

LEGAL SERVICES

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MEMORANDUM

October 13, 2010

SUBJECT: Coverage of dependent "adult children" under the state retiree health insurance plan. (Work Order No. 27-LS0088)

TO: Senator Bettye Davis
Attn: Tom Obermeyer

FROM: Dan Wayne
Legislative Counsel
and
Jack Chenoweth
Assistant Rexisor

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You have asked

(1) whether the federal Patient Protection and Affordable Care Act (PPACA) exempts the state retiree health insurance plan from the PPACA requirement that certain group health insurance plans extend coverage to dependents of insured persons; and

(2) if the federal Act does not exempt the state retiree health insurance plan from the PPACA requirement, whether those dependents (or similarly situated dependents of state employees) are eligible for the coverage now or is a legislative appropriation required for the next budget cycle?

There is a difference of opinion between the Division of Retirement and Benefits and this office concerning the answer to the first question: the division's current website posts that:

Based on the most recent federal regulations issued in June 2010, the AlaskaCare Retiree Health Plan is not subject to the provision in the PPACA requiring some health plans to add coverage for older dependent children up to age 26.

We believe that another federal Act and related program regulations will require the extension of coverage.

However the first question may be answered, it is certain that those dependents are, today, not eligible for coverage. Coverage requirements, if applicable, are delayed into 2011. In addition, if coverage is eventually determined to be required, the Department of

Administration may seek an appropriation -- either as part of a program budget submission or a supplemental request -- to extend the coverage under the retirees' health insurance program.

The federal Act prescribes the extension of the coverage.

The PPACA language providing for coverage of dependents through age 26 has been codified under 42 U.S.C.S. 300gg-14, which reads:

Extension of dependent coverage. (a) *In general.* A group health plan and a health insurance issuer offering group or individual health insurance coverage that provides dependent coverage of children shall continue to make such coverage available for an adult child until the child turns 26 years of age. Nothing in this section shall require a health plan or a health insurance issuer described in the preceding sentence to make coverage available for a child of a child receiving dependent coverage.

(b) *Regulations.* The Secretary shall promulgate regulations to define the dependents to which coverage shall be made available under subsection (a).

(c) *Rule of construction.* Nothing in this section shall be construed to modify the definition of "dependent" as used in the Internal Revenue Code of 1986 [26 U.S.C.S. §§ 1 et seq.] with respect to the tax treatment of the cost of coverage.

The federal Act provides for delayed health insurance coverage for dependents who are "adult children."

Under PPACA, group health care plans are not required to provide the dependent care coverage you have described until the first full plan year that is six months after March 23, 2010.¹ 42 U.S.C.S. 300gg-14. If the "plan year" -- the term used in the federal Act -- for the state retiree health insurance program is the same as the plan's "benefit year," then that next benefit year for state retiree health insurance coverage does not begin until January 1, 2011.² That delayed eligibility of affected dependents is prescribed

¹ The effective date note following 42 U.S.C.S. 300gg-14, the dependent care provision, reads:

This section is effective for plan years beginning on [or] after the date that is 6 months after enactment of [the] Act [enacted March 23, 2010]. P.L. 111-148, as provided by § 1004(a) of such Act, which appears as 42 U.S.C.S. § 300gg-11 note.

² In contrast, the plan year/benefit year for the state active employee health insurance plan begins every year on July 1. Since July 1, 2010, the first day of that group health care plan was before the six month period lapsed, that means the state active employee

by federal law; if made eligible by the PPACA, the affected dependents of retirees appear to be eligible for coverage beginning January 1, 2011. According to temporary federal regulations published in 75 FR 27122, if a group plan is required to provide the dependent coverage through age 26, the plan provider is required to provide the dependent an opportunity to enroll. 75 FR 27122, 27136 - 27138.

Program regulations appear to us to require dependents' coverage for "adult children" under the state retiree health insurance plan.

The pages you provided, 34539 - 34540 of Federal Register vol. 75, no. 116, do not support a conclusion that non-federal governmental group health plans, like the state's retiree health insurance plan, are exempt from the new dependent coverage requirement. The sections of ERISA that are highlighted in the document and suggest the existence of an exemption do not apply to the state retiree health insurance plan because the federal government considers the state's health insurance plans to be "governmental plans."³ Governmental plans like the state retiree health insurance plan are not covered by ERISA.⁴

They are, however, covered by the Public Health Service Act (PHSA), at least with respect to the dependent coverage provision in the PPACA. 45 C.F.R. 147.140. Conforming amendments related to PPACA applicability, found in PPACA, sections 1563(a)(1) and (c)(12)(A), support a conclusion that, in our view, PHSA does not exempt plans like the state retiree health insurance plan from the PPACA dependent coverage requirement. This is also explained on page 34539 of the Federal Register excerpt you provided, which says Part A of title XXVII of PHSA formerly contained language that could have been construed as an exemption for certain group health plans from the dependent care coverage requirement, but PPACA amended PHSA so that the exception under that Act no longer exists.

