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Beyond Health Insurance: What Your Company Should be Doing Today to Protect Against New Risks Created by the Affordable Care Act

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The enactment of the Patient Protection and Affordable Care Act brings new insurance exposures for risk managers to consider, far beyond the obvious issue of health insurance.

Areas worthy of consideration are liability insurance, directors and officers insurance, errors & omissions insurance, stop-loss insurance and more specific policies covering employment practices, employee benefits and crime. All corporations would be well advised to review their existing insurance policies and assess whether they provide full protection for the new risks that may come with this entirely new set of regulations.

Liability Insurance

Liability insurance provides defense and indemnification against lawsuits filed by third parties. This type of insurance is relevant because the Affordable Care Act has the potential to produce third-party lawsuits against corporations, such as private lawsuits by employees against employers for alleged violations.

Although the law is still in its infancy, one private action already has been filed and resolved. In 2011, a convenience store employee in Iowa sued her employer in federal court on grounds of noncompliance.

The employee, a nursing mother, alleged that the store had failed to provide her with a private location during which she could express breast milk during her workday. She alleged that her employer had violated the Affordable Care Act, which amended the Fair Labor Standards Act by requiring employers to provide employees with "a place, other than

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a bathroom, that is shielded from view and free from intrusion from coworkers and the public" to express breast milk.

In July, the Northern District of Iowa rejected the argument that the employee had a private right of action under the health care law. The court ruled that any alleged interference with this new right must be addressed solely by filing a complaint with the Department of Labor.

The court also ruled, however, that a private cause of action is available to employees who assert that they were terminated or otherwise subjected to retaliation for complaining about an employer's noncompliant practices.

Like the first raindrop, this lawsuit is destined to be the first of many that are filed by employees against their employers, arising from alleged violations of the Affordable Care Act and the various statutes that it amends. Corporations and their risk managers would be well advised to make sure that they have appropriate insurance protection before the downpour gets underway.

Directors & Officers Insurance

D&O insurance provides defense and indemnification to directors and officers who are individually named in lawsuits against their corporations. An example would be shareholder class actions, which often are filed when large corporations suffer losses on grounds of alleged corporate mismanagement. Such derivative lawsuits are commonplace following alleged violations of Sarbanes-Oxley antifraud law and securities laws, so there is reason to believe they will follow alleged Affordable Care Act violations as well.

The federal agencies overseeing compliance — the IRS, Department of Labor and Department of Health and Human Services — have the power to impose monetary penalties or taxes on companies that violate the Affordable Care Act. These enforcement proceedings, whether by audit or otherwise, may be lengthy and complex. They may be expensive to defend in terms of legal fees and costs, and may lead to large losses in penalties, taxes and interest.

D&O policies should be scrutinized carefully to assess whether they cover shareholder actions alleging mismanagement of the health care law. On the one hand, D&O policies often exclude coverage for violations of the Employee Retirement Income Security Act of 1974, known as ERISA, and other statutes regarding employee benefits, such as workers' compensation laws. On the other hand, shareholder class actions alleging Affordable Care Act losses may be more comparable to securities class actions than to ERISA litigation.

Either way, employers and risk managers should review those exclusions carefully, both in their existing D&O policies and in future policies, to assess their applicability to potential litigation. They also should undertake to acquire as much insurance protection as possible.

The possibility of antitrust lawsuits is an additional consideration for corporations engaged in the business of health care, such as hospitals, health care systems and organizations of service providers. Experts agree that the Affordable Care Act is likely to lead to consolidation of health care operations, and that transition, in turn, is likely to generate a wave of antitrust allegations and litigation. In fact, the Justice Department and the Federal Trade Commission have pledged to intervene in mergers and collaborations that appear to have a dampening effect on competition in a given market.

Some D&O policies provide coverage for antitrust litigation, at least with regard to

defense costs, while others exclude it. For corporations in the business of health care, it would be wise to make every effort to secure D&O coverage for Affordable Care Act antitrust actions, at least until the dust settles from the law's full effect.

Errors & Omissions Insurance

E&O insurance provides defense and indemnification for corporations accused of professional malpractice. Claims of professional malpractice are anticipated to increase in upcoming years, especially for corporations engaged in health-related occupations.

One reason for the anticipated increase is that the individual mandate will lead to many more consumers of health care. With more people receiving health care, there will be more opportunities for mistakes to be made — or at least alleged.

