Health Reform Road Map for Cities and Villages

By Josh Brown, Esq.

Weekly Update 1 – April 29, 2013

Question: Is There an Exception to the ACA Requirements for Retiree-Only and Excepted Benefits Plans?
Answer: Probably.

The ACA *probably* carves out an exception to the ACA's requirements for non-federal, retiree-only and excepted benefits plans. However, if you are dealing with this situation, you should keep a very close eye on where the law moves on this. This essay will explain why.

Does This Issue Apply to You?

This issue applies when you have:

1. a "retiree-only health plan"
   - –to qualify as a "retiree-only plan," the law requires that only two or less of the enrollees in the retiree-only plan can be currently employed,
   - – "currently employed" employees would likely include any employee getting a W-2 or 1099, including re-hired retirees, although there is no specific guidance on this issue ;
   - –although the participants in the plan must be retirees, the plan may cover the retiree's dependents without risking its status as a "retiree-only plan";
2. that retiree-only plan must be separate from your plan for current employees;
3. and must be a non-federal plan;
4. and that plan does not comply with the ACA's requirements.

Is There an Incentive to Maintain the Exception?

Yes. Most municipal employees move to OPERS or Ohio Police and Fire Pension Fund (OPFPF) healthcare coverage when they retire. Soon, I will do a detailed document on the issues involving their healthcare coverage. However, some cities offer their own retiree-only coverage, most notably Cincinnati. If your retiree plan does not comply, it could really cost some money to bring it into compliance, so employers will be very interested in seeing the exception remain. For example, many retirement health plans have lifetime or annual limits. The ACA would require each of these plus more.

Many, if not most private sector employers are moving from a "defined benefit" system of retiree benefits, to a "defined contribution." Although Ohio governments have not made this move, it is surely an issue that will be discussed over time, so I thought it was worth discussing here.

Frequently, under a defined contribution system, the employer will often pay into an employee's (and their dependent's) health reimbursement arrangement (HRA). The retiree would be able to use the HRA to pay for individual insurance, including Medicare supplemental insurance, Medicare D, and other out-of-pocket expenses. I also plan to expand upon this subject and Healthcare Savings Accounts (HAS) in the future.

The HRA, being a retiree-only plan, would likely benefit from the exception to the ACA. If you would like to provide an HRA, it would be perfectly legal as far as I have been able to decipher – but you should check with your legal counsel. Just know that, alone, an HRA would not be sufficient to comply with the ACA if the exception to retiree-only plans is not recognized. You would pay a penalty if you do not offer

further coverage to comply with the ACA.[1] What you could do, is create an HRA in addition to your retiree-only plan, which in most cases is likely to be OPERS or the OPFPF.

Why is the Exception Questionable?
This exception is based on a statement in a regulatory preamble regarding several federal statutes, made by the federal Departments of HHS, Treasury, and Labor.[2] This preamble specifically includes non-federal governmental plans in the exception (which would include municipalities). Further, each Department has a "Memorandum of Understanding," stating that they will recognize the exception.

There are essential four issues which make this statement suspect:

1. These agencies' approach is expressed in the preamble the agencies' rules on grandfathering of plans. The exception for retiree-only plans is not discussed at all in the actual regulation itself. The problem is:
    - **A "preamble" is not a rule**, rather it is a part of a document that provides relevant information about the document, such as its purpose, or the process used to create the document. It is not an enforceable or binding part of the regulation, except that it may provide some general guidance as to what the operative part of the document is trying to accomplish.
    - **The exception is not really an exception at all**—in fact, it is clear from the language that it is actually a federal non-enforcement promise. For example, they explicitly state that federal law contains no express statement of the exception. They then say that, despite the lack of an express statement, it would "create confusion" if they did not recognize the exception and therefore they do "not intend to use [their] resources to enforce the . . . requirements . . . with respect to nonfederal governmental retiree-only . . . and excepted benefits plans." This is not binding on the federal agencies who made the promise, nor other federal agencies such as the Justice Department, nor the State of Ohio. However, a Judge would likely find it persuasive in determining whether an employer attempted to comply with the law in good faith.
2. Also, another problem is that this interpretation has not been litigated by the Courts. So the issue is unresolved currently. The problem is:
    - A Court could easily rule that the agency's non-enforcement promise is meaningless and that the plan participant is entitled to a plan that complies with the ACA.
3. If the courts ever hear a challenge, they may give deference[3] to the agency's interpretation. The problem is:
    - Usually deference is given to rules, not preambles, so this issue is up in the air.[4]
    - Further, the deference is given the federal agencies interpretation of a rule, which means that they normally win when they get into a dispute with a citizen. However, again, this is not an interpretation as much as it is a non-enforcement promise. Plus, that deference

[1] This is elaborated on in more detail here: http://www.dol.gov/ebsa/faqs/faq-aca11.html .

[2] See: http://www.gpo.gov/fdsys/pkg/FR-2010-06-17/pdf/2010-14488.pdf on page 34539. Last accessed April 26, 2013.

[3] The deference rule here is called "Chevron Deference," and can be examined further here: http://www.law.cornell.edu/wex/chevron_deference .

[4] See: www.dol.gov/ebsa/faqs/faq-aca3.html .

cannot be used by a defendant to prevent Ohio from enforcing the law, if Ohio's view is that there is no exception.

4. Lastly, it seems that the agencies' Memorandum of Understanding recognizing the exception, pre-dates the ACA, The ACA made several significant amendments to the relevant preexisting laws that established the exception.[5] In fact, the ACA's amendments to these laws eliminated the exception. We do not know if this was the intent.

