ALSTON+BIRD LLP

Employee Benefits & Executive Compensation ADVISORY

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New Michigan Law Imposes a Tax on Claims Paid by Employer-Sponsored Health Plans

In September of 2011, Michigan passed the Health Insurance Claims Assessment Act[1] (the "Act"), which imposes a one percent tax on, among others, certain group health plan claims paid by employer-sponsored group health plans subject to ERISA. The Act is effective from January 1, 2012, through December 31, 2013.

IF YOU SPONSOR OR ADMINISTER A HEALTH PLAN (OTHER THAN AN FSA OR HRA) THAT PAYS CLAIMS OF MICHIGAN RESIDENTS FOR SERVICES OR TREATMENTS PROVIDED IN MICHIGAN, THIS ACT WILL IMPACT YOU!

This advisory addresses some of the basic questions regarding the Act's application to employers who sponsor medical plans covering employees in Michigan and suggests strategies for addressing this new law with your third-party administrators.

Practice Pointer: Michigan's treasury department has issued a very helpful FAQ on the operation of the tax, which you can find at http://www.michigan.gov/taxes/0,4676,7-238-43519_59498-264523--,00.html.

What is the "tax"?

The Act imposes a one percent tax on "paid claims" for Michigan residents with respect to services provided in Michigan on or after January 1, 2012, not to exceed $10,000 per covered person per year.

Practice Pointer: Paid claims include only claims for services provided on or after January 1, 2012. Thus, claims processed after January 1, 2012, that relate to services received by participants in 2011 are *not* subject to the tax.

"Paid claims" are generally defined as actual payments, net of recoveries, made to health and medical services providers or reimbursed to an individual by a carrier, third-party administrator or stop-loss insurer. Paid claims include (but are not limited to):

- amounts paid on behalf of active employees, retired employees and their covered dependents;
- amounts paid to a pharmacy benefits manager (PBM) that provides services in Michigan;
- amounts paid to dental and vision care providers;

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[1] *See* Health Insurance Claims Assessment Act, 2011 Mich. Pub. Acts 142; Mich. Comp. Laws § 550.1731-1741.

- amounts paid under a Medicare supplemental policy; and
- claims paid pursuant to an administrative services only (ASO) agreement (i.e., claims paid on behalf of a self-insured group health plan).

Practice Pointer: According to the FAQ, amounts paid under a wellness program for screening and other preventive services are included in the definition of "paid claims."

Essentially, any health plan-related claims are included unless specifically excluded. Paid claims do *not* include:

- claims-related expenses—i.e., cost containment expenses, including but not limited to payments for utilization review, care management, case management, disease management, medication review management, risk assessments and other similar administrative services intended to reduce the claims paid under the group health plan;
- claims paid for participants who do *not* reside in Michigan;
- claims for participants who reside in Michigan *if those services are performed outside of Michigan;*
- claims under Medicare (Parts A, B, D and Medicare Advantage) and Tricare;
- reimbursements under health reimbursement arrangements (HRA) that are "authorized under federal law," health FSAs and other "health flexible spending arrangements" (as defined in Internal Revenue Code Section 106(c)), health savings accounts (HSA), Archer medical savings accounts (Archer MSA), and Medicare advantage medical savings accounts;
- claims paid by a carrier for specified accident, accident-only coverage, disability income, long-term care, health-related claims under automobile insurance, homeowners insurance, worker's compensation insurance or coverage issued as a supplement to liability insurance; and
- claims paid by a carrier under an indemnity policy.

Who pays the tax?

The one percent tax is generally imposed on "carriers" and "third-party administrators." "Carriers" are defined as insurers (including stop-loss insurers), HMOs *and sponsors of group health plans.* "Third-party administrators" are defined as any entity that processes claims under a service contract and that may also provide one or more other administrative services under a service contract. Thus, if a plan sponsor of a plan uses an insurance carrier or third-party administrator to process and/or pay claims, the carrier or third-party administrator is responsible for paying the tax. However, a plan sponsor of a self-insured plan could be liable for the tax if (i) the third-party administrator or a stop-loss insurer fails to pay the tax or (ii) the plan is self-administered with no stop-loss insurance.

