



Meeting the Requirements for Defining the “Essential Health Benefits Package”: DOL Publishes Survey of Employer-Sponsored Coverage

May 13, 2011

RESOURCE LINKS

Department of Labor Survey
<http://www.bls.gov/ncs/ebs/sp/selmedbensreport.pdf>

Department of Labor Survey Data for 2008
<http://www.bls.gov/ncs/ebs/sp/selmedbensreport.pdf>

Department of Labor Survey Data for 2009
<http://www.bls.gov/ncs/ebs/detailedprovisions/2009/ebbl0045.pdf>

Additional Data on Health Benefits from the National Compensation Survey
http://www.bls.gov/ncs/ebs/smb_health.htm

On April 15, 2011, the U.S. Department of Labor (“**DOL**”) released a survey report that is being used to satisfy a requirement in the Patient Protection and Affordable Care Act (“**ACA**”) that the Secretary of Labor “conduct a survey of employer-sponsored coverage” as a condition precedent to the development of the “essential health benefits package” by the Secretary of Health and Human Services (“**HHS**”).¹ This DOL survey is the first step in the process laid out in the federal health reform law for establishing the minimum benefits package to be offered in the various health insurance exchanges for which subsidies and tax credits will be available. Under ACA, the Secretary of HHS ultimately has the discretion to determine the “essential health benefits package,” which goes to the heart of federal health reform by providing an adequate level of health insurance coverage to the uninsured and underinsured. That discretion is limited by certain conditions and requirements set forth in ACA.

For example, the scope of the “essential health benefits package” is preliminarily defined in the statute.² At a minimum, the following categories of services must be included in the “essential health benefits package”

- Ambulatory patient services
- Emergency services
- Hospitalization
- Maternity and newborn care
- Mental health and substance use disorder services, including behavioral health treatment
- Prescription drugs
- Rehabilitative and habilitative services and devices
- Laboratory services
- Preventive and wellness services and chronic disease management
- Pediatric services, including oral and vision care

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¹ See “Selected Medical Benefits: A Report from the Department of Labor to the Department of Health and Human Services” (Apr. 15, 2011), available at <http://www.bls.gov/ncs/ebs/sp/selmedbensreport.pdf> [hereinafter, “DOL Report”].

² See Section 1302(b)(1) of the Patient Protection and Affordable Care Act (Pub. L. 111-148) [hereinafter, “ACA”].

**RESOURCE LINKS
Contd.**

BNA Article: “The Importance of Stakeholder Participation in the Process to Define the ‘Essential Health Benefits Package’”
<http://www.ebglaw.com/showarticle.aspx?Show=13830>

Bureau of Labor Statistics Article “In Case of Emergency: New Data on Medical Benefits”
<http://www.bls.gov/opub/cwc/cm20110325ar01p1.htm>

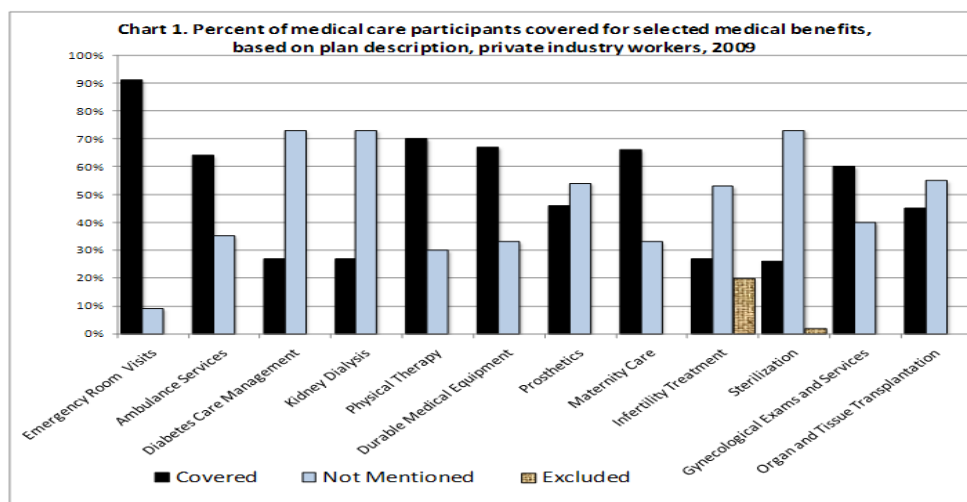
IMPORTANT DATES

January 1, 2014

State-based exchange offering health plan products that include the “essential health benefits package” will be available

Further, ACA directs the Secretary of HHS to “ensure that the scope of the essential health benefits ... is equal to the scope of benefits provided under a typical employer plan.” To help the Secretary of HHS in this regard, the Secretary of Labor is instructed by ACA to “conduct a survey of employer-sponsored coverage to determine the benefits typically covered by employers,” and to provide this survey to the Secretary of HHS.³ For more information about the “essential health benefits package” provisions, see the EpsteinBeckerGreen article “The Importance of Stakeholder Participation in the Process to Define the ‘Essential Health Benefits Package,’” which is available at <http://www.ebglaw.com/showarticle.aspx?Show=13830>.

