



APPLICATION OF SPECIAL RULE FOR COLLECTIVE BARGAINING AGREEMENTS UNDER PPACA

June 2, 2010

I. Summary

Since the passage of the Employee Retirement Income Security Act of 1974 (ERISA), employee benefit plan legislation has been carefully drafted to avoid the imposition of significant legal requirements on collectively-bargained plans in the middle of applicable bargaining cycles. Congress has recognized that employers and unions must be able to negotiate over the terms and conditions of employment (including employee benefits) to apply over the course of a collective bargaining cycle with the security of knowing that the benefits of the bargain will not be changed, mid-cycle, by unforeseen legislative initiatives.

The need for a delayed effective date for collectively-bargained plans has been recognized whether the legislation involved has affected pension benefit plans (as in the case of ERISA, the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), the Deficit Reduction Act of 1984 (DEFRA), the Retirement Equity Act of 1984 (REA), the Tax Reform Act of 1986 (TRA '86), the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), and the Pension Protection Act of 2006 (PPA)) or group health plans (as in the case of DEFRA, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Code Section 89 nondiscrimination rules (which were repealed before they became effective), or the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA)).

In that same spirit, the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 (referred to collectively as PPACA), includes section 1251(d)¹ – a deferred effective date rule for applying various health care reform coverage mandates insofar as they would apply to collectively-bargained plans. The language used in section 1251(d) is virtually identical to language used historically by Congress for collectively-bargained plans in various legislative acts dating back to ERISA and provides that subtitles A and C of PPACA “shall not apply” until termination of the last collective bargaining agreement related to the health coverage.

Some have argued that, notwithstanding section 1251(d), certain grandfathered health plan coverage mandates otherwise applicable under PPACA to grandfathered

¹ Except as otherwise noted, all section references herein are to PPACA.

health plans should apply equally to all collectively-bargained group health plans at the same time as they apply to non-collectively-bargained group health plans. This interpretation would impose undue costs and administrative burdens on collectively-bargained arrangements mid-bargaining cycle and would, essentially, render section 1251(d) and the policy underlying a delayed effective date for collectively-bargained plans meaningless.

By treating section 1251(d) as a true deferred effective date rule for collectively-bargained arrangements, the interpretation of section 1251(d) will be consistent with the specific PPACA statutory terms as well as the history of the use of delayed effective dates in the employee benefit plan field for over 35 years. It also leaves the parties free to implement early those aspects of PPACA that make sense in light of the collective bargaining objectives and costs/benefit tradeoffs that are relevant to each workforce.

II. Discussion

A. Background and Summary of Applicable Effective Date Rules

PPACA includes various coverage mandate provisions in subtitles A and C. These coverage mandates are effective at various statutory effective dates. For example, section 1004 provides that the basic effective date for those coverage mandates included in subtitle A is for plan years beginning on or after September 23, 2010 (the date that is six months after enactment). Separately, section 1255 provides that the general effective date for coverage mandates in subtitle C is for plan years beginning on or after January 1, 2014, except that:

- (1) section 1251 takes effect on the date of enactment; and
- (2) the provisions governing no preexisting condition exclusions for enrollees who are under age 19, become effective for plan years beginning on or after September 23, 2010 (the date that is six months after enactment).

Apart from these general effective date rules, there are special rules for grandfathered health plans in section 1251(a) (specifically, section 1251(a)(4)) and special rules governing the effect of PPACA on collective bargaining agreements in section 1251(d). Under the special rules for grandfathered health plans, various PPACA coverage mandates (including the prohibition on annual or lifetime benefit limits, the “no rescission rule,” and the rule mandating coverage for dependent children to age 26) apply to grandfathered health plans notwithstanding their grandfathered status. These coverage mandates, as well as the rule prohibiting preexisting condition limitations in section 1255, are referred to herein collectively as the “grandfathered health plan coverage mandates” and generally apply to grandfathered health plans for plan years beginning on or after September 23, 2010.

The special rules governing the effect of PPACA on collective bargaining agreements found in section 1251(d) reads as follows:

(d) EFFECT ON COLLECTIVE BARGAINING AGREEMENTS.—In the case of health insurance coverage maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers that was ratified before the date of enactment of this Act, the provisions of this subtitle and subtitle A (and the amendments made by such subtitles) shall not apply until the date on which the last of the collective bargaining agreements relating to the coverage terminates. Any coverage amendment made pursuant to a collective bargaining agreement relating to the coverage which amends the coverage solely to conform to any requirement added by this subtitle or subtitle A (or amendments) shall not be treated as a termination of such collective bargaining agreement.

