

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, (“PPACA” or the “Act”) signed into law by President Obama on March 23, 2010, and the Health Care and Education Affordability Reconciliation Act, Pub. L. No. 111-152, (“Reconciliation Act”) signed into law on March 30, 2010 imposes new responsibilities on employers and will require substantial changes to employer-sponsored group health care plans. This E-Alert organizes and summarizes these new requirements in order of effective date.

**Effective Immediately**

**Reasonable Break Time for Nursing**

**Mothers:** The PPACA amends Section 7 of the Fair Labor Standards Act. Employers are now required to provide “a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk.” Employers must also provide a shielded place, other than a restroom, where mothers can express their milk. Employers are not required to compensate employees for breaks taken pursuant to this provision. Moreover, employers with fewer than 50 employees are excluded from the new requirement if compliance would impose undue hardships. The effective date of this provision was omitted from the Act; therefore, this provision is presumed effective as of March 23, 2010, the date of enactment.

**Whistleblower Protections:**

Section 1558 amends the Fair Labor Standards Act by adding Section 18C. Under this new provision, employers are prohibited from discriminating or retaliating

against workers who: (1) receive health care subsidies, (2) report violations of the PPACA, (3) testify or assist in proceedings involving violations of the PPACA, or (4) object to, or refuse to participate in actions they “reasonably believe” violate the PPACA. The Act adopts the enforcement procedures, notifications, statutes of limitations, burdens of proof, and remedies set forth in the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. 2087(b). The effective date of this provision was omitted from the Act; therefore, this provision is presumed effective as of March 23, 2010, the date of enactment.

**Small Employers’ Tax Credit:**

“Qualified Small Employers” may be eligible to receive a tax credit to assist in purchasing health insurance for their employees. A “Small Employer” is defined as an employer with “no more than 25 full-time equivalent employees for the taxable year.” Thus, an employer with more than 25 employees may still qualify if some of their employees are part-time and all employees, when taken together, constitute fewer than 25 full-time equivalent employees. The tax credit includes a phase-out provision that begins when an employer has more than ten (10) employees or the average annual wage exceeds \$25,000. The credit is eliminated when an employer has more than twenty-five (25) employees or the average annual wage exceeds \$50,000.

**Non-Taxable Income:**

The value of coverage for a child “who as of the end of the taxable year has not attained age 27,” is excluded from the parents’ and

the child's taxable income.

### Effective June 21, 2010

**Reinsurance for Early Retirees:** No later than June 21, 2010 the Secretary of Health and Human Services must create a reinsurance program to reimburse employers up to 80% of the cost of providing health coverage to retirees between age 55 and 64, their spouses and dependents. To be eligible for reimbursement, claims must be greater than \$15,000 but less than \$90,000, after adjusting for inflation. The PPACA appropriated \$5 billion to fund the reinsurance program. The program is slated to end January 1, 2014.

### Effective After September 23, 2010 or January 1, 2011

The following changes “shall become effective for plan years beginning on or after the date that is 6 months after the date of enactment.” In other words, if the first day of a plan year begins after September 23, 2010—six months after enactment—the new changes will apply when the plan year begins. If an employer uses a calendar plan year, the changes must be implemented on January 1, 2011.

**Coverage Extended to Older Dependents:** All health plans that offer dependent coverage must extend coverage to children up to age 26—whether or not the child is married—if the child would be treated as a dependent under the plan but for their age. This provision does not apply if the child is otherwise eligible to enroll in an employer-sponsored health plan. Beginning January 1, 2014, coverage must be extended even if the child is eligible to enroll in an employer-sponsored health plan.

**No Preexisting Condition Exclusions:** Group health plans must remove pre-existing condition exclusions for children under the age of 19.

**Restricted Annual Limits:** Group health plans will be subject to a cap set by the Department of Health and Human Services for “essential health benefits.” Although “essential health benefits” is not fully defined, forthcoming regulations are expected to exclude vision and dental benefits. It is

clear that the term “essential health benefits” includes: 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; and pediatric services, including oral and vision care. Beginning January 1, 2014, group health plans will be barred from setting any annual limits.

**No Lifetime Limits:** Group health plans are prohibited from setting lifetime limits for “essential health benefits” (described above).

**No Discrimination Based on Employment Status:** Employer-sponsors may not issue benefits that discriminate in favor of high wage earners. Plans may, however, provide lower premiums for employees with lower pay.

**Preventative Services Required Without Cost Sharing:** New group plans will be required to provide preventative services, medical screenings and immunizations without imposing co-pays or deductibles.

### Effective January 1, 2011

**W-2 Reporting Requirements:** Employers will be required to report the value of the employer-provided health care plans on the employee's W-2.

**Non-prescription Drugs Excluded from HSA and FSA reimbursement:** Health Savings Accounts and Flex-Spending Accounts can no longer provide tax-free reimbursement for non-prescription drugs.

**Tax Increase on HSA Non-Qualified Medical Expenses:** Distributions from Health Savings Accounts directed toward non-qualifying medical expenses will be subject to a 20% tax.

**Creation of “Simple Cafeteria Plans” for Small Employers:** Simple Cafeteria Plans with relaxed non-discrimination provisions will be available to employers with 100 or fewer employees.

### **Wellness Program Grants to Small Employers:**

Small employers (employers with fewer than 100 employees who work 25 hours or greater per week) may be eligible to receive grants to establish comprehensive wellness programs for up to five years. The Act appropriated \$200,000,000 for fiscal years 2011 through 2015; this amount will remain available until expended.

