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Millions May Stay Uninsured Under ACA Affordability Rule

By **Jeff Overley**

Law360, New York (January 31, 2013, 9:29 PM ET) -- While the Affordable Care Act promises federal assistance to those lacking "affordable" health coverage, the Obama administration's decision to measure affordability by reviewing the cost of only individual employer-provided health plans, not family plans, could leave millions of Americans without federal subsidies and unable to buy insurance, experts say.

A final rule issued Wednesday by the Internal Revenue Service says employees are considered to have access to affordable family plans if their premium for self-only coverage doesn't exceed 9.5 percent of household income, no matter what the family plan premiums cost. Under that scenario, an employee's relatives who were offered coverage couldn't access subsidies to shop on health insurance exchanges, even if the family plan was prohibitively expensive.

While those relatives would be exempt from the mandate to acquire coverage if the insurance was too costly, observers on both sides of the issue warned that the intent of the ACA could be damaged as a result.

"People are going to remain without coverage, and to me, it's no comfort that we're making them exempt from the mandate, because what we wanted to do was get them covered," Judith Solomon, vice president for health policy at the left-leaning Center on Budget and Policy Priorities, told Law360.

Michael A. Carvin, a Jones Day litigator who argued before the U.S. Supreme Court last year in an unsuccessful bid to strike down the individual mandate, had much the same take.

"Obamacare was built on the notion that we're going to reduce the uninsured," Carvin told Law360. "Now you're not going to reduce the number of uninsured nearly as much."

Researchers at the Kaiser Family Foundation in 2011 estimated that there were 3.9 million nonworking dependents in families where the worker had access to affordable coverage but the family members did not.

"Some of these families would probably still decide to enroll in their employer coverage even though they would have to pay a large percentage of income for it," the researchers said. "People value insurance, and they particularly value employer-provided benefits. But some of these family members would undoubtedly remain uninsured."

Last year, the U.S. Government Accountability Office estimated that the policy would leave at least 460,000 uninsured children without coverage. Another 1.9 million children could

be affected depending on future funding for the Children's Health Insurance Program, a state-federal program that provides low-cost coverage to kids whose families don't qualify for Medicaid but can't afford private insurance.

First Focus, a Washington-based group that advocates for family-friendly budget policies, said it was "deeply disappointed" by the IRS' stance and called for Congress to boost funding for CHIP, which is authorized through most of 2015.

"The children's community is disappointed by the administration's decision to deny access to coverage for children based on a bogus definition of affordability," Bruce Lesley, president of First Focus, said in a statement. "Today the promise of health reform has been denied for hundreds of thousands of children."

Larry Levitt, a senior vice president at the Kaiser Family Foundation, told Law360 that the decision to exempt spouses and children from the mandate if employer coverage is too costly underscored the challenge of making health reform work without burdening families.

"On the one hand, you don't want to penalize people who don't have affordable coverage available to them," Levitt said. "On the other hand, the more exemptions there are from the mandate, the less effective it is at getting people insured."

The question of whether the ACA hits its target of covering 30 million more Americans could also be complicated by a proposed rule released Wednesday in which the U.S. Department of Health and Human Services detailed new hardship exemptions that would join existing accommodations for certain religious objections and financial difficulties.

One exception would cover individuals who are not required to file income tax returns but who technically fall outside the statute's exemptions for lower-income Americans. People would also be exempt if they would be eligible for Medicaid under health reform but their state elects not to expand the program. A third exemption would cover individuals who decline coverage because a health insurance exchange estimates their insurance would not meet affordability requirements but who, because of an unexpected change in circumstances, end up earning enough money in the year to have made the coverage affordable.

Carvin suggested that many shortcomings with regard to newly insured individuals stem from flaws embedded in the ACA.

"There's no better approach given the inherent schizophrenia of the act, which [makes] a lot of people buy insurance, understanding that they couldn't afford it," Carvin said.

Alden J. Bianchi, head of the employee benefits practice at Mintz Levin Cohn Ferris Glovsky & Popeo PC, told Law360 that while some observers might be upset with the IRS' decision, the root of the problem rests with murky ACA language that the agency had to interpret one way or the other.

"The regulators have made a ... decision based on the statute, and that's where they've come down," Bianchi said. "There's plenty of room to debate whether the policy is correct, but Congress sets policy."

--Editing by John Quinn and Richard McVay.

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