Michigan Law Imposes Assessments on Health Claims Paid under Employer-Sponsored Plans

Employee Benefits Alert
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Last September, Michigan enacted a law that imposes upon certain entities an assessment equal to 1% of their total paid claims [1] under an ERISA group health plan, up to a cap of $10,000 per individual, effective for dates of service on or after January 1, 2012. *See* Health Insurance Claims Assessment Act, 2011 Mich. Pub. Acts 142 (the "HICA Act"), Mich. Comp. Laws § 550.1733(3)(1), (3)(4) (2011). The Michigan Treasury Department has issued a set of frequently asked questions on the new law (available **here**).

The HICA Act was enacted to replace Michigan's previous 6% use tax on certain Medicaid contracted and specialty prepaid health plans, and the intent was to generate monies that will be used to leverage federal Medicaid matching funds. Unless additional legislative action is taken, the law will expire effective January 1, 2014.

Entities Subject to the Law

The new assessment is imposed upon "carriers" and third party administrators ("TPAs") of ERISA group health plans. Notably, in addition to health insurers, HMOs, and other entities, the law defines a "carrier" to include an employer that sponsors a single-employer group health plan -- meaning both an employer that sponsors a self-funded group health plan, and its TPA, are "potentially subject to the assessment" -- but provides that an employer will not be responsible for any assessments on claims paid by a TPA or stop-loss insurer. In other words, for a self-funded group health plan that has a TPA and a stop-loss carrier, and under which claims are paid in excess of a specified "attachment point," the TPA will be responsible for the 1% assessment on paid claims up to the attachment point, and the stop-loss carrier will be responsible for the 1% assessment on paid claims that exceed the attachment point. The Michigan Treasury Department already has sent initial notices to a number of entities that may be subject to the assessment.

Claims Subject to the Law

The assessment applies to claims paid for health care services rendered, in the State of Michigan, to Michigan residents, regardless of where the employer is headquartered or "domiciled." Thus, all employers with Michigan employees and dependents covered under a group health plan may be impacted. The assessment does not apply to payments or reimbursements under a health FSA, HSA, or HRA, or to cost-sharing amounts paid by an individual (*e.g.*, deductibles, coinsurance, copayments, etc.). In addition, claims for certain types of coverage -- including accident, disability, long-term care and worker's compensation insurance -- and claims paid under the Federal Employees Health Benefit Program ("FEHBP"), Medicare (including Medicare Advantage and Part D plans), TRICARE, and certain other Federal programs, similarly are exempt. The Michigan Treasury Department has also clarified that the assessment applies to paid claims under certain wellness programs, including screenings, risk assessments, and annual physicals.

Payments and Related Reporting and Recordkeeping Requirements

Quarterly payments of the assessment are due on April 30, July 30, October 30, and January 30 of each year, and an annual return for the 2012 calendar year -- which will reconcile the quarterly payments made throughout the year -- will be due by February 28, 2013. No returns are required to be filed with the quarterly payments, although Form 4930, Quarterly Worksheet for HICA (Dec. 2011) (available **here**), must be completed and maintained for an entity's own records, in case of an audit, for at least four years after the due date of each quarterly payment. Although not entirely clear from the statute, it appears that only an

entity that has "paid claims" subject to an assessment under the HICA Act will need to maintain the quarterly worksheets and file annual returns. Thus, an employer seemingly will not be required to maintain the worksheets and file the annual returns, unless it self-insures and self-administers its health plan.

Pass-Through to Employers

The law contemplates that TPAs may pass through the cost of the assessment directly to employers that sponsor group health plans, although, in general, it is the TPA that ultimately will be liable for paying the assessment to the Michigan Treasury Department.[2] Any methodology that a TPA utilizes to collect the assessment must be applied uniformly within a line of business. For employers with self-funded plans, the methodology must be determined "as a percentage of actual paid claims," and for employers with fully-insured plans, the methodology must be determined "as a percentage of premium" (without any additional allowance for administrative expenses).

Preemption

The new law may be subject to challenge on ERISA preemption grounds. The Self-Insurance Institute of America, Inc. -- a nonprofit trade association whose members include employers, plan sponsors, plan administrators, and TPAs -- filed a complaint in federal court late last year, seeking to enjoin the law and obtain a declaratory judgment that it is preempted. It remains to be seen how the fate of the HICA Act will be decided in court. In the meantime, an employer that sponsors a group health plan covering employees -- or dependents -- who reside in Michigan should be prepared to begin paying additional fees or increased health insurance premiums to TPAs and health insurers, to cover the cost of assessments levied under the law.

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[1] For this purpose, "paid claims" include all payments, net of recoveries, made to a health and medical services provider or reimbursed to an individual.

[2] The statute and current guidance are unclear as to whether the state will or may attempt to recover any unpaid assessments from an employer/plan sponsor directly, in the event that the insurer or TPA goes out of business, becomes bankrupt, or otherwise is unable to make a payment.

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