The recently released DOL survey is the Obama administration’s attempt to satisfy the ACA survey requirement. This DOL survey references the following 12 benefit areas: emergency room visits, ambulance services, diabetes care management, kidney dialysis, physical therapy, durable medical equipment, prosthetics, maternity care, infertility treatment, sterilization, gynecological exams and services, and organ and tissue transplantation. Significantly, HHS identified these 12 benefit areas for DOL to supplement the medical benefit data already available from existing DOL surveys of employee health benefits. The purpose of the survey is to collect information on the potential prevalence, coverage, and cost sharing around these particular 12 benefit areas. Included in this alert is a copy of Chart 1 from the recently released DOL survey showing the percent of medical care participants covered for these 12 selected medical benefits based upon what the DOL found on plan descriptions for private industry workers.



Source: “Selected Medical Benefits: A Report from the Department of Labor to the Department of Health and Human Services” (Apr. 15, 2011), available at <http://www.bls.gov/ncs/ebs/sp/selmedbensreport.pdf>.

³ See Section 1302(b)(2) of ACA.

The Obama administration has taken advantage of ongoing DOL surveys to capture data about health benefits generally. In particular, the Bureau of Labor Statistics National Compensation Survey (“NCS”) of employers is done periodically and already provides data on employer-based health care benefits. For 2008 data, see <http://www.bls.gov/ncs/ebs/detailedprovisions/2008/ebbl0042.pdf>. For 2009 data, see <http://www.bls.gov/ncs/ebs/detailedprovisions/2009/ebbl0045.pdf>.

Although the NCS currently captures data from approximately 36,000 employers, including both public and private employers, HHS identified the additional 12 benefit categories for which information on coverage and cost sharing “would be helpful.”⁴ The data on these 12 benefit categories came from 2009 survey data extracted from approximately 3,200 plan documents of private employers. However, DOL has indicated that these 12 benefit areas may not be complete. For example, in reviewing the data reported, DOL warns that “it is not possible to produce reliable data for many of the services due to the lack of detail that characterizes many plan documents. Services may or may not be covered when they are not mentioned in plan documents.”⁵ DOL further advises that it “is important to note that these [12] services are only a subset of all the services potentially covered by employment-based health insurance plans.”⁶

Given these limitations, there may be concerns about whether this effort satisfies the ACA requirement that the survey be conducted “to determine the benefits typically covered by employers.” The recently released DOL survey instrument is not “new.” Specifically, DOL is using data from the 2008 and 2009 NCS surveys, rather than creating a new survey instrument designed to determine the full scope of “benefits typically covered by employers.” As such, there are key interpretation issues around whether these existing survey tools appropriately capture the information necessary to develop an “essential health benefits package” that is “*equal*” to a “*typical*” employer plan.

Further, in reviewing the data in Chart 1 from the recently released DOL survey, issues arise as to how this data could be used by HHS in preparing any proposed benefits package. For those benefits with less than a certain percentage of prevalence, is it possible that the Secretary of HHS will take the position that the benefit is not “typical”? What if that benefit is a new benefit not yet disseminated into the marketplace, such as the 25 percent prevalence for “diabetes care management”? This benefit might make the benefits package a more cost-effective benefits package, even though it may not yet be “typical.” What about the ambiguities that arise from interpretations, such as those found in the scope of the prosthetic benefit, that may or may not include orthotics? What are the conclusions reached when a benefit is predominantly “not mentioned” in plan documents—either as an enumerated benefit or as an enumerated exclusion?

As discussed in the EpsteinBeckerGreen article on the “essential health benefits package” that was cited above, because there were no funds specifically allocated for DOL to conduct the required survey, there were budgetary issues raised with respect to DOL’s obligations here. Nevertheless, ACA still requires this survey to play a key role in establishing what will be included in the “essential health benefits package.” Interestingly, in addition to the information provided by DOL about what should be included in the “essential health benefits package,” the Secretary of HHS has also requested that the Institute of Medicine (“IOM”) recommend a process for actually defining and updating these benefits. The IOM is expected to provide its recommendations this Fall, after engaging in a study of how insurers determine covered benefits and medical necessity.

⁴ Paul A. Welcher, Bureau of Labor Statistics, “In Case of Emergency: New Data on Medical Benefits,” (Apr. 15, 2011), available at <http://www.bls.gov/opub/cwc/cm20110325ar01p1.htm>.

⁵ See DOL Report at 10.

⁶ *Id.*

The ultimate scope of the “essential health benefits package” is critical to achieving the goals of federal health reform. If the benefits package is defined too broadly, then arguably it fails to be an “essential” package to which additional benefits could be added as supplemental benefits. The premiums also could be greater than what had been expected at the time of the passage of ACA. If the benefits package is too limited, then the expansion of health insurance coverage under ACA could result in underinsured persons who are unable to afford medically necessary services. This could contribute to cost-shifting to those people who already enjoy appropriate coverage. That is the balancing act that is underway at this time.

While there has been no specific request by either DOL or HHS for comments yet, the Secretary of HHS has promised that the public will have an opportunity to comment through some type of rulemaking about this benefits package later this year. Companies that are interested in the scope of the “essential health benefits package” will want to review not only this recently published DOL survey in detail, but also other DOL survey information. Further, those interested in commenting on this process, or on the benefit categories, should consider weighing in with the Secretary of HHS now, before any preliminary positions are published by HHS in proposed or interim final regulations.

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For more information about this issue of *IMPLEMENTING HEALTH AND INSURANCE REFORM*, please contact one of the authors below or the member of the firm who normally handles your legal matters.

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