Even if the tax is paid by the carrier or third-party administrator, a carrier or third-party administrator that wishes to collect the tax from an employer/plan sponsor must develop a methodology for allocating the tax and that methodology must then be submitted to the commissioner of the Office of Financial and Insurance Regulations in Michigan (the "Commissioner"). If the plan is fully insured, the methodology must be based

on premiums. If the plan is self-insured, then the methodology must be based on a percentage of actual paid claims.

Practice Pointer: Under the Act, the carrier or third-party administrator maintains the liability for the tax even if they are unable to collect the tax from the plan sponsor (e.g., the plan sponsor files for bankruptcy).

The Act indicates that the assessment may not exceed $10,000 per "insured individual or covered life annually," which the Michigan Treasury department interprets as amounts paid for an individual on a per-carrier or third-party administrator limitation. Moreover, if more than $400 million is collected annually, each carrier or third-party administrator that paid a tax will receive a proportional credit against subsequent assessments or, if the credit exceeds subsequent liability, then the carrier or administrator will receive a refund.

Practice Pointer: If the carrier or administrator receives a refund, the Act requires that it be used for the benefit of the entity for which it processed the claims.

When is the tax due?

The first payment is due April 30, 2012. Thereafter, the assessment is due on the following dates:

2012
July 30
October 30
2013
January 30
April 30
July 30
October 30

Are there any reporting or filing requirements?

A carrier or third-party administrator must file a form showing all the information deemed necessary by the Michigan Department of Treasury for proper administration of the Act. This filing is due on the same date a payment is due. Moreover, the carrier or third-party administrator must keep accurate and complete records relating to the tax under the Act for a period of four years.

Practice Pointer: Does the plan sponsor also have to satisfy the filing requirement? The report is filed at the same time the assessment is paid. Thus, it appears that the employer/plan sponsor has no filing requirement unless the plan sponsor is also directly responsible for paying the assessment.

What are the consequences of noncompliance?

There is a penalty equal to five percent of the unpaid tax due for the first two months. After the first two

months, a five percent penalty is assessed for each month the unpaid tax is due, up to a maximum penalty of 25 percent of the unpaid tax. Interest penalties also apply.

Practice Pointer: The FAQs referenced above provide a helpful penalty and interest calculator.

In addition, the Commissioner may suspend or revoke a carrier's certificate of authority to transact insurance in the state of Michigan or the license to operate in the state of any carrier or third-party administrator that fails to pay an assessment under the Act.

Isn't this law preempted by ERISA?

Well, that isn't clear. In The *New York State Conference of Blue Cross Blue Shield Plans v. Traveler's Insurance Company* (115 S. Ct. 1671 (1995)), the Supreme Court appeared to have paved the way for laws such as the Act that impose a surcharge or tax on medical services provided in that state to escape preemption. On December 22, 2011, the Self Insurance Institute of America (SIIA) filed suit in federal court seeking a declaratory judgment that the Act is preempted by ERISA and an injunction against enforcement of the Act against self-funded plans and their vendors. Certain factors of the Michigan law make it more susceptible to a preemption argument, but the preemption landscape is constantly changing.

Practice Pointer: The conservative employer or third-party administrators may wish to comply until a definitive ruling on preemption is reached. Others may adopt a wait-and-see approach in light of SIIA's lawsuit.

What do employers need to do?

Employer/plan sponsors should reach out to their health plan carriers or administrators to discuss the new tax. Employers with fully insured plans should discuss with the carrier whether the assessment will impact the premium paid by the employer/plan sponsor. Employers with self-insured plans should review their administrative services agreement to determine the rights and obligations of each party with regard to the tax.

Please contact us if you have questions about the Act's application to entities or plans not addressed in this advisory.

