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## benefits MAGAZINE

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A growing number of states are enacting individual health care coverage mandates, which may create reporting and data privacy headaches for employers.



# Y-STATE

## Individual Mandate Reporting Compliance: A Cautionary Tale

by | Kyle J. Scott

It was the proverbial calm before the storm: When 2019 dawned with the rollback of the Affordable Care Act (ACA) penalty for failing to have individual health insurance, many employers, brokers, advisors, health plan sponsors and carriers believed it was the end of the individual coverage requirement as well as the beginning of fewer reporting compliance obligations.

That collective sigh of relief didn't last long. Some states saw an opportunity to stabilize their insurance markets, prevent increases in the uninsured and create new revenue streams by reinstating an individual insurance mandate. As a result, employers across the country now face the brewing of a new reporting tempest: New Jersey and Washington, D.C. have individual coverage requirements that became effective in 2019; mandates for Vermont, Rhode Island and California are effective with the 2020 tax year. Other states, including Connecticut, Maryland, Hawaii, Minnesota and Washington, are considering mandates of their own; Massachusetts has had an individual mandate since 2006.

Each state that initiates an individual coverage requirement will also need a way to confirm coverage and so will likely issue its own set of employer reporting obligations. What's more, no two reporting requirements will likely be exactly the same, as evidenced by the differences between the reporting guidelines in New Jersey, Washington, D.C., Massachusetts and California.

For example, although New Jersey and Washington, D.C. are both leveraging the federal ACA employer reporting forms (i.e., 1095 forms), New Jersey is using an extensible markup language (.xml) submission format similar to the federal format and its existing electronic submission solution. Washington, D.C. is requiring a delimited text format with manual web-based upload submission, and as of this writing, that data layout was not scheduled to be available until

December 2019 or January 2020, according to the regulators. For more information on state mandate reporting requirements, see the sidebar on p. 32 and the article on p. 34.

Even employers that aren't located in any of the states mentioned above can expect to be swept up in the storm. That's because these reporting requirements affect employers with any employees living in the states noted. That means they now have to comply with reporting requirements for each state in which their workers live, regardless of where their organization has operations, as well as continue to meet federal ACA reporting requirements.

Even more concerning is that many employers and industry leaders were not thinking about data privacy issues when their states passed their insurance mandates and reporting laws.

### Data Privacy Laws an Afterthought?

Every state has data privacy laws restricting the sharing of personal information about its residents, including sharing the information with any government entity with which the consumer does not have a relationship. Since New Jersey and Washing-

ton, D.C. require the same forms used for federal ACA reporting, many assumed that employers could simply use their federal ACA file (an aggregated file including forms for all their employees) to submit to New Jersey and Washington, D.C. However, this approach poses an enormous data privacy risk for employers.

The federal ACA forms include protected data such as tax and insurance coverage information. This means that, beginning this year, employers that submit federal forms to New Jersey and Washington, D.C. now need to comply with state privacy laws by scrubbing all information on any employee who doesn't reside in either of those two jurisdictions so that each jurisdiction receives only information on its own residents.

### An Employer's Dual Role Can Add to the Data Privacy Headache

Employers, particularly those that self-fund their health plans, have other data privacy questions, because they serve dual roles as the plan sponsor and the employer. These organizations frequently assume that all of their employee data is protected health information (PHI) under the Health Insurance Portability and

Accountability Act (HIPAA). In reality, that data is not PHI when the employer is acting in the role of employer (rather than plan sponsor) as it collects employee information for benefits administration. The data isn't PHI if the employer itself isn't a covered entity under HIPAA—that is, if it isn't an insurance company, health care clearinghouse or health care provider doing electronic transactions. The data is employee personal information and becomes PHI under HIPAA only after the employer entity hands it over to the plan entity.

This distinction matters because, even though benefits data may not be PHI under HIPAA when collected and used by the employer, it must still be protected. That's where state-by-state consumer data privacy and breach notification laws come into play, and the legal distinctions grow quickly in complexity. For example, the California Consumer Protection Act (CCPA) currently does not apply to HIPAA data, and employer data has a one-year exclusion from CCPA protection. If, however, an employer relies on the HIPAA exclusion when the data is employer data, when the one-year employer data exception expires, it may be failing to follow rules under CCPA.

Employers that must manage data under the privacy regulations of multiple states face a big reporting compliance burden and data privacy risk.

### A State-By-State Data Privacy Soup

What's more, some state data privacy laws are incredibly nuanced. The previously mentioned CCPA is again a perfect example. While employers currently are exempt from complying

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with the new law, when it goes into effect, the act—as it now stands—will apply only to companies that meet certain criteria such as annual revenue thresholds. (Importantly, the act also will apply to any entity doing business in California, regardless of geographic location.) While the criteria are many, only one has to be true for an employer in order for the act to apply.

This privacy law soup can be particularly confusing for third parties (brokers or advisors, for example) who are acting on behalf of numerous employers. They may not be privy to revenue numbers and other business information that may serve as qualifying criteria in state privacy laws if more states follow California's applicability criteria approach. So, they may be unsure whether the law(s) apply to their clients. To be on the safe side, these third parties could assume that all their clients meet at least one requirement. Or, they may place the expectation on their clients to notify them if and when those laws pertain to them.

### One More Data Privacy Challenge

Employers that must adhere to more than one state's health reform reporting requirements also face the potential of having to set up multiple types of submission processes. Managing this level of administrative detail can increase the risk of violating state privacy laws through simple human error. For example, Washington, D.C. requires employers to manually upload either text or zipped text files, while New Jersey wants uploads of .xml files. As more states come on board with individual coverage and employer reporting mandates, accompanied by their own manual or automated submission processes and file formats, inadvertently uploading the wrong file to the wrong state would be a data privacy incident and could be considered a data privacy breach.