Given the various effective date rules, and the importance of complying with the PPACA coverage mandates when required, it is essential to understand the impact of section 1251(d) on timely compliance with PPACA. In particular, the issue to address is whether section 1251(d) should be applied as a deferred effective date for collectively-bargained health plans or whether the grandfathered health plan coverage mandates apply to all group health plans and arrangements when otherwise required by sections 1251(a) and 1255 without regard to section 1251(d).

While we recognize that section 1251(d) could be read to apply solely to “health insurance coverage,” we see no reason to distinguish between insured and self-insured collectively-bargained plans for purposes of section 1251(d) and understand from informal comments of various agency officials that there is a general agency recognition of the view that there is no reason to make such a distinction for this purpose. Also, we would note that the use of the term “health insurance coverage” in other contexts under PPACA should not necessarily bind the interpretation of how it is used for effective date rules. Therefore, we have referred to group health plan coverage in reference to section 1251(d).

B. The Statutory Language Supports the Interpretation of a Delayed Effective Date for Collectively-Bargained Health Coverage

In our view, section 1251(d) should be applied as a delayed effective date for group health plans maintained pursuant to one or more collective bargaining agreements. That means that neither the general PPACA provisions in subtitles A and C nor the grandfathered health plan coverage mandates should apply to an otherwise grandfathered collectively-bargained group health plan subject to section 1251(d) until

termination of the last collective bargaining agreement relating to the coverage.² At termination of that last collective bargaining agreement, the arrangement needs to be reviewed to determine whether the arrangement continues to qualify as a “grandfathered health plan.”³ If it does, then the grandfathered health plan coverage mandates should apply at the later of the otherwise applicable effective date for those mandates or the termination of the last applicable collective bargaining agreement. If it does not, then all of the PPACA provisions in subtitles A and C applicable to non-grandfathered plans should apply to the arrangement at the later of the otherwise applicable PPACA effective date or termination of the last applicable collective bargaining agreement.

There are two key reasons supporting this reading of section 1251(d): (1) the specific language of section 1251(d) itself; and (2) the history and purpose of applying delayed effective dates for collectively-bargained plans in employee benefits legislation dating back at least to ERISA.

1. Section 1251(d) Provides Subtitles A and C “Shall Not Apply” Until Expiration of Final Collective Bargaining Agreement

As indicated above, section 1251(d) specifically states that the provisions of subtitles A and C “shall not apply” until the termination of the last collective bargaining arrangement related to the coverage in question. The grandfathered health plan coverage mandates specified in sections 1251(a)(4) and 1255 are otherwise included in subtitles A and C. Section 1251(d) is not limited or qualified in a way so that certain provisions of subtitles A and C (such as grandfathered health plan coverage mandates) apply whereas other provisions do not. Therefore, on its face, the statutory language of section 1251(d) reflects a delayed effective date rule for collectively-bargained arrangements.

² For purposes of this analysis, we generally assume that a collectively-bargained arrangement covered by section 1251(d) is otherwise a grandfathered health plan as defined in section 1251(e) (meaning, essentially, that the group health coverage was in effect on March 23, 2010, the date of enactment). The reason for this assumption is that section 1251(d) only applies to plans that were maintained pursuant to collective bargaining agreements ratified before enactment. For the most part, this effectively means that the coverage subject to section 1251(d) would otherwise be under a grandfathered health plan (subject to it being amended in a way that causes it to lose grandfathered health plan status). It is theoretically possible that a collective bargaining agreement in effect on March 23, 2010 could contemplate the creation of a group health plan after that date. In that case, the group health plan contemplated by the agreement might not be grandfathered, but would nevertheless be subject to the delayed effective date in section 1251(d).

³ We understand that guidance is currently under consideration that would alter a group health plan’s grandfathered health plans status depending on the nature of certain amendments. This comment is not intended to address those specific issues.

2. History and Purpose of the Rule on Delayed Effective Dates Supports a Delay for Collectively-Bargained Plans

This technical understanding of section 1251(d) is supported by looking at the history and purpose of delayed effective dates for collectively-bargained plans. Dating back to 1974 and ERISA, employee benefit plan legislation has frequently included delayed effective dates for collectively-bargained plans. Indeed, special rules for collective bargaining agreements have been included in ERISA, TEFRA, DEFRA, REA, TRA '86, COBRA, the Omnibus Budget Reconciliation Act of 1993, the Small Business Job Protection Act of 1996, EGTRRA, PPA, and MHPAEA, among other employee benefits legislation. The language used in these delayed effective date provisions routinely includes three key provisions:

- (1) The delay applies to those plans “maintained pursuant to one or more collective bargaining agreements” “between employee representatives and one or more employers” “ratified before the date of the enactment of [the applicable act]”;
- (2) The applicable legal rule “shall not apply” until termination of the last collective bargaining agreement related to the plan in question;⁴ and
- (3) In some cases (such as ERISA, TEFRA, DEFRA, REA, and MHPAEA), amendments made to conform to the legislation in question are specifically not treated as a termination of the applicable collective bargaining agreement and will not cause the delayed effective date to apply to all other provisions being changed.