The law and additional guidance may be found at:

http://www.legislature.mi.gov/(S(otc5v5ylse25ejj2ekojf045))/mileg.aspx?page=GetObject&objectname=mcl-act-142-of-2011

http://www.michigan.gov/taxes/0,4676,7-238-43519_59498-264523--,00.html

This advisory was written by Ashley Gillihan, Dan Taylor and John Hickman.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any one of the following:

Members of Alston & Bird's Employee Benefits & Executive Compensation Group

John R. Anderson
202.239.3816
john.anderson@alston.com

Robert A. Bauman
202.239.3366
bob.bauman@alston.com

Saul Ben-Meyer
212.210.9545
saul.ben-meyer@alston.com

Emily Seymour Costin
202.239.3695
emily.costin@alston.com

Patrick C. DiCarlo
404.881.4512
pat.dicarlo@alston.com

Ashley Gillihan
404.881.7390
ashley.gillihan@alston.com

David R. Godofsky
202.239.3392
david.godofsky@alston.com

John R. Hickman
404.881.7885
john.hickman@alston.com

H. Douglas Hinson
404.881.7590
doug.hinson@alston.com

Emily C. Hootkins
404.881.4601
emily.hootkins@alston.com

James S. Hutchinson
212.210.9552
jamie.hutchinson@alston.com

David C. Kaleda
202.239.3329
david.kaleda@alston.com

Johann Lee
202.239.3574
johann.lee@alston.com

Brandon Long
202.239.3721
brandon.long@alston.com

Douglas J. McClintock
212.210.9474
douglas.mcclintock@alston.com

Blake Calvin MacKay
404.881.4982
blake.mackay@alston.com

Emily W. Mao
202.239.3374
emily.mao@alston.com

Earl Pomeroy
202.239.3835
earl.pomeroy@alston.com

Craig R. Pett
404.881.7469
craig.pett@alston.com

Jonathan G. Rose
202.239.3693
jonathan.rose@alston.com

Syed Fahad Saghir
202.239.3220
fahad.saghir@alston.com

Thomas G. Schendt
202.239.3330
thomas.schendt@alston.com

John B. Shannon
404.881.7466
john.shannon@alston.com

Richard S. Siegel
202.239.3696
richard.siegel@alston.com

Carolyn E. Smith
202.239.3566
carolyn.smith@alston.com

Michael L. Stevens
404.881.7970
mike.stevens@alston.com

Jahnisa P. Tate
404.881.7582
jahnisa.tate@alston.com

Daniel G. Taylor
404.881.7567
dan.taylor@alston.com

Laura G. Thatcher
404.881.7546
laura.thatcher@alston.com

Elizabeth Vaughan
404.881.4965
beth.vaughan@alston.com

Kerry T. Wenzel
404.881.4983
kerry.wenzel@alston.com

Kyle R. Woods
404.881.7525
kyle.woods@alston.com

ATLANTA
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404.881.7000

BRUSSELS
Level 20 Bastion Tower
Place du Champ de Mars
B-1050 Brussels, BE
Phone: +32 2 550 3700

CHARLOTTE
Bank of America Plaza
Suite 4000
101 South Tryon Street
Charlotte, NC 28280-4000
704.444.1000

DALLAS
2828 N. Harwood St.
Suite 1800
Dallas, TX 75201
214.922.3400

LOS ANGELES
333 South Hope Street
16th Floor
Los Angeles, CA 90071-3004
213.576.1000

NEW YORK
90 Park Avenue
New York, NY 10016-1387
212.210.9400

RESEARCH TRIANGLE
4721 Emperor Boulevard
Suite 400
Durham, NC 27703-8580
919.862.2200

SILICON VALLEY
275 Middlefield Road
Suite 150
Menlo Park, CA 94025-4004
650.838.2000

VENTURA COUNTY
Suite 215
2801 Townsgate Road
Westlake Village, CA 91361
805.497.9474

WASHINGTON, D.C.
The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202.239.3300

www.alston.com