What Liability Are You Facing if You Screw Up on This?

You will not have to worry about the federal government on this one. However, one dangerous situation is where you have an employee, who is in a retiree-only plan that is not in compliance with the ACA. You may be facing possible lawsuit from multiple other sources, such as the retiree who believes he/she is entitled to ACA compliant coverage or possibly his/her dependents under the age of 26.[6]

This is especially true if you offer multiple, similarly-priced, retiree-only and excepted benefits coverage plans, some of which are ACA compliant and some that are not. If this is the case, employees should probably at least be given clear, written notice of this fact.[7] Just imagine this: a retiree testifies against an employer, who was denied coverage under a retiree-only plan that was not ACA compliant, who would have had coverage for his ailment if his plan were ACA compliant. And that employee unknowingly chose his non-compliant coverage over another plan that was compliant and similarly priced. It looks bad. So the least you can do is make sure your insurance companies inform your retirees of what is going on.

What makes this even more dangerous is that the states have "primary authority" on this—not the federal agencies who the exception relies upon (which I discuss above). The regulatory section preamble that makes this exception specifically recognizes this. The agencies wrote that they "encouraged" the states to recognize the exception, but Ohio has absolutely no obligation to listen to them. If Ohio decides not to recognize the exception, that could be a big problem for employers.

I spent some time trying to figure out how the state will handle this. I found that most state agencies were not even aware of this issue. However, I also spoke to OPERS officials about this issue and they were very aware of it. They agreed that the state has not issued a statement regarding whether they plan to enforce the ACA requirements or not. If it is out there, I could not find it.

What Liability Issues is OPERS (and OPFPF) Facing?

Most municipal employees will switch to OPERS health coverage when they retire. This is a retiree-only health plan. However, this retiree-only health plan is provided by a state pension fund, not the municipality itself. I am not willing to say that only the pension fund will incur liability for these retiree-

[5] So how could this be possible? Basically, this happened because the ACA incorporates other laws (HIPPA, ERISA, and PHSA) into itself—and part of what was incorporated may have included the exception. Although, some reputable commentators have opined that, according to the language of the ACA, the exception should not have been incorporated.

[6] Possibly up to age 28 in Ohio—Ohio requires coverage up to 28, the ACA up to 26.

[7] One reason I believe this is a good approach, is because of HHS's view of another exception, the student health plan exception. When HHS published a proposed rule that exempted these plans from the ACA, they required that the student be informed in writing. See: Student Health Ins. Coverage, 76 Fed. Reg. at 7781-82. It only makes sense to think that an employer, who is relying on another exception to the ACA, would have at least a little more cover if it also provided written notice under the retiree-only/excepted benefits exception/non-enforcement promise.

only funds—only that I am not aware of any liability that a city could incur. Some municipalities, such as Cincinnati, have their own retiree-only plan.

OPERS has recently undergone extensive changes in their health coverage. They provide detailed reports as to what they are doing on their website and youtube.com channel. They are adopting their plans to comply with the ACA, although I cannot promise that they will be 100% compliant. It is hard to image the state suing OPERS to change its healthcare coverage. Ohio already requires dependent coverage up to age 28 (the ACA requires 26). So the only liability issue would be the beneficiaries suing to have coverage expanded to be ACA compliant. An OPERS representative told me (emphatically) that OPERS will not increase their pay in to cover any cost of additional care they may incur.

What is Excepted?
If the exception is upheld, then the retiree-only plans would be excepted from the following ACA provisions:

- No lifetime or annual dollar limits on essential benefits
- Prohibition on rescission
- Coverage of certain preventive health services provided in network
- Extension of dependent coverage
- Development and utilization of uniform explanation of coverage documents and standardized definitions (Summary of Benefits and Coverage)
- Provision of additional information
- Prohibition on discrimination in favor of highly compensated individuals for insured plans
- Ensuring the quality of care reporting
- Medical loss ratio requirements
- Required appeals process and various requirements in the claims and appeals rules
- Patient protections (choice of provider, emergency services requirements)
- Rate review
- Prohibition of preexisting condition exclusions or other discrimination based on health status for children under age 19
- Restrictions on what criteria can be used in rating and rate band limits
- Guaranteed issue
- Guaranteed renewability
- Prohibiting discrimination against individual participants and beneficiaries based on health status
- Non-discrimination towards health care providers
- Cost-sharing requirements and essential benefit requirements
- Prohibition on waiting periods of more than 90 days
- Coverage for individuals participating in approved clinical trials

The retiree-only plans would not be excepted to the following ACA provisions:

- Web portal reporting requirements
- Reinsurance
- Risk pooling (applies to small group retiree-only plans, with the exception of grandfathered plans)
- Reinsurance
- Risk corridors (applies to retiree-only qualified health plans)

- Risk adjustment (applies to small group retiree only plans)
- Research Trust Fund Health Plan Fee (PCORI)
- Excise tax on high-cost employer-sponsored health coverage
- W-2 reporting (applies to employers that sponsor retiree only plans, but only if the retiree otherwise is receiving a Form W-2 from the employer.)
- Reporting of health insurance coverage
- Pharmacy benefit managers transparency
- Exclusion of over-the-counter drugs for group health plans, FSAs, HRAs, HSAs
- Annual fee on health insurance providers

Josh Brown, Esq. is the Legislative Advocate and a Policy Analyst at the Ohio Municipal League.
This is a working paper, available at www.omlohio.org . To help improve this paper, we need your input. Please send your feedback and questions to jbrown@omlohio.org .