Section 1251(d) includes each of these three specific provisions. Congress’ decision to use this language in section 1251(d) knowing that it has been used this way for over 35 years in so many contexts ought to create a presumption that Congress intended for section 1251(d) to apply as a delayed effective date. *See Morissette v. U.S.*, 342 U.S. 246, 263 (1952) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them.”)

⁴ In some cases, the applicable law might apply at the earlier of a fixed date in the future or the termination of the last collective bargaining agreement related to the plan. However, this does not change the basic point that the rule is one of a deferred effective date for collectively-bargained plans.

This view is also consistent with the purpose of a deferred effective date for collectively-bargained arrangements. Collective bargaining related to benefits and wages is a process of economic trade-offs. Each party to the agreement makes its decisions based on, among other things, economic and financial forecasts expected to apply for the duration of the agreement. If unexpected new legislation were allowed to impose additional costs or burdens without a delayed effective date, it would frustrate the parties' contractual expectations. In this regard, the IRS has specifically recognized the purpose of a deferred effective date for collectively-bargained plans in a 1993 field service advice letter related to the DEFRA delayed effective date for collectively-bargained plans. In that letter, the IRS stated:

“The purpose of adopting a deferred effective date for collectively bargained plans is to delay the effects of new legislation until the expiration of current collective bargaining agreements. This avoids disrupting, mid-cycle, the terms agreed to between employers and collective bargaining representatives.⁵ This purpose is arguably better served by consistently applying the same historical test, in interpreting such provisions. Such a course permits employers and unions to commit themselves to specific terms over the course of a collective bargaining cycle, provided the historically applicable test is met, with a degree of security that the intended consequences of those terms will not be changed, mid-cycle, by unforeseen legislation. By contrast, application of ad hoc, statute-specific regulatory definitions, promulgated after enactment of the subject legislation, arguably leaves employers and unions without the ability accurately to anticipate the effects of bargained-upon terms.”

C. Alternative Interpretation of Section 1251(d) and Difficulties Presented

We understand that the agencies are considering other interpretations of section 1251(d), including one that would mean that the grandfathered health plan coverage mandates would apply to collectively-bargained group health plans in the same way that they apply to non-collectively-bargained group health plans. We believe such an interpretation is not correct for the reasons stated above. In addition, we believe that there are a number of problems and difficulties that would be created were such an interpretation to be followed.

⁵ See, e.g., H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 52 (1974), 1974-3 C.B. (Pt. 1) 236, 287 (rationale for the 25% rule is “The presence of a small number of nonunion participants should not force the untimely renegotiation of labor-management contracts.”).

1. Section 1251(d) Should Not be Rendered Meaningless

Interpreting section 1251(d) to mean that the grandfathered health plan coverage mandates would apply to collectively-bargained group health plans in the same way that they apply to non-collectively-bargained group health plans effectively renders section 1251(d) meaningless. To see why that is, consider what happens at termination of the last collective bargaining agreement related to the coverage. Section 1251(d) clearly contemplates that something will happen at termination of the last collective bargaining agreement related to the coverage. Logically, there appear to be only two possibilities: (1) the plan in question could remain a grandfathered health plan under section 1251(e) subject to all of the grandfathered health plan coverage mandates as it was before termination of the last collective bargaining agreement; or (2) it could lose its grandfathered health plan status at termination of the last collective bargaining agreement.

The second possibility would result in section 1251(d) becoming a rule overriding grandfathered status solely with respect to collectively-bargained arrangements. There is absolutely no support, statutory or otherwise, for the proposition that a grandfathered health plan loses its status as grandfathered merely due to the passage of time (*i.e.*, at expiration of the last collective bargaining agreement related to the coverage). Moreover, such a view would lead to an incongruous result whereby collectively-bargained plans would become subject to PPACA mandates applicable to non-grandfathered health plans when similarly situated non-collectively-bargained plans would remain grandfathered. Therefore, this alternative should be rejected.

