HONIGMAN ALERT

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If you have questions regarding the information in this alert or would like to receive further information regarding our Employee Benefits Practice Group, please contact:

Michael J. Friedman
313.465.7388
mfriedman@honigman.com

Crescent A. Moran
313.465.7532
cmoran@honigman.com

Gregory R. Schermerhorn
313.465.7638
gschermerhorn@honigman.com

What You Need to Know About Michigan's New Health Insurance Claims Assessment Act

Late in 2011, the Michigan legislature passed the Health Insurance Claims Assessment Act (HICA) which imposes a 1% tax on all claims paid on or after January 1, 2012 for health and medical services provided in Michigan to Michigan residents. The HICA tax can be paid at any time, but will be due quarterly on the 30th of April, July, October and January. The first payment of the HICA tax, therefore, is due April 30, 2012. The HICA tax is to be paid on claims incurred through December 31, 2013, as the statute is, barring an extension, self-repealing effective as of January 1, 2014.

The purpose of the HICA tax is to provide $400 million to the state to cover increases in Medicaid funding over this period of time that will not be covered by the federal government. Michigan's Department of Treasury has issued a useful set of FAQs that explain numerous details of how HICA is to be administered and enforced. The FAQs can be found at:

http://www.michigan.gov/taxes/0,4676,7-238-43519_59498-264523--.00.html

Who Must Pay the Tax?

The HICA tax is imposed on health insurers (including Medicare supplemental insurers), medical excess loss and stop-loss carriers, third party administrators (TPAs), HMOs, and employers or unions that establish or maintain a group health plan. The tax, however, need only be paid once with respect to a particular paid claim, so that if the insurer or TPA pays the tax with respect to participants in a group health plan, the sponsor of that plan need not also pay the tax. Insurers and TPAs that pay the tax may collect the tax from their policy holders or group sponsors, but to do so must develop a methodology for allocating the tax and filing that methodology with the Office of Financial and Insurance Regulations (OFIR). For a claim that is subject to reimbursement by a stop-loss carrier, the TPA is liable for the amount of the claim up to the attachment point, and the stop-loss carrier is responsible for amounts paid on the claim above the attachment point. An employer who pays the tax directly or through an insurer or TPA may require employee contributions to offset its tax liability, in whole or in part. Insurers and TPAs, however, are liable for the tax whether or not they are able to be reimbursed by their policyholders or group sponsors.

What Are "Paid Claims?"

Paid claims for purposes of the HICA tax are payments made to a health and medical services provider, net of recoveries, including but not limited to:

- Services included in furnishing medical care, dental care, pharmaceutical benefits or hospitalizations
- Ancillary services such as, but not limited to, ambulatory services, emergency and non-emergency transportation
- Services provided by physicians (both M.D.s and D.O.s), nurses, dentists, chiropractors, acupuncturists, audiologists, optometrists, speech-language therapists, pharmacists, physical therapists, podiatrists, psychologists, occupational therapists, dietitians and nutritionists, social workers, and respiratory care therapists (but health and medical services do not include services provided by veterinarians, marriage and family therapists, athletic trainers, massage therapists, licensed professional counselors and sanitarians)
- Behavioral health services, including but not limited to, mental health and substance abuse services
- Wellness and EAP programs if classified as group health plans. The FAQs indicate that a wellness program providing health screenings, risk assessments and other health care services, administered by a TPA, would be subject to the tax

"Paid claims," however, do <u>not</u> include:

- Payments for services provide before January 1, 2012
- Claims paid for services provided to persons who are not residents of Michigan
- Claims paid for services provided outside of Michigan to Michigan residents
- Claims-related expenses
- Claims paid under specified accident or accident-only coverage, credit insurance, disability income insurance, long-term care insurance, automobile insurance, homeowner's insurance, farm owner's insurance, commercial multi-peril coverage, workers' compensation and coverage issued as a supplement to liability insurance
- Claims paid under a federal employee health benefit program, Medicare, Medicare Advantage, Medicare Part D, Tricare, claims paid by the U.S. Veterans Administration and claims paid by certain high risk pools
- Reimbursements to individuals under a flexible spending account (FSA), a health savings account (HSA), an Archer medical savings account, a Medicare Advantage medical savings account or any other health reimbursement arrangement authorized under federal law (*e.g.*, a health reimbursement arrangement (HRA))

Tax Filing Procedures

The burden on claiming an exemption falls on the entity paying the tax. Taxpayers must file Form 4926, Electronic Funds Transfer Application-Health Insurance Claims Assessment, listing the gross amount of paid claims for the given period and then deducting as line items, amounts spent for exempt claims. Simply listing the net amount of paid claims subject to the tax is not acceptable. Payments must be made by electronic funds transfer (EFT). Form 4930 is available to calculate the quarterly payment amount, but this is only a worksheet and should not be sent in with the payment. Taxpayers must keep adequate records to support their filings for a period of four years.

Other Limitations and Noncompliance Penalties

There is a $10,000 per insured individual or covered life annual limit on the HICA tax that has to be paid. The Department of Treasury FAQs have construed this limitation to mean amounts paid for health and medical services rendered to an individual on a per-carrier or per TPA basis.

If the HICA tax collection exceeds $400 million, adjusted annually by the medical inflation rate, each person or entity that paid the tax shall receive a proportional credit towards the following year's tax obligation. If that person or entity has no tax obligation the next year, it may receive a refund of any unused credit.

If the HICA tax is not timely paid, it is subject to penalties and interest. The penalty is 5% of the total unpaid tax due for the first two months, and after two months, 5% of the unpaid tax is assessed each month. Interest is calculated using the current interest rate. The Department of Treasury's website has a variable penalty and interest calculator that can be used to determine penalties and interest amounts.

What About ERISA Preemption?

A lawsuit has been filed challenging the application of this statute to self-funded employers and their TPAs on the basis of ERISA preemption. The lawsuit seeks an injunction to prevent collection of the tax, but its success is not clear. There is U.S. Supreme Court precedent for holding that surcharges and taxes on medical service providers are not preempted under ERISA, though here the tax is not on the medical service providers as it was in the Supreme Court cases; rather, here the tax is levied directly on those who pay for those services, *i.e.,* insurers, TPAs and ERISA plans. As one can never presume the outcome of any litigation, it is hard to say if this distinction will yield a different result. That said, even if the lawsuit is successful, that result likely will not be determined until long after the first filing deadline for the HICA tax. Those liable for the tax will, therefore, need to be prepared to pay the tax, if they wish to avoid the penalties and interest for late payment. If the suit subsequently succeeds, they will be able to file for a reimbursement.

Action Steps

Insurers and TPAs that are licensed in Michigan to insure or administer claims for Michigan residents (whether or not they themselves are headquartered in Michigan) will need to establish procedures for tracking and calculating the HICA tax on the business they do, and register with Michigan's Department of the Treasury for making the EFT payments. Information about registering for the EFT process can be obtained from the Michigan Treasury Department's website at:

www.michigan.gov/biztaxpayments

Employers and employee organizations that sponsor or maintain group health plans will need to determine whether they or their insurers or TPAs will be paying the tax, and will need to discuss with their insurers or insurance brokers the impact of this tax on their premiums. Self-funded employers and plans will have to review their administrative service agreements to see how this tax will be addressed, and possibly re-negotiate certain provisions to accommodate how they want the filing responsibility and costs of the HICA tax to be allocated.

If you have any questions about this new Michigan tax on health and medical benefits, or about any other employee benefits design or compliance issue of concern to you, please contact any of the Honigman attorneys listed on this Benefits Alert.