OLSHAN
OLSHAN GRUNDMAN FROME ROSENZWEIG & WOLOSKY LLP

Client Alert

Employment Practices Group November 2010

New Non-Discrimination Tests for Group Health Plans Under the Patient Protection and Affordable Care Act

Under the provisions of the Patient Protection and Affordable Care Act ("PPACA"), beginning on September 23, 2010, fully-insured, employer-provided health plans will be subject to non-discrimination testing, except for grandfathered plans that were in existence when the PPACA was signed into law on March 23, 2010.

The new non-discrimination rules require fully insured group health plans to meet two requirements: First, a health plan may not discriminate in favor of highly compensated individuals as to eligibility to participate in the plan. Second, a plan cannot discriminate by offering benefits to highly compensated participants that are not offered to all other participants. For example, companies may not offer different levels of benefits such as co-pays, deductibles, and/or provider networks to highly compensated participants, unless those same levels of benefits are offered to all other participants.

The non-discrimination rules also prohibit employers from providing different health plan coverage or different employer subsidies for different classes of employees. Many employers currently offer different subsidy levels to management employees and lower-level employees. Under the new non-discrimination rules, employers will not be permitted to discriminate against a particular class of employee in such a manner.

If a fully-insured, employer-provided health plan is found to be discriminatory, the employer will be subject to a penalty of $100 per individual discriminated against for each day of non-compliance. As a result, failure to comply with the new rules can easily become a costly issue for employers.

A plan may be deemed to be discriminatory for various reasons, many of which may not be readily apparent to employers. For example, executive compensation and severance agreements often include company-subsidized continuation of benefits after termination of employment. This type of post-termination benefit may be deemed to be discriminatory if the same benefit is not offered to all employees. In order to avoid liability for this form of discrimination, companies should consider designing compensation and severance plans that provide a lump sum payment or after-the-fact reimbursement to cover the cost of an executive's benefits, rather than directly pay an insurer for the executive's benefits or benefit continuation. Existing compensation and severance plans should be reviewed to determine if any plan modifications are required in order to comply with the new non-discrimination rules.

In addition, for employers with grandfathered plans, it is critical to understand how to maintain a plan's grandfathered status and to conduct non-discrimination testing if changes are made to the plan. Elimination of benefits offered, increases in cost sharing, increases in co-payments or decreases in the contributions made by employers, among other changes, may cause a plan to lose its grandfathered status.

Although the IRS has not yet issued guidance with respect to the new non-discrimination laws, it appears that the PPACA will operate in the manner discussed in this Client Alert. We intend to update you once the IRS issues its guidance. Please feel free to contact any of the partners listed below for more information on how to comply with the PPACA or if you would like to discuss any other employment matter.

Aliza F. Herzberg
aherzberg@olshanlaw.com
212.451.2205

Manes Merrit
mmerrit@olshanlaw.com
212.451.2330