According to the National Association of Insurance Commissioners, the PPACA requires that all plans that provide dependent coverage must extend coverage to adult children up to age 26. The Association notes that for plan years beginning before 2014, group health plans will be required to cover adult children only if the adult child is not eligible for

health insurance plan, if required to provide dependent care coverage for dependents through age 26 under the PPACA, is not required to do so until July 1, 2011 -- the first plan year after the passing of the six-month period that followed March 23, 2010.

³ A governmental plan "means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. . . ." 29 U.S.C. 1002.

⁴ See 26 U.S.C. § 401(a).

employer-sponsored coverage. NAIC report, "Patient Protection and Affordable Care of 2009," updated on June 25, 2010.

45 C.F.R. 147.140, cited in the division of retirement and benefits document, relates to the right of certain "grandfathered" health plans to preserve types and levels of coverage provided before PPACA requirements took effect. According to 45 C.F.R. 147.140(e)(2), the state retiree health insurance plan is not a "grandfathered" health plan with respect to the dependent coverage requirement in PPACA. It reads:

(e) Applicability of PHS Act sections 2704, 2711, and 2714 to grandfathered group health plans and group health insurance coverage --

(2) For plan years beginning before January 1, 2014, the provisions of PHS Act section 2714 apply in the case of an adult child with respect to a grandfathered health plan that is a group health plan only if the adult child is not eligible to enroll in an eligible employer-sponsored health plan (as defined in section 5000A(f)(2) of the Internal Revenue Code) other than a grandfathered health plan of a parent. For plan years beginning on or after January 1, 2014, the provisions of PHS Act section 2714 apply with respect to a grandfathered health plan that is a group health plan without regard to whether an adult child is eligible to enroll in any other coverage.

Moreover, according to pages 2 and 3 of the report, "Grandfathered Health Plans Under the PPACA," Congressional Research Service, April 4, 2010, by Bernadette Fernandez, the PPACA requires that even grandfathered health plans provide the dependent care coverage required by the PPACA.

With your request you also provided a document you obtained online from the state's division of retirement and benefits. That document, entitled "Dependent Coverage," indicates that the retiree health insurance plan is exempt from the PPACA dependent coverage requirement, based on the preamble to Interim Final Rules issued June 14, 2010, under 26 C.F.R. 54.9815-1251, 29 C.F.R. 2590.715-1251, and 45 C.F.R. 147.140. First, 26 C.F.R. 54.9815-1251 is only applicable to plans that are subject to ERISA, and the state retiree health insurance plan is not an ERISA plan.⁵ Second, the Interim Final Rules referred to by the division do not include a retiree health insurance plan exception; only the preamble to those rules addresses it.

In the "background" section of the preamble, the agencies responsible for establishing the Interim Final Rules say that although the exception for retiree plans in PHSA has been

⁵ 29 C.F.R. 2590.715-1251 is a regulation of the U. S. Department of Labor that is almost identical to the language of 45 C.F.R. 147.140, and concerns "grandfathering" of health plans.

deleted by PPACA, the agencies will not treat retiree plans covered by PHSA any differently than those covered by ERISA for the purpose of enforcing PPACA requirements. They justify this position by arguing that if they treated plans under PHSA differently, it would create confusion.⁶ Because the view that PPACA does not or should not apply to retiree plans is stated only in the preamble to the Interim Final Rules, it may be given less weight by a court than if it were included in the rules themselves. *Hecker v. Deere & Co.*, 569 F.3d 708 (7th Cir. 2009). However, the amount of deference a court would give to the informal interpretation by the agencies in this instance is uncertain, and might depend on a number of factors, including the validity of its reasoning. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (U.S. 1944).

Navigating through the new federal requirements and the limitations on those requirements is as difficult as predicting the outcome of disputes related to them, and I cannot say with certainty whether, if challenged, the position of the division of retirement and benefits on retiree plan exemption would fail. Although the ERISA regulations relied on by the division of retirement and benefits do not apply, and the former exception for retiree plans in PHSA has been eliminated, the preamble language does give the state's position at least one leg to rest on; whether it is sufficient to support the full weight of that position may come down to the question of whether or not the purpose underlying the enforcement policy described in the preamble -- the avoidance of confusion -- is reasonable.

If we may be of further assistance, please advise.

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⁶ This position is also explained on page 34540 in the highlighted portion of the Federal Register excerpt you provided. Incidentally, enforcement of the PPACA is not left entirely to the federal government. Under 42 U.S.C.S. 300gg-22, states are required to enforce PPACA provisions for group health plans that are non-federal governmental plans.