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Health Law May Limit HHS Power To Toughen Penalties

By **Rachel Slajda**

Law360, New York (January 18, 2013, 7:31 PM ET) -- Insurers' and state regulators' recent suggestions of stiffer penalties for people who delay getting health insurance under the Affordable Care Act could mitigate lingering concerns that only the sick will enroll and drive up premiums, but it's unclear how much legal authority federal officials have to strengthen the individual mandate, experts say.

In recent comments to the U.S. Department of Health and Human Services, the insurance industry and state regulators asked HHS to allow them to impose harsher penalties on people who wait to purchase health insurance.

The concern is that healthy people will forgo insurance, especially in the first two years of the individual mandate, when the tax penalty for failing to comply with the individual mandate is being phased in. Without healthy people to balance out the risk, premiums on the exchanges could quickly become unaffordable, in turn forcing more people off the rolls — a scenario insurers call "the death spiral."

When asked by HHS how they might prevent that from happening, insurance groups recommended that the agency allow penalties for late enrollment, such as higher premiums when a latecomer does finally enroll. They also suggested limiting coverage options, allowing latecomers to enroll only in plans offering the fewest benefits.

"We strongly urge the adoption of additional strategies to bolster participation in the early years of implementation and promote stability in the market," said America's Health Insurance Plans, a trade group, in comments to HHS.

The American Academy of Actuaries suggested some of the same remedies, while noting problems with the ideas. Higher premiums for late enrollees and limiting coverage options could hit low-income individuals harder, the group said. More generous tax subsidies could also encourage more enrollment, but the actuaries noted that would add to federal costs. The academy also suggested fewer enrollment periods, but experts say the Affordable Care Act requires annual enrollment periods.

The National Association of Insurance Commissioners, which represents state regulators, asked HHS to leave these questions to the states.

"There are many tools states use to limit adverse selections, such as open enrollment periods (which are included in the regulations), waiting periods, penalties for late enrollment and others," the group said. "States need flexibility to develop a regulatory environment that will discourage adverse selection while preserving consumer protections, rather than having the federal government prescribe open enrollment as the tool that states must use."

AHIP asked for the changes on a federal level, but said that if HHS wouldn't take that step, it encouraged the agency to allow states the flexibility to institute their own measures.

Experts say that while the insurers' concerns are valid, there's no way of knowing in advance how a complicated confluence of factors — the cost of insurance, the size of the penalty, the federal tax subsidies and the value people will place on getting covered — will come together on the exchanges. Still, toughening penalties could motivate enrollment.

"With almost any mandate penalty, some people won't sign up, and even without it, some people will," said Jonathan Gruber, an economist at the Massachusetts Institute of Technology and director of the health care program at the National Bureau of Economic Research. "If you made it stronger, would you get better outcomes? Yes."

Then there's what HHS is willing and able to do. The agency explicitly asked for suggestions on how to encourage people to enroll in 2014, as well as how to prevent people from "gaming" the system by waiting to enroll until they get sick or by purposely not paying premiums and then enrolling in a new policy when they lose the first one.

But it's unclear how much legal authority will HHS have to impose further penalties or incentives under the Affordable Care Act. HHS can clearly establish limited open enrollment periods on the exchanges, as well as impose the individual mandate penalty. But past that, the road is murky, experts say.

"It's not clear to me what the legal authority would be for this. There's certainly no legal authority for no open enrollment every year. It would be interesting to know what it would be for a penalty or a waiting period" for late enrollees, said Tom Baker, an insurance law expert at the University of Pennsylvania School of Law.

AHIP, for one, argues that the additional penalties would be well within HHS' power, saying the ACA allows HHS to "promulgate such regulations as may be necessary or appropriate to carry out the provisions of this subchapter."

As for the merits of the insurers' arguments, it's overly simplistic to compare the cost of the mandate penalty with the cost of a year of health insurance, experts say. The cost of insurance will almost always be higher. Still, there are other factors.

"A lot of folks say, 'Even when the full penalty or tax kicks in, if it's $695 or a certain percentage of income, and the cost of insurance is $10,000, people will always take the penalty,'" said Theodore Tucci, a partner with Robinson & Cole LLP who represents insurers. "But you're getting a product. You're getting insurance."

For example, he said, a family who, through subsidies, can get the $10,000 policy for $3,000 — a higher fee than the penalty — could find the security of the insurance coverage worth it.

Any new penalties would have to be balanced so they don't ultimately discourage people from signing up, experts said.

"There's a tension between creating an incentive to sign up when they can and making it too hard for people to sign up when they need to," Baker said.

--Editing by Elizabeth Bowen and Lindsay Naylor.