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## Most U.S. Employers Plan to Keep Coverage after 2013

Less than 1 percent of U.S. employers planned to stop providing employees with health care coverage in 2014 when the health care reform law's "play or pay" provisions become effective, according to a survey by the International Foundation of Employee Benefit Plans (IFEBP).

The 2011 survey of more than 1,350 individuals—including HR and benefits professionals along with general and financial managers—found that although many employers will look to employees to help manage rising costs, very few plan to eliminate or reduce their health plan benefits as the result of health care reform.

Beginning in 2014, under the "play or pay" provisions of the Patient Protection and Affordable Care Act (PPACA), employers with 50 or more employees will face penalties for not providing health care coverage or for providing plans that are not deemed sufficient or affordable by the government.

Half of responding organizations reported that they will continue to provide health care coverage and avoid penalties. One-third (33.6%) were still conducting an analysis. Just 0.7 percent intended to respond to this requirement by paying the \$2,000-per-employee penalty rather than providing sufficient or affordable health care coverage as defined by law.

Moreover, the IFEBP survey found just 2.6 percent of respondents plan to cut health benefits for new hires, 0.9 percent will close health benefits to new hires and 1.6

percent plan to drop dependent coverage.

### McKinsey: Large Number of Employers Expect to Drop Coverage

A very different outlook for employer-provided health care in the U.S. was suggested by an early 2011 McKinsey & Co. survey of 1,300 U.S. employers covering a range of industries, locations and sizes. In the McKinsey survey, about 30% of respondents said they would "definitely or probably" stop offering employer-sponsored health insurance after 2014. The survey is viewed by many as an outlier but points to the uncertainty over what the future health care landscape will be.

Contrary to what many employers assume, more than 85 percent of employees would remain at their jobs even if their employer stopped offering health care coverage, McKinsey found, although 60 percent would expect increased compensation.

### Extending More Benefits to Employees' Adult Children

Although the legal requirement that employers offer to extend coverage to employees' adult children until age 26 only applied to health care, the IFEBP survey found that most employers (60 percent) will go a step further and change the eligibility requirements for dependents in other benefit plans (e.g., dental and vision) to conform to the requirements of their medical plans.

### Higher Costs

While the impact of PPACA will vary from one employer to the next, it is generally agreed that the law will increase plan costs, further amplifying health care inflation trends, the IFEBP survey found. A majority of employers (60 percent) have conducted an analysis to determine how health care reform will impact their 2011 plan costs. Among respondents analyzing cost impacts:

- A large majority (85.4%) expect that the legislation will raise their costs in 2011.
- More than one-third (36%) estimate the legislation will increase their costs by 1% to 2%.
- One-quarter (26.3%) estimate cost increases of 3% to 4%.
- Just under one-quarter (23.1) predict that compliance will increase their health benefit costs by 5% or more.

Extending coverage to adult children to age 26 is still seen as the top driver of cost increases. However, administrative costs and cost-shifting attributable to reduced Medicare and Medicaid payments to providers have emerged over the past year as major concerns.

### More Cost-Sharing

To help ease the increased costs brought on by health care reform, employers report increasing:

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## Class of 1.5 Million Wal-Mart Employees Should Not have Been Certified, High Court Rules

In a decision much anticipated by employers, the U.S. Supreme Court ruled on June 20, 2011, that a trial court erred in certifying the largest plaintiff class in employment class-action history. The class, which consisted of about 1.5 million female employees—every woman employed for any period of time over the past decade in any of Wal-Mart's approximately 3,400 stores across the U. S. —was certified by a California district court, and the certification decision was upheld by the 9th U.S. Circuit Court of appeals (Dukes v. Wal-Mart). The high court reversed the Ninth Circuit's holding.

The named plaintiffs were claiming that Wal-Mart discriminated against women in violation of Title VII of the Civil Rights Act and were seeking judgment against the company for injunctive and declaratory relief, punitive damages and back pay, on behalf of themselves and the class. They claimed that local managers exercised their discretion over pay and promotions disproportionately in favor of men, which had an unlawful disparate impact on female employees, and that Wal-Mart's refusal to rein in its managers' authority amounted to disparate treatment.

"Employers should rejoice by the practicality and fairness of this ruling," said employment law expert, Patricia Thompson, a shareholder in the Miami office of Carlton Fields. "It would have been close to impossible to defend against such a claim, as each employee's circumstances would be particular to her, her managers and the other allegedly similarly situated male employees to whom she wanted to be compared in her argument that they were treated more favorably."

### Commonality Lacking, Majority Rules

The high court ruled unanimously that the certification was not consistent with federal rules governing class actions. However, Justices, Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan dissented in part, asserting that the case should have been decided more narrowly. The majority opinion, written by Justice Anthony Scalia, joined by Chief Justice John Roberts, and justices Anthony Kennedy, Clarence Thomas and Samuel Alito, concluded that the types of claims asserted were not the type of claims that lent themselves to determination in a class-action proceeding.

