Can the Affordable Care Act and the Prepaid Health Care Act Co-Exist?

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Health Reform

- PHCA – An employer-mandate health insurance program
- ACA – A comprehensive and complex program to improve access, cost, and quality of health care
  - Employers (50 and over) employer play or pay penalties for failure to comply
  - Exchanges (small employers and individuals market access)
  - Individual Mandate (penalties & subsidies) (captures currently uninsured individuals in Hawai‘i)
  - Medicaid Expansion
  - Health care delivery incentives to change and improve

PHCA – An employer-based program

- 1974 Hawai‘i enacted the Prepaid Health Care Act
- 1974 ERISA enacted and preempted Hawai‘i’s PHCA (*Standard Oil Co. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), aff'd. mem., 454 U.S. 801 (1981), PHCA was held to be preempted by ERISA).
- 1983 Congress exempts Hawai‘i’s PHCA from ERISA preemption.
- Hawaii is the only state with an ERISA exemption.

PHCA Poison Pill Problems

- PHCA contains a provision that sunsets or repeals itself if and when federal law "provides for voluntary prepaid health care for the people of Hawai‘i in a manner at least as favorable as the health care provided by this chapter, or upon the effective date of federal legislation that provides for mandatory prepaid health care for the people of Hawai`i." Haw. Rev. Stat. § 393-51 (2009).
- The State Legislature Repealed the sunset provision in 2010.
- However, the 1983 federal law that saved PHCA also had the effect of "freezing" PHCA by invalidating "any amendment of the Hawai‘i Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date." 29 U.S.C. 1144(b)(5)(B)(ii).
- In *Council of Hotels v. Agsalud*, 594 F. Supp. 449 (D. Hawaii 1984), ERISA's waiver provision was construed strictly and therefore a PHCA amendment regarding collectively bargained plans was invalidated because it was interpreted as a substantive change to PHCA.
- SO, WE DO NOT KNOW IF THE REPEAL OF THE SUNSET PROVISION WOULD SURVIVE UNDER FEDERAL LAW OR IF THE ACA WOULD 'TRIGGER' SUNSETTING UNDER STATE LAW

The ACA Provision That 'Preserves' PHCA

(b) Rule of Construction Regarding Hawaii's Prepaid Health Care Act.--Nothing in this title (or an amendment made by this title) shall be construed to modify or limit the application of the exemption for Hawaii's Prepaid Health Care Act (Haw. Rev. Stat. 393-1 et seq.) as provided for under section 514(b)(5) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1144(b)(5)).

- It does not exempt Hawai'i from the ACA.
- It does not deny Hawai'i citizens or employers the rights/burdens of the ACA
- It does not commit the federal government to coordinating the requirements or preserving the PHCA
- It does not give the PHCA provisions any superiority over the provisions of the ACA in a conflict
- It does not ensure compatibility

The ACA Does Invite Constructions That Preserve State Laws and Greater Benefits

- No interference with state regulatory authority
- Rule of construction to allow benefits in excess of essential health benefits
- Empowering consumer choice and continuing State Benefit Requirements

Side-by-side versus integration of laws

- Side-by side comparisons
- Bridgeable differences versus fatal differences
- Build on the provisions that give states flexibility and latitude

Approach Differences

PHCA

- Applies to all workers with one or more employees working more than 19 hours.
- Leaves out dependents, part-time workers, and those outside the workforce

ACA

- Employers of over 200 employees must automatically enroll employees (employees can opt out)
- Employers of over 50 FTEs must offer adequate and affordable coverage under the ACA or incur penalties
- Provides tax incentives for employers with fewer than 25 employees (but not employers with 25-50 employees)
- Penalties are triggered by a FTE qualifying for a premium subsidy
- Creates insurance markets/exchanges for individuals and small businesses

PHCA applies to all workers over 19 hours; Individual Exchange open to others. Employers with less than 50, must still comply with PHCA but may qualify for tax incentives.

The ACA Exchange– Individual and Small Employer (Separate exchanges to avoid diminishing value)

PHCA

- 393-7(a) plans – equal to largest subscriber plans (assumed equivalent of platinum)
- 393-7(b) plans – demonstrate that it provides sound basic care. If more limited than (a), employer contributes ½ the cost of dependents as well (assumed equivalent of gold)

Small Business Health Options Program (SHOP)

- < 100; state option to restrict to < 50 til 2016; state option to open to > 100 in 2017
- A qualified health plan must offer at least one QHP in silver (70%) level and one at gold level (80%)
- May but need not offer plans at the bronze level if rejected as not in best interests of state

In order to work together, SHOP and PHCA plans have to be mutually compliant.

