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EXEMPTIONS FOR RETIREE-ONLY PLANS MUST BE PRESERVED

I. Summary

Since the Health Insurance Portability and Accountability Act ("HIPAA") was enacted, retiree-only plans have relied on the parallel provisions under the Public Health Services Act ("PHSA"), the Internal Revenue Code ("Code"), and ERISA for plans with less than two participants who are current employees (commonly referred to as the retiree-only plan exemptions) as the basis for concluding that they are not subject to several plan requirements added by HIPAA. This interpretation has been confirmed informally by the Department of Labor[1] *See* PHSA § 2721(a) (prior to enactment of Patient Protection and Affordable Care Act ("PPACA")), Code § 9831(a)(2), and ERISA § 732(a).

The exemption plays a key role in the ability of employers and labor organizations (which may have established standalone VEBAs) to offer affordable retiree health benefits. Rising health care coverage costs have contributed to the steady erosion in retiree medical coverage in recent years. The exemption allows employers and labor organizations to offer retiree health coverage without the cost and administrative burden of compliance with certain HIPAA coverage requirements.

PPACA eliminates the exemption in the PHSA for "plans with less than two participants who are current employees," but preserves the exemption under the parallel provisions in ERISA and the Code. As a result, there is some uncertainty regarding the ability of employers and labor organizations to continue relying on the retiree-only plan exemption.

Congress' objective in eliminating the exemption was to expand the number of employers participating in the small group market who would be eligible for coverage via the Health Benefits Exchange and the special rating reforms that apply in 2014. The impact of the elimination of the exemption on retiree plans appears to be an unintended consequence.

If the exemption were no longer available, PPACA's reforms (and other group health plan requirements under HIPAA, e.g., the mental health parity requirements), would place new

[1] *See* DOL Joint Committee on Employee Benefits Q&As – 2002, Q&A 3, at http://www.abanet.org/jceb/2002/qa02dol.pdf.

burdens on retiree-only plans, which could jeopardize their existence. As a result, we request immediate guidance from the Department of Health and Human Services, the Department of Labor, the Treasury Department, and the Internal Revenue Service (the "agencies") that confirms the continued application of the exemption for retiree-only plans, as employers and labor organizations are making plan design decisions right now and need clarification on this crucial issue.

II. Discussion

A. Congressional Intent Supports the Preservation Of The Retiree-Only Exemption In Its Entirety

In connection with comprehensive insurance market reforms, PPACA specifically eliminates the exemption for "plans with less than two participants who are current employees" under the PHSA as part of a complicated series of conforming amendments.[2] PPACA does not, however, eliminate the parallel exemptions for group health plans under the Code and ERISA.

The objective of eliminating the PHSA exemption for "plans with less than two participants who are current employees" was to give effect to the expansion in the size of small groups from two to fifty employees to one to 100 employees. These expanded small groups are subject to special rating reforms and to participation in the Exchanges in 2014. From the formation of the bill through its final passage, debate surrounding reforms for small groups focused on the need to provide employees of small businesses with affordable health insurance coverage through Exchanges. There was no discussion of retiree-only plans or the need to subject retiree-only plans to PPACA.

Indeed, there are compelling policy reasons *not* to eliminate the retiree-only plan exemption. If employers and labor organizations are forced to comply with HIPAA's current mandates (such as the mental health parity requirements) and the new mandates required by PPACA (such as the elimination of lifetime and annual limits for essential benefits), the cost impact to retiree-only plans would be enormous and many employers and unions – already suffering from a historically bad economy – would likely eliminate or significantly scale back their retiree-only plans for affordability reasons.

One of the objectives of Congress in adopting PPACA was to encourage the ongoing maintenance of retiree health plans – not to scale back or eliminate those plans. That is the purpose of the new $5 billion retiree reinsurance program established in PPACA § 1102. The Administration reiterated the problems facing retirees in the recently issued early retiree reinsurance program regulation, noting in the preamble –

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[2] The exclusion for plans that cover fewer than 2 current employees had appeared in subsection (a) of PHSA § 2721. PHSA § 2721 was redesignated as PHSA §2735 by PPACA § 1004(4), and subsequently redesignated as PHSA § 2722 by PPACA § 1562[3](c)(12)(D). Subsection (a) of PHSA § 2721/2735/2722 was deleted by PPACA § 1562[3](a)(1) and by PPACA § 1562[3](c)(12)(D).