That leaves the more likely interpretation that the plan in question would remain grandfathered after termination of the last collective bargaining agreement related to the coverage (assuming no actions were taken to amend the plan out of grandfathering as provided in any future guidance on this point). The problem with this view is that it would effectively mean that collectively-bargained group health plans are treated exactly the same as similarly situated non-collectively bargained group health plans to which section 1251(d) does not apply. Section 1251(d) would, therefore, cease to have any meaning. Under general rules of statutory construction, an interpretation that renders provisions meaningless is to be avoided. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (internal quotation marks omitted)); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’ ...We are thus ‘reluctan[t] to treat statutory terms as surplusage’ in any setting.”) (quoting *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995)); *Donnelly v. Federal Aviation Administration*, 411 F.3d 267, 271 (D.C.Cir.2005) (“We must strive ... certainly not to treat an entire [statutory] subsection as mere surplusage.”).

By interpreting section 1251(d) as a true deferred effective date for collectively-bargained plans, this problem is avoided.

2. **Preferring Health Care Reform Policy Over Policy for Delayed Effective Date Frustrates Legislative Purpose**

It might be argued that the overriding policy objectives of health care reform are so compelling that they should override the policy underlying the delayed effective date rule otherwise articulated in section 1251(d). This argument would result in the agencies adopting an interpretive rule that essentially overtakes the legislative prerogative left to Congress which is to decide the relative priorities of the competing policy interests. As the Supreme Court stated in another context, it is a rule of statutory construction that:

“no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of *legislative choice* - and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law. *Rodriguez v. U.S.*, 480 U.S. 522, 525-526 (1987) (Emphasis added.).

In other words, if the agencies were to rely on the policy behind health care reform as a reason to override a clearly expressed policy preference for a delayed effective date for collectively-bargained plans reflected in the language of section 1251(d), they would be inappropriately exercising what is tantamount to a legislative choice.

3. **Possibility of Future Technical Correction Weighs in Favor of Interpreting Section 1251(d) as a Delayed Effective Date Rule**

Alternatively, it might be argued that the suggested agency interpretation could be imposed on collectively-bargained group health plans now and, if Congress does not prefer that result, Congress could enact a legislative fix to correct the interpretation and clarify that a delayed effective date rule was intended. This argument should be rejected. Implementing a rule that the grandfathered health plan coverage mandates (or, perhaps, all of subtitles A and C of PPACA) apply to collectively-bargained plans notwithstanding the delayed effective date language in section 1251(d), would make it impossible, as a practical matter, for Congress to step in and override that interpretation.

The reason that this choice effectively limits Congressional options is that, in reality, it will take several months or longer for Congress to act. If the agencies mandate that health care reform provisions apply without a delayed effective date and

Congress did not intend for that result, by the time Congress acts, many of the affected plans will already have had to implement health care reform mandates to avoid violating the agency rule and will have incurred the mid-year bargaining cycle costs. Both Congress and the affected plans will find it virtually impossible, as a practical matter, to undo that implementation. What that means is that the agencies will have effectively legislated their interpretation and overridden the intent of Congress (assuming Congress intended a delayed effective date rule to apply).

On the other hand, if the agencies were to interpret section 1251(d) as a delayed effective date to effectuate that clear and specific purpose, Congress could easily step in and override that decision legislatively to impose the health care reform coverage mandates. Any gap in applying the coverage mandates between the time that the coverage mandates would otherwise have applied and the time Congress eventually acts to clarify their application to collectively-bargained plans could be easily filled if Congress so intends by applying special effective date transition provisions at that point to reflect the policy of implementing health care reform.⁶

Therefore, the solution that best balances the competing policy interests underlying both policy goals (the health care reform policy and the delayed effective date policy) is to treat section 1251(d) as a delayed effective date first and then let Congress act to impose the health care reform coverage mandates on collectively-bargained plans if it so chooses.

4. **Imposing Grandfathered Health Plan Coverage Mandates Early Forces Collectively-Bargained Plans to Incur Costs and Burdens Not Originally Anticipated in Bargaining**

Imposing grandfathered health plan coverage requirements (such as the coverage for adult children up to age 26) on collectively-bargained plans mid-contract imposes significant costs and administrative burdens on these plans that was not originally anticipated in the negotiations underlying the collective bargaining agreements. The amount of cost imposed depends on the specific mandate at issue and the specifics underlying the plan in question. Furthermore, the aggregate effect of coverage requirements, such as the mandates eliminating lifetime and annual limits, could impose even greater costs. Finally, in considering the magnitude of the costs and burdens on collectively-bargained plans, it is important to factor in the administrative

⁶ Comparable retroactive gap filling was done after the COBRA premium subsidy provisions originally enacted as part of the American Recovery and Reinvestment Act of 2009 were amended to extend the subsidy period from 9 months to 15 months as part of the Department of Defense Appropriations Act, 2010 (DoD Act). Because the DoD Act retroactively expanded the benefits of the premium subsidy program and some individuals may have exhausted their original 9 months of premium subsidy at the time the DoD Act was enacted, Congress added a transition period allowing affected individuals the right to add back coverage retroactively to take advantage of the newly expanded benefit.

costs associated with implementing any coverage mandate, such as computer programming costs, communication costs, and plan drafting costs.