A class claim, Scalia wrote, must depend upon a common contention "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

In the case against Wal-Mart, "the proof of commonality necessarily overlaps" with the plaintiffs' claim that Wal-Mart engages in a pattern or practice of discrimination, Scalia asserted. The crux of a Title VII inquiry is "the reason for a particular employment decision," and the plaintiffs wish to sue for millions of employment decisions at once. "Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims will produce a common answer to the crucial" discrimination question.

Further, "significant proof that an employer operated under a general policy of discrimination" is absent here, the majority opinion noted. Wal-Mart's announced policy forbids sex discrimination, and the company

has penalties for denials of equal opportunity. The plaintiffs' only evidence of a general discrimination policy was a sociologist's analysis asserting that Wal-Mart's corporate culture made it vulnerable to gender bias. But because he could not estimate what percent of Wal-Mart employment decisions might be determined by stereotypical thinking, his testimony was worlds away from "significant proof" that Wal-Mart "operated under a general policy of discrimination," Scalia found.

The only corporate policy that the plaintiffs' evidence convincingly establishes, Scalia wrote, is Wal-Mart's "policy" of a Title VII disparate impact claim, recognizing that a claim "can" exist does not mean that every employee in a company with that policy has a common claim. In a company of Wal-Mart's size and geographical scope, Scalia continued, it is unlikely that all managers would exercise their discretion in a common way without some common direction. The plaintiffs' attempt to show such direction by means of statistical and anecdotal evidence fell well short, he concluded.

### May Stop Rise in All Employment Class Actions

"This decision will stop in its tracks the growing trend of more class actions against employers in the discrimination context," Anthony Oncidi, a partner in the L.A. office of Proskauer Rose stated. "It may also have a cascading effect on other employment class actions, such as wage and hour actions, which have been the bane of employers," added Oncidi.

"The dirty secret about these cases, is that if they lose on the certification question, many employers will settle". If Wal-Mart had lost, they would have had to think long and hard" to continue, since a jury could have awarded billions.

"This decision will stop in its tracks the growing trend of more class actions against employers in the discrimination context"....

## Ninth Circuit Expands ERISA Liability to Include Carrier

On June 22, 2011, the U.S. Court of Appeals for the Ninth Circuit in San Francisco, in *Cyr v. Reliance Standard Life Ins. Co.*, ruled that ERISA does not specifically limit which parties can be sued to recover benefits due under the terms of an employee benefits plan.

As background, the plaintiff, Laura Cyr, worked for CTI as a vice president. CTI offered long-term disability benefits through Reliance Insurance. Reliance ultimately controlled whether benefits would be awarded, but it was not the “plan administrator” under ERISA. Cyr was on long-term disability at the time and sought an

increase to her benefits. Reliance denied the increase in benefits, so Cyr sued CTI as the plan administrator, CTI’s Long-term Disability Plan and Reliance under different sections of ERISA and the common law, resulting in a settlement and a retroactive adjustment to her salary. In the Ninth Circuit, beneficiaries were limited to suing the plan and plan administrator for denial of benefits under ERISA plans. As a result of this case, insurance companies may now be sued where they have a role in denying benefits independent of the plan administrator. The Ninth Circuit ruling overturns four other employee

benefits cases: *Ford v. MCI Communications Corp. Health and Welfare Plan*, *Everhart v. Allmerica Financial Life Insurance Co.*, *Spain v. Aetna Life Insurance Co.*, and *Gelardi v. Pertec Computer Corp.*

**The case could also shape the outcomes of similar lawsuits in other jurisdictions.**

**Source:**

**National Financial Partners**

### Mileage Rate Increased

The IRS increased the optional standard mileage rate for the final six months of 2011. Taxpayers may use the optional standard rates to calculate the deductible costs of operating an automobile for business and other purposes.

**The rate will increase to 55.5 cents a mile for all business miles driven from July 1, 2011, through Dec., 31, 2011.** This is an increase of 4.5 cents from the 51 cent rate in effect for the first six months of 2011.

[www.irs.gov/newsroom](http://www.irs.gov/newsroom)

## New FCRA Requirement Will Take Effect in July

A Dodd-Frank Act amendment to the Fair Credit Reporting Act (FCRA) will take effect July 21, 2011, according to Bruce Richards, an attorney with Taylor English Duma LLP in Atlanta.

Richards, formerly general counsel with the credit reporting agency Equifax, said that one of the amendments to the FCRA deals with the use of credit scores by anyone who takes adverse action based on the scores. If an employer uses a consumer report that includes a credit score in order to determine eligibility for employment, the employer will be required to disclose that a credit score was used and to disclose information on the credit score, including the credit score itself, up to four key adverse factors in the score, and the identity of the agency that provided the score so that an applicant may contact the agency to correct any error.