> [T]he recent erosion in the number of employers providing health coverage to early retirees. People in the early retiree age group often face difficulties obtaining insurance in the individual market because of advanced age or chronic conditions that make coverage unaffordable and inaccessible.

75 Fed. Reg. 24450, 24450 (May 5, 2010). This problem will only worsen if retiree-only plans are subject to plan requirements under PPACA – such as the elimination of lifetime and annual limits – or other previously enacted requirements for group health plans.

Well-established principles of statutory construction support the retention of the retiree-only plan exemption. In this regard, in the absence of express language to repeal a prior statute, the Supreme Court has repeatedly found that a statute cannot repeal another statute merely by implication. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Court stated that "Appellees encounter head-on the 'cardinal rule… that repeals by implication are not favored" and that "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *See also U.S. v. Fausto*, 484 U.S. 439 (1988) ("Repeal by implication of an express statutory text is one thing; it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change."); *Watt v. Alaska*, 451 US 259 (1981) ("the intention of the legislature to repeal must be clear and manifest" and "We must read statutes to give effect to each if we can do so while preserving their sense and purpose.")

These principles should be applied here, and there is no doubt that there is no manifest intention of Congress to eliminate the retiree-only exemption. As noted, the exemptions for "plans with less than two participants who are current employees" under the Code and ERISA are not expressly repealed. Only the PHSA provision has been eliminated, but it was eliminated to expand the small group market, not to subject retiree-only plans to the panoply of PPACA (and HIPAA) regulation.

It is important to note that current guidance related to the Retiree Drug Subsidy (RDS) program defines "employment-based retiree health coverage" as coverage under a group health plan provided to a retired participant in the plan (and the spouse or dependents of the retired participant). This approach allowed the agency to appropriately distinguish a plan (or plan option) which was eligible for reimbursement under the RDS program from other group health plans (or options) which were not eligible for such reimbursement.

Similarly, to address the elimination of PHSA § 2721(a) by PPACA and maintain a basis for a retiree-only plan exemption, the agencies might give guidance that a retiree-only plan (or a plan option) that provides unique benefits to retirees (and their spouse and dependents) is not a "group health plan" subject to the plan requirement provisions added by PPACA under Title I, subtitles A and C, or previously enacted plan requirements which such plans have not been subject to by operation of the retiree-only exemption.

Distinguishing between group health plans (or plan options) which are subject to PPACA's plan requirements and those which are not would be consistent with the interpretation that the elimination of PHSA § 2721(a) was intended solely to apply certain insurance reforms and the Exchange provisions in PPACA to employer groups with less than 2 current employees and was not intended to apply these same requirements to retiree-only

plans. Such guidance should also clarify that retiree-only plans would also continue to be exempt from certain other group health plan requirements in ERISA, PHSA and the Code, consistent with the agencies' and plan sponsors' interpretation of the application of the retiree-only exemption.

B. At A Minimum, The Retiree-Only Exemption Remains In Effect for Self-Insured Plans

While we believe that Congress did not intend to eliminate the retiree-only plan exemption at all, at most the elimination of the exemption for "plans with less than two participants who are current employees" under the PHSA should only affect insured group health plans and governmental plans. As noted, PPACA does not eliminate the parallel exemptions for self-funded group health plans under the Code and ERISA.

To the extent there is any uncertainty with regard to self-funded plans, it is because PPACA incorporates by reference amendments made to the PHSA into the Code and ERISA through new Code § 9815 and new ERISA § 715. See PPACA § 1653(e) and (f). These provisions add language to deal with potential conflicts between the Code and ERISA and the PHSA –

> [T]o the extent that any provisions of this subchapter conflicts with a provision of such part A with respect to group health plans, or health insurance issuers providing health insurance coverage in connection with group health plans, the provisions of such part A shall apply.

Code § 9815(a)(2); ERISA § 715(a)(2).

Thus, in the event of a conflict, the PHSA provisions that are specifically incorporated into the Code and ERISA are controlling. Because the PHSA retiree-only plan exemption may have been eliminated, there has been uncertainty about whether the Code and ERISA's retiree-only plan exemptions are also eliminated under a conflict analysis. As explained below, however, there is no conflict in eliminating the retiree-only exemption for insured and governmental plans while retaining the exemption for self-funded plans, and well-established principles of statutory construction support this result.

