operated its Independent Agency, Morris & Reynolds Insurance, since 1950.

Morris & Reynolds offers trusted choices from over 100 of the world's leading insurers for all forms of coverage, as well as innovative care and service from a passionate, award-winning TEAM of professional people, the finest people in insurance.

Whether you need Personal Protection, Commercial Coverage or Employee Benefits, we are happy to help. Please contact us at **305.238.1000**.

14821 South Dixie Highway
Miami, Florida 33176

305
238.1000

Established 1950
MORRIS & REYNOLDS Insurance

305
255.9643

www.
morrisandreynolds.com