From a labor law perspective, if the law were to require mid-contract modifications to negotiated benefits, either party would be free to negotiate concerning implementation of the cost impact of these new benefits. For example, an employer might demand increased employee contributions or other benefit changes to cover the costs. In multiemployer health plans, there could be trustee deadlocks on any demands to reduce other benefits to cover costs or other cost problems where collective bargaining agreements already contain negotiated contribution payment caps. These are the types of mid-contract disruptions that a delayed effective date rule is designed to avoid.

From the perspective of a delayed effective date rule, it is important to clarify that the purpose of a delayed effective date rule is not to avoid forever the costs or benefits of health care reform that otherwise apply. Rather, the point is that these costs must be considered in the context of collective bargaining. As stated above, Congress has routinely applied a delayed effective date rule for collectively-bargained plans so they could manage the costs associated with legal changes in the context of the collective bargaining negotiations and not outside that process.

5. **Use of Similar Language in Other PPACA Provisions Should not Change Meaning of Section 1251(d) as a Delayed Effective Date Rule**

PPACA in many instances is admittedly not drafted with the precision that would have applied had the drafters had an opportunity to scrutinize each section carefully for consistent usage of terminology. This has caused some confusion in comparing section 1251(d) to other PPACA rules. For example, section 1251(c) has wording indicating that a group health plan may enroll new employees and their families and, in that case, subtitles A and C “shall not apply” with respect to that plan and the new employees. No one disputes that notwithstanding the “shall not apply” language in section 1251(c), the grandfathered health plan coverage mandates would apply to a non-collectively bargained plan. In that sense, sections 1251(a)(4) and 1255 would override section 1251(c). Based on that reading, one argument might be that since sections 1251(a)(4) and 1255 override section 1251(c), perhaps they should also override the comparable provision in section 1251(d).

There are two problems with that argument. First, even though the grandfathered health plan coverage mandates override section 1251(c), there is still meaning left for section 1251(c). Specifically, section 1251(c) is intended to clarify that a grandfathered health plan does not lose its status as a grandfathered plan even if new employees are enrolled in coverage. By contrast, as explained above, if the grandfathered health plan coverage mandates were to override section 1251(d), that

section would be rendered meaningless, a result to be avoided under well-established rules of statutory construction.

Second, as explained above, Congress has a long history of using statutory language such as that in section 1251(d) to apply a delayed effective date for collectively-bargained plans. There is no comparable history with the language in section 1251(c). Therefore, it is more reasonable to conclude that the grandfathered health plan coverage mandates do not override section 1251(d) even if they do override section 1251(c).

6. **Health Care Reform Mandates Could Still be Voluntarily Implemented Notwithstanding a Delayed Effective Date Rule**

Finally, we believe that voluntary adoption of PPACA coverage requirements could be done prior to their effective dates notwithstanding section 1251(d). In fact, those terms permit collectively-bargained arrangements to apply the PPACA mandates early if they so chose without losing the benefits of the deferred effective date. This way, collectively-bargained arrangements may retain the benefits of collective bargaining, and the benefits of the bargains already struck, while at the same time are permitted to voluntarily apply those PPACA provisions prior to statutory effective dates. We have already seen examples of this with respect to the PPACA coverage requirement for adult children to age 26. As you know, a number of insurers voluntarily agreed to apply that rule early in order to facilitate broader coverage. So, too, collectively-bargained plans may choose to apply certain of the PPACA rules early to the extent consistent with their collective bargaining needs as well as their union member desires. Thus, by treating section 1251(d) as a deferred effective date for collectively-bargained plans, the interpretation will be consistent with the specific statutory terms as well as the history of statutory enactments that have used deferred effective dates. At the same time, it also leaves the parties free to implement those aspects of PPACA that make sense in light of the collective bargaining objectives and costs/benefit tradeoffs that were already made as well as taking into account the desires of the specific members of the collective bargaining unit.