### A Cautionary Note of a Different Sort

Another unanticipated challenge for employers in complying with state-by-state individual mandate reporting rules has to do with an organization's nonemployees; that is, individuals who once worked at an employer's place of business but who no longer do, or surviving spouses or former spouses of employees, and who now are enrolled in Consolidated Omnibus Budget Reconciliation Act (COBRA) benefits. Typically, human resources departments hold data on individuals of this type in an human resource

## takeaways

- Following the rollback of the tax penalty on the Affordable Care Act (ACA) individual mandate, a number of states have enacted their own individual coverage requirements.
- Massachusetts, New Jersey and Washington, D.C. previously had individual coverage requirements, and requirements in Vermont, Rhode Island and California take effect during the 2020 tax year. Connecticut, Maryland, Hawaii, Minnesota and Washington are considering mandates.
- Each state that initiates an individual coverage requirement will also need a way to confirm coverage and will likely issue its own set of employer reporting obligations. These reporting requirements affect employers with any employees living in the states that have mandates.
- Issues of concern include data privacy and complying with reporting rules when reporting coverage for nonemployees.

information system (HRIS) separate from payroll. Consequently, employers may not have the same amount of information on them as they do their regular employees.

When it comes to state individual mandate reporting compliance, this could be a problem. For instance, states may require employers and plans to provide data on individuals who have resided within their states at some point during the last year. If an employer was simply accepting the nonemployee's COBRA payments and administering the premiums, it may not know where its COBRA enrollees have lived over the full tax year. To comply with the law, employers will need to ensure that they utilize the data that they have in their possession and be prepared to provide additional reporting if requested by a state or consumer. The same reporting requirements will hold true for any retirees who are enrolled in a self-funded or self-insured plan.

### What Employers Can Do Now

The rising popularity of state-based individual coverage mandates and employer reporting requirements is creating an atmosphere of uncertainty and confusion, especially for employers with operations in multiple states and those whose employees live in regions other than their employer's home base. What is certain is that the storm continues to brew, and all employers need to keep their eyes on the horizon. It can be difficult, however, to

## State Individual Mandates

Here is a look at the states that have passed individual health care mandates and their reporting requirements.

### **California**

- Effective date: January 1, 2020
- Employers must submit returns to the state by March 31, 2021. There is a \$50 penalty per form with no maximum for failure to file.
- Employers must file Forms 1095 by March 31, 2021 via the state's Secure Web Internet File Transfer (SWIFT) system.

### **Massachusetts**

- Law originally signed in 2006.
- Most insurance companies issue forms on the employers' behalf and send the state a report listing all the Forms 1099-HC they issued.
- Employer reporting requirements apply when employees reside in Massachusetts.
- Massachusetts requests an .xml format similar to the Internal Revenue Service (IRS) or a mapped data upload for smaller employers, but the only employer reporting obligation is to file Form 1099-HC.
- Employers must deliver Form 1099-HC to employees by January 31, 2020.
- Employers that do not file are subject to a \$50 penalty per individual form up to a \$50,000 maximum.

### **New Jersey**

- Effective date: January 1, 2019
- Employer reporting requirements apply when employees reside in New Jersey.
- New Jersey requests the same format (.xml) used for submitting to IRS.
- Employer submission files must be transmitted in .xml format (not zipped) to an MFT SecureTransport account with the state.
- Employers must file Forms 1094 and 1095 to the New Jersey Department of Treasury by March 31, 2020.

### **Rhode Island**

- Effective date: January 1, 2020
- Employers must submit tax information to the state and deliver Form 1095 to employees by January 31, 2021.

### **Vermont**

- Effective date: January 1, 2020.
- The state is not expected to require employer reporting at this time.

### **Washington, D.C.**

- Effective date: January 1, 2019
- Employer reporting requirements apply when employees reside in Washington, D.C.
- Employer submissions differ from the IRS submission in that D.C. requires the file in .txt or .zip (.xml is not supported).
- Employer submission files must be uploaded to the district's submission website.
- Employers must file Form 1094 and 1095 to the Washington, D.C. Office of Tax and Revenue by June 30, 2020.

stay on top of the changing laws since there is no single source of information. Therefore, employers should take advantage of the expertise of their brokers, consultants, or ACA solution providers and industry connections for the latest information.

Other steps employers can take today include the following.

- Keep the employees who manage the organization's reporting compliance informed of changing laws and provide them with the training they need to access and use required forms.
- Review the address data they collect and keep on employees, retirees and COBRA enrollees. Analyze whether only the most current addresses are retained or whether all addresses provided during the tax year are compiled. Determine whether needed data can be easily accessed for the full tax year.
- Review their federal ACA employer shared responsibility reporting process and verify whether it can be leveraged for states that will require submission of federal form data for their individual mandates.
- Make certain that data is stored in a manner that can be transformed into multiple formats to accommodate different state submission formats, and ensure that they are ready to leverage multiple submission mechanisms (automated, manual gateway and web upload processes).
- Ensure that data on employees, retirees and COBRA enrollees can be filtered by state, based on the

states in which they have lived at any point during the reporting tax year.

- Because states may have different reporting due dates, devise a solution that can help efficiently manage multiple time lines.
- Consider working with an ACA compliance provider that offers state reporting solutions, which stay up to date and adhere to all data privacy laws.

Finally, consult with appropriate business professionals on state mandates and data privacy to reduce the risk of both overcompliance and noncompliance. 📍

The content of this article reflects the author's observations and insights as of December 2019. It does not constitute legal advice.

bio



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