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As the 2014 Health Care Reform changes draw closer, unionized employers need to know what options they should consider as they commence collective bargaining. For negotiations in 2011 and 2012, flexibility in 2014 is critical.

Health Care Reform and Collective Bargaining: Mid-Term and Long-Term Strategies for Bargaining over the Impact of the PPACA on Employers

By Jay Sumner

Much has been written about The Patient Protection and Affordable Care Act (PPACA), which was signed into law on March 23, 2010, as well as the amendments to the PPACA included in the Health Care and Education Reconciliation Act of 2010, enacted on March 30, 2010 (these two Acts are collectively referred to as the "PPACA"). By now, most employers have examined the impact of the PPACA, have commenced making the changes required for this calendar year and have begun considering the changes required in 2011. The most profound changes are scheduled to take effect beginning in 2014, subject to the outcome of pending litigation, regulations, and any legislative modifications that may occur before then.

Unionized employers must consider the impact of the PPACA on collective bargaining occurring between now and 2014. Different strategies may apply as 2014 draws closer.

Collective Bargaining Implications in 2011-2012

For employers facing collective bargaining in 2011 or 2012, the most important concept to keep in mind is "flexibility." Because of the uncertainty concerning the details of the changes to take place in 2014, very few employers will be in a position in 2011 or 2012 to predict accurately how to respond to the 2014 changes. Therefore, it generally will not be in the best interests of an employer to lock into any health care option for 2014 during collective bargaining that takes place in 2011/12. Employers entering into negotiations have four realistic bargaining strategies:

- **Short-term CBA.** The optimal strategy for numerous employers will be to negotiate a shorter contract. Many already are doing so in the current uncertain economic environment, as many companies are unwilling to commit to a long-term agreement and, even if they are, many unions are unwilling to agree to a contract with little or no compensation increases for a multiple year period. The 2014 health care reform changes simply provide employers with one more reason not to want to commit to a longer-term agreement. Employers agreeing to a contract that provides for specific health care benefits in 2014 risk incurring the penalties that accompany the 2014 PPACA changes.

- **“Me-too” Health Care Language.** Another strategy that allows employers to maintain flexibility is to negotiate into the union contract what is commonly referred to as “me-too” language. In terms of health care, a “me-too” provision would provide for the union employees to receive the same health care coverage under the same terms and costs as a defined group of non-union employees. To be fully effective, this provision should include language constituting a clear and unmistakable waiver of the union’s right to negotiate over any changes to health care coverage for the employees during the life of the contract. While many unions are reluctant to cede this type of power to the company, the likelihood of obtaining agreement by the union will be enhanced if the bargaining unit employees are assured of receiving the same benefits as management, or at least the same benefits as enjoyed by a very significant portion of the non-union workforce. The probability of success for this strategy depends on the company’s bargaining leverage, how willing the union is to cooperate, the bargaining history of the parties, the level of trust that exists between them, and potentially what the company is willing to concede in order to achieve a “me-too” agreement on health care.
- **Limited Waiver of Obligation to Bargain.** As the PPACA currently stands, subject to changes from litigation, regulation, or legislation, employers can anticipate having to make certain changes in response to the 2014 requirements including: (1) addressing the sufficiency and cost of coverage; (2) changing coverage options; (3) ceasing coverage; and/or (4) offering vouchers to employees electing not to be covered by the employer plan. All of these changes would be considered mandatory subjects of bargaining, meaning that an employer with a contract in effect in 2014 may not be able to make any of these changes unilaterally. As the union may not have an obligation even to discuss these changes during the life of the agreement, one option for employers is to obtain a limited waiver of its obligation to bargain over these changes with the union. Unlike the “me-too” provision, which would constitute a complete waiver of the obligation to bargain over any change, the limited waiver would permit the company to make only certain changes without bargaining. To be effective, this limited waiver must be clear and unmistakable in the way it is written.
- **Targeted Health Care Re-opener.** For a variety of reasons, a company may not choose to pursue or be able to achieve a short-term CBA, “me-too” health care language, or a limited waiver of the obligation to bargain over PPACA changes. In that event, another strategy available to employers to provide flexibility heading into 2014 is to negotiate a “re-opener” of the union contract. Essentially, a re-opener is a provision by which the company and the union agree to meet and bargain prior to the expiration of the collective bargaining agreement over the issues specified in the re-opener. Re-opener provisions are generally used when the parties cannot agree on a specific wage increase for future years in a multi-year union contract. In this context, a re-opener can be used to provide the parties the flexibility to negotiate over health care prior to 2014 without having to re-negotiate the entire agreement. Any such re-opener should deal with the following issues:
 - The timing of and preconditions for re-opening the contract.
 - The scope of issues that are subject to bargaining during the re-opener.
 - Whether and to what extent the no strike/no lockout provisions of the contract remain in effect during the re-opener with no labor disruptions as a result of the re-opener negotiations.

Collective Bargaining Implications in 2013 and Beyond

Employers entering into negotiations starting in 2013 will be much better positioned than those today to bargain with a full understanding of how to respond to health care reform changes and the cost-impact of those changes on the company. Unfortunately, for most employers, the choices that will be required as a result of the PPACA will be difficult to make, and in many instances even harder to bargain successfully. Over the two decades of skyrocketing health care costs, and particularly since the current economic crisis started, employers have been faced with the unpleasant prospect of addressing spiraling labor costs at the bargaining table. While health care reform has been touted by its supporters as a step toward containing rising health care costs, the changes required by employers to deal with the PPACA mandates and penalties will almost certainly be met with stiff resistance at the bargaining table by unions already tired of years of hard bargaining by employers.

Some options employers are likely to explore are:

- dropping health care coverage for employees
- eliminating non-conforming benefits
- changing or modifying plans to decrease plan costs
- altering employee contributions due to affordability or voucher concerns
- moving to Taft-Hartley health and welfare plans

Employers considering moving to a Taft-Hartley plan should be mindful of the excise tax that will be imposed in 2018 on so-called “Cadillac Plans” whose total cost exceeds certain thresholds. While the tax will be imposed on the plans, it is predictable that the plans will pass along the impact of the excise tax to the plan purchasers. Further, while a Taft-Hartley plan might look appealing in 2014, once an employer agrees to participate in such a plan, it is often extremely difficult to negotiate out of participation in that plan. Therefore, an employer making a decision in 2014 to enter into a Taft-Hartley plan may regret that decision in 2018 if the plan’s costs trigger the excise tax.

In conclusion, employers facing bargaining between 2010 and 2014 need to develop a negotiating strategy that will give them maximum flexibility to deal with the uncertain PPACA changes that will occur in 2014.

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