**Internal and External Appeals:** Group health plans must have written internal and external appeals processes in place. These processes must be impartial, provide enrollees access to their records and provide an opportunity to be heard. Internal processes must comply with ERISA's claim review regulations and will be subject to forthcoming regulations issued by the Department of Health and Human Services. External processes must comply with applicable state review processes.

**Long-Term Care:** Title VIII, the Community Living Assistance Services and Supports Act ("CLASS Act"), creates a national, voluntary program for the purchase of community living assistance services. Forthcoming regulations will create procedures under which employers must allow employees to participate in the program through payroll deductions. As a general matter, the CLASS program is effective as of January 1, 2011.

**Plan Summaries Required:** Pending forthcoming regulations, but not later than March 23, 2012, Plan sponsors must provide a summary of benefits to applicants and plan participants. The plan summary must comply with forthcoming regulations, and the willful failure to comply will result in a \$1,000 penalty per failure, per day.

### **Effective January 1, 2013**

**HSA & FSA Contribution Cap:** Maximum annual contributions to Health Savings Accounts and Flexible Spending Accounts will be capped at \$2,500.

### **Medicare Hospital Insurance Tax Withholding:**

Employers will be required to withhold additional hospital insurance equal to 0.9% on wages in ex-

cess of \$200,000 for single filers and \$250,000 for joint filers.

**Medicare Tax on "Unearned" Income:** The Reconciliation Act imposes a 3.8% Medicare Tax on "net investment income" for individuals with a modified adjusted gross income in excess of \$200,000 for single filers and \$250,000 for joint filers. This provision includes a new, expanded definition of "net investment income." The new definition includes royalties, rents, annuity distributions, and gross income from passive activities, in addition to what has traditionally been understood as investment income—namely, interests, dividends and capital gains.

**Written Notice to Employees:** Employers "shall provide to each employee at the time of hiring (or with respect to current employees, not later than March 1, 2013), written notice --(1) informing employees of the existence of an Exchange, including a description of the services provided by such Exchange, and the manner in which the employee may contact the Exchange to request assistance; (2) if the employer plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of such costs, that the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986 and a cost sharing reduction under section 1402 of the [PPACA] if the employee purchases a qualified health plan through the Exchange; and (3) if the employee purchases a qualified health plan through the Exchange, the employee will lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for Federal income tax purposes."

### **Elimination of Deduction for Expenses Allocable to**

**Medicare Part D Subsidy:** The 28% federal subsidy available to employers who paid for retiree prescription drug coverage will no longer be deductible.

### **Effective January 1, 2014**

**"Assessments" Imposed on Large Employers without Group Health Plans:** Although employers are not required to provide group health plans, un-

der Section 1513, “assessments” will be imposed on employers with more than 50 full-time employees if the employer fails to offer minimal essential coverage to its full-time employees (and their dependents) for any month and at least one full-time employee obtains federally subsidized health care coverage through an Exchange.

**No Annual Limits:** Group health plans will be barred from setting any annual limits.

**No Preexisting Condition Exclusions:** Group health plans cannot include pre-existing condition exclusions for adults (age 19 or older).

**Waiting Period Limitation:** Group health plans cannot impose waiting periods that exceed 90 days.

**Free Choice Vouchers:** Employers who offer minimum essential coverage to their employees and pay any portion of the costs of the employer-sponsored plan must provide “free choice vouchers” to “qualified employees” to allow the employees to purchase coverage through an Exchange. The value of the voucher must equal the maximum amount the employer would have paid to insure the employee under the group health plan. The value of the voucher will not constitute taxable income to the employee, but the employer can deduct the value as a compensation expense.

**Employers Required to Report Health Insurance**

**Coverage:** Employers with more than 50 employees, and any employer who (1) offers minimal essential coverage, (2) pays any portion of the costs of its employer-sponsored plan, and (3) has employees that contribute more than 8% of their wages to the employer-sponsored plan, shall provide an annual report to the Secretary of Health and Human Services. Each report must contain a certification stating whether or not the employer offers its employees (and their dependents) the opportunity to enroll in minimum essential coverage under an employer-sponsored plan, the length of the waiting period, the months during which coverage was available, the monthly premium for the lowest-cost option under each enrollment category, the employers share of total allowed costs of

benefits, the number of employees participating in the plan each month, the name and address of each participating employee, and any other requirements specified by the Secretary in forthcoming regulations.

**Coverage Extended to Older Dependents:** All health plans that offer dependent coverage must extend coverage to children up to age 26 if the child would be treated as a dependent under the plan but for their age. This provision applies even if the child has access to their own employer-sponsored health plan.

**State-Run SHOP Exchanges:** Each State is required to establish a Small Business Health Options Program (“SHOP Exchange”) by January 1, 2014. SHOP Exchanges are designed to help small business (employers with fewer than 100 employees) enroll their employees in qualified health plans in the small group market.

**Effective January 1, 2017**

**Large Employers Permitted in the Exchange:** Beginning in 2017, States may permit Large Employers to enter the Exchange.

**Effective January 1, 2018**

**Excise Tax on High-Cost Plans:** High-cost, or “Cadillac,” plans will be subject to a 40% excise tax. The tax will be applied to the aggregate value that exceeds \$10,200 for individual coverage or \$27,500 for family coverage.

**Effective Date Pending Regulations**

**Automatic Enrollment for Large Employers:** The effective date was omitted from the Act. The provision, however, expressly relies on forthcoming regulations, so the effective date will be set by regulation. The automatic enrollment provision amends the Fair Labor Standards Act by adding Section 18A. Under this provision, employers with 200 or more full-time employees must automatically enroll employees in the lowest-premium plan unless the employee opts out or selects a different option.

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**May 6, 2010**

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