Employee eligibility differences

PHCA	ACA
• 19 hours • Opt out with certification of coverage	• Full-time (30 hours) (while part time employees are tallied on a pro rata basis to determine company size, penalty provisions are only triggered by full-time FTE seeking premium subsidies) • Employee can opt out

While the ACA penalties are triggered when a 30 hour a week employee obtains an premium subsidy from the exchange, nothing in the ACA precludes Hawai‘i from enforcing the PHCA requirement to provide insurance for 20 hour a week workers.

Allocation of premium differences

PHCA	ACA
• Employer contributes ½ of premium cost • Employee's share cannot be more that 1.5% of employees wages	• Not premium allocation based • Employer must provide a plan that covers at least 60% of the cost of "minimal essential coverage" and the total for health care coverage for employees should not exceed 9.5% of employees household income.

The ACA doesn't speak in terms of premium allocations. But employers complying with PHCA probably exceed the ACA provisions.

Penalties are different

PHCA

- Various penalties per day or per violation

ACA

Two triggers

- Failure to provide a plan
- Failure to provide an adequate or affordable plan (less than 60% actuarial value or employee cost is > 9.5% of household income)
- Penalty triggered by an FTE receiving a Premium Credit in the Exchange
- Generally, employees who are eligible for employer-sponsored coverage are not eligible to receive subsidized coverage through an Exchange. However, an employee may qualify for subsidized coverage through an Exchange if his or her household income is less than 400 percent of the Federal Poverty Level (currently, that level is set at $88,200 per year for a family of four and $43,320 for an individual) and (a) the employer does not pay at least 60 percent of the allowed costs under the employer-sponsored plan (the coverage does not provide "minimum value), or (b) the employee's required contribution for coverage exceeds 9.5 percent of the employee's household income (the coverage is "unaffordable").

Those compliant with PHCA would incur no federal penalty because a PHCA plan is superior to the ACA minimum plan. Noncompliance subjects an employer to both penalties.

Benefit package

PHCA

- Match the prevalent plan and enumerated in the PHCA and state mandated benefits (PHCA benefits include inpatient hospital stays, outpatient services, surgery and ER services, diagnostic lab services, maternity and substance abuse coverage. State mandates include coverage for IVF, mammograms, hospice care, medical foods and diabetes coverage)
- No differences for self-insurers

ACA

- 10 Essential Categories: Ambulatory patient services; Emergency services; Hospitalization; Maternity and newborn care; Mental health and substance use disorder services, including behavioral health treatment; Prescription drugs; Rehabilitative and habilitative services and devices; Laboratory services; Preventive and wellness services and chronic disease management, and; Pediatric services, including oral and vision care
- HHS GUIDANCE: States flexibility to select a benchmark plan that reflects the scope of services offered by a "typical employer plan" (excludes Riders) (Revisited in 2016)
- State Mandates: This guidance may allow states to preserve state mandated coverage as part of its essential benefits package (to be revisited in 2016). The ACA requires states to reimburse for state mandated coverage in excess of essential beneifts
- Self insurers have fewer regulatory requirements

The HHS guidance allows the state to pick a benchmark plan, at least through 2016. To the extent that we use an allowable benchmark with state mandates, the state won't have to defray the cost of those mandates.

State innovation waivers?

Requirements

- State Innovation Waivers are designed to allow states to implement policies that differ from those in the Affordable Care Act so long as they:
- Provide coverage that is at least as comprehensive as the coverage offered through Health Insurance Exchanges – new competitive, private health insurance marketplaces.
- Make coverage at least as affordable as it would have been through the Exchanges.
- Provide coverage to at least as many residents as otherwise would have been covered under the Affordable Care Act.
- Do not increase the federal deficit.

Application Content

- **Content of the Application:** Consistent with what is required by the law, the proposed rule says that an application must include:
  - The provisions of law that the state seeks to waive;
  - An explanation of how the proposed waiver will meet the goals related to coverage expansion, affordability, comprehensiveness of coverage, and costs;
  - A budget plan that does not increase the federal deficit, with supporting information;
  - Actuarial certifications and economic analysis to support the state's estimates that the proposed waiver will comply with the comprehensive coverage requirement, the affordability requirement, and the scope of coverage requirement; and
  - Analyses of the waiver's potential impact on provisions that are not waived, access to health care services when residents leave the state, and deterring waste, fraud, and abuse.

How innovative?