Small Business under PPACA: Behind the Eight-ball (8/22/12)

NFIB Healthcare Bulletin

NFIB v. Sebelius is history. The Patient Protection and Affordable Care Act (PPACA) lives on – 1,000 pages of law and 10,000 pages (so far) of regulations. Small businesses ask what lies ahead, and the job-killing answer comes from the Magic 8 Ball®: “REPLY HAZY. ASK AGAIN LATER.”

For decades, the high and erratically increasing costs of health insurance have throttled the capacity of small business to plan and grow. The Great Recession compounded that uncertainty. Now, a Supreme Court-altered PPACA thickens the haze.

An exchange-based health insurance market is scheduled to open on January 1, 2014. The exchanges are essential to other provisions that kick in the same day – individual mandate tax, employer mandate, health insurance tax (HIT), essential health benefits, health insurance premium tax credits (i.e., subsidies), guaranteed issue, modified community rating, etc.

It’s not hard to find descriptions and forecasts of where small businesses will buy health insurance after January 1, 2014, or how much that insurance will cost, or how many Americans will be covered. But for now, no forecast is worth the pixels it’s written with. PPACA will make life worse for small business, but there are big reasons why no one can say how much worse or worse in what ways. This is because every small business has to ask the following baker’s dozen of questions:

[1] Will PPACA’s key institutions be up and running by 2014? The exchanges and other provisions will require a massive new information technology infrastructure that merges individual-level data (on all 310,000,000 Americans) from the U.S. Departments of Health and Human Services (HHS), Labor, Justice, Homeland Security, Treasury (and the Internal Revenue Service), plus Social Security, Medicare, Medicaid, 50 states, exchanges, and hundreds of insurers. Governors of both parties reported a year ago that HHS was missing crucial deadlines related to the construction of this IT infrastructure. Indeed, some skeptics (I am one) question whether this unparalleled IT integration will ever be feasible.

[2] Who will establish my state’s exchanges? Most states have not yet decided whether to establish health insurance exchanges or whether to leave the task to HHS. Is HHS capable of running a multi-state array of exchanges? A recent paper has raised questions about whether individual subsidies and employer mandate penalties are applicable in states that have HHS-operated exchanges. Only time and courts will tell.

[3] Will my state expand Medicaid? In the original forecasts, half of those gaining insurance coverage would do so through Medicaid, partly thanks to heavy-handed federal incentives. NFIB v Sebelius, however, diminished the federal government’s power to force states into complying. Some states are declining the expansion and others are thinking about doing so. This new question gives a small business
yet another uncertainty: how many employees will be on Medicaid and not on its group plan or in the exchanges?

[4] How many Americans will pay the individual mandate tax rather than purchase coverage? Before NFIB v Sebelius, PPACA ordered Americans to purchase insurance and threatened them with penalties if they did not. After the ruling, PPACA offers Americans a choice: buy insurance or pay a tax. Choosing the latter no longer implies a violation of the law. If a large percentage of Americans choose to pay the tax, health insurance premiums will spike, thanks to adverse selection.

[5] How will the individual mandate affect wages? Whether or not a business offers coverage, many or most of its employees will now be required to either purchase health insurance or pay the individual mandate tax. A business will have to pay sufficient wages for employees to meet this obligation. But until we know how many states expand Medicaid and how many opt for the individual mandate tax, we can’t estimate the impact on wages with any confidence.

[6] How many employers will choose to pay the employer mandate penalty rather than provide coverage? For any small business, bottom line calculations will be complicated by how their competitors react to PPACA. Will a large percentage of businesses offer employees insurance coverage, or will they send employees instead into the exchanges (when and if the exchanges open)? Both employees and employers stand to gain financially from the exchange-based individual subsidies.

[7] Which services must my insurance policy cover, and who decides? Every insurance policy purchased in the small-group and individual markets must cover PPACA’s Essential Health Benefits (EHB) package – a menu of mandates. An expansive EHB package will increase the cost of insurance. PPACA stipulated that the U.S. Secretary of HHS would define EHB, but this role was shifted to the states, at least temporarily.

[8] Will I be able to self-insure? Some small businesses find they can control costs better by self-insuring, rather than by purchasing a commercial policy in the fully-insured market. But some in Congress and in state legislatures would like to deny small businesses this option. (See the 5/31/10 entry here.)

[9] Is my businesses “small” or “large” with respect to the employer mandate? When and if the exchanges open, businesses with 50 or more full-time employees (FTs) or full-time equivalents (FTEs) will be subject to potentially massive employer mandate penalties each year. Calculating FTs and FTEs is not simple; the employee count will depend on whether a particular individual is considered full-time, part-time, seasonal, or temporary, and the distinctions are not always clear. In addition, multiple businesses with a common owner – even unrelated businesses – may be interpreted by the IRS as a single business.

[10] How expensive and time-consuming will PPACA’s paperwork requirements be? Some businesses are already experiencing a cascade of paperwork thanks to the Medical Loss Ratio (MLR) provision. MLR sets a benchmark for when an insurer has “overcharged” a business. When this occurs, the insurer sends the employer a rebate check which the employer may have to refund, in turn, to employees who received health insurance during the previous plan year. This can entail complex calculations and may require the employer to track down former employees and send them checks, often for trivial amounts of money.
[11] Which insurers will still be around once the exchanges open? Some insurers have already been driven out of certain markets. It is already true, for example, that insurers cannot refuse to cover children. The result has been the virtual disappearance of child-only policies nationally. Similarly, the market for student health insurance plans at colleges is also drying up. Other insurers in other markets may follow.

[12] Will provider shortages drive up costs? PPACA supposedly brings complete insurance coverage to perhaps 35 million Americans. It promises free services to just about all 310,000,000 Americans. Yet there is no near-term increase in the number of doctors, nurses, hospitals. The result will be shortages, and the response should be higher costs. Here’s a back-of-the-envelope calculation: Suppose the new provisions lead Americans to spend one extra hour a year with a doctor. With just under 1 million doctors, that’s around 300 extra hours of demand per year for each doctor.

To make this a baker’s dozen, we can add one more element.

[13] Will the U.S. head over the “fiscal cliff” in 2013? If all of these issues were not complicated enough, decisions on most of these provisions will have to be made in 2013 – a year when the American economy may be heading over the fiscal cliff and potential disaster.

What To Do

Summing up, a business owner planning for the next year has to think the following: “Will the exchanges be ready in 2014? Will my state open one? How many of my employees will be on Medicaid? How many of my employees will opt out of insurance? What will PPACA do to wages? Will my competitors offer coverage? How generous will my health insurance policy have to be to attract employees? Will I be able to self-insure? Am I ‘large?’ How much paperwork will I have? Will my insurer still be around? How much will doctors charge for their services? And will the U.S. economy lie in a heap at the bottom of the fiscal cliff?” This mash-up of questions is not a strong incentive to create jobs.

To operate a small business in the PPACA era, the owner has no choice other than to become something of an expert in health care law. This means spending large amounts of time reading circulars from the IRS, other federal agencies, insurers, and other entities. But no owner can possibly grasp all the ways that PPACA will affect a business and its employees. Those of us who spend every working hour poring over this law discover new mysteries every week.

However, any business that tries to be its own health care consultant is likely to miss important requirements, impacts and opportunities. Trolling the Internet for advice will likely yield plenty of misinformation. Perhaps a small business owner should add an extra bedroom on his house. Going forward, he’ll want his accountant available 24/7, and perhaps an insurance broker and tax attorney close by as well.

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