The New York Times

A Health Care Fight That Punishes Federal Workers

Uwe E. Reinhardt September 27, 2013

One can think of the Affordable Care Act as a highly complex patch on the even more complex and fragmented health insurance system.

Thinking of it that way helps explain why even people who have no ideological dog in the hunt have such difficulty getting their mind around this complex legislation, especially from a worm's-eye view. It does not help that Americans are bombarded daily with misleading information about the act.

Viewing the law from a distance, one discerns two main objectives:

1. To facilitate easier and affordable access to health insurance to Americans who do not now have health insurance (and that latter phrase warrants emphasis).

2. To help reorganize the delivery of health care in the United States to enhance its cost-effectiveness by lowering the cost of producing a given level or quality of care or by enhancing the quality of care for a given cost, or both.

To the best of my knowledge, nowhere in its many pages does the law, either in its spirit or its wording, suggest that employers who currently sponsor health insurance for their employees and who make contributions to the premiums for that coverage are expressly forbidden to do so come Jan. 1.

And yet, seemingly serious adults seem to believe that this is exactly what Section 1312(d)(3)(D)of the law dictates. Among them are the editors of The Wall Street Journal, Michael Cannon of the Libertarian Cato Institute and Robert Moffitt, Edmund Haislmaier and Joseph Morris of the Heritage Foundation.

These longstanding critics of the Affordable Care Act assert that its Section 1312(d)(3)(D) expressly forbids the federal government from sponsoring health insurance for members of Congress and their staffs; they accuse the Office of Personnel Management of the Obama administration of breaking the law by exempting the targeted federal employers from the supposed prohibition. Writing on the opinion page of The Wall Street Journal, for example, former Secretary of Education William Bennett and Christopher Beach speak of "The Hypocrisy of Congress's Gold-Plated Health Care."

Traditionally, members of Congress and all federal employees have been able to choose their private health insurance coverage from a wide array of policies offered by private health insurance on a federal health insurance exchange, the Federal Employee Health Benefits Program, operated by the Office of Personnel Management of the executive branch.

The premiums on this exchange have for decades been fully community-rated, as they are within companies under most employment-based health insurance systems, certainly among large employers. This means the premium quoted by a particular insurer was the same for every individual (and analogously for families), regardless of the health status or age of the insured.

The federal government has contributed to coverage of members of Congress and of all federal employees 72 percent of the average premium bid made by the various insurers on the exchange, or 75 percent of the premium of the health policy chosen by the employee, whichever is lower.

Most large private-sector employers make similar contributions, albeit a bit more generous, toward coverage for their employees. In that regard, the federal program is not really "gold-plated coverage" as Mr. Bennett and Mr. Beach suggest.

Effective Jan. 1, Section 1312(d)(3)(D) of the law forces members of Congress and their personal staff out of the exchange and onto the state-run or federally run, state-based health insurance exchanges established under the law, there to seek whatever coverage is offered on the relevant exchange.

These new exchanges, it must be emphasized, were not even intended for the great majority of employed Americans and their families who already have job-based, group health insurance with premiums that are community-rated within the company (although some smaller employers currently with small-group coverage and those with many low-wage workers may in the future take advantage of the federal subsidies offered on the new exchanges).

Rather, the new exchanges were designed mainly for the minority of Americans who have to buy coverage in the nongroup market, many millions of whom have pre-existing medical conditions and hitherto could not afford the high premiums they were quoted or were refused coverage outright.

For what it is worth, I view the requirement spelled out in Section 1312(d)(3)(D) as dubious, because it will create many avoidable headaches regarding the interface with Medicare and the Internal Revenue Service. To get a feel for these headaches, I refer readers to a lucid column written by Prof. Timothy Jost of the Washington and Lee School of Law on Aug. 7 and posted on the Health Affairs blog.

It may be helpful to present the relevant Subsection D of Section 1312(d)(3)(D), or the more intrepid can read the entire Section 1312 (starting on Page 64). Subsection D reads as follows:

(D) MEMBERS OF CONGRESS IN THE EXCHANGE.
(i) REQUIREMENT. Notwithstanding any other provision of law, after the effective date of this subtitle, the only health plans that the Federal Government may make available to members of

Congress and congressional staff with respect to their service as a member of Congress or congressional staff shall be health plans that are:

(I) created under this act (or an amendment made by this act); or
(II) offered through an exchange established under this act (or an amendment made by this act).

(ii) DEFINITIONS. In this section:

(I) MEMBERS OF CONGRESS. The term "member of Congress" means any member of the House of Representatives or the Senate.
(II) CONGRESSIONAL STAFF. The term "congressional staff" means all full-time and part-time employees employed by the official office of a member of Congress, whether in Washington, D.C., or outside Washington, DC.

That's it. Does it state in the section that the federal government may not continue to make the traditional employer-provided contributions to the targeted employees' health insurance?

As I read this short section, it says absolutely nothing about this issue, and I am by no means the first to assert this. Indeed, as early as April 2010, about a month after the act was signed into law on March 23, 2010, the legal staff of the nonpartisan Congressional Research Service, Congress's research arm, came to a similar conclusion in response to an inquiry on this point from Representative Tom Price, Republican of Georgia.

The legislative attorneys composing the carefully worded memo suggested to Mr. Price that the intent of the law was not to forbid the government from making contributions to the insurance coverage of the federal employees covered by the section. But they looked to the relevant federal agency to clarify the questions raised by Section 1312(d)(3)(D).

It may be asked how this dubious section ever found its way into the law. It was added by an amendment proposed by Senator Charles Grassley, Republican of Iowa.

Whatever Senator Grassley's motive for his amendment, by design or inadvertently, he helped lure the supporters of the bill into the kind of public relations ambush into which Democrats so frequently stumble. Was it really Senator Grassley's intention to punish all of his colleagues and their staff because some of them had supported the act?

Years ago, former Representative Pete Stark, Democrat of California, somewhat facetiously introduced a bill in the House of Representatives providing that all members of Congress should lose their employer-based insurance coverage until they had legislated a truly universal health insurance system in this country.

We now have the spectacle of Senators David Vitter, Republican of Louisiana, and Ted Cruz, Republican of Texas, eagerly seeking to abolish employer-based coverage for their colleagues and, if Senator Cruz has his way, for all personnel on the federal government's payroll, because Congress had tried at long last to extend insurance coverage to more Americans.

It would all be quite amusing, were it not so serious an issue.