Published on *The National Law Review* https://natlawreview.com

The Affordable Care Act—Countdown to Compliance for Employers, Week 0: Final Thoughts and Acknowledgements

Article By:

Employment Labor and Benefits at Mintz

The *Affordable Care Act* is the single most important piece of Federal social legislation in more than a generation. While there was and is broad agreement on the law's principal goals—to expand medical coverage, increase the quality of medical outcomes, and constrain costs—there is little agreement on the "means whereby." This is perhaps both unavoidable and unfortunate. Unavoidable given the partisan political environment from which the ACA sprang and in which it now lives; unfortunate because, at bottom, there are few viable alternatives. If Congress was considering health care finance for the first time, as if on a blank slate, no one thinks that they would design anything remotely like our current fragmented system. But Congress did not and does not have that luxury.

Despite the preference of some on the political left, we do not as a country have the collective political will to adopt a single-payer system. Despite the preference of some on the political right, we do not as a country have the collective political will to permit but not require all U.S. citizens to purchase individual coverage, subsidized perhaps with tax credits for certain low- and moderate-income individuals, across state lines. (There are, to be sure, gradations on this rather admittedly crude model of the political spectrum, but in the author's view they don't much change the analysis.) What remains is the middle road, which calls for the reform of existing market and regulatory structures: employer-based group health insurance, coverage provided by commercial carriers in the individual and group markets, and government programs for low-income individuals, children, and the aged. The ACA works within rather than disrupting existing market-based legal and regulatory structures. It reforms but does not displace the private health insurance markets; relies on but does not displace employer-sponsored group health coverage; and expands but does not displace Medicare, Medicaid and other existing government programs.

In 2006, the Commonwealth of Massachusetts overhauled its health care financing rules by adopting a market- and regulatory-based approach that included five key components: an individual mandate, an employer mandate, low-income subsidies, a public insurance exchange, and associated tax reforms to pay for it all. The design was due in large part to the work of the right-leaning *Heritage Foundation*, and the law was the joint effort of a Republican Governor (Mitt Romney) and a decidedly left-leaning democratic legislature. The Massachusetts law served as the blueprint for the ACA, which includes the same five components. That the two laws share the same chassis should surprise no one. In each case the policymakers faced the daunting constraints of a larger political, social, and cultural environment, and they reacted accordingly.

Contrary to the claims of some of the law's detractors, the ACA is not a "government takeover" of health care. That happened about 50 years ago, in July of 1965 to be exact, with the enactment of Medicare. But it is accurate to say that the ACA federalized the regulation of health care by establishing a comprehensive Federal regulatory superstructure that replaced the piecemeal approach of prior law. This is particularly true in the case of the regulation of individual and group health insurance, which was (since 1945) under the primary jurisdiction of the states.

The ACA sits atop a major tectonic plate of the U.S. economy, nearly 18% of which is health care related. Health care providers, commercial insurance carriers, and the vast Medicare/Medicaid complex are the law's primary stakeholders. They, and their local communities, have much to lose or gain depending on how health care financing is regulated. The ACA is the way it is largely because of them. Far more than any other circumstance, including which political party controls which branch of government, it is the interests of the ACA's major stakeholders that determine the law's future. And there is no indication whatsoever that, from the perspective of these entities, the calculus that drove the ACA's enactment has changed. U.S. employers, even the largest employers among them, are bit players in this drama. They have little leverage, so they are relegated to complying and grumbling (not necessarily in that order).

The requirements imposed on employers by the ACA are in many cases complex and difficult. Myriad technical corrections are needed, and there is no shortage of good (and bad) ideas for amendments. Sometimes overlooked, however, is that the regulators (principally, the Departments of Health and Human Services, Labor, and Treasury/IRS) have already done much to make the ACA rules that apply to employers workable—even if they don't always feel that way. In addition, certain industry, trade, and professional organizations have done yeomen's work both in providing comments and informing and educating their members. The same can be said of more than a handful of law-firms, benefit consultants, and accounting and actuarial firms, among others. Recognizing that any such list will be woefully incomplete, I offer the following acknowledgements:

- As a member of the *Employee Benefits Committee* of the American Bar Association, I have had the opportunity to meet personally some of the government representatives with front-line responsibilities for ACA implementation. These folks generally shun the spotlight, (rightly) preferring instead to let their respective agencies' formal guidance speak for them. So I will not single any of them out. But I will say that these folks are to a person smart, gracious and fair. Occasionally, they come under criticism from members and others. When that happens, it usually stems from a failure to recognize that the regulators are tasked with carrying out the will of our elected representatives.

- As co-chair of the Welfare Plan Issues, EEOC, FMLA, and Leave Issues Subcommittee of the ABA Tax Section's Employee Benefits Committee, Linda Mendel (Vorys, Sater, Seymour and Pease LLP) has led the committee's efforts to educate members on the ACA. In that effort, she early on enlisted Helen Morrison (formerly of the Treasury Department's Office of Tax Benefit Counsel and currently Ernst & Young, LLP). Both women, and those that they have recruited to their cause, are tenacious in their collective efforts to understand the law and communicate it in a way that folks get it.

- When it comes to commentators on the ACA, Professor Tim Jost at Health Affairs Blog is in a class by himself. His commentary, which is far broader than just employer issues, is prolific and insightful. Similarly remarkable in usefulness and scope is the commentary provided by theKaiser Family Foundation and the Urban Institute.

- The ERISA Industry Committee (ERIC) and the American Benefits Council deserve special attention. Gretchen Young, ERIC's Senior Vice President for Health Policy, has labored tirelessly and with her signature sense of humor to keep ERIC members up-to-date and to advance her members' interests. (Disclosure: Mintz Levin is an ERIC member.) The same can be said forKathryn Wilber, Senior Counsel, Health Policy, of the American Benefits Council, and for her outside counsel, Seth Perretta of the Groom Law Group.

- Law, accounting, actuarial, and consulting firms have put out a steady stream of informative commentary, much directed squarely at employers and their advisors. Earlier drafts of this blog sought to list them, but it became apparent with each successive effort that this was a fool's errand. So many folks did such good work that any such list would serve only to polarize and annoy.

- Some final notes of thanks: To Ed Lenz, Senior Counsel of the American Staffing Association, a Senior Advisor at Mintz Levin, my friend and co-author on many of the year's blog posts; to my colleagues (lawyers and non-lawyers alike) at Mintz Levin who are a delight to work with, even on the bad days; to the readers of this blog (I hear from some of you from time-to-time, so I know thatsomeone is reading it); and, last and most importantly, to the firm's clients that I have the privilege of serving. Without them, I would be unable to do this work.

National Law Review, Volumess IV, Number 363