Overburden on the medical establishment is another reason for the anticipated increase. Based on experience with health care reform in Massachusetts, the demand for medical care is expected to overwhelm the current supply of medical professionals and hospital beds.

An aggravating factor is the concurrent aging of baby boomers. Waves of retirements can be expected in upcoming years among the current stock of medical providers. Doctors and nurses, along with a large chunk of the working population, will slowly turn into elderly retirees — consumers of the very services they used to provide.

Even if insurance companies sharply increase the cost of professional liability premiums, the message for corporations in the business of health care is clear. Professional liability insurance is a necessity for survival in the years ahead.

Stop-Loss Insurance

Stop-loss insurance indemnifies self-insured employers and group health plans when medical losses exceed predetermined levels. The levels can be set on a per-employee basis, a plan-wide basis or both.

The use of stop-loss insurance usually corresponds to the size of the employer or group plan. The largest plans — 5,000 covered lives or more — typically do not purchase stop-loss insurance. But the vast majority of self-insured plans do. An estimated 60 percent of self-insured plans rely on stop-loss insurance, which translates to approximately 50 million covered lives.

The existence of stop-loss insurance does not have a direct impact on the covered individuals in a plan. Plans are bound to honor their contractual obligations to their members regardless of whether the plans have stop-loss indemnification. But stop-loss insurance can have a substantial impact indirectly. In a year of high losses, the existence of stop-loss insurance can spell the difference for a plan between solvency and insolvency.

The Affordable Care Act increases the value of stop-loss insurance for all plans, even massive ones with 5,000 members or more. One reason is that the law eliminates annual and lifetime financial limits on benefits. Because plan members will have the potential for unlimited coverage, the plans will have the corresponding potential for unlimited risk. Many plans are expected to view stop-loss insurance as the best, if not the only, solution.

Other Types of Insurance

Other insurance policies that may provide coverage for Affordable Care Act–related risks include employment practices liability

insurance, employee benefits liability insurance and crime insurance. Such insurance can fill the coverage gaps left by the exclusions in liability, D&O and E&O policies.

Employment practices liability insurance provides defense and indemnification to corporations named in lawsuits based on employment decisions and actions. Many of these policies are manuscript and contain a variety of exclusions, often for losses from the violation of certain federal laws. The Affordable Care Act is relatively new, amends other laws and may not be contemplated by employment practices policies. Moreover, even if the health care law is found not to provide a right of recovery for certain employee benefit decisions, these employees may allege claims under the various statutes that the law amends, which then may fall under the policies.

Employee benefits liability insurance, which provides coverage for employee benefit plans, can be available when employment practices and D&O coverage are excluded. Employee benefits liability insurance typically covers alleged violations of ERISA, the Fair Labor Standards Act and comparable statutes. It provides defense and indemnification for mistakes in administering employee benefits offered to employees.

The Affordable Care Act requires corporations to make various decisions about employee benefits, which leads to increased liabilities for those decisions. Thus, this fairly specialized type of insurance may become more prevalent as the full effects of the law unfold.

Finally, crime insurance and fidelity bonds provide indemnification for losses suffered by a corporation due to fraud and other crimes. The insurance is "first party" in that it covers the losses suffered by the company. The health care law potentially expands corporate exposure to allegations of fraud and criminal activity, as corporations (particularly health care providers) may face alleged violations of the False Claims Act, as well as whistleblower claims. Thus, in doing an overview of existing insurance policies, crime insurance and fidelity bonds should be considered as well.

Conclusion

In the years since the passage of the Affordable Care Act, many employers have taken important actions to avoid problems with compliance and implementation. There has been less conversation, however, about what new risks will be created by these new regulations, and how they should be managed. This critical year before 2014, when the health care law becomes fully effective, is the right time for employers to turn their attention to assessing what new liabilities may arise under the law, whether their existing insurance policies will cover those liabilities and whether new insurance products may prove to be necessary.

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estate, Trusts and Tax Services, Corporate and Securities, Antitrust, Bankruptcy, Real Estate and Construction, Public Law, Government Affairs, Anti-Counterfeiting, Employment and Labor Law, Captives, Intellectual Property, Corporate Tax, Health Reform and International Business. Recognized nationwide by Chambers USA for Client Service and Commercial Awareness, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small- and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. Based in New York City, the firm also has offices in Ventura, CA, Stamford, CT, Washington, DC, Newark, NJ, Philadelphia, PA, and Burlington, VT.