1. There Is No Conflict.

In our view, that there is no conflict between the elimination of the retiree-only plan exemption for insured plans and governmental plans under the PHSA, but continued existence of the retiree-only plan exemptions for self-funded plans under the Code and ERISA.

It is instructive to look to the well-established conflict preemption principles that are used in establishing whether state and federal laws are in conflict. Conventional conflict preemption principles require preemption "where compliance with both federal and state regulations is a physical impossibility, ... or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 98, 112 S.Ct. 2374, 2383, 120 L.Ed.2d 73 (1992) (internal quotation marks and citation omitted).

Clearly, it is not physically impossible for both laws to coexist and be complied with by the appropriate parties. Fully insured and state and local government retiree-only plans subject to the PHSA can comply with the requirements of PPACA (and HIPAA). And self-insured retiree-only plans subject to ERISA and the Code can remain exempt.

There is also no policy conflict with this result. As noted above, the objective of eliminating the PHSA exemption was to expand the size of small groups from two to fifty employees to one to 100 employees for purposes of the special rating reforms and Exchange participation in 2014. These policy objectives, however, are irrelevant to self-funded plans, which are not subject to the rating reforms or Exchange provisions. There was no discussion of the need to subject self-funded retiree-only plans to PPACA. In fact, as explained above, there are compelling policy reasons *not* to eliminate the retiree-only plan exemptions for self-funded plans.

Finally, from a policy perspective, distinguishing between self-insured and insured retiree-only ERISA plans would be entirely consistent with the different treatment that such plans have under ERISA's preemption scheme, whereby state insurance laws are preserved with respect to insured retiree-only plans.

2. Principles of Statutory Construction Support Retaining the Retiree-Only Exemption for Self-Insured Plans

As noted above, the Supreme Court has repeatedly found that a statute cannot repeal another statute merely by implication. *Morton v. Mancari*, 417 U.S. 535; *U.S. v. Fausto*, 484 U.S. 439; *Watt v. Alaska*, 451 U.S. 259. These principles should be applied here, and there can be no doubt that there is no manifest intention of Congress to eliminate the retiree-only exemption, at least with respect to self-funded retiree-only plans since the retiree-only plan exemptions under the Code and ERISA are not expressly repealed. While PPACA incorporated by reference many of the PHSA reforms into the Code and ERISA, it does not explicitly repeal any sections of the Code or ERISA. Nor, as we explained above, does the conflicts language that has been incorporated into the Code and ERISA indicate clear Congressional intent to eliminate the retiree-only plan exemptions under the Code and ERISA. Therefore, the agencies should respect the strong presumption that the retiree-only plan exemption provisions under the Code and ERISA remain in effect.

C. At A Minimum, With Respect To Insured Retiree-Only Plans, The Elimination Of The Retiree-Only Plan Exemption Should Be Effective In 2014

In the event that the agencies conclude that the retiree-only exemption were eliminated for insured and governmental retiree-only plans, the agencies must provide a transition period during which Congress could reconsider this matter and amend the PHSA to preserve such plans, or for such plans to come into conformance with PPACA and HIPAA in an orderly way.

The effective date of the elimination of the exemption for "plans with less than two participants who are current employees" under the PHSA is unclear. The provision is eliminated under section 1563 of PPACA, which is a conforming amendment. There is no effective date provided for the conforming amendment, which could be interpreted to mean

that any changes made by the conforming amendment are effective the date of enactment of PPACA (March 23, 2010).

However, in our view the intent of Congress was to make these provisions effective in 2014 when the rating reforms that apply to the small group insurance market take effect and the Exchanges become operable. It would be impossible for insured and governmental retiree plans that have relied on the retiree-only exemption for years to immediately comply with HIPAA's already existing plan requirements, such as the mental health parity rules, and prepare to comply with PPACA's new plan requirements, such as the prohibitions on lifetime and annual limits on essential benefits. The only reasonable interpretation is for the elimination of the retiree-only exemption under the PHSA to be effective for the first plan year beginning on or after January 1, 2014.