Most employers don’t use third-party scores. They instead order background checks and sometimes credit reports, Richards noted. But he said that in highly sensitive situations a number of companies seek credit scores from credit reporting agencies when financial assets are at risk. For example, an employer that is seeking to hire someone for a position that involves access to cash or other liquid assets might want to be particularly careful in hiring to make sure that they do not select someone who is in need of cash and might be at a greater risk of stealing. The employer in this circumstance might decide to use credit scores as part of the hiring process.

Under the FCRA, prior to an employer taking adverse action against an applicant or employee based wholly or partly on the information contained in a consumer report, the employer must first provide

the applicant or employee with a copy of the report, along with a written description of his or her rights under the statute (including the right to request disclosure of the nature, sources and recipients of any credit report). According to the FCRA, “adverse action” includes the “denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.

Whenever any adverse action is taken against an applicant or employee, either partly or wholly because of information contained in a consumer report, the employer must provide him or her with oral, written or electronic notice of the adverse action as well as the name, address and phone number of the consumer reporting agency that furnished the report and a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to

explain the specific reasons behind the decision. In addition, the applicant or employee must be notified of his or her right to dispute the accuracy of the report.

Often, small employers aren’t aware of their obligations under the FCRA, such as getting an applicant’s or employee’s consent to order a credit report, Richards said. Some employers fail to provide the appropriate “pre-adverse-action” notices to applicants, which are required in order to enable the applicant or employee to address or clear up any potentially erroneous information.

Richards remarked that it is “clear that employers that consider using credit scores need to be aware of their obligations.”

**Source: SHRM**

## USCIS Launches I-9 Central

The U.S. Citizenship and Immigration Services (USCIS) has launched I-9 Central, an online resource center dedicated to providing information and about the federal government's I-9 form for employment eligibility verification.

According to USCIS officials, the new website builds on other recent employment-related enhancement from the agency and provides employers and workers quick access to information on immigration and employment eligibility regulations and guidance on

how to properly fill out and file Form I-9. "I-9 Central is the latest in our ongoing efforts to better serve the 7.5 million employers who use Form I-9 every time they hire an employee," said Alejandro Mayorkas, director of the USCIS. "The new site provides critical information for all employers—whether they hire just one employee or hundreds—in an accessible, intuitive and comprehensive online format."

I-9 Central provides information on employer and employee rights and responsibilities, step-by-step

instructions for completing the I-9 form, and a list of the acceptable documents for establishing a employee's identity and employment authorization. In addition, I-9 Central includes discussion of common mistakes when completing the form, guidance on how to correct errors and answers to frequently asked questions.

The site follows recent launches of other USCIS employment-related resources, including E-Verify Self Check, an online service that allows works and job seekers in the United States

to check their own employment eligibility status.

USCIS activated the self-check service in March 2011. It is currently offered only to users located in Arizona, Colorado, the District of Columbia, Idaho, Mississippi and Virginia. According to a written statement from the USCIS, the self-check service eventually will be available in all states.

However, I-9 Central is available to all at:

[www.uscis.gov/I-9Central](http://www.uscis.gov/I-9Central)

### Continued from Cover Page: "Most U.S. Employers Plan to Keep Coverage after 2013"

- Participant's share of premium costs (39.8%)
- In-network deductibles (29.3%)
- Employees' proportion of dependent coverage cost (28.4%; an additional 16.2% plan to increase employees' proportion of dependent coverage accost in the next 12 months).
- Out-of-pocket limits (27.2%)
- Co-payments or co-insurance for primary care (24.3%).

#### Remaining Grandfathered

Even though employers report several benefits of maintaining their grandfathered status—namely that their plans are exempt from the appeals process and the requirement to provide coverage for preventive care with no cost-sharing or annual limits—**just 30 percent expect to maintain grandfathered status beyond the next three years.**

"Maintaining grandfathered status will be very challenging for employers,"

said Sally Natchek, senior director, research, at IFEBC. "Plans can lose the status in numerous ways, including reducing benefits, raising co-insurance or significantly raising co-payments or deductibles. To remain grandfathered, an employer will be able to make only limited changes in their health care plan. This does not appear feasible for most organizations," she noted.

#### RX Cost-Sharing

Employers are passing on to employees additional prescription drug plan costs as well. Drug plan design changes include increasing:

Co-payments or co-insurance for retail pharmacy benefits (18.9 percent of respondents).

Co-pays for maintenance medication filled at retail sties (17.3 percent).

Co-payments or co-insurance for maintenance medications filled through a mail-order pharmacy (15.9 percent).

#### Promoting Wellness

The survey shows that because of

health care reform, more employers have (or plan to) adopt or expand their use of:

- Wellness initiatives (44.6 percent of respondents).
- Financial incentives to encourage healthy behavior (38 percent).
- Disease management programs (27.1%).

#### HDHPs Proving Popular

As a result of health care reform, approximately one-third of responding organizations are increasing their emphasis on high-deductible health plans (HDHPs) with a health savings account (HSA) or are assessing the feasibility of adding an HDHP with an HSA. Rarely are employers decreasing their emphasis or assessing the feasibility of dropping HDHPs, the survey found.